



**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"B" BENCH, MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND**  
**SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER**

ITA no.2711/Mum./2019  
(Assessment Year : 2013-14)

B.E. Billimoria & Co. Ltd.  
Shivsagar Estate  
Dr. A.B. Road, Wiorli  
Mumbai 400 018  
PAN – AAACB1542P

..... Appellant

v/s

Principal Commissioner of Income Tax  
City-1, Aayakar Bhawan  
101, M.K. Road, Mumbai 400 020

..... Respondent

Assessee by : Shri Satish R. Mody  
Revenue by : Shri Ajay Kumar

Date of Hearing – 25.09.2019

Date of Order – 28.11.2019

**ORDER**

**PER SAKTIJIT DEY, J.M.**

The captioned appeal by the assessee arises out of order dated 29<sup>th</sup> March 2019 passed under section 263 of the Income Tax Act, 1961 (for short "*the Act*") by the learned Commissioner of Income Tax (CIT)-1, for the assessment year 2013-14.

2. Briefly the facts are, the assessee, a resident company, is carrying on business in executing civil contract work. For the assessment under dispute, the assessee filed its return of income on 27<sup>th</sup> September 2013 declaring loss of ₹ 68,58,22,875. Subsequently, the assessee filed a revised return of income on 31<sup>st</sup> March 2014, declaring current year loss of ₹ 47,73,22,997. The assessment in case of the assessee was completed under section 143(3) of the Act vide order dated 21<sup>st</sup> December 2016, accepting the current year loss of ₹ 47,73,22,997, as shown in the revised return of income. After completion of the assessment as aforesaid, learned CIT called for the assessment records for examination. On verifying the records, he observed, though, the assessee filed the original return of income within the due date provided under section 139(1) of the Act, but, the audit report as required under section 44AB of the Act was filed on 31<sup>st</sup> March 2014. According to learned CIT, since the assessee did not fulfill the conditions of section 139(1) of the Act, the original return of income filed was defective, therefore, invalid. Hence, the loss claimed by the assessee could not have been allowed to be carried forward as per section 139(3) read with section 80 of the Act. The learned CIT observed, without examining the issue, the Assessing Officer allowed carry forward of loss which included business loss of ₹ 23,81,77,238, resulting in potential notional short levy of tax of ₹ 7,72,76,604. Being of the view that non consideration of the aforesaid aspect has made

the assessment order erroneous and prejudicial to the interest of Revenue, learned CIT issued a show cause notice under section 263 of the Act on 23<sup>rd</sup> March 2019, calling upon the assessee to explain as to why the assessment order should not be revised. As observed by learned CIT in response to the show cause notice issued, the assessee neither filed any reply nor attended the hearing in person. Thus, he proceeded to pass the order under section 263 of the Act. The learned CIT observed, a assessee earning income which falls under the head profits and gains of business and profession or capital gain is mandatorily required to file the return of income before the due date as prescribed under section 139(1) of the Act. He observed, as per section 139(1) of the Act, companies/entities requiring tax audit have to file the return of income before the due date prescribed under section 139(1) of the Act. Unless the return of income is filed before the due date under section 139(1) of the Act, the assessee would lose the right to carry forward the losses incurred to subsequent years. He observed, in course of assessment proceeding the Assessing Officer has not at all examined whether the assessee is eligible to carry forward the loss before allowing it. Referring to Explanation 2 of section 263 of the Act as well as certain judicial precedents, learned CIT held that the Assessing Officer having not examined the issue relating to assessee's eligibility to carry forward loss, the assessment order is erroneous and prejudicial to the interest of revenue.

Accordingly, exercising power under section 263 of the Act, he set aside the assessment order with a direction to the Assessing Officer to examine the issue afresh and pass a fresh assessment order in accordance with law, after providing reasonable opportunity of being heard to the assessee. While doing so, learned Commissioner also observed, while exercising power under section 263 of the Act, it is not necessary for him to record a final conclusion on the issue on which the power under section 263 is exercised.

3. The learned Counsel for the assessee submitted, the assessee had filed its original return of income within the due date prescribed under section 139(1) of the Act. He submitted, subsequently, the assessee filed its revised return of income on 31<sup>st</sup> March 2014, along with the audited report. He submitted, the revised return of income was also filed within the time prescribed under section 139(5) of the Act. Drawing our attention to sub-section (9) of section 139 of the Act, he submitted, even assuming but not admitting the fact that the original return of income filed by the assessee is defective, as alleged by the learned CIT, however, once the assessee removed the defect, the return of income filed under section 139(1) of the Act would be treated as valid return of income and the date of filing of the audit report would be reckoned from the date when the original return of income was filed. He submitted, in the facts of the present case, admittedly, the

assessee has filed the original return of income within the due date prescribed under section 139(1) of the Act. He submitted, along with the revised return of income filed under section 139(5) of the Act, the assessee had furnished audit report as required under section 44AB of the Act. Therefore, the defect in the original return of income stood removed on filing of the audit report along with the revised return of income. Thus, he submitted, assessee's claim of carry forward of loss has to be allowed as per section 139(3) r/w section 80 of the Act. He submitted, the Assessing Officer having taken note of the original return of income as well as the revised return of income filed by the assessee along with the audit report has computed loss as claimed in the revised return of income and allowed carry forward of the same. Thus, he submitted, learned CIT has completely misdirected himself in exercising power under section 263 of the Act to revise the assessment order. In support of his contention, learned Authorised Representative relied upon the decision of the Hon'ble Madras High Court in CIT v/s Periyar District Co-operative Milk Producers Union Ltd., [2004] 266 ITR 705 (Mad.) and the decision of the Tribunal, Mumbai Bench, in Gilbarco Veeder Root India Pvt. Ltd. v/s DCIT, ITA no.2695/Mum./2017, dated 7<sup>th</sup> September 2018.

4. The learned Departmental Representative drawing our attention to the assessment order submitted, the assessment order does not

reveal even a semblance of enquiry by the Assessing Officer with regard to the allowability of carry forward of business loss. Drawing our attention to the provision of section 139(9) of the Act, he submitted, as per the condition prescribed therein, a return of income filed without enclosing the audit report, as required under section 44AB, is to be treated as a defective return of income. He submitted, the original return of income filed by the assessee was without the audit report. Therefore, it was a defective return of income. He submitted, for claiming carry forward of loss, the assessee had to file the return of income within the due date prescribed under section 139(3) r/w section 139(1) of the Act. He submitted, since the original return of income filed by the assessee was defective, it cannot be treated as a valid return of income. Hence, the assessee is not eligible for carry forward of business loss. He submitted, while completing the assessment, the Assessing Officer overlooking this aspect has allowed carry forward of loss. That being the case, the assessment order being erroneous and prejudicial to the interest of Revenue, learned CIT has rightly exercised power under section 263 of the Act to revise the assessment order.

5. We have considered rival submissions and perused the material on record. We have also applied our mind to the decisions relied upon. Insofar as the factual aspect of the issue is concerned, there is no

dispute that the assessee had filed its return of income on 27<sup>th</sup> September 2013, within the due date prescribed under section 139(1) of the Act. However, the original return of income filed by the assessee was not accompanied by the audit report as required under section 44AB of the Act. Subsequently, along with the revised return of income filed on 31<sup>st</sup> March 2014, the assessee had filed the audit report. On the basis of revised return of income filed by the assessee, the Assessing Officer has ultimately completed the assessment under section 143(3) of the Act determining and allowing carry forward of loss as shown in the revised return of income. Now, the issue before us is, whether the return of income filed originally is to be treated as defective return of income so as to deny the benefit of carry forward of loss to the assessee in terms of section 139(1) r/w sections 139(3) and 80 of the Act. On a reading of section 139(3) of the Act as well as section 80 of the Act, it becomes clear that for claiming loss and carry forward of the same, the assessee has to file the return of income within the due date prescribed under section 139(1) of the Act. It is a fact, in the original return of income filed within the due date prescribed under section 139(1) of the Act, the assessee had claimed loss at a higher figure. Section 44AB of the act requires the assessee to get his accounts audited and furnish the audit report within the due date prescribed under section 139(1) of the Act. Admittedly, in the facts of the present case the assessee did not furnish the audit report

within the date prescribed under section 139(1) of the Act. A reading of section 139(9) of the Act makes it clear that non filing of audit report along with return of income within the due date under section 139(1) of the Act is one of the causes for which the return of income has to be considered as defective. Further, as per section 139(9) of the Act, the defective return of income is to be treated as invalid, unless, the assessee removes the defect within the time provided by the Assessing Officer. However, on a reading of section 139(9) of the Act it becomes clear that the Assessing Officer unilaterally cannot declare a defective return of income invalid without providing opportunity to the assessee to remove the defect within specified time limit. In the facts of the present case, it appears that the Assessing Officer has not considered the original return of income defective as no intimation under section 139(9) of the Act was issued to the assessee. The assessee had voluntarily filed a revised return of income claiming loss at a lesser figure and along with the said return of income has furnished the audit report. Therefore, the defect in the original return of income stood removed. That being the case, the original return of income has to be treated as a valid return and the assessee was eligible to claim carry forward of business loss. It is evident, the Assessing Officer has completed the assessment after taking note of both the original return of income as well as the revised return of income. Therefore, it cannot be said that the Assessing Officer has

allowed carry forward of loss without proper examination. In the facts of the present case, the assessee itself has removed the defect without being intimated by the Assessing Officer. Therefore, the original return of income cannot be treated as invalid as there is no failure on the part of the assessee to remove the defect within the time limit permitted by the Assessing Officer. In fact, the provisions of section 139(9) of the Act have never been pressed into action in the instant case. Moreover, since the assessee has already filed the audit report, there is no question of Assessing Officer issuing a defect notice now in terms of section 139(9) of the Act for non filing of audit report. Therefore, exercise of power under section 263 of the Act to revise the assessment order simply for the purpose of going through the process of complying with the provisions of section 139(9) of the Act, in our view, is a futile exercise. In any case of the matter, non-filing of the audit report along with the original return of income is a technical error which is subject to rectification in terms of section 139(9) of the Act. Since, the defect has already been rectified, there is no purpose of again restoring the issue to the Assessing Officer for fresh adjudication considering the fact that the only issue on which the learned Commissioner held the assessment order to be erroneous and prejudicial to the interests of Revenue is inadmissibility of claim of carry forward of loss due to non filing of audit report, which allegedly, made the return of income of income filed under section 139(1) of the

Act defective. Therefore, in our view, the exercise of power under section 263 of the Act in the present case is without justification, hence, invalid. Accordingly, we quash the order passed under section 263 of the Act and restore the assessment order. Ground raised is allowed.

6. In the result, appeal is allowed.

Order pronounced in the open Court on 28.11.2019

**Sd/-**  
**MANOJ KUMAR AGGARWAL**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SAKTIJIT DEY**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 28.11.2019**

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

*Pradeep J. Chowdhury*  
*Sr. Private Secretary /*  
*Shamshad, PS on tour*

True Copy  
By Order

Assistant Registrar  
ITAT, Mumbai