

आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत  
IN THE INCOME TAX APPELLATE TRIBUNAL-SURAT-BENCH-SURAT  
BEFORE SHRI SANDEEP GOSAIN, JUDICIAL MEMBER  
AND SHRI O.P.MEENA, ACCOUTANT MEMBER

आ.अ.सं./I.T.A No.586/AHD/2018

निर्धारण वर्ष/Assessment Year:2013-14

M/s. S. N. Tradelink Pvt. Ltd. 3010-11, Moamai Complex, Near Bombay Market Surat PAN: AAKCS 0060 R	Principal Commissioner of Income-Tax- 2, Surat
अपीलार्थी Appellant	प्रत्यर्थी/Respondent

निर्धारिती की ओर से /Assessee by	Shri Rasesh Shah, CA
राजस्व की ओर से /Revenue by	Shri Srinivas T. Bidari, CIT(D.R.)

सुनवाई की तारीख/ Date of hearing:	10.12.2019
उद्घोषणा की तारीख/Pronouncement on	12.12.2019

आदेश /O R D E R

PER O. P. MEENA, AM:

1. This appeal by the Assessee is directed against the order of learned Principal Commissioner of Income-Tax-2, Surat (in short “the Pr.CIT”) dated 20.03.2018 pertaining to Assessment Year 2013-14, passed under section 263 dated 20.03.2018 of Income Tax Act, 1961 (in short ‘the Act’).

2. Ground No. 1 to 3 of appeal states that Pr.CIT has erred in passing order under section 263 although assessment order passed under section 143 (3) was neither erroneous nor prejudicial to the interest of the Revenue and directing to the AO to frame denovo

**by wrongly invoking clause (a) of the Explanation-2 of section 263 of the Act when original assessment was passed after making enquiries/ verification. Hence, order passed may please be quashed.**

2. Succinctly, facts as culled out from the orders of lower authorities are that the assessee is engaged in business of trading in coal , chemical & Transport Services. The assessee has filed return of income on 07.10.2013 declaring total income of Rs.5,23,48,010 which was assessed at Rs.6,25,50,590 vide order dated 22.03.2016 under section 143(3) of the Act. On examination of records, the Pr. CIT noticed that the assessee has shown total liabilities at Rs. 36,28,76,986 as on 31.03.2012 in the balance sheet whereas figures shown in previous year balance sheet as on 31.03.2012 were at Rs. 36,13,98,888. Therefore, there is difference in opening balance of liabilities at Rs. 14,78,098 which should have been disallowed under section 41(1) of the Act. Further, perusal of balance sheet and Profit & Loss Account and 3CD Report, revealed that the assessee has claimed sale at Rs. 227,65,20,025 from which a sum of Rs. 55,67,517 reduced being TCS amount collected by seller from buyers and deposited in government account. The credit of TCS is given to buyers hence, seller cannot reduce the amount collected from buyers,

hence, same should be disallowed. The Pr.CIT has issued a show-cause notice to the assessee . The assessee has replied that difference in liabilities is on account of regrouping and recasting of various schedules of balance sheet, while finalizing accounts. However, the Pr. CIT observed that the assessee has not mentioned which head of regrouping and recasting has been netted off. For reduction of TCS amount, it was contended that the assessee follows exclusive method of accounting of VAT/ Additional VAT and TCS. The bills are issued adding amount of TCS. The TCS accounts are maintained separately and no deduction of the same is claimed in Profit & Loss Account. Therefore, there is no question of disallowance of Rs. 56,67,517. However, Pr.CIT observed that reply in the matter appears to be correct but requires details verification. Thus, after considering reply to show-cause notice, the Pr. CIT observed to the order passed by the AO is erroneous as well as prejudicial to the interest of revenue because assessment order passed without making inquiries and verification therefore, clause (a) & (b) of the Explanation 2 of section 263 are clearly applicable. Therefore, the order was considered to be erroneous and prejudicial to the interest of the revenue hence, was set-aside to the file of the AO with a

direction to frame the assessment denovo after giving due opportunity to the assessee.

3. Aggrieved with order, the assessee filed this appeal before Tribunal. The learned counsel for the assessee vehemently contended that the AO has duly verified and applied his mind to issue under consideration; therefore, the order of the AO is not erroneous and prejudicial to the interest of the revenue. The learned counsel for the assessee submitted that the Pr. CIT can assume jurisdiction under section 263 of the Act only if the order of the AO is erroneous as far as it is prejudicial to the interest of the revenue. Both the conditions have to be fulfilled before action under section 263 is initiated. The ld. Counsel for the assessee has drawn our attention to point no. 8 of reply dated 22.12.2015 (PB-22-23) by which the details of TCS/TDS claimed by the assessee in the return of income were filed and TCS not claimed in the return of income{point no. 9] The AO vide questionnaire dated 19.11.2015 (PB-25- by which details of TDS/TCS and prepared 26AS statement were asked for. Thus, the assessment order passed after making enquiries and verification. The learned counsel for the assessee further, referred Paper Book Page No. 70 to 74 which is copy of balance sheet and notes on accounts, and submitted that the assessee has done regrouping and recasting of

various schedules. The learned counsel for the assessee drawn our attention to Paper Book Page No. 63 which is forming part of audited notes on account and submitted that as per note No. 9, it mentioned that Previous year`s figures have been regrouped and /or rearranged whenever necessary. The learned counsel for the assessee also referred Paper Book Page No. 72 to 74 which is reconciliation of liabilities not acceptable. It was submitted that current liabilities were regrouped and figures reflected in Schedule 8,9,10 and 11 of balance sheet as on 31.03.2012 are regrouped and reflected in difference Schedule viz. 4,5,6 and 16 of balance sheet. The change taken place due to change of auditors for both assessment years. The details of same were submitted along with books of accounts during the course of assessment proceedings and also submitted details related to sundry creditors. Therefore, relevant comparable details are available on record and both the figures are comparable and there was no difference in current liabilities and this is merely change of presentation. Therefore, the assessment order passed after verification and enquiry is not erroneous and prejudicial to the interest of the Revenue. The Pr. CIT though accepted but observed that which schedule is regrouped is not specified. This observation of the Pr.CIT suggest that he was convince with reply of the assessee.

The Id. Counsel for the assessee further submitted that the CIT in his notice himself mentioned that the assessee company has shown liability as on 31.03.212 which means the details were on record and were examined by the AO. Further, the Pr. CIT himself stated that in respect of explanation to TCS accounting method, that the reply of the assessee appears to be correct. Thus, the Pr. CIT was also satisfied but he set-aside issue for verification. Therefore, invocation of clause (a) & (b) of Explanation 2 of section 263 is not applicable. It was submitted that erroneous order means the assessment that deviate from law and not in accordance with law. If the AO acting in accordance with law makes certain assessment, the same cannot be termed as erroneous.

4. In support of his contentions, the Id. Counsel for the assessee relying on plethora of decisions, including the decisions of the Hon'ble Supreme Court in Malabar Industrial Co. Limited (243 ITR 83); and CIT V/s. Max India Ltd. 2007] 295 ITR 282 (SC), ITO V. DG Housing Projects Limited [2012] 343 ITR 329 (Del), DIT v. Jyoti Foundation [2013] 357 ITR 388 (Delhi), CIT v. Sunbeam Auto Ltd. [2011] 332 ITR 167 (Delhi) [2010] 189 Taxman 436 (Delhi), CIT v. Gabriel India (P) Ltd. 203 ITR 108 (Bom) and A2Z Maintenance And Engineering Service Ltd. v. CIT [I.T.A.No. 2438/DEL/2012(DelHC)]. The learned counsel

for the assessee submitted as a settled position of law that when the assessing officer has taken a certain view on the basis of evidence before him on the information furnished by the assessee regarding issue under consideration in response to enquiries made by the assessing officer, the Pr.CIT cannot seek to revise the asset under Section 263 of the Act by taking a different view.

5. On the other hand, the Ld. CIT (DR) submitted this is a case of inadequate inquiry. Therefore, the order passed by the AO is erroneous and prejudicial to the interest of the Revenue. Hence, Pr. CIT has rightly assumed jurisdiction to set-aside the issue to the AO for denovo assessment as the AO failed to examine the liabilities and accounting of TCS method.

6. We have heard the rival submissions of both the parties and perused the material available on record. We are of the view that section 263 of the Act enables supervisory jurisdiction to the CIT over the AO. The CIT is empowered to act u/s. 263 of the Act when he considers that AO's order is erroneous in so far as it is prejudicial to the interest of Revenue. It is a settled position of law that the aforesaid twin condition i.e. AO's order is erroneous and prejudicial to the interest of revenue is sine qua non for assumption of revisionary jurisdiction by CIT. As per the scheme of the Act, AO has

a dual role to discharge while assessing the income of an assessee. He is both an investigator as well as an adjudicator. If the AO fails in discharging any of the two said duties i.e. as an investigator or that of an independent/impartial adjudicator, the CIT's supervisory jurisdiction is attracted because the order of the AO would be erroneous for lack of inquiry. Thus if he does not investigate, it would be erroneous for failure of AO to adjudicate as an independent/impartial adjudicator which means that if the AO passes assessment order in violation of natural justice, or there is bias or arbitrariness etc. then also the order of AO would be erroneous. When we say that lack of inquiry makes an AO's order erroneous, one has to keep in mind the difference between lack of inquiry and inadequate inquiry. Lack of inquiry makes the AO's order erroneous, but inadequate inquiry does not make the order of AO erroneous. The Supreme Court in the case of Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83 (SC) 109 Taxman 66 (SC) had interpreted the provisions of section 263(1) in the following words :"*A bare reading of this provision makes it clear that the prerequisite to the exercise of jurisdiction by the Commissioner suo-moto-moto under it, is that the order of the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The Commissioner has*

*to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent— if the order of the Income-tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue—recourse cannot be had to section 263(1) of the Act.-*

*--- There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind . . . The phrase 'prejudicial to the interests of the Revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue ; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does*

*not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income-tax Officer is unsustainable in law."*

7. Following the aforesaid judgment, the Supreme Court in CIT v. Max India Ltd. [2007] 295 ITR 282 (SC) reiterated that the phrase "prejudicial to the interests of the Revenue" as used in section 263(1) of the Act must be read in conjunction with the expression "erroneous" and unless the view taken by the Assessing Officer is found to be unsustainable in law, the powers under section 263 of the Act cannot be invoked.

8. No doubt clause (a) of the Explanation 2 to section 263 deems the order to be erroneous and prejudicial to the interest of the Revenue in case order is passed without making enquiries or verification which should have been made in the opinion of Pr.CIT. In our opinion, for the applicability of clause (a) of *Explanation*, it is necessary that the Pr. CIT must mention in the order what inquiries or verification the Pr. CIT desires to have been carried out by the AO. The Pr. CIT in this case even though stated that the AO failed to examine during the course of assessment proceedings the claimed development expenses but did not pointed out what type of inquiry of verification should have been carried out in this regard by the AO.

However, non examination of this aspect has resulted in under assessment. The order passed by the AO , in our opinion, shall be deemed to be erroneous in so far as it prejudicial to the interest of the Revenue, if the Pr. CIT would have specifically pointed out which of inquiries or verification should have been carried out by the AO in this regard and the AO failed to carry out those inquiries and verification as desired by the Pr. Commissioner of Income-tax. Since the Pr. CIT has not suggested the basis of inquiry or verification to be carried out by the AO, the order passed by the AO cannot be deemed to be erroneous in so as far as it is prejudicial to the interest of the Revenue.

9. Similar view has been in the case of CIT v. Sunbeam Auto Ltd. [2011] 332 ITR 167 (Delhi) [2010] 189 Taxman 436 (Delhi) wherein the Hon`ble High Court held that inadequacy of enquiry will not give jurisdiction to Commissioner under section 263. In this case the Hon`ble High Court has held as under: (Head note) : **Section 263 of the Income-tax Act, 1961 - Revision - Of order prejudicial to interest of revenue - Assessment year 2001-02 - Whether if while making assessment, Assessing Officer has made an inadequate enquiry , that would not, by itself, give occasion to Commissioner to pass order under section 263, merely because he has different**

opinion in matter, it is only in cases of 'lack of inquiry' that such a course of action would be open - Held, yes - Assessee-company was engaged in business of manufacturing and supplying auto parts - In assessment for relevant assessment year, it had been allowed deduction of expenditure incurred on tools and dyes as revenue expenditure - Commissioner, however, set aside assessment order in exercise of his powers under section 263 on ground that Assessing Officer had allowed aforesaid expenditure without making proper enquiry - He, accordingly, remitted matter back to Assessing Officer to re-examine issue - Whether when facts clearly showed that Assessing Officer had undertaken exercise of examining as to whether expenditure incurred by assessee in replacement of dyes and tools was to be treated as revenue expenditure or not and on being satisfied with assessee's explanation, he accepted same, it could be said to be a case of lack of inquiry - Held, no - Whether further, on facts and law, view taken by Assessing Officer was one of possible views and, therefore, assessment order passed by Assessing Officer could not be held to be prejudicial to interest of revenue - Held, yes - Whether, therefore, Tribunal was justified in setting aside order of Commissioner - Held, yes

10. The Pr. CIT has merely stated which schedule is regrouped is not mentioning but did not pointed out as to why order is erroneous when the all detailed of balance sheet and notes appended thereto were on record of the AO. that The order passed by the AO, in our opinion, shall be deemed to be erroneous in so far as it prejudicial to the interest of the Revenue, if the Pr. CIT would have specifically pointed out which of inquiries or verification should have been carried out by the AO in this regard and the AO failed to carry out those inquiries and verification as desired by the Pr. Commissioner of Income-tax. Since the Pr. CIT has not suggested the basis of inquiry or verification to be carried out by the AO, the order passed by the AO cannot be deemed to be erroneous in so as far as it is prejudicial to the interest of the Revenue.

11. In the case of CIT v. Sunbeam Auto Ltd. [2011] 332 ITR 167 (Delhi) [2010] 189 Taxman 436 (Delhi) it was held that if there is some enquiry by the Assessing Officer in the original proceedings, even if inadequate, that cannot clothe the Commissioner with jurisdiction under section 263 merely because he can form another opinion. At the most, the case of the assessee can be regarded to be lack of inquiry in accordance with Commissioner of Income tax if he has different opinion how to proceed with assessment of the case.

12. In the light of the above mentioned judicial precedents and facts of the present case, what has to be seen is whether the AO has made enquiries about issue under consideration. The Learned Counsel of assessee has drawn our attention to point no. 8 of reply dated 22.12.2015 (PB-22-23) by which the details of TCS/TDS claimed by the assessee in the return of income were filed and TCS not claimed in the return of income{point no. 9] The AO vide questionnaire dated 19.11.2015 (PB-25- by which details of TDS/TCS and prepared 26AS statement were asked for. Thus, the assessment order passed after making enquiries and verification. The learned counsel for the assessee further, referred Paper Book Page No. 70 to 74 which is copy of balance sheet and notes on accounts, and submitted that the assessee has done regrouping and recasting of various schedules. The learned counsel for the assessee drawn our attention to Paper Book Page No. 63 which is forming part of audited notes on account and submitted that as per note No. 9, it mentioned that Previous year`s figures have been regrouped and /or rearranged whenever necessary. The learned counsel for the assessee also referred Paper Book Page No. 72 to 74 which is reconciliation of liabilities not acceptable. It was submitted that current liabilities were regrouped and figures reflected in Schedule 8,9,10 and 11 of balance sheet as on 31.03.2012

are regrouped and reflected in difference Schedule viz. 4,5,6 and 16 of balance sheet. The change taken place due to change of auditors for both assessment years. The details of same were submitted along with books of accounts during the course of assessment proceedings and also submitted details related to sundry creditors. Therefore, relevant comparable details are available on record and both the figures are comparable and there was no difference in current liabilities and this is merely change of presentation. Therefore, the assessment order passed after verification and enquiry is not erroneous and prejudicial to the interest of the Revenue. Merely just because the view taken by the AO was not found acceptable does not mean that the AO has failed to make requisite enquiries. If the answer is affirmative then second question arises whether the acceptance of the claim by the AO was a plausible view or on the facts of the finding on the facts that the said finding of the AO can be termed as sustainable in law. We find that vide questionnaire, the assessee regarding current liabilities and details of TCS were asked for. The assessee had furnished his reply, which is placed found placed in Paper Book Pages as referred above. The assessee has explained that the TCS is being accounted separately and no deduction of the same has been claimed in the Profit & Loss Account. Therefore, it the

method of accounting, which does not mean that income has escaped assessment or order being erroneous, because if TCS are considered as part of sale then corresponding debit of TCS was to be claimed in the Profit & Loss Account. Hence, there is no revenue loss. In view of these facts and circumstances, we find that the AO has made due enquiries and had taken a plausible view, hence, same, cannot be disturbed by Pr.CIT in the name of verification. Since the AO has made during enquiry and examined the issues, hence, invocation of Expln2 of section 263 is not justified as same is applicable where the AO had not made enquiry and applied his mind which should have been done in the opinion of Pr.CIT. However, the Pr. CIT has not done any enquiry and not suggested what enquiries were to be carried out, therefore, Explanation 2 of section 263 is not applicable. In view of this matter, we find that twin condition were not satisfied for invoking the jurisdiction under section 263 of the Act. Therefore, in absence of the same the Ld. Pr. CIT was not correct in exercise the jurisdiction under section 263 of the Act and setting aside assessment for making denovo and accordingly, we quash the impugned order passed under section 263 of the Act and allow the appeal of the assessee.

**13.** In the result, the appeal of the assessee stands allowed.

14. The order pronounced in the open Court on 12-12-2019

Sd/-  
**(SANDEEP GOSAIN)**  
**JUDICIAL MEMBER**

Sd/-  
**(O.P.MEENA)**  
**ACCOUNTANT MEMBER**

Surat: Dated: 12<sup>th</sup> December, 2019/opm  
Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/  
Guard file of ITAT.

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**By order**

**Assistant Registrar, Surat**