

आयकर अपीलिय अधीकरण, न्यायपीठ – “वि” कोलकाता,
*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “B” KOLKATA*

Before **Shri S.S.Godara, Judicial Member** and
Dr. A.L. Saini, Accountant Member

ITA No.1278/Kol/2018
Assessment Year :2013-14

M/s Top Grain Management Pvt Ltd., Beriwala Building, 2 nd Floor, 1/1 Meridith Street, Kolkata-700 072 [PAN No. AA ACT 9889 K]	V/s.	Principal Commissioner of Income Tax-1, 7 th Floor, Aayakar Bhawan, P-7, Chowringhee Square, Kolkat-700 069
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri B.K. Nema, Advocate
प्रत्यर्थी की ओर से/By Respondent	Shri Radhey Shyam, CIT-DR
सुनवाई की तारीख/Date of Hearing	17 -12-2019
घोषणा की तारीख/Date of Pronouncement	10-01-2020

आदेश /O R D E R

PER S.S.Godara, Judicial Member:-

This assessee's appeal for assessment year 2013-14 arises against the Principal Commissioner of Income Tax-1, Kolkata's order dated 16.03.2018 passed in Memo. No.Pr.CIT-1/Kol/Revision u/s.263/2017-18/14321-24, involving proceedings u/s 263 of the Income Tax Act, 1961; in short 'the Act'.

Heard both the parties. Case file perused.

2. We advert to basic relevant facts first of all. This assessee is stated to be a company deriving income from finance and agricultural activities. The assessment order dated 14.10.2015 forming subject-matter of revision proceedings reveals that the assessee had filed its return on 29.10.2013

stating total income of ₹44,29,820/-. The Assessing Officer thereafter framed regular assessment in its case disallowing ₹7,000/- by invoking u/s 14A r.w.s. Rule 8D disallowance.

3. We proceed further to notice that PCIT thereafter has revised the above regular assessment by terming it as erroneous causing prejudice to interest of the Revenue by exercising his jurisdiction vested u/s. 263 of the Act as follows:-

"2. From the impugned assessment order u/s 143(3) it is observed that assessee company claimed depreciation of Rs.1,0,17,831/- including depreciation of Rs.10,10,686/- on Factory building, wherein, in a part of building agricultural produces were stored during the financial year 2012-13, which was also allowed in the assessment. Since agricultural income is exempt u/s. 10 of IT Act, 1961, therefore, depreciation claimed on factory building utilized for earning exempt agricultural income is required to be disallowed and added to the total income. but the same was not done in the assessment u/s.143(3) which has resulted in underassessment of income of Rs.10,10,686/- with undercharge of tax of Rs.4,09,115/-.

3. Jurisdictional Principal Commissioner of Income Tax was satisfied that it was a case of erroneous assessment in so far as it was prejudicial to the interests of the revenue. Show cause notice u/s 263 of the Act was issued vide this office letters फ.सं.पधान आ.आयुक्त,कोल-1/U/s263/AACT9889K/2017-18/12191 दिनांक:05.02.2018. The assessee was requested to cause an explanation to why the provisions of section-263 of the Act should not be invoked in this case and the assessment completed by the Assessing Officer should not be revised / modified or set-aside.

4. In response to the said notice Shri B. K. Nema, Advocate and AIR of the assessee attended. He was heard. The written submission furnished on 07.03.2018 is as follows:

1. It is respectfully submitted that the order passed u/s 143(3) of I.T. Act 1961 by Dy. Commissioner of Income Tax, Circle-1(2), Kolkata on 14/10/2015 for Asstt. Year 2013-14 determining total income at Rs.44,36,820/- is neither erroneous nor prejudicial to the interest of revenue. In view of above no proceedings u/s 263 of I.T. Act 1961 ought to have been initiated in the case of assessee.

2. It is respectfully submitted that in notice issued u/ s 263 of I.T. Act 1961 it has been observed that depreciation of Rs.10,10,686/- on factory building has been allowed in the assessment framed which has been utilized for earning exempt agricultural income and thus was required to be disallowed. It has been observed that this has resulted into under assessment of income at Rs.10,10,686/- .

3. Assessee has used the building for activity of business for deriving warehousing charges and during the year under consideration company has received warehousing receipt at Rs.3,60,210/-. The business receipts of warehousing has been assessed as income from business in the assessment framed. The building having been used for the activity of business of warehousing depreciation on opening written down value of block of asset being statutory allowance u/s 32 of I.T. Act 1961 cannot be denied as claimed. Allowance of depreciation in case of assessee on the opening WDV of block of assets cannot be faulted and allowance of depreciation cannot be said to be erroneous and prejudicial to the interest of revenue.

4. It is respectfully submitted that assessee has opening WDV of block of assets of "**Building**" at Rs.1,01,06,861/ -. Assessee in return of income has also shown warehousing receipts to the tune of Rs. 3, 60, 210/ -. The aforesaid asset even if utilized on certain occasion for deriving exempt income no disallowance in respect to allowable depreciation u/ s 32 of I. T. Act 1961 can be made at the hands of assessee. On opening WDV in respect to block of assets of "**Building**" statutory allowance u/ s 32 of I.T. Act 1961 has to be granted even if asset is partly used for the purpose of deriving exempt income. There is no provisions to deny grant of depreciation in respect to block of asset if the building has been utilized for the purpose of business.

5. It is respectfully submitted that AO has taken the only possible view in the matter while accepting the claim of depreciation. It is settled position of law that if AG. has taken one of the possible view of the matter, order passed by him cannot be termed as erroneous. The assessee for this proposition places reliance on the decision of Apex Court in the case of Max India Ltd. reported at 295 ITR 282 (SC). Ratio laid down by the decision squarely applies to the facts in the case of assessee and order of AO cannot be termed as erroneous. In view of above it is humbly submitted that proceedings initiated u/ s 263 be dropped.

6. Considering the submission made hereinabove it is humbly submitted that there is no mistake in the assessment framed and there is no under assessment of income at Rs.10,10,686/- as observed in notice issued u/s 263 of I.T. Act 1961. The order passed by A.O being neither erroneous nor prejudicial to the interest of revenue no order u/s 263 of I.T. Act 1961 in respect to same can be passed.

5. I have considered the facts and circumstances of the case as well as the submission of the assessee. At the outset, the assessee has strongly objected to the proceedings u/s 263 stating that the impugned assessment order was neither erroneous nor prejudicial to interest of revenue. It is the contention of the assessee that the building on which excess depreciation of Rs.10,10,66686/- was claimed, was used for its activity of business of warehousing. Furthermore that the building was part of the block of assets of opening WDV of Rs.1,1,06,861/-, hence statutory allowance u/s 32 could not

be denied. It was explained that Ware housing income of Rs.3,60,21/- from a partnership firm SRBH Technology for storing of their Wheat bags was received during the year.

From the records, it is seen that assessee had nowhere clarified its activity of ware housing business. The portion of building on which depreciation has been claimed is admittedly utilized for storing of agriculture produce, while no depreciation was claimed on leased out portion. Needless to say, the task of any taxing authority is to ensure bringing to tax the correct income / or as in the case disallow any incorrect claims on a/c of error of facts or law. AO did not also verify the source of rental income. It was incumbent upon the AO to apply his mind and make necessary enquires by calling for documents to his satisfaction. This is not a case of AO taking one possible view point as contended when facts of the matter are either clear or when assessee had not discharged its onus of substantiating its claim.

6 Hon'ble Delhi High Court in the case of GEE VEE Enterprise vs. Addl.CIT reported in 99 ITR 375, 386 (Del) has held that the CIT may consider the order of the Assessing Officer to be erroneous not only if it contain some apparent error of reasoning or of law or of fact on the face of it but also because the Assessing Officer has failed to make enquiries which are called for in the circumstances of the case and it is an order which simply accepted what the assessee has stated in his return of income on the said issue. It is not necessary for the CIT to make further enquiries before cancelling the assessment order. The Commissioner can regard the order erroneous on the ground that the Assessing Officer should have made further enquiries.

7 Hon'ble Karnataka High Court in the case of Thalibai F. Jain vs. ITO 101 ITR 1, 6 (Karn) has held that where no enquiries made by the Assessing Officer on the relevant issue, assessment must be held to be prejudicial to the interests of the revenue and what is prejudicial to the interest of the revenue must be held to be erroneous though the converse may not always be true.

8 Hon'ble Supreme Court in the case of Malabar Industrial Co. Pvt. Ltd vs. CIT reported in (2000) 243 ITR 83, 87-88(SC) affirming the Hon'ble Kerala High Court decision (198 ITR 611) has held that the phrase "**Prejudicial to the Interests of the Revenue**" is of wide import and is not confined to only loss of taxes. If the A.O has accepted the claim of the assessee without any enquiries then such assessment order passed by the A.O. was held to be erroneous.

9 In this regard it is mentioned that mere non enquiry would also render a particular order passed by lower authority as erroneous and prejudicial to the interests of Revenue. This position has been clearly confirmed by Hon'ble Supreme Court in the case of Rampyari Devi Saraogi v. CIT [1968] 67 ITR 84 & Smt. Tara Devi Aggarwal v. CIT [1973] 88 ITR 323 (SC). The reasoning for this proposition has been explained by Hon'hle Delhi High Court in the case of Gee Vee Enterprise v. Addl. CIT [1975] 99 ITR 375 in the following para:-

"It is not necessary for the Commissioner to make further inquiries before cancelling the assessment order of the Income-tax Officer. The

Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Income-tax Officer should have made further inquiries before accepting the statements made by the assessee in his return. The reason is obvious. The position and function of the Income-tax Officer is very different from that of civil court. The statements made in the pleading proved by the minimum amount of evidence may be adopted by a civil court in the absence of any rebuttal. The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which come before it. The Income-tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. It is because it is incumbent on the Income-tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word "**erroneous**" in section 263 includes the failure to make such an enquiry. The order becomes erroneous because such an inquiry has not be made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct. "

10 Further to this it is noticed that there is no appeal right available to the Revenue from the order of assessment passed by Assessing Officer and i.e. why revisionary powers have been given to the Commissioner and such power were held to be of wide amplitude by the Hon'ble Supreme Court in the case of CIT v. Shree Manjunathesware Packing Products & Camphor Works [1998], 231 ITR 53/96 Taxman 1. Therefore, normally when Assessing Officer has not made any enquiry on a particular issue, then such order in view of the above detailed discussion has to be construed as erroneous and prejudicial to the interest of Revenue and therefore, the impugned assessment order is erroneous and prejudicial to the interest of Revenue as Assessing Officer has failed to make any enquiry.

11 Having regard to the facts and circumstances of the case and in the light of the aforesaid decisions of Hon'ble Supreme Court and Hon'ble High Court, I hold that the impugned assessment order dated 14.10.2015 passed by the A.O. is erroneous in so far as it is prejudicial to the interests of the revenue. I further hold, after giving the assessee an opportunity of being heard, that the impugned assessment order dated 14.10.2015 is liable to set-aside. Therefore, I set aside the said assessment order directing the AO to re-frame the assessment after considering the aforesaid observations, Hon'ble Supreme Court and Hon'ble High Courts decisions and as per law.

12. In the result, the assessment order u/s 143(3) dated 14.10.2015 for AY 2013-14 is set-aside to the file of the Assessing Officer with a direction to pass a fresh assessment order limited to the aforesaid observations, as per law and after giving an opportunity of being heard to the assessee."

4. We have given our thoughtful consideration to rival pleadings. It has come on record that main issue between the parties is that of assessee's depreciation claim regarding its warehouse. The PCIT's case as per his above extracted detailed discussion is that since the assessee had also utilized the fixed asset / warehouse for storing agricultural produce yielding exempt income, the Assessing Officer failed to conduct necessary enquiry to this effect rendering the impugned assessment as erroneous causing prejudice to interest of the Revenue. We find no merit in PCIT's foregoing reasoning. There can hardly be any dispute about the settled law *Malabar Industrial Co. Ltd. vs. Commissioner of Income Tax* (2000) 243 ITR 83 (SC) reiterated in *Commissioner of Income Tax vs. Max India* (2007) 295 ITR 282 (SC) that twin conditions for an assessment being erroneous as well as causing prejudice to interest of the Revenue have to be simultaneously satisfied before the CIT or the PCIT; as the case may be, seeks to invoke his revision jurisdiction vested u/s. 263 of the Act. And also that such revision proceedings ought not to be set into motion in case the Assessing Officer has taken one of the two possible views. We keep in mind this settled legal proposition to deal with the facts of the instant case. The assessee's detailed paper book its page 19 indicates that the Assessing Officer had issued his sec. 142(1) notice dated 22.09.2015 asking for detailed evidence regarding depreciation at # 9 as well as on the issue that the corresponding fixed asset had not been put to use during the relevant previous year. The assessee detailed reply dated 07.10.2020 stated that its building at factory site had been divided into two parts and one of them was given on lease without any corresponding depreciation claim raised thereupon. The other part of the building was stated to have been utilized for storage of agricultural produce relevant to its depreciation claim. Suffice to say, the Assessing Officer did not make any disallowance.

5. Coupled with this, it further emerges that the assessee had also declared its income from warehouse(s) operation as well *qua* storage of agricultural

produce only. And also that the relevant fixed assets form part of block of assets having corresponding carried forward written down value as on 01.04.2012 eligible for depreciation relief. We observe in this clinching factual backdrop that once the assessee had itself chosen not to its depreciation claim as per its stand before the Assessing Officer, the impugned assessment allowing depreciation on the remaining portion cannot be held as an instance of an erroneous one causing prejudice to interest of the Revenue. We accordingly hold that the PCIT has erred in exercising his revisional jurisdiction u/s 263 of the Act more particularly when the Assessing Officer had carried out all necessary factual verification and enquiries *qua* the instant issue. We therefore reverse the PCIT's action exercising revision jurisdiction and restore the regular assessment dated.14.10.2014 framed in assessee's case. Ordered accordingly.

6. This assessee's appeal is allowed.

Order pronounced in the open court 10/01/2012

Sd/-

(लेखा सदस्य)

(A.L.Saini)

(Accountant Member)

Kolkata,

*Dkp

दिनांक:- 10/01/2012 कोलकाता ।

Sd/-

(न्यायिक सदस्य)

(S.S.Godara)

(Judicial Member)

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-M/s Top Grain Management Pvt.Ltd., Beriwalla Buildings, 2nd Floor, 1/1 Meridith St., Kolkata-72
2. प्रत्यर्थी/Respondent-PCIT,-1, 7th Fl, Aayakar Bhawan, P-7, Chowringhee Sq. Kolkakta-69
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।