

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C": NEW DELHI
BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
(Through Video Conferencing)

ITA No. 4712/Del/2019
(Assessment Year: 2014-15)

Delhi-Gurgaon Super Connectivity Ltd, E-9, 3 rd Floor, Part-II, South Extension, New Delhi PAN: AABCJ0969R	Vs.	Pr. CIT-2, IIIrd Floor, ARA Centre, E-2, Jhandewalan Extn., New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri G.S. Grewal, CA
Revenue by:	Ms. Nidhi Srivastava, CIT DR
Date of Hearing	24/09/2020
Date of pronouncement	13/10/2020

ORDER

PER PRASHANT MAHARISHI, A. M.

1. M/s Delhi Gurgaon super connectivity Ltd (the assessee/the appellant) has filed this appeal against the order passed by The Commissioner Of Income Tax, Central – II, New Delhi dated 29th of March 2019 u/s 263 of The Income Tax Act [The Act] in respect of assessment order passed u/s 143 (3) of the Act dated 31 December 2016 for assessment year 2014-15 by The Assistant Commissioner Of Income Tax, Central Circle – 14, New Delhi (The Learned AO) was held to be erroneous and prejudicial to the interest of the revenue. The learned CIT set aside the assessment order passed and restored assessment proceedings back to the file of the learned assessing officer directing him to examine the genuineness of the transaction amounting to ₹ 514,453,415 on account of sundry creditors and also conduct proper enquiries and investigation to the above issue is in the case. The assessee is aggrieved and therefore has raised following grounds of appeal:-

- “1. On the facts and circumstances of the case, the order passed by the learned Principal Commissioner of Income Tax {PCIT} is bad both in the eye of law and on facts.
2. On the facts and circumstances of the case, the order passed by the Ld. PCIT setting aside the assessment order passed by the A.O. is untenable in the absence of order of the A.O. being erroneous as well as prejudicial to the interest of the Revenue.
3. On the facts and circumstances of the case, the Ld.PCIT has erred both on facts and in law in ignoring the fact that all the issues raised by him in notice under Section

263 were before the A.O. and as such, the jurisdiction on this issue under Section 263 cannot be assumed.

4. *On the facts and circumstances of the case, the Ld.PCIT has erred both on facts and in law in ignoring the that the proceeding under Section 263 cannot be used to as a tool to simply extent the time limitation a proceeding, as laid down by the Income Tax Act, 1961.*
 5. *On the facts and circumstances of the case, the Ld.PCIT has erred both on facts and in law in setting aside the matter to the file of the A.O. without giving a finding as to the error and prejudice caused to the revenue by the assessment order.*
 6. *On the facts and circumstances of the case, the learned PCIT has erred both on facts and in law in ignoring the facts that the AO having taken one of the possible views, the power under section 263 of the Act cannot be invoked by PCIT to substitute the alternative view.”*
2. Brief facts of the case shows that assessee is a company engaged in the business of maintaining toll plaza and collecting toll. The assessee has signed an agreement with the National Highway authority of India on 18th of April 2002 for conversion of Delhi Gurgaon Section of National Highway – 8 into an access controlled 8/6 lane highway from kilometre 14.32 to km 42. The assessee filed its return of income on 29th of December 2016 declaring income of Rs. Nil. The case of the assessee was selected for scrutiny by issue of various notices u/s 143 (2) and 142 (1) of the act. The assessee initially did not submit requisities details, however, subsequently the details were submitted. The learned assessing officer on examination of the profit and loss account noted that on perusal of details submitted, during the year revenue from operation has declined compared to the last year from ₹ 192.2 crores to ₹ 1 49.1 crore. From the profit and loss account there is an increase of various expenses as compared to last year Under the heads of project running expenses, electricity and fuel expenses, administration and office expenses, printing and stationery expenses, postage and stamps , vehicle running and maintenance expenses were noted. The AO further held that the expenditure claimed by the assessee does not appear to have claimed only for business purposes. Further the assessee has also not substantiated these expenses with proper documents. In view of this, the learned assessing officer, keeping in view the credentials of the business and continuation of business, 20% of the expenses were disallowed and therefore the addition of ₹ 24,083,797/- was made. The learned AO disallowed a sum of ₹ 3,557,753/- out of project running expenses, ₹ 8,342,412/- on account of electricity and fuel expenses, ₹ 9,554,812/- on administration and office expenses, ₹ 1,515,705/- on printing and stationery expenditure, ₹ 452,640/- on postage and stamps expenses and ₹ 660,475/- on vehicle running and maintenance expenditure. Accordingly the assessment was made at the total loss of ₹ 23,536,058/- against the returned income of the assessee of a loss of Rs. 476,19,855/-.

3. This assessment order along with the records were examined by The Commissioner Of Income Tax and observed that assessment was completed without proper examination/verification of relevant issues involved in this case and that the express provisions of the act were not applied properly. Therefore he was of the view that the Ao allowed the sundry creditors without proper examination and verification, a show cause notice was issued u/s 263 of the act on 28/1/2019 stating the reasons that:-

“On perusal of the assessment record it is found that as per balance-sheet the assessee has shown an amount of ₹ 514,453,415/- as the sundry creditors. Out of total 70 entities in list of sundry creditors, only one entry of Rs 4 65,86,911/- was verified and which was found bogus, therefore for verification was required of sundry creditors because assessee’s business income was from collection of tollsl which was cash generating business and there is generally no reason/scope for increased/accumulation of sundry creditors. In any case the total amount of sundry creditors was not verified by the AO, not even on a simple check basis.”

4. The assessee submitted that it is assessed u/s 143 (3) of the act. During the assessment proceedings, the assessee has furnished all the information called for and the same were duly verified by the learned AO. The details of sundry creditors as desired by the learned AO was also furnished and which were duly verified by the learned AO and were found satisfactory as no further enquiry was raised by the learned AO. Therefore the order passed by the learned AO is neither erroneous nor not prejudicial to the interest of revenue and hence order u/s 263 of the act should not be passed.
5. Thereafter the learned CIT rejected the explanation of the assessee and passed an order u/s 263 of The Income Tax Act holding as Under:-

“4. I have perused the assessment records and submissions made by the assessee in this case. The core issue in this revision proceedings u/s 263 of the income tax act, 1961 is that assessment on the issues raised in the show cause notice was made without proper examination/verification or all the relevant rules have not been properly applied. In this case, it is found that the assessee has shown an amount of ₹ 514,453,415/- as sundry creditors in his balance-sheet. During the assessment proceedings the assessee submitted the list of creditors on 29.12.2016 to which the AO did not have sufficient time for requisite enquiry/investigation of these transactions and whatever was

claimed by the assessee, was allowed without verifying the genuineness of transactions. The assessee filed a list of creditors only during the revisional proceedings u/s 263. However confirmation of parties or copies of the Ledger account of the sundry creditors was not provided by the assessee. Therefore, the genuineness and creditworthiness of sundry creditors could not be verified even during the proceedings u/s 263 of the income tax act.

5. I, thus, hold that the assessment order passed in the case of the assessee by The Assessing Officer, Central Circle – 14, New Delhi on 31/12/2016 u/s 143 (3) is erroneous and prejudicial to the interest of revenue. Hence, the AO is directed to examine the genuineness of transactions of amounting to ₹ 514,453,415/- on account of sundry creditors and also conduct proper enquiries and investigation to the above issue in this case.

6. Thus, the said assessment is set aside and the assessment proceedings are restored back to the file of the assessing officer on the aforesaid issues. The AO is directed to frame the assessment afresh as per the provisions of the income tax act as directed above, after affording the assessee reasonable opportunity of being heard and after making proper enquiries and verification.”

6. Contesting the order passed u/s 263 of the income tax act, the learned authorised representative submitted that the show cause notice issued by the learned CIT is on incorrect facts as stated therein that out of the total creditors of ₹ 514,453,415/- one entry of Rs 465,86,911 was verified and found to be bogus. He submitted that there is no such addition made by the learned assessing officer in the assessment order, there is no reference that such credit is found to be bogus. He submitted that during the course of assessment proceedings the assessee submitted details of the expenses which have been verified by the learned assessing officer and he compared it with the increase in the expenditure qua the increase in the revenue and therefore out of the total expenditure he disallowed applying a certain percentage on ad hoc basis. He submitted that the creditors are generated only out of the expenditure incurred by the assessee, when those remain unpaid. The expenditures are debit entry and the creditors are consequent resulting credit entry. When the expenditures have been verified and an ad hoc disallowance has been made by the learned assessing officer consequently to that extent the creditors have been verified and ad hoc percentages applied to disallow the same. He therefore submitted that the assessee has also submitted the complete list of the sundry creditors which is available at page number one of the paper book wherein

the assessee as per letter dated 29 December 2016 at serial number six has submitted the details of the sundry creditors above ₹ 1 lakh as per annexure [3] of the submission. He further referred to that letter and stating that name and address of the all bank account maintained were submitted, he further referred that assessee submitted that assessee is not a manufacturing concerned and there is no comparative chart of percentage of yield for the last two years since project was Under implementation stage. He therefore submitted that as the project was under implementation stage there was a list of some the creditors. He referred to the list of sundry creditors placed at page number two of the paper book wherein there are 70 creditors available amounting to ₹ 51,44,53,415/-. He therefore submitted that it is wrong finding by the CIT that assessee did not submit the details of creditors. With respect to confirmation and copies of ledger accounts before CIT, he submitted that same were never asked for. With respect to the creditors mentioned in the show cause notice by the learned CIT he submitted that assessee has submitted the complete detail wherein it has entered into an agreement for management and maintenance contract with one company EGIS infra Management private limited on 17th of December 2010 for the management and maintenance services on the national highway – 8. The copy of the concession agreement is also submitted. According to that the supplier was to provide management and routine maintenance services for the operation of Toll for which management fee was paid by the assessee. He further referred that the audited financial statements were submitted wherein as per note number 24 the details of previous financial year was also shown where that company was paid expenditure of ₹ 280,776,786. The above expenditure was containing toll collection expenses of ₹ 53,441,626/- and maintenance and repair charges of ₹ 227,135,160/-. Therefore he submitted that the complete details were furnished to the AO with respect to the above party. He submitted that the assessing officer was satisfied with that and did not make any addition on account of that particular creditor. With respect to the increase in the total expenditure it was submitted before AO that those decreased from RS. 2680409631/- to ₹ 221,56,14,462, therefore, there is no increase in expenses towards operation and maintenance of the toll. The learned authorised representative submitted that revisionary proceedings have been initiated on the assessee on basis of an audit objection and not on the basis of any enquiry establishing that the amount claimed to be bogus is actually bogus. He submitted that audit objection stated that out of total creditors of ₹ 514,453,415/- one item of Rs 4 65,86,911 was verified and found to be bogus. He submitted that neither the assessing officer has stated so in the order nor there is any evidence provided to the assessee for that. He therefore submitted that it clearly shows non application of mind by CIT. Further he relied upon several judicial precedent to say that mere audit objection cannot be

a basis for revision of the assessment order. He even otherwise stated that assessing officer has not passed any order which is erroneous as well as prejudicial to the interest of the revenue and further the learned CIT has set aside the matter to the file of the assessing officer without giving a finding as to what error has crept into in the assessment order and what prejudice is caused to the revenue. For this proposition also, he relied on several judicial precedents. He even otherwise stated that the learned AO did verify the creditors and the expenditure associated with such creditors and make a disallowance out of that therefore it is not the fact that AO is not aware about the same. He further stated that creditors are result of debiting expenditure in the books of accounts which remain unpaid, which have been fully examined by the assessing officer. Therefore after examination he has made disallowance only on the basis of increase in expenditure which is also not the fact. He also submitted that when after an enquiry the learned assessing officer on perusal of the details of expenditure has made disallowance out of those expenditure, such expenditure has gone to result into the creditors existence, failure of the learned CIT to show that what error assessing officer has committed, the order passed by him u/s 263 of the income tax act is not sustainable. He further submitted that it is stated by the learned CIT that there was no time available with the assessing officer and therefore the order is held to be erroneous is devoid of any merit as 263 proceedings cannot be used to give assessing officer an extended time limit which is not permissible Under the law. He further submitted that if the assessing officer did not have time to make enquiry then the proper course of action by the learned assessing officer is to make addition of the whole of the sundry creditors and disallow all the expenditure, which is not the case. Therefore 263 proceedings cannot be used to extend the time limit for passing an order u/s 143 (3) of the act. He even otherwise stated that in case of sundry creditors what is stated to be bogus by the learned principal Commissioner of income tax was not based on any material, the learned assessing officer has also not disallowed or made addition on account of that creditor. It is not the case of learned CIT that assessing officer was not having the complete details with respect to those creditors. In view of this, the revision proceedings initiated by the learned that CIT was on incorrect facts. In view of this he submitted that the 263 order is not sustainable in law.

7. The learned read CIT DR vehemently supported the order of the learned CIT. It was stated that assessee submitted the details of the creditors on 29th of December 2016 due to which AO did not have sufficient time for requisite enquiry/investigation of those transaction and whatever was claimed by the assessee, was allowed without verifying the genuineness of the transaction. Therefore the order passed by the learned assessing officer was erroneous and prejudicial to the interest of the revenue. Therefore it was submitted that there is no infirmity

in the order of the learned principal CIT in assuming jurisdiction u/s 263 of the act as well as directing the assessing officer to reframe the assessment order after carrying out complete enquiry.

8. We have carefully considered the rival contentions and perused the order of the learned assessing officer which was held to be erroneous and prejudicial to the interest of the revenue by the order of the learned CIT. Firstly coming to the reason for invoking the jurisdiction u/s 263 of the income tax act the learned CIT has stated that as per the balance-sheet the assessee has shown a sundry creditors of ₹ 514,453,415 comprising of total 70 entities and only one entity of s. 465,86,911/- was verified and which was found to be bogus and therefore for verification was required of sundry creditors. On careful reading of the assessment order we do not find that the learned assessing officer could find that one entity comprising of Rs. 4 65,86,911 was bogus. No evidence were also led by CIT in her order to show that. Ld CIT DR also could not show us basis of holding so by the CIT. Thus, There is no material on record which shows that any such creditor is found bogus. Therefore, it is a wrong fact or a fact which is not borne out from the evidence was recorded by the learned CIT for invoking jurisdiction u/s 263 of the act.
9. In fact, as per the assessment order the learned assessing officer has not made any addition on account of any bogus creditor found during the course of assessment proceedings. In fact the learned assessing officer on verification of the details of the expenditure and on the basis of its statistical analysis found that assessee has incurred higher expenditure during the year therefore he disallowed 20% of the expenses u/s 37 of the act keeping in view the credentials of the business and continuation of the business. In fact the creditors have arisen out of the expenditure booked by the assessee which remains unpaid. Therefore, two options were available with the assessing officer, (1) either to disallow the expenditure, (2) or to make an addition on account of unsubstantiated creditors. If the assessing officer would have made the addition of the creditors holding those unsubstantiated, it would result into a consequence that he allows the expenditure incurred by the assessee holding them to be wholly and exclusively incurred for the purposes of the business and the creditors being source of those unpaid expenditure would have been held to be unsubstantiated. In those circumstances the order of the assessing officer would have become unsustainable in law. This for the reason that the expenditure incurred by the assessee were allowed and subsequently creditors resulting out of booking of those expenditure are added to the total income of the assessee. Therefore, the assessing officer took the first recourse available of disallowing the proportionate expenditure, which is according to us the one of the two options available with the assessing officer. By disallowing the expenditure to the extent of 20%, in fact he has held

that the sundry creditors to the extent of that 20% i.e. ₹ 24,083,797/- are not related to the business and are unsubstantiated. The order of Ld CIT thus, did not show how the order passed by the ld AO is erroneous.

10. Further, the learned CIT held that the order is erroneous and prejudicial to the interest of the revenue for the reason that the assessee submitted the list of creditors on 29/12/2016 due to which the AO did not have sufficient time for requisite enquiry. According to us, if the assessee is found lacking in provision of the details to the assessing officer, the learned assessing officer could have used vast powers bestowed upon him by the act to make the best judgment assessment. But the assessing officer took a view to disallow 20% of the expenditure. Thus merely non availability of time to the assessing officer to make adequate enquiry or proper enquiry cannot be rectified by invoking the jurisdiction u/s 263 of the income tax act and then granting further time to the assessing officer to make further enquiry and decide the issue afresh is not permissible according to the law. If this is held to be permissible then it would amount to extension of further time limit provided u/s 153 of the income tax act to complete the assessment. Thereby any assessment order passed by the learned assessing officer could further be tinkered with the provisions of Section 263 of the income tax act by the CIT and then a further time is granted to the assessing officer to make further inquiries. That is not the mandate of the law. The mandate of the law is to rectify an order if it is found to be erroneous and prejudicial to the interest of the revenue u/s 263 of the act. But here an alternative bypass route is devised by revenue to give further time to the assessing officer to complete the assessment order by making further enquiry. In the original assessment proceedings, AO was not precluded to make addition of the whole of the creditors or disallow the whole of the expenditure, if the details were not forthcoming from the assessee. But when the details are filed by assessee, because of the lack of time available with the assessing officer, provisions of Section 263 cannot be invoked. For this reason the order of CIT cannot be sustained.
11. Even otherwise in the order passed by the learned CIT there is no inclination or finding that how the creditors are unsubstantiated. Even one creditor of ₹ 4,65,86,911/- allegedly held to be bogus by the learned CIT, we do not find any mention in the order of the assessing officer or in the order of the CIT. There is no basis for such a finding. Further when the complete expenditure has been allowed by the learned assessing officer to the extent of 80% of those expenditure as expenditure incurred wholly and exclusively for the purposes of the business there is no question to further examine the genuineness and creditworthiness of such creditors when such creditors emerge from these expenditure only. The creditors were not the loans received by the assessee but are part of unpaid expenditure. Thus the reason given

for resuming jurisdiction u/s 263 of the act to verify the genuineness and creditworthiness of the sundry creditors is also not correct. There is no provision in the act that unpaid expenditure is also to be tested on the parameter of creditworthiness. Therefore even in the assessment order the ld AO did not commit any error of law.

12. While deciding this appeal we have considered and applied the ratio laid down by various judicial precedents cited before us.
13. In view of this, the order passed by the learned and CIT u/s 263 of the act is not sustainable. In the result order of the learned CIT passed u/s 263 of the act for the impugned assessment year is quashed.
14. Resultantly, Appeal of the assessee is allowed.
Order pronounced in the open court on 13/10/2020.

Sd/-
(H.S.SIDHU)
JUDICIAL MEMBER

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated : 13/10/2020
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	09.10.2020
Date on which the typed draft is placed before the dictating member	12.10.2020
Date on which the typed draft is placed before the other member	13.10.2020
Date on which the approved draft comes to the Sr. PS/ PS	13.10.2020
Date on which the fair order is placed before the dictating member for pronouncement	13.10.2020
Date on which the fair order comes back to the Sr. PS/ PS	13.10.2020
Date on which the final order is uploaded on the website of ITAT	13.10.2020
date on which the file goes to the Bench Clerk	13.10.2020
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	