

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI
(Through Video Conferencing)**

**BEFORE
SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

ITA No. 5362/Del/2019
Asstt. Year 2014-15

Kisan Steel Corporation C/O Raj Kumar 7 Associates L-7A, LGF, South Extn. Part-II, New Delhi 110 049 PAN AACFK6201D	Vs.	Pr.CIT, FF CGO Complex-1, Hapur Road, Kamla Nehru Nagar, Ghaziabad, Uttar Pradesh Pin 201 001.
(Appellant)		(Respondent)

Assessee by:	Shri Raj Kumar Gupta, CA Shri Sumit Goel, CA
Department by :	Shri JayMishra, CIT (DR)
Date of Hearing	08/10/2020
Date of pronouncement	29/10/2020

ORDER

PER R.K. PANDA, AM

This appeal filed by the assessee is directed against the order dated 25th March 2019 of the Ld. PCIT-Ghaziabad passed u/s 263 of the I.T. Act 1961 for the assessment year 2014-15.

2. Facts of the case, in brief, are that the assessee is a partnership firm engaged in the business of wholesale trading of iron & steel. It filed its return of income on 30.11.2014 declaring total income of Rs. 65,88,200/-. The AO completed the assessment u/s 143(3) on 4.11.2016 determining the total income of the assessee at Rs. 68,38,200/- wherein he has made adhoc disallowance of Rs. 2,50,000/- out of various expenses.

3. Subsequently the Ld. PCIT called for the record and noted certain discrepancies in the order of the AO. Accordingly he issued a show cause notice to the assessee asking it to explain as to why proceedings u/s 263 of the I.T. Act should not be initiated.

The relevant portion of the notice is reproduced as under :-

“i) It is gathered from the record that the firm was having 3 partners during the year under consideration, namely Shri Dhan Pal Gupta, Shri Amit Gupta and Shri Ankit Gupta, having share of 20% , 40% and 40% respectively. Interest on capital of partners & remuneration to partners were claimed at Rs. 15,70,834/- and Rs. 13,20,000/- respectively and the claim of the assessee firm was accepted by the AO without taking cognizance of partnership deed. In fact he did not procure the same from the assessee.

ii) Total turnover during the year under consideration amounts to Rs. 80,84,44,763/-. Rebate & discount are shown at Rs. 2,20,73,322/-. The G.P. and N.P. were shown at Rs. 2,36,72,351/- and Rs. 9,59,000/- respectively, after allowing salary and interest on capital to partners which reflects that N.P. in terms of

percentage is only 0.12% which is very low. It is gathered that commission of Rs. 58,77,675/- is debited in the P & L A/c . The AO accepted the version of the assessee and did not make any independent enquiry to verify the genuineness of the same.

iii) It is noticed that in P & L Account the assessee has shown profit on sale of property at Rs. 75,07,860/- whereas in computation of income statement, long term capital gain of Rs. 56,27,736/- has been declared. The AO did not make any enquiry in this regard and this issue has been left to be examined by him, for the reason that neither the purchase deed nor the sale deed of property was procured by him to verify the information provided by the assessee firm in this regard. As per computation chart, sale price and purchase price of the said property are shown at Rs. 1,48,840/-. All these facts could be verified only if bills in respect of improvement cost had been procured by the AO besides purchase and sale deed of the property but he failed to do so.

iv) As per capital account of partners, addition in capital and withdrawal from capital a/c of the partners, are as under :-

Description	Dhan Pal Gupta	Amit Gupta	Ankit Gupta
Addition in capital	Rs. 27,05,000/-	Rs. 18,00,000/-	Rs. 18,65,000/-
Withdrawal from capital	Rs. 77,55,000/-	Rs. 27,08,500/-	Rs. 25,55,000/-

It is observed that the AO neither raised any query in respect of source of addition in capital nor questioned withdrawal from capital a/c despite the fact that assessee has paid heavy interest on CC account at Rs. 33,93,619/- and interest on unsecured loans at Rs. 10,86,688/-. Further, information to the concerned AOs was also not passed on by the AO in respect of the partners. Similarly, the information regarding the

persons to whom commission was paid, was also not passed on to the concerned AOs.”

4. The assessee appeared before the Ld. PCIT on various dates and explained its case. However, the Ld. PCIT(A) was not satisfied with the arguments advanced by the assessee and held that the order passed by the AO is erroneous as well as prejudicial to the interest of revenue on account of the following :-

- a) that the AO has allowed interest and salary to partners without making proper enquiries and the genuineness of the supplementary deed of partnership has not been investigated since the same is neither registered nor notarised for which its authenticity is doubtful.
- b) The benefit of Rs. 1,48,840/- on account of improvement expenses cannot be allowed in absence of documentary evidence.
- c) The AO has not conducted discrete enquiries to ascertain the genuineness of deposits and withdrawals in partners' capital account.

4.1 He accordingly set aside the order passed by the AO u/s 263

with a direction to pass a fresh order after giving due opportunity of being heard to the assessee.

5. Aggrieved with such order of PCIT the assessee is in appeal before the Tribunal by raising following grounds :

1. *“That under the facts and circumstances, the asstt. order u/s. 143(3) Dtd.04.11.16 is neither erroneous nor prejudicial to the interest of revenue, hence the Ld. PCIT wrongly assumed the jurisdiction u/s.263 of the I.T. Act.*
2. *That Ld. Pr. CIT erred in law as well as on facts in setting aside various issues to the file of Ld. A.O. with the directions without making any enquiry at her end, in the absence of which, the issues could not had been set aside and no directions could had been issued to the A.O. for re-adjudicating those issues.*
3. *That the impugned asstt. u/s. 143(3) has been framed by the Ld. A.O. after calling for the explanations, after examining the books of accounts alongwith the bills and vouchers, as specifically noted by the A.O. in Para-4 of Asstt. Order and thereafter the A.O. has taken a proper and legal possible view on all the issues, which is not found apparently or otherwise*

by the Ld. Pr. CIT either erroneous or prejudicial to the interest of revenue, hence the Ld. Pr. CIT exceeded her jurisdiction in invoking the provisions of Sec.263 under the facts and circumstances of the case

4. *That under the facts and circumstances the Ld. Pr. CIT erred in law as well as on facts and also exceeded her jurisdiction in directing the A.O. to make independent enquiry / investigation to ascertain authenticity and genuineness of supplementary **partnership deed**, more so when, it is applicable from A.Y.12-13 and the effect thereof has already been given by the deptt. in A.Y.12-13 as well as in A.Y.13-14 u/s.143(3).*
5. *That under the facts and circumstances the Ld. Pr. CIT erred in law as well as on facts and also exceeded her jurisdiction in directing the A.O. to re-examine the calculations of **capital gain** on sale of property, as the same already stands examined during asstt. and further erred in directing the A.O. not to allow the benefit of improvement expenses of Rs. 1,48,840/-, for calculating capital gain which were incurred quite long back in F.Y.2000-01, which already stands recorded in audited books and stands accepted since F.Y.2000-01.*

6. *That under the facts and circumstances the Ld. Pr. CIT erred in law as well as on facts and also exceeded her jurisdiction in directing the A.O. to examine the genuineness of transactions of **deposits and withdrawals in the capital a/c of partners**, more so the said aspect already stands examined by the A.O. during asstt.*

7. *That under the facts and circumstances the impugned order u/s 263 be please quashed.”*

6. Ld. Counsel for the assessee challenged the order of the Ld. PCIT in setting aside the order passed by the AO u/s 263 of the I.T. Act. Referring to page 13 and 14 of the paper book, the Ld. Counsel for the assessee submitted that in the supplementary deed there is no clause for amendment of the interest clause of earlier partnership deed dated 4th February, 2008 and interest issue is covered only by the original deed of partnership deed dated 4th February, 2008. Referring to page 8 of the paper book he submitted that the AO has allowed interest as per the original deed dated 4th February, 2008 as has already been allowed in the past. There is no change in the interest position with respect to supplementary deed of partnership deed dated 30th March, 2012.

Further the interest has always been allowed on that basis in the past as well as even in assessment year 2013-14 u/s 143(3). He submitted that the Ld. PCIT misunderstood that the interest clause has also been amended in supplementary deed which is not so.

7. The ld. Counsel for the assessee submitted that as per clause 11 of the original deed dated 4th February, 2008, remuneration to partners is to be calculated on book profit so computed in the manner laid down in section 40 (b) (v) of the I.T. Act. He submitted that the supplementary partnership deed dated 30th March, 2012 is effective from 1.4.2012 relevant to assessment year 2013-14. As per the supplementary deed, the salary payable to partners is Rs. 13,20,000/- the Ld. PCIT directed the AO to verify the authenticity and genuineness of the supplementary deed as a condition for allowing the above salary on the ground that the AO did not procure the amended supplementary deed. He submitted that the supplementary deed is applicable with effect from assessment year 2013-14. The AO had completed the assessment u/s 143(3) for assessment year 2013-14 wherein salary to partners stands accepted after examining the necessary documents as thought proper by the AO. Since there is no change

on this issue in assessment year 2014-15, therefore, there is no requirement of law to examine the supplementary partnership deed in assessment year 2014-15. Further, the remuneration has been allowed in assessment year 2014-15 as per the law and as in the past.

8. The Id. Counsel for the assessee submitted that the AO has examined the issues relating to salary and interest to partners. He submitted that the AO during the course of assessment proceedings, had asked to furnish the details of payment made to related persons which obviously included salary and interest to partners. Referring to page 19 and 20 of the paper book he drew the attention of the bench to the reply furnished by the assessee on 24th October, 2016. Referring to page 2 of para 4 of the AO Ld. Counsel for the assessee submitted that AO during the course of assessment proceedings has examined books of accounts alongwith bills and vouchers and has found no discrepancy. Therefore, the issue of interest and salary to partners has been properly examined by the AO.

9. Without prejudice to the above, the Ld. Counsel for the assessee submitted that the Ld. PCIT was doubting the genuineness of the supplementary deed. He submitted that even if the original deed is considered then also it is to be seen that the remuneration paid to the partners at Rs. 13,20,000/- is well within the limit as provided as per clause 11 of the original deed. Referring to various decisions he submitted that Ld. PCIT is not justified in invoking jurisdiction u/s 263 of the Act on this issue.

10. So far as the correctness of computation of capital gain is concerned which is the second reason given by the PCIT for invoking the jurisdiction u/s 263, he submitted that the assessee purchased three properties on 6th February 2001 for a total consideration of Rs. 12,83,300/-. The cost of improvement on 6th February 2001 was shown at Rs. 1,48,840/-. Thus total cost as on 6th February 2001 for assessment year 2001-02 was Rs. 14,32,140/-. He submitted that all the properties were sold in the impugned assessment year for Rs. 89,40,000/- and the assessee has computed long term capital gain after indexation. He submitted that the Ld. PCIT has directed the AO to examine the capital gain with respect to purchase and sale deed and also held that the benefit of improvement expenses cannot be allowed in

the absence of documentary evidences. He submitted that since the three properties were purchased on 6th February 2001 for Rs. 12,83,300/- and the cost of improvement of Rs. 1,48,840/- was also incurred in the same period, thus total cost came to Rs. 14,32,140/- which was appearing in the balance sheet since assessment year 2001-02. The properties were sold during the impugned assessment year i.e after about 13 years and therefore there is no need to examine the evidence of improvement cost by the AO since the same stood accepted in the past in the orders passed u/s 143(3). Since the Ld. PCIT himself has examined the purchase and sale deeds and found no discrepancy, therefore, there was no requirement of law to send it back for fresh examination. He submitted that complete working of capital gain was furnished before the AO for his examination and the ledger account of the properties in the books were also examined by the AO. Therefore, there is no need of sending it back for further examination.

11. So far as the 3rd issue i.e. to ascertain the genuineness of transactions of deposits and withdrawals in the capital account of partners is concerned, Ld. Counsel for the assessee submitted

that the copies of partners' capital account were furnished to the AO during the course of assessment proceedings which were examined. Further all the partners are separately assessed to income tax and copies of their income tax returns were filed. Further the deposits are very small and less than the amount of withdrawal. Since the AO had verified all the details furnished before him and was satisfied, therefore, the order of the AO cannot be held to be erroneous and prejudicial to the interest of the revenue.

12. Ld. Counsel for the assessee submitted that the extent of enquiry is the sole decision and prerogative of the AO. Further lack of enquiry is different from inadequate enquiry and in the case of even inadequate enquiry, provision of section 263 cannot be invoked. He submitted that merely because the AO has not discussed the issue in the assessment order it cannot be said that the issue remained un-enquired if from the proceedings it can be seen that the issue was enquired.

13. The Ld. Counsel for the assessee referred to the decision of Hon'ble Delhi High Court in the case of CIT vs. Sunbeam Auto Ltd. 227 CTR (Del) (332 ITR 167) and submitted that there is a

“distinction between” “lack of enquiry” and “inadequate enquiry”. If there is an enquiry, even inadequate, that would not by itself give occasion to the Ld. CIT to pass order u/s 263 merely because he has a different opinion in the matter. Such a course of action is open only in cases of lack of enquiry. Referring to decision of the Delhi Bench of the Tribunal in the case of Super Casteete Industries Pvt. Ltd. reported in 41 ITD 530 (Del) he submitted that the Tribunal relying on various decisions has held that section 263 is not intended for change of opinion and cannot be invoked to take a different view from subordinate officer. He also relied on the following decisions :

1. Ganpat Rai Bishnoi 152 Taxman 242 (Raj.)
2. Salora International Ltd. (2005) 2 SOT 705 (Del.)
3. Super Casteete Industries Pvt. Ltd. 41 ITD 530 (Del)
4. Jhulelal Land Development Corporation 56 ITD 345 (BOM)
5. CIT vs. Krishna Capbox (P) Ltd. 372 ITR 310 (All.)
6. DIT vs. Jyoti Foundation 357 ITR 388 (Del)
7. Mrs. Khatiza S. Oomerbhoy 100 ITD 173 (MUM)

14. Ld. DR on the other hand heavily relied on the order of the Ld. PCIT. He submitted that the AO has never examined the issue under provisions of section 40(b)(v) or 40(b)(iv) and he has

examined only the provision of section 40 (a)(ii)(b). Similarly the AO has never examined the cost of improvement. Thus it is a case of no enquiry. Relying on various decisions he submitted that the order passed by the Ld. PCIT u/s 263 is fully justified.

15. The ld. Counsel for the assessee in his rejoinder submitted that no section 263 proceedings were initiated for asstt. Year 2013-14 and even till date the assessee is still claiming the salary and interest to the partners and salary was not the issue in section 263 . He accordingly submitted that the order passed by the Ld. PCIT should be set aside and the grounds raised by the assessee be allowed.

16. We have considered the rival arguments made by both the sides, perused the orders of the AO and Ld. CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the original assessment in this case was completed u/s 143(3) on 4.11.2016 determining the total income of the assessee at Rs. 68,38,200/- as against the returned income of Rs. 65,88,200/-. We find Ld. PCIT examined the records and noted that the order passed by the AO is erroneous and prejudicial to the interest of the Revenue on three issues i.e

(a) salary and interest to the partners has not been examined by the AO properly especially when there is a supplementary partnership deed

(b) AO has allowed the long term capital gain claimed by the assessee without examining the cost of improvement claimed by the assessee and

(c) there are certain additions in capital account and withdrawal from capital account of the partners and the AO has not examined the same properly. He therefore, set aside the order of the AO and directed him to pass a fresh order after necessary verification since according to him the order passed by the AO was erroneous as well as prejudicial to the interest of the revenue.

It is the submission of the Ld. Counsel for the assessee that there is no error in the order passed by the AO. According to the Ld. Counsel for the assessee the supplementary deed was dated 30th March 2012 effective from 1.4.2012 which is relating to assessment year 2013-14 and in that year the order was passed u/s 143(3) where the salary and interest paid to the partners has been accepted and no proceedings u/s 263 has been initiated. Since this is the subsequent year, therefore there was no necessity on the part of the AO to again re-examine the same

especially when the interest paid to the partners is as per original deed and there is no change in the supplementary deed on this issue and the salary paid to the partners is also within the limit. Further books of accounts were examined by the AO during the course of assessment proceedings which is not in dispute. Therefore this issue stands squarely verified by the AO.

17. So far as the income from long term capital gain is concerned it is the submission of the Ld. Counsel for the assessee that the 3 properties were purchased during the assessment year 2011-12 . The cost of improvement was also declared in that year. The cost of the properties alongwith cost of improvement were consistently being shown in the balance sheet and the assessments in the past were completed u/s 143(3) in some of the years. Therefore, when the purchase deed and sale deed were before the AO and the long term capital gain was computed and no discrepancy was found there was no occasion on the part of the Ld. PCIT to invoke jurisdiction u/s 263(3).

18. Similarly the assessee has produced the books of accounts before the AO which contained the ledger account of the partners giving details of withdrawals and deposits. Deposits are very small and less than the amount of withdrawal and the partners are

withdrawing only out of their credit balance. Therefore, the order of the AO cannot be held to be erroneous and prejudicial to the interest of the revenue on the third issue also.

19. We find force in the above arguments made by the Ld. Counsel for the assessee. From the various details furnished in the paper book we find there is no change in the rate of interest clause in the supplementary deed dated 30th March 2012 and such interest has been allowed in the past on that basis and also in the immediately preceding assessment year i.e 2013-14 where the order was passed u/s 143(3). Further, the salary paid to the partners is within the limit prescribed u/s 40(b)(v) of the Act which is as per the original deed dated 4th February, 2008. Even otherwise also on the basis of supplementary partnership deed dated 30th March, 2012 effective from 1.4.2012 i.e relevant to assessment year 2013-14 the salary to partners has been allowed at Rs. 13,20,000/- in the order passed u/s 143(3). Therefore, we find no reason as to why the AO shall again go through the same when the salary paid to the partners is in consonance with the salary paid in assessment year 2013-14.

20. So far as the cost of improvement and the cost of properties for computation of LTCG is concerned, we find these are already

shown in the balance sheet since assessment year 2001-02 which is not in dispute. Therefore, once the assessee sells these properties during impugned assessment year there was no necessity for the AO to again re-examine the cost of purchase and cost of improvement once those were accepted in the past years u/s 143(3) proceedings.

21. So far as the deposits and withdrawals in the capital account of the partners are concerned, we find these are already recorded in the books of accounts which were produced before the AO who has examined the same on test check basis and has passed the order u/s 143(3). Therefore it cannot be said that the order passed by the AO is erroneous and prejudicial to the interest of the revenue on this issue.

22. It is the settled proposition of law that for invoking jurisdiction u/s 263 of the Act the twin condition namely that a) the order is erroneous and (b) the order is prejudicial to the interest of the revenue must be satisfied. In the instant case the order may be prejudicial to the interest of revenue but certainly cannot be called as erroneous. We, therefore, find force in the arguments of the Ld. Counsel for the assessee that the Ld. PCIT(A) has exceeded his jurisdiction by invoking the provision of

section 263 of the Act for the impugned assessment year. We, therefore, set aside the order of the Ld. PCIT and the grounds raised by the assessee are allowed.

23. In the result the appeal filed by the assessee is allowed.

Order pronounced on 29th October, 2020.

sd/-

sd/-

**(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

**(R.K. PANDA)
ACCOUNTANT MEMBER**

Dated: 29/10/2020

dk

Copy forwarded to

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

ASSISTANT REGISTRAR
ITAT, New Delhi