

**IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH 'B', LUCKNOW**

[Through Virtual Court]

**BEFORE SHRI A. D. JAIN, VICE PRESIDENT AND
SHRI T. S. KAPOOR, ACCOUNTANT MEMBER**

ITA No.409/Lkw/2018
Assessment Year:2013-14

M/s Basti Wine Co. (English), 24/4, The Mall, Kanpur. PAN:AAAAB4224A	Vs.	Pr.C.I.T.-I, Kanpur.
(Appellant)		(Respondent)

Appellant by	Shri Ashish Jaiswal, Advocate
Respondent by	Shri Sheela Chopra, CIT, D.R.
Date of hearing	01/09/2021
Date of pronouncement	28/09/2021

ORDER

PER T. S. KAPOOR, A.M.

This is an appeal filed by the assessee against the order of learned CIT passed u/s 263 of the I.T. Act.

2. Learned counsel for the assessee, at the outset, submitted that the assessee is an AOP engaged in the business of trading of liquor and the case of the assessee was selected for scrutiny and the assessment was completed u/s 143(3) of the Act and in assessment proceedings certain additions were made which were confirmed by learned CIT(A) and which however, were got deleted by the Tribunal vide order dated 07.12.2018 in I.T.A. No.564/Lkw/2017. It was submitted that learned CIT was required to follow the mandatory condition precedent for exercise of jurisdiction u/s 263

which requires that the order of the Assessing Officer must be erroneous and such order must be prejudicial to the interest of the Revenue. It was submitted that even if one condition is missing, the learned CIT does not get power to exercise its power u/s 263 of the Act. It was submitted that in the case of H. H. Maharaja Raja Pawar Dewas vs. CIT [1982] 138 ITR 518 (MP), it was held that CIT cannot exercise the revisional jurisdiction u/s 263 of the Act if the order is erroneous but is not prejudicial to the interest of the Revenue. Similarly if the order is not erroneous but is prejudicial to the interest of the Revenue, the same can also be not subject of action u/s 263 of the Act as held by Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. vs. CIT [2000] 243 ITR 83 (SC). Inviting our attention to the copy of show cause notice placed at pages 1 to 3 of the paper book, Learned counsel for the assessee submitted that on all these issues, the Assessing Officer had raised its enquiries and all were replied to by the assessee during the original assessment proceedings. Inviting our attention to the first objection of learned CIT regarding details of expenses debited in the profit & loss account, it was submitted that complete details all expenses including copies of ledger accounts. Accounts of such expenses was filed during the assessment proceedings and in this respect our attention was invited to the query raised by the Assessing Officer in his questionnaire at point No. 15 a copy of which is placed in PB, pgs. 255 and its reply submitted to the Assessing Officer vide letter dated 18/01/2016, a copy of which is placed at pages 259 to 261 of the paper book. Further it was submitted the observations of Id. CIT that no ledger account of expenses is available in the record, is also incorrect in view of the fact that Assessing Officer himself at pages 2 para 3 has noted that the assessee had maintained books of account on mercantile basis and books of accounts have been audited u/s 44AB of the Act. As regards another objection of learned CIT regarding shop rent expenses, Learned counsel for the assessee

invited our attention to the reply against question No. 10,15 and 18 to the questionnaire dated 18/11/2015 wherein specific replies were filed before the Assessing Officer and our attention was invited to pages 24 and 25 of the paper book where the complete break-up of rent paid during the year was placed. Learned counsel for the assessee submitted that in respect of rent, vide question dated 18/11/2015 page 254, vide query No. 10, the assessee was required to furnish the details of all shops wherein the name of landlord, amount of rent paid and copy of rent agreement was demonstrated. In this respect, our attention was invited to the reply filed on 15/02/2016, placed at pages 257 and 258 of the paper book, where detailed reply to point No. 10 was submitted. As regards the query regarding license fee, Learned counsel for the assessee took us to query No. 22 in questionnaire dated 18/11/2015 and its reply placed at page 258 of the paper book. Similarly, regarding the query of house rent, Learned counsel for the assessee submitted that the same was also replied to against the questionnaire and our attention was invited to page 263 of the paper book. As regards the query regarding capital contribution by the partner, Learned counsel for the assessee invited our attention to question No. 1 and 5 to the questionnaire dated 18/11/2015 and its specific reply to its letter dated 15/02/2016, placed at pages 257 and 258 of the paper book where the specific replies were placed. It was submitted that before the learned CIT also, the assessee had filed complete reply to the show cause notice issued by him and the final finding of learned CIT(A) is that the assessee had not maintained stock register as well as sale invoices and that the assessee had filed copy of acknowledgement of ITR as well as confirmation of members in respect of capital contribution of Rs.2,13,64,000/- but Assessing Officer has failed to verify these documents through independent enquiries. It was submitted that the objection of learned CIT is that assessment record shows that during the assessment

proceedings the Assessing Officer has not correctly verified the expenses claimed under various heads, as discussed above whereas the fact remains that the assessee had filed complete information during the assessment proceedings itself and as regards his objection regarding non availability of ledger account of expenses, our attention was invited to the fact that books of account include ledgers as well and moreover, it was argued that books of account were rejected by the Assessing Officer by applying provisions of section 145(3) and Assessing Officer had estimated the income of the assessee by applying gross profit rate. It was submitted that learned CIT, in his order, has also not been able to demonstrate that how the assessment order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. It was submitted that the Assessing Officer, after due application of mind, had made certain additions which were confirmed by learned CIT(A) but which has been settled in favour of the assessee by the Tribunal. In view of all these facts and circumstances, it was submitted that the notices issued and order passed by learned CIT u/s 263 is illegal and invalid that all the issues on which proceedings were initiated and order was passed u/s 263 were already assessed and examined during the assessment proceedings and therefore, the order passed by learned CIT u/s 263 is invalid and reliance in this respect was placed on an order of Hon'ble jurisdictional High Court in the case of CIT vs. Krishna Capbox (P) Ltd. [2015] 372 ITR 310 (All). In view of these facts and circumstances, it was argued that the order passed by learned CIT u/s 263 be cancelled.

3. Learned CIT D. R., on the other hand, placed reliance on the order of learned CIT and argued that he has clearly recorded his findings that Assessing Officer has not carried out the assessment proceedings in the way in which it should have been carried out.

4. We have heard the rival parties and have gone through the material placed on record. We find that Id. CIT in this case observed from the

assessment record that in support of various expenses incurred by the assessee there was no details filed by the assessee during the course of proceedings and there was no copy of ledger accounts in respect of these expenses. The expenses observed by the Id. CIT are salary and wages, shop rent, license fee and house rent etc. Besides the above observations with regard to the expenses Id. CIT further observed that assessee had made an addition on account of capital of partners to the extent of Rs.2,13,64,000/- . He observed that Assessing Officer had not carried out sufficient verifications in this respect. Further he observed that the assessee had not given the details of excise duty tax paid by it and further he held that quantitative records were not maintained and therefore held that the order passed by Assessing Officer was prejudicial to the interest of Revenue and erroneous and concluded by holding as under:

"I have carefully considered the submission made by the assessee as well as perused the case records. It is noticed that no ledger accounts of the expenses as mentioned in the AO report is available in the case records. It is also noticed that assessee is not maintaining stock register as well as sales invoice. The assessee has filed copies of acknowledgement of ITR's as well as confirmations of members in respect of capital contribution of Rs.2,13,64,000/- made by members but AO has failed to verify these documents through independent enquiry. The Assessment records show that during the assessment proceedings A.O has not correctly verified the expenses claimed under the various heads as discussed above so as to bring correct facts on record to examine the allowability of these expenses which renders the order passed by the A.O is erroneous and prejudicial to the interest of revenue." The order has been passed without application of mind. The Hon'ble jurisdictional High Court in the case of C/7" v. Bhagwan Das 12005] 272 ITR 367 (Ail.)(HC), held that non-application of mind by the Assessing Officer was prejudicial to the interest of the revenue.

In view of the above facts, it is clear that the assessment order passed by AO is erroneous as well as prejudicial to the interest of the revenue. Accordingly, the order u/s!43(3) of the I.T. Act, 1961 passed by the assessing officer on 31.03.2016 is set aside to be

framed denovo. The assessing officer is directed to pass a fresh assessment order, after considering all the facts of the case and above observations after providing an opportunity of being heard to the assessee, within the time limit as given in the Income Tax Act, 1961."

5. Before Id. CIT against show cause notice, the assessee filed detailed replies with respect to his each observation which the Id. CIT has made part of his order. We find that the assessee before Id. CIT had explained that Assessing Officer had raised the queries during original assessment proceedings and assessee had filed necessary explanations to which Assessing Officer was satisfied and therefore he had passed the assessment order and therefore the order passed by the Commissioner u/s. 263 of the Act is not as per the provisions of law. We find that as regards the observations of Id. CIT with respect to various aspects the Assessing Officer besides other questions during assessment proceedings raised the following queries:

- "5. *Please furnish copies of all partner's capital account and explain sources of additions made in capital with supporting evidences justifying the creditworthiness and genuineness of transactions.*
10. *Please furnish following details in respect of all shop owned by you:*
 - (i) *Addresses of all shops.*
 - (ii) *Name of landlord, amount of rent paid and copy of rent agreement in respect of each shop.*
 - (iii) *Shop wise details of all employees including salary paid to each of them and identify proof in respect of each employee.*
 - (iv) *Shop wise details of licence holder's alongwith copy of licence for the year under consideration.*
 - (v) *Shop wise details of license fee details alongwith proof of payment.*

(vi) Shop wise details of purchases and sales of liquor alongwith freight and cartage paid.

- 12. Please furnish month wise quantitative details of opening stock, purchases, shortage/excess, sales and closing stock in respect of all items of liquor shop wise. Also produce stock register of each shop for verification.*
- 15. Please furnish the copies of accounts of all expenses claimed in the trading and P&L account and prove the reasonableness of these expenses stating nature of each type of expense.*
- 17. Please give details of all employees to whom salary has been paid. State duties of each employee.*
- 22. Please explain renewal fee, assessment fee and processing fee and its necessity for the business."*

6. In respect of query relating to Query No. 5, the assessee submitted as under:

"4&5. That as required to explain the source of deposit in name of members of A.O.P. In this regard it is submitted that assessee has already furnished copy of Capital Accounts of all the members of A.O.P along with theirs confirmations as well as theirs ITR's. The assessee- has already furnished the copy of income Tax-acknowledgments of members incorporating theirs complete postal addresses and PAN, On perusal of the capital account, your good self may appreciate that there is fresh addition in most of accounts of the members. It may be appreciate that it is normal practice of the members to withdraw entire amounts standing in the name of members at the end of each financial years and thereafter they used to deposit the same by rolling back the amount earlier withdrawn for payment of License Fees etc in next year. In supports of the above facts, assessee is furnishing herewith the copy of Balance Sheet as on 31.03.2011 for your honour kind perusal and records. At may be appreciated that all the members are individually assessed to tax with the ITO having jurisdictions over the case. The addition was made by him out of their withdrawal from firm as on 31.03.2012 as well as theirs own sources and regular income shown to Income Tax Department. The assessee is furnishing-herewith the confirmations received from partners, their capital accounts, in support of justification of investment in, the form of Capital."

7. The assessee also relied on certain case laws in support of its claim that the firm is not required to satisfy itself that money which it received from the partners was the money which had partners earned by honest means. With respect to Query relating to Question No. 10, the assessee filed following reply:

"Point No.10

That as required by your honour, assessee is furnishing herewith the followings:

- (i) That Shop address details is being furnished herewith.*
- (ii) Shop wise details of rent paid giving name, address of Land Lord.*
- (iii) Shop wise details of employees giving name, address and total salary paid and nature of duties performed.*
- (iv) Shop wise details of License Holders.*
- (v) That evidence in respect of license fee has-already filed along with reply dated 15.12.2015.*
- (vi) Details of purchases and sales have also already been filed placed on assessment record."*

8. With respect to Query No.12, the assessee submitted as under:

"Point No-12

That as required by your honour to furnish the month wise quantitative details of purchases and sales and closing stock. In this regards it is submitted that assessee's engaged in business of trading of foreign liquor i.e. Beer and wine. Both products has number of varieties in brands, quality, quantity and measurements like quarter, half Bottles i.e. 180ML, 375 ML and 750 ML. The assessee has never maintained any quantitative details for its recordings and therefore desired information could not be furnished. Your good self may appreciate that license is granted for a year and therefore it is compulsion on the assessee to make entire sales before the closing of year as it is not possible for assessee to sale the product after expiry of license period. In other words, it is compulsion on the assessee to NIL its stock at the end of year. Liquor is purchased from distilleries after paying license

fees which is subject to deduction TCS. The assessee has claimed TCS in which amount of purchases made by members are given. Your honour may verify purchase; from TCS Certificates regarding purchases made by members from the distilleries in which amount of TCS and amount of purchases made by members of AOP is given and therefore purchases of the assessee is completely verifiable. Your good self may appreciate -that this practice is being consistently followed by assessee and accordingly assessee make humble request that assessee may please very kindly be exempted from furnishing this-information which is, not possible for assessee because of the reason narrated above."

9. With respect to Query No.15, the assessee submitted as under:

"Point No-15

That as required by your honour to furnish the copies of accounts of all the expenses claimed in the profit and loss account and to prove the reasonableness of all the expenses. In this regards it is submitted that assessee is furnishing herewith the copies of accounts of all the expenses claimed in the Trading and Profit & Loss Account. With regards it genuineness and reasonableness of the expenses, it is submitted that all the expenses claimed are having direct nexus with the assessee's nature of business. The assessee has not claimed any expenses which are either personal nature or capital nature. The assessee is also furnishing comparative details of expenses claimed in preceding 3 years to justify the claim. The assessee has also maintained proper books of accounts. The Books of accounts are duly audited and auditor has not made any adverse comments on the reasonableness of the expenses. In view of the above, your honour is, requested to allow the claim and oblige."

10. With respect to Query No.17, the assessee submitted as under:

"Point No.17

That as required by your honour to furnish the proof of all employees. In this regards it is submitted that all the employees are residing at various places of Basti, Siddhartha Nagar and Gorakhpur shops and therefore it is very impracticable to collect ID proof immediately. The assessee make humble request that at least 1 month time may please very kindly be allowed to get the ID proof. Without prejudice to the above, it is submitted that during

the year under question, assessee has paid salary of Rs.4608000/-. There are 48 shops in which business is being carried out and at least 2 employees are required to in each and every shops. The assessee has paid salary 96 employees and average monthly salary per employee comes to Rs.4000/- which is very reasonable looking to the place of services and price inflation indeed. In view of the above, your honour is requested not to take any adverse view and oblige."

11. With respect to Query No.22, the assessee submitted as under:

"Point No.22

That as required, assessee is furnishing herewith the details of renewal fee, assessment fee and processing fee. The renewal fee is paid to Excise Department as renewal of license. The assessment fee is nothing but fee for model shop paid to Excise department. Processing fee is a Form Fee for renewal. The necessary Challans are being furnished herewith."

12. The above submissions made by the assessee during the course of assessment proceedings indicate that Assessing Officer did carryout the necessary investigation and assessee filed the relevant replies which in our opinion are plausible explanations and therefore Assessing Officer rightly passed the assessment order accepting the explanations of the assessee.

13. The Assessing Officer took a plausible view and therefore the order passed by the Assessing Officer is not erroneous and therefore the condition for initiating the action u/s. 263 does not arise as on all the issues on which the Id. CIT took u/s. 263 were examined during the assessment proceedings. The Jurisdictional High Court of Allahabad in CIT vs. Krishna Capbox (P.) Ltd. [2015] 372 ITR 310 (All) has held where the Assessing Officer made certain queries which were replied to by assessee and after inquiry, being satisfied in respect to any queries replied by the assessee, Assessing Officer accepted declared income and passed the assessment order, Commissioner cannot issue notice u/s. 263 on the ground that Assessing Officer had not made enquiry on certain accepted version of

assessee without making any enquiry or verification. In DIT vs. Jyoti Foundation in ITA No. 267 of 2013, 357 ITR 0388 (Del) the Hon'ble Delhi High Court held that where revisional authority opined that further enquiry was required such enquiry should have been conducted by the revisionary authority himself to record finding that assessment order passed by the Assessing Officer was erroneous and prejudicial to the Revenue. In Salora International Ltd. vs. Addl. CIT [2005] 2 SOT 705 (Del) the Tribunal held that merely because from a preferential point of view it is apprent that some more enquiry and verification could have been made by the Assessing Officer while making assessment order cannot be declared to be erroneous and prejudicial to the interest of the Revenue. The Hon'ble Delhi High Court in the case of CIT vs. Vikas Polymers, 194 Taxman 57 (Del) held that there is difference between lack of enquiry and inadequate enquiry and it is only cases of lack of enquiry that the Commissioner is empowered to exercise his revisional powers by calling for and examining the records of any proceedings under the Act and passing orders thereon.

14. In view of the facts and circumstances, we find that Id. CIT was not justified in passing the order u/s. 263 of the Act and directing the Assessing Officer to make assessment order *de novo* and therefore we cancel the order passed by the Id. CIT(A) u/s. 263 of the Act.

15. In the result, the appeal filed by the assessee is allowed.

(Order pronounced in the open court on 28/09/2021)

Sd/-
(A. D. JAIN)
Vice President

Sd/-
(T. S. KAPOOR)
Accountant Member

Dated: 28/09/2021

*Singh/Aks/-

Copy of the order forwarded to :

1. The Appellant
2. The Respondent.
3. Concerned CIT
4. The CIT(A)
5. D.R., I.T.A.T., Lucknow

Assistant Registrar