IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI ‘C’ BENCH, NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND SHRI YOGESH KUMAR, JUDICIAL MEMBER

ITA No. 4651/DEL/2019 [A.Y 2014-15]

M/s H.T.L Ltd 8, Commercial Complex Masjid Moth, Greater Kailash – II New Delhi	Vs.	The Pr. C.I.T Central - 3 New Delhi
PAN: AAACH 5516 P		
(Applicant)		(Respondent)

Assessee By	:	Shri Rakesh Joshi, CA
Department By	:	Ms. Parvinder Kaur, CIT-DR

Date of Hearing	**:**	**23.06.2022**
Date of Pronouncement	**:**	**06.07.2022**

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order of the PCIT, New Delhi dated 30.03.2019 framed u/s 263 of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'].

2. The sum and substance of the grievance of the assessee is that the PCIT erred in assuming jurisdiction u/s 263 of the Act by holding that the assessment order framed by the Assessing Officer u/s 143(3) of the Act is erroneous and prejudicial to the interest of the Revenue.

3. The representatives of both the sides were heard at length, the case records carefully perused.

4. Briefly stated, the facts of the case are that the assessee company e-filed its return of income on 26.11.2014 declaring income of Rs. 6,24,10,490/- which was processed u/s 143(1) of the Act. Return was selected for scrutiny under CASS and, accordingly, statutory notices were issued and served upon the assessee.

5. The Assessing Officer framed the assessment order u/s 143(3) of the Act on 08.12.2016 by accepting the returned income. Invoking the powers conferred upon him by provisions of section 263 of the Act, the PCIT, Central -3 issued a notice to the assessee which reads as under:

"Office of the **Pr** Commissioner of Income Tax
(Central)-3, 325, 3rd Floor, ARA Centre, E-2, Jhandewalan Extn,
New Delhi-110055, t 23593426

F. No: PCIT(C)-3/263/2018-19/30V2- Date: 19.03.2019

To

The Principal Officer M/s. H.T.L Ltd.
8, Commercial Complex,
Masjid Moth, Greater Kailash-II New Delhi-110048

Sir,

Sub: Proceedings u/s 263 of the Income Tax Act, 1961 for the Assessment Year 2014-15- M/s. H.T.L Ltd. (PAN: AAACH5516P) - reg.

On examination of Income-tax records of M/s HTL Limited (PAN: AAACH5516P) for the assessment year 2014-15, it is seen that the ACIT, Central Circle-25, New Delhi has passed an order u/s 143(3) of the IT Act, 1961 on 08.12.2016.

On examination, prima facie, it appeared that while passing the order dated 08.12.2016 u/s 143(3) of the Act, the following issues in respect of sale of impugned land measuring 10.162 acres to M/s VGN Developers Pvt. Ltd, Chennai below the stamp duty value in contravention of the provision of the Act (Section 50C) were left unverified:

(i) On perusal of records, it is observed that the Consortium of banks should not have quoted a reserve price much below the Stamp Duty Value, thus defeating the very purpose of the Section 50C of the Income Tax Act purposely inserted for the purpose.

(ii) The stamp duty value of Rs. 387,64,76,000/- should have been considered for the computation of capital gains instead of Rs 272,29,08,000/- the amount of sale. The mistake resulted in under assessment of income of Rs. 115,35,68,000/-.

(iii) Since the provision of section 56(2}(vii)(a) are only applicable only to the individuals and HUF therefore the differential amount of Rs. 115,35,68,000/- could not be brought to tax in the hands of the buyer company either, consequently the differential amount of Rs. 115,35,68,000/- was neither taxed in the hands of assesse'e company nor in the hands of buying company.

3. In view of the above facts, the assessment order dated 08.12.2016 passed u/s 143(3) of the Income-tax Act, 1961, for the assessment year 2014-15 appears to be erroneous and prejudicial to the interest of the revenue. The assessment is framed without carrying out necessary enquiries, investigation & verification by the A.O rendering the assessment erroneous. Therefore, I propose to invoke the provisions of section 263 of the Income tax Act, 1961. In case you have any objection to the proposed action, you may file your objections before me at 11.00 A.M. on 22-03-2019. If no objections are received by the aforesaid date, it will be presumed that you have nothing to say in this matter and order u/s 263 of the Income tax Act, 1961 will be passed on merits on the basis of material! available on record.

Yours faithfully,

(ANURADHA MISHRA)
Pr. Commissioner of Income Tax,
(Centra!)-3, New Delhi.

5. A perusal of the aforesaid notice clearly shows that the PCIT was unaware of the relevant provisions of SARFEASI Act, 2002. We are of the considered view that before issuing notice u/s 263 of the Act and before assuming jurisdiction thereupon, the PCIT ought to have gone through the underlying facts of the case in hand. If the PCIT had gone through the records of the assessee, he would have come to know that the accumulated losses of the assessee were more than the paid up capital and free reserves, the assessee company became a sick company as per the provisions of Sick Industrial Companies Act [SICA] and was referred to the Board of Industrial and Financial Reconstruction [BIFR] u/s 15(1) of the SICA [Special Provisions] Act declaring the company as a sick industrial company.

6. In 2006, the assessee company sought permission for disposal of surplus land of 11.02 acres from the Government of India to redeem the mounting financial burden and also to generate funds needed for its revival.

7. The Government of India gave permission in Assessment Year 2006 for the sale of land, but the sale of land could not be completed in Assessment Year 2006-07 due to State Government's intervention for buy-back.

8. Since the assessee company could not pay bank dues as demanded by the State Bank of India and other bankers, SBI, on behalf of consortium of banks, issued a notice dated 18.04.2009 to the company u/s 13(3) of SARFEASI Act requiring the company to discharge its full dues and attached the assets including the freehold surplus land mortgaged to the extent of 11.02 acres.

9. SBI took possession of the land on 29.06.2009. Actual measurement of land came to 10.162 acres. The appellate authority for industrial and financial reconstruction, in its order dated 13.10.2010, abated the proceedings of the assessee company's reference before BIFR and permitted SBI to proceed with the action initiated under the SURFEASI Act for realization of other dues.

10. Facts on record show that SBI made several attempts to sell the vacant land through e-auction four times, i.e. 17.02.2011, 09.03.2011, 05.11.2012 and 23.01.2013. Copies of advertisement in leading newspapers are placed on record.

11. Finally, SBI in its meeting with consortium of banks decided to sell the said land to any prospective buyer who is willing to pay the reserve price of 250 crores or more on private treaty basis.

12. In response to SBI's callings, M/s VGN Developers Pvt. Ltd, Chennai responded and offered the price of 272.29 crores to SBI in March 2013 and accordingly, SBI sold the land under SARFEASI Act in June 2013b and issued sale certificate to the assessee company and intimated the assessee company regarding the sale of land and the appropriation of sale proceeds thereof.

13. A conspectus understanding of the underlying facts clearly show that sale/transfer of land is effected by SBI under the SARFEASI Act and it has to be understood clearly that the assessee company has not sold/transferred the land of its own. It is known to everyone that SBI is a bank created by the Act of Parliament who has taken possession of

the land of the assessee company and the action of the SBI is akin to compulsory acquisition of land by the Government under SURFEASI Act to recover dues of consortium of banks.

14. Facts on record clearly show that in spite of several attempts, SBI could not sell the land at the stamp duty value of Rs. 387.64 crores. Therefore, under the given circumstances, it can be safely concluded that the price realized by SBI is fair market value of land as on the date of sale.

15. We find that vide notice dated 22.2.2016, the Assessing Officer raised 50 queries. The relevant query for the case in hand reads as under:

> *"Details with supporting evidence in respect of short term capital pain / loss and long term capita! gain / loss."*

16. The assessee replied as under:

"Short Term Capital gain - Nil

LT Capital gain - See computation , however reproduced below

	Rs.
Long term capital gain (Sale of land by S8I under SARFAESI Act)	
Sale consideration received by SBI	272,29,08,000

Less: Cost of acquisition -		
Actual cost - amount paid in 1973	2,83,989	
Other expenses	5,011	
	2,89,000	
Fair market value as on 1.4.1981 taken at 15,00,000 Indexed cost of acquisition for 2013-14 (15,00,000x939/100)		140,85,000
Long Term Capital gain		270,88,23,000

The land was allotted to HTL by the Tamilnadu Govt in the year 1973. Copy of the assignment deed is enclosed as Annexure 21 (a). As per the assignment deed, the land measured was 11.021 acres. This assignment deed was converted into sale deed in the year 1993. Copy enclosed as Annexure 21 (b). This land was taken over by SBI under the SARFAESI Act. SBI has sold this land under SARFAESI Act and issued a sale certificate, which was registered with Sub-Registrar office, Alandur. Copy of the sale certificate is enclosed as Annexure *22.* The actual measurement by SBI was Rs. 10.46 acres only at the time of sale."

17. It can be seen from the above that a specific query was raised by the Assessing Officer for a specific reason for which return was selected for scrutiny assessment and specific reply was given by the assessee.

18. The Hon'ble Supreme Court in Malabar Industrial Co. Ltd., 243 ITR 83, has laid down the following ratio:

> "A bare reading of section 263 of the Income-tax Act, 1961, makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suo motu 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. 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 ".

19. The Hon'ble Bombay High Court in the case of Gabriel India Ltd 203 ITR 108 has held as under:

> "The power of suo motu revision under subsection (1) is in the nature of supervisory jurisdiction and the same can be exercised only if the circumstances specified therein exist. Two

circumstances must exist to enable the Commissioner to exercise power of revision under this sub-section, viz., (i) the order is erroneous; (ii) by virtue of the order being erroneous prejudice has been caused to the interests of the Revenue. It has, therefore, to be considered firstly as to when an order can be said to be erroneous. We find that the expressions "erroneous", "erroneous assessment" and "erroneous judgment" have been defined in Black's Law Dictionary. According to the definition, "erroneous" means "involving error; deviating from the law". "Erroneous assessment" refers to an assessment that deviates from the law and is, therefore, invalid, and is a defect that is jurisdictional in its nature, and does not refer to the judgment of the Assessing Officer in fixing the amount of valuation of the property. Similarly, "erroneous judgment" means "one rendered according to course and practice of court, but contrary to law, upon mistaken view of law; or upon erroneous application of legal principles".

12. From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is held to be erroneous. Cases may be visualised where the Income-tax Officer while making an assessment examines the accounts, makes enquiries, applies his

mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure. It is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. It may be said in such a case that in the opinion of the Commissioner the order in question is prejudicial to the interests of the Revenue. But that by itself will not be enough to vest the Commissioner with the power of suo motu revision because the first requirement, viz., that the order is erroneous, is absent. Similarly, if an order is erroneous but not prejudicial to the interests of the Revenue, then also the power of suo motu revision cannot be exercised. Any and every erroneous order cannot be the subject-matter of revision because the second requirement also must be fulfilled. There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed. We, therefore, hold that in order to exercise power under sub-section (1) of section 263 of the Act there must be material before the Commissioner to consider that

the order passed by the Income-tax Officer was erroneous in so far as it is prejudicial to the interests of the Revenue. We have already held what is erroneous. It must be an order which is not in accordance with the law or which has been passed by the Income-tax Officer without making any enquiry in undue haste. We have also held as to what is prejudicial to the interests of the Revenue. An order can be said to be prejudicial to the interests of the Revenue if it is not in accordance with the law in consequence whereof the lawful revenue due to the State has not been realised or cannot be realised. There must be material available on the record called for by the Commissioner to satisfy him prima facie that the aforesaid two requisites are present. If not, he has no authority to initiate proceedings for revision. Exercise of power of suo motu revision under such circumstances will amount to arbitrary exercise of power.

It is well-settled that when exercise of statutory power is dependent upon the existence of certain objective facts, the authority before exercising such power must have materials on record to satisfy it in that regard. If the action of the authority is challenged before the court it would be open to the courts to examine whether the relevant objective factors were available from the records called for and examined by such authority.

The Income-tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation in that regard by a letter in writing. All these are part of the record of the case. Evidently, the claim was allowed by the Income-tax Officer on being satisfied

> with the explanation of the assessee. Such decision of the Income-tax Officer cannot be held to be "erroneous" simply because in his order he did not make an elaborate discussion in that regard. Moreover, in the instant case, the Commissioner himself, even after initiating proceedings for revision and hearing the assessee, could not say that the allowance of the claim of the assessee was erroneous and that the expenditure was not revenue expenditure but an expenditure of capital nature. He simply asked the Income-tax Officer to re-examine the matter. That, in our opinion, is not permissible. Hence the provisions of section 263 of the Act were not applicable to the instant case and, therefore, the commissioner was not justified in setting aside the assessment order."

20. It is a settled position of law that powers u/s 263 of the Act can be exercised by the Commissioner on satisfaction of twin conditions, i.e., the assessment order should be erroneous and prejudicial to the interest of the Revenue. By 'erroneous' is meant contrary to law. Thus, this power cannot be exercised unless the Commissioner is able to establish that the order of the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. Thus, where there are two possible views and the Assessing Officer has taken one of the possible views, no action to exercise powers of revision can arise, nor can revisional power be exercised for directing a fuller enquiry to find out if the view taken is erroneous. This power of revision can be exercised

only where no enquiry, as required under the law, is done. It is not open to enquire in case of inadequate inquiry. Our view is fortified by the decision of Hon'ble High Court of Bombay in the case of CIT vs. Nirav Modi, [2016] 71 Taxmann.com 272 (Bombay)".

21. The Hon'ble High Court of Gujarat in the case of CIT vs. Nirma Chemical Works Ltd. 309 ITR 67 has observed as under:

> "if assessment order were to incorporate the reasons for upholding the claim made by an assessee, the result would be an epitome and not an assessment order. In this case, during the assessment proceedings for both the Assessment Years, the Assessing . A.Y. 2009-10 Officer issued a query memo to the assessee, calling upon him to justify the genuineness of the gifts. The Respondent-Assessee responded to the same by giving evidence of the communications received from his father and his sister i.e. the donors of the gifts along with the statement of their Bank accounts. On perusal, the Assessing Officer was satisfied about the creditworthiness/capacity of the donors, the source from where these funds have come and also the creditworthiness/ capacity of the donor. Once the Assessing Officer was satisfied with regard to the same, there was no further requirement on the part of the Assessing Officer to disclose his satisfaction in the Assessment Order passed thereon. Thus, this objection on the part of the Revenue cannot be accepted."

22. We find that the Hon'ble Delhi High Court in the case of CIT Vs Sunbeam Auto reported in 332 ITR 167 has held as held as under:

> *"12. We have considered the rival submissions of the counsel on the other side and have gone through the records. The first issue that arises for our consideration is about the exercise of power by the CIT under s. 263 of the IT Act. As noted above, the submission of learned counsel for the Revenue was that while passing the assessment order, the AO did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This argument predicates on the assessment order, which apparently does not give any reasons while allowing the entire expenditure as revenue expenditure. However, that by itself would not be indicative of the fact that the AO had not applied his mind on the issue. There are judgments galore laying down the principle that the AO in the assessing order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate that would not by itself give occasion to the CIT to pass orders under s. 263 of the Act, merely because he has different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open".*

23. The ld. DR placed strong reliance on the decision of the Mumbai Bench of the Tribunal in the case of Vithal Nagar Co-operative Housing Society Ltd 88 Taxmann.com 890 and on the decision of the Ahmadabad Bench in the case of Babu Lal Solanki 104 Taxmann.com 155 and vehemently stated that the Tribunal has categorically held that Provisions of Section 50C of the Act are deeming provisions and mandatory, failure of Assessing Officer to apply provisions of Section 50C would render assessment order erroneous and prejudicial to the interest of the revenue.

24. We have given thoughtful consideration to the decisions relied upon by the ld. DR. We are of the considered view that in none of the two cases relied upon by the ld. DR, there was a sale under SARFEASI Act by secured lender.

25. As mentioned elsewhere, in the case in hand, sale was under SURFEASI Act and sale was not by the assessee.

26. Considering the facts of the case in totality from all possible angles, we are of the considered view that the order framed u/s 263 of the Act deserves to be set aside in light of the peculiar facts of the

case in hand. We, accordingly, set aside the order of the PCIT and restore that of the Assessing Officer dated 18.12.2016 framed u/s 143(3) of the Act.

27. In the result, the appeal of the assessee in ITA No. 4651/DEL/2019 is allowed.

The order is pronounced in the open court on 06.07.2022.

Sd/-	**Sd/-**
[YOGESH KUMAR] **JUDICIAL MEMBER**	**[N.K. BILLAIYA]** **ACCOUNTANT MEMBER**

Dated: 06th July, 2022.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
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	