

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
**IN THE INCOME TAX APPELLATE TRIBUNAL,
RAJKOT BENCH, RAJKOT**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER,
And
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER**

आयकर अपील सं./ITA No. 176/Rjt/2016
निर्धारण वर्ष/Asstt. Years: 2011-2012

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| Rajshanti Metals Pvt. Ltd., B-42, GIDC, Shankar Tekri, Jamnagar. PAN: AABCR0211Q | Vs. | The Principal Commissioner of Income Tax, Jamnagar. |
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| Assessee by : | Shri Mehul Ranpura, A.R |
| Revenue by : | Shri Sanjeev Jain, CIT. D.R |

सुनवाई की तारीख / **Date of Hearing** : **30/06/2022**
घोषणा की तारीख / **Date of Pronouncement**: **09/09/2022**

आदेश/ORDER

PER BENCH:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Principal Commissioner of Income, Jamnagar, dated 15/03/2022 arising in the matter of revision order passed under s. 263 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2011-12.

2. The only interconnected issue raised by the assessee is that the learned PCIT erred in holding the assessment framed under section 143(3) of the Act as erroneous insofar as prejudicial to the interest of Revenue.

3. The brief facts are that the assessee is a private ltd. company and claimed to be engaged in the business of manufacturing of extruded brass rods & export & wind energy convertor. The PCIT on examination of the case records of the assessee, found certain defects in the assessment framed under section 143(3) of the Act dated 19 March 2014 which are detailed as under:

- i. As a result of survey operation at the business premises of the assessee under the provisions of section 133A of the Act, the unaccounted stock of brass scrap was found amounting to ₹53,00,075/- which was also admitted by the assessee but the same was not offered to tax in the income tax return. The AO has not verified the same properly during the assessment proceedings.
- ii. There was sharp decline in the gross profit ratio and net profit ratio in the year under consideration in comparison to the immediate preceding assessment year. The gross profit ratio and the net profit ratio for the year under consideration stands at 7.69% and 4.69% whereas the same stands in the immediate preceding assessment year at 20.74% and 15.74% respectively. Despite there was a sharp decline in the ratio as discussed above, but the AO has not verified the same thoroughly.
- iii. The deduction claimed by the assessee under section 80 IA (1) of the Act amounting to ₹ 30,06,181/- was not included in the gross total income and therefore it was not eligible for the deduction in respect of such income. But the same was allowed by the AO during the assessment framed under section 143(3) of the Act without carrying out necessary verification.
- iv. There were fresh loans shown by the assessee from the directors and shareholders amounting to ₹ 1,35,36,000/- and ₹ 17,28,949/- respectively but the AO has not verified the identity and creditworthiness of the parties as well as genuineness of the transaction. The learned PCIT in his order clearly admitted that the

necessary documents were furnished by the assessee in support of the above defects but the AO has failed to carry out any independent verification.

3.1 In view of the above, show cause notice was issued upon the assessee dated 7 January 2016. The assessee in response to such notice submitted that the AO during the assessment proceedings has made necessary verification after due application of mind. Therefore assessment order framed by the AO cannot be held as erroneous insofar as prejudicial to the interest of revenue under the provisions of section 263 of the Act.

3.2 However, the Id. PCIT rejected the contention of the assessee by observing on the reasoning that the AO has framed the assessment without necessary verification. Thus, the order of the AO is erroneous in so far as prejudicial to the interest of the Revenue.

4. Being aggrieved by the order of the learned PCIT, the assessee is in appeal before us.

5. The learned AR before us filed a paper book running from pages 1 to 75 and contended that all the necessary details about the excess stock of Rs. 53, 00,075/- found during the course of survey has been filed during the assessment proceedings. The learned AR in support of his contention drew our attention on pages 24 and page Nos. 27 to 32 of the paper book where the reply was placed in respect of excess stock of Rs. 53, 00,075/- found during the course of survey. The learned AR, simultaneously, in support of his contention drew our attention on page No. 2 of the AO order where the AO discussed about the excess stock found during the survey.

5.1 The learned AR further contended that the assessment was framed by the AO after considering the necessary details, verification and application of mind, taking into account the drastic reduction in the GP and NP. The learned AR in

support of his contention drew our attention on pages 15 to 16 of the paper book where was copy of the notice under section 142(1) of the Act was placed. In that notice, the assessee was asked explain the reduction in the GP and NP during the year under consideration. Likewise, the learned AR also drew our attention on pages 18, 23, 24, and 25 of the paper book where the reply of the assessee in response to the notice issued under section 142(1) of the Act was placed. Thus, the learned AR contended that it cannot be said that the assessment order is erroneous which is causing prejudice to the interest of Revenue in the given facts and circumstances.

6. The learned AR further contended that the assessment was framed by the AO after considering the necessary details and verification and application of mind in respect of the deduction claimed by the assessee u/s 80IA of the Act. The learned AR in support of his contention drew our attention on page 20 of the paper book where the clarification of the assessee in respect of deduction u/s 80IA of the Act was placed. Thus, the learned AR contended that there cannot be said that the assessment order is erroneous which is causing prejudice to the interest of Revenue in the given facts and circumstances.

6.1 The learned AR further contended that the assessment was framed by the AO after considering the necessary details and verification and application of mind in respect of unsecured loan raised by the assessee during the year under consideration. The learned AR in support of his contention drew our attention on pages 15 to 16 where was copy of the notice under section 142(1) of the Act was placed, where the assessee was asked about the address and confirmation of new unsecured loan. Likewise, the learned AR also drew our attention on pages 19 of the paper book where the reply of the assessee in response to the notice issued under section 142(1) of the Act was placed. Thus, the learned AR contended that there cannot be said that the assessment order is erroneous and causing prejudice to the interest of Revenue in the given facts and circumstances. The learned AR

further before us furnished the confirmation along with copy of ITR and ledger account in respect of Parties from whom loan was obtained, the copy of such documents are available on pages 89 to 118 of the paper book.

7. On the contrary, the learned DR vehemently supported the order of the authorities below.

8. We have heard the rival contentions of both the parties and perused the materials available on record. The issue in the present case relates whether the assessment order has been passed by Ld. AO without making inquiries or verification with respect to the issues as discussed above and hence the assessment is erroneous insofar prejudicial to the interest of the Revenue and thus requiring revision by Pr. CIT u/s 263 of the Act.

8.1 An inquiry made by the Assessing Officer, considered inadequate by the Commissioner of Income Tax, cannot make the order of the Assessing Officer erroneous. In our view, the order can be erroneous if the Assessing Officer fails to apply the law rightly on the facts of the case. As far as adequacy of inquiry is considered, there is no law which provides the extent of inquiries to be made by the Assessing Officer. It is Assessing Officer's prerogative to make inquiry to the extent he feels proper. The Commissioner of Income Tax by invoking revisionary powers under section 263 of the Act cannot impose his own understanding of the extent of inquiry. There were a number of judgments by various Hon'ble High Courts in this regard.

8.2 Delhi High Court in the case of **CIT Vs. Sunbeam Auto 332 ITR 167 (Del.)**, made a distinction between lack of inquiry and inadequate inquiry. The Hon'ble court held that where the AO has made inquiry prior to the completion of assessment, the same cannot be set aside u/s 263 of the Act on the ground of inadequate inquiry. The relevant observation of Hon'ble Delhi High Court reads as under:

"12. There are judgments galore laying down the principle that the Assessing Officer in the assessment 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 Commissioner to pass orders under section 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. ———

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. 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.

15. Thus, even the Commissioner conceded the position that the Assessing Officer made the inquiries, elicited replies and thereafter passed the assessment order. The grievance of the Commissioner was that the Assessing Officer should have made further inquiries rather than accepting the explanation. Therefore, it cannot be said that it is a case of 'lack of inquiry'."

8.3 The Hon'ble Bombay High Court in case of **Gabriel India Ltd. [1993] 203 ITR 108 (Bom)**, discussed the law on this aspect in length in the following manner:

"The consideration of the Commissioner as to whether an order is erroneous in so far as it is prejudicial to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. **The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity.**

8.4 The Mumbai ITAT in the case of **Sh. Narayan Tatu Rane Vs. ITO, I.T.A. No. 2690/2691/Mum/2016, dt. 06.05.2016** examined the scope of enquiry under Explanation 2(a) to section 263 in the following words:-

*"20. Further clause (a) of Explanation states that an order shall be deemed to be erroneous, if it has been passed without making enquiries or verification, which should have been made. In our considered view, this provision shall apply, if the order has been passed without making enquiries or verification which a reasonable and prudent officer shall have carried out in such cases, which means that the opinion formed by Ld Pr. CIT cannot be taken as final one, without scrutinising the nature of enquiry or verification carried out by the AO vis-à-vis its reasonableness in the facts and circumstances of the case. **Hence, in our considered view, what is relevant for clause (a) of Explanation 2 to sec. 263 is whether the AO has passed the order after carrying our enquiries or verification, which a reasonable and prudent officer would have carried out or not. It does not authorise or give unfettered powers to the Ld Pr. CIT to revise each and every order, if in his opinion, the same has been passed without making enquiries or verification which should have been made. In our view, it is the responsibility of the Ld Pr. CIT to show that the enquiries or verification conducted by the AO was not in accordance with the enquiries or verification that would have been carried out by a prudent officer.** Hence, in our view, the question as to whether the amendment brought in by way of Explanation 2(a) shall have retrospective or prospective application shall not be relevant."*

8.5 The Hon'ble Supreme Court in recent case of **Principal Commissioner of Income-tax 2 v. Shree Gayatri Associates*[2019] 106 taxmann.com 31 (SC)**, held that where Pr. CIT passed a revised order after making addition to assessee's income under section 69A in respect of on-money receipts, however, said order was set aside by Tribunal holding that AO had made detailed enquiries in respect of such on-money receipts and said view was also confirmed by High Court, SLP filed against decision of High Court was liable to be dismissed. The facts of this case were that pursuant to search proceedings, assessee filed its return declaring certain unaccounted income. The Assessing Officer completed assessment by making addition of said amount to assessee's income. The Principal Commissioner passed a revised order under section 263 on ground that Assessing Officer had failed to carry out proper inquiries with respect to assessee's on money receipt. In appeal, the Tribunal took a view that Assessing Officer had carried out detailed inquiries which included assessee's on-money transactions and Tribunal, thus, set aside the revised order passed by Commissioner. The Hon'ble High Court upheld

Tribunal's order. The Hon'ble Supreme Court while dismissing the SLP filed by the Department held as under:-

"We have heard learned counsel for the Revenue and perused the documents on record. In particular, the Tribunal has in the impugned judgment referred to the detailed correspondence between Assessing Officer and the assessee during the course of assessment proceedings to come to a conclusion that the Assessing Officer had carried out detailed inquiries which includes assessee's on-money transactions. It was on account of these findings that the Tribunal was prompted to reverse the order of revision. No question of law arises. Tax Appeal is dismissed"

8.6 The Supreme Court in the another recent case of **Principal Commissioner of Income-tax-2, Meerut v. Canara Bank Securities Ltd[2020] 114 taxmann.com 545 (SC)**, dismissed the Revenue's SLP holding that 263 proceedings are invalid when AO had made enquiries and taken a plausible view in law, with the following observations:

"Having heard learned counsel for the parties and having perused the documents on record, we see no reason to interfere with the view of the Tribunal. The question whether the income should be taxed as business income or as arising from the other source was a debatable issue. The Assessing Officer has taken a plausible view. More importantly, if the Commissioner was of the opinion that on the available facts from record it could be conclusively held that income arose from other sources, he could and ought to have so held in the order of revision. There was simply no necessity to remand the proceedings to the Assessing Officer when no further inquiries were called for or directed"

8.7 From an analysis of the above judicial precedents, the principle which emerges is that the phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an Assessing Officer adopts one of the course permissible in law and it has resulted in loss of revenue; or where two views are possible and the Assessing Officer has taken one view with which the Commissioner of Income-tax does not agree, it cannot be treated as an erroneous order causing prejudice to the interests of the Revenue unless the view taken by the Assessing Officer is unsustainable in law, or the AO has completely omitted to make any enquiry altogether or the order demonstrates non-application of mind.

Stock statement (summary)

We hereby attach a sheet in which all the stock will summarized for the period of 01.04.2010 to 31.03.2011.

As discussed during the course of last hearing, we, on behalf of our above client, submit the required details as per index enclosed herewith. Kindly find the same in order.

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Claimed deduction u/s. 80IA

In the above matter, our client has claimed deduction u/s.80IA in respect of generation of Electricity by Wind Mill Energy Converter. This is a statutory allowance which is not an expenditure as per sec. 32. Hence, this cannot be disallowed. Our client has also obtained certificate in Form No.10CCB wherein it is mentioned that the above enterprise satisfied the conditions stipulated u/s.80IA and the amount of deduction claimed is deductible. We rely on the following judgements.

*West Cast Paper Mill Vs CIT 32 CIT 32 SOT 164 Delhi
Dalamiya Cement (Bharat Ltd.), Mumbai Vs CIT 103 ITD 19/100 TTJ 833 Mumbai.
In view of the above facts, it is requested to allow the deduction of the claim made u/s.80IA.*

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Reg. reason for decline in G.P. & N.P

- a) *Our client's total purchases are from foreign countries and therefore, importe. So, we have to make payments for purchase depending upon the rates of International market Flutuations in currency always effect in our business and fall in value of rupee in well known.*
- b) *During the year under reference, turnover has decreased by 15% due to decrease in production/manufactured goods as under:*

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|-------------------------------|-----------------------|
| <i>A.Y. 2010-11</i> | <i>16,97,836 kgs.</i> |
| <i>A.Y. 2011-12</i> | <i>14,46,472 kgs.</i> |
| <i>Decrease in production</i> | <i>2,51,364 kgs.</i> |
- e. *Purchase price jumped and go up 26% as narrated below:*

| | |
|---------------------|--------------------------|
| <i>A.Y. 2010-11</i> | <i>Rs.175.93 per kg.</i> |
| <i>A.Y. 2011-12</i> | <i>Rs.221.66 per kg.</i> |
| <i>Gone up by</i> | <i>Rs.45.73</i> |

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Vi *As regard 'Disclosure of stock' (brass scrap)*

There was a survey operation u/s.133A of the IT Act was conducted on 23-3-11 at the business premises of our client. During the course of survey, excess stock of Brass scrap of 19.273 kgs. Valuing Rs.53,00,075/- was found and declared for taxation. The same has been added on the next day of survey in brass stock resulting into increase in normal profit by Rs.53,00,075/-. The above stock has not been added in purchase a/c. the above stock credited to material consumption a/c The same has been debited and shown as closing stock as per accounting method. The same has accordingly been transferred to P & L. a/c.

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As discussed during the course of last hearing and our earlier explanation in our letter dt.7-3-14 respect of G.P. &N.P., we, on behalf of our above client, submit further that we are furnishing herewith a chart of comparative purchase, sales, manufacturing administration exp. where from your honor will observe

- i) that sales increased by 1.77% i.e. in value of Rs.67,10,055A*
- ii)' that material consumption increase by 7.34% i.e. in value of Rs.2,19,28,162/-*
- iii) that Mfg. exp. decrease by Rs,1,003/-*
- iv) that personal and adm. Exp. decrease by Rs.3,60,6837-*
- v) S that selling expenses increased by Rs. 1,60,7997-*
- vi) that bank interest, financial exp, increased by Rs.9,22,390/-*
- vii)'that depreciation decreased by Rs.42,487/-*
- viii)'that sale price increased by Rs.43.76/-*
- ix) that purchase price increased by Rs.45.27/-*
- x) that Mfg. & Adm. Exp. increased by Rs.5.54/-*
- xi) that over all there is decrease of 7.51 per kg.*
- xii)'that total sale of 14,46,472 kgs. when multiplied by above over all decrease of 7,51 per kg., it comes to less (decrease) profit at Rs.1,08,63,004/- as compared to last year.*

3. Disclosure income:

With reference to our letter dt.7-3-14, we have produced note in respect of accounting treatment given in respect of excess stock found during the course of survey being at Rs.53,000,75/-

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4. A survey u/s 133A of the I.T. Act was carried on business premises of the assessee on 23/03/2011. During the course of survey excess stock of brass scrap to the tune of 19273 Kg. was found. Value of excess stock was determined as Rs. 53,00,000/-@ Rs. 275/- per Kg. Therefore, the assessee declared an amount of Rs. 53 Lakhs as unexplained investment in the stock for the F.Y. 2010-11 relevant to A.Y. 2011-12. The assessee, has taken this excess stock in account in the return of income.

8.9 From the above it is revealed it is not the case that the AO has not made any enquiry. Indeed the Pr. CIT initiated proceedings under section 263 of the Act on the ground that the AO has not made enquiries or verification which should have been made in respect of matters objected by the Ld. PCIT. It is not the case of the Pr. CIT that the Ld. AO did not apply his mind to the issue on hand or he had omitted to make enquiries altogether. We find, in the instant set of facts, that the AO had made enquiries and after consideration of materials placed on record accepted the genuineness of the claim of the assessee.

8.10 At this juncture, it is also important to note that the learned PCIT in his order passed under section 263 of the Act has made reference to the explanation 2 of section 263 of the Act. It was attempted by the learned PCIT to hold that there were certain necessary enquiries which should have been made by the AO during the assessment proceedings but not conducted by him. Therefore, on this reasoning the order of the AO is also erroneous insofar as prejudicial to the interest of revenue. In this regard, we make our observation that the learned PCIT has not invoked the explanation 2 of section 263 of the Act in show cause notice dated 17 January 2022 about the same. Therefore, the opportunity with respect to the explanation 2 of section 263 of the Act was not afforded to the assessee. Thus, on this count the learned PCIT erred in taking the re-course of such provisions while deciding the issue against the assessee. Secondly, the learned PCIT has also not specified the nature and the manner in which the enquiries which should have been conducted by the AO in the assessment proceedings. Thus, in the absence of any specific finding of the learned PCIT with respect to the enquiries which should have been made, we are not convinced by his order passed under section 263 of the Act.

8.11 In view of the above and after considering the facts in totality, we hold that there is no error in the assessment framed by the AO under section 143(3) causing prejudice to the interest of revenue. Thus, the revisional order passed by the learned PCIT is not sustainable and therefore we quash the same. Hence the ground of appeal of the assessee is allowed.

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

Order pronounced in the Court on 09/09/2022 at Ahmedabad.

**Sd/-
(SIDDHARTHA NAUTIYAL)
JUDICIAL MEMBER**

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

Ahmedabad; Dated 09/09/2022
Manish

(True Copy)