IN THE INCOME TAX APPELLATE TRIBUNAL,
'B' BENCH, KOLKATA

Before Shri Rajpal Yadav, Vice-President (KZ)
&
Shri Rajesh Kumar, Accountant Member

I.T.A. No. 373/KOL/2022
Assessment Year: 2017-2018

Bharat Tirtha Rice Mill,**.....*****Appellant***
Block-A, 4th Floor, Flat-C, Burdwan Residency,
Burdwan Jailkhana More,
Burdwan-713101, West Bengal
[PAN: AAJFB0050E]
-Vs.-

Principal Commissioner of Income Tax,**.....*****Respondent***
Asansol,
Parmar Building,
54, G.T. Road, Asansol-713305

Appearances by:
Shri S.K. Tulsiyan, Advocate & Mita Rizvi, CA, appeared on behalf of the assessee
Shri Sudipta Guha, CIT (DR), appeared on behalf of the Revenue

Date of concluding the hearing : September 28, 2022
Date of pronouncing the order : October 10, 2022

O R D E R

Per Rajpal Yadav, Vice-President (KZ):-

The present appeal is directed at the instance of assessee against the order of ld. Principal Commissioner of Income Tax, Asansol dated 09.03.2021 passed under section 263 of the Income Tax Act, 1961 for assessment year 2017-18.

2. The Registry has pointed out that appeal is time-barred by 47 days. In order to explain the delay, the assessee has filed an application for condonation of delay and also annexed an affidavit of Shri Rabin Tibriwala, Partner of M/s. Bharat Tirtha Rice Mill. The affidavit of the assessee reads as under:-

P/1838 20 JUN 2022

भारतीय गैर न्यायिक

भारत

दस रुपये रु.10

TEN RUPEES Rs.10

INDIA

INDIA NON JUDICIAL

पश्चिमबंगाल पश्चिम बंगाल WEST BENGAL 66AB 382710

NOTARY ★ GOVT. OF WEST BENGAL ★ Asim Kr. Das BURDWAN Sadar Sub-Division Regd No. 2/1998

Sign. In my Presence & Identified by Advocate

AFFIDAVIT

I, Rajiv Tibriwala, Partner of M/s. Bharat Tirtha Rice Mill of Jailkhana More, Burdwan-713101, do hereby solemnly affirm and declare as follows :

1. That M/s. Bharat Tirtha Rice Mill was assessed to Income-tax by the I.T.O., Ward-1(1), Burdwan, under PAN No. AAJFB0050E for the A.Y. 2017-18

2. That the assessment for A.Y. 2017-18 in the case of M/s. Bharat Tirtha Rice Mill was completed u/s. 143(3) of the I.T. Act vide order dated 01.02.2019

3. That the l.d. Pr. C.I.T., Asansol passed order u/s. 263 of the Act dated 09.03.2021 setting the assessment order passed u/s. 143(3) of the Act dated 01.02.2019 for de novo assessment in terms of directions contained in the said revisionary order.

4. That due to reconstitution of the petitioner-firm pursuant to which three new partners were inducted and existing two partners retired, no enquiry was made by either the new partners or the existing partners, from the auditor, responsible for looking after the income-tax matters of the firm, as to whether any intimation/order was received from the Department.

5. That, subsequently, after learning about the outstanding demand of the relevant assessment year and about the order passed by the Ld. Principal C.I.T u/s. 263 of the Act on 09/03/2021, immediately, the petitioner-firm consulted its tax consultant.

6. That having come to know of the duty to file an appeal, as aforesaid, the petitioner-firm handed over the relevant papers in relation to the above matter to our tax consultant who in turn gave it to senior advocate Sri S.K.Tulsiyan who advised filing of appeal against

A. K. DAS Notary Govt. of W.B. 20-6-2022 20 JUN 2022

the order u/s. 263 of the Act and the appeal has thus been filed with a delay of about 374 days beyond the prescribed due date before the Hon'ble Tribunal.

7. That there was no mala fide intention behind not filing the appeal before the Hon'ble Tribunal within the prescribed time, because in that case the petitioner-firm would be sufferer by paying additional income-tax on such an income which is not taxable at all under the Act.

8. The impugned delay in filing of the appeal before the Hon'ble ITAT, therefore, is for the good and sufficient reason and there was no intentional motive in filing the appeal belatedly, inasmuch as that would result in serious risk and the petitioner-firm would not have gained in any manner whatsoever.

9. That to meet the cause of substantial justice, technical considerations should not be preferred and the petitioner-firm has thus filed a condonation petition before the Hon'ble Tribunal along with appeal papers in Memorandum of Appeal, praying condonation of such unintentional delay and admission of the appeal for adjudication on merits.

10. That the above statement is true to the best of my knowledge and belief.

[DEPONENT]

NOTARY
Asis Kr. Das
BURDWAN
Sadar Sub-Division
Regd No 2/1998
GOVT. OF WEST BENGAL

Sign. in my Presence & identified by
Advocate

PARAMESHWAR PRASAD
ADVOCATE
Dist. Judge's Court
Purba Bardhaman

Solemnly affirmed & declared before me on identification

Asis Kumar Das
Notary, Govt. of W.B.
Regd. No.-2/1998
Bajepratappur, Burdwan
Pin-713101, W.B.

20-6-2022

3. The ld. Counsel for the assessee submitted that there was reconstitution of the firm and on account of such reconstitution, the partners were not fully aware about the pending income-tax litigation.

More particularly, there was a confusion between the partners, who will keep a track about the income tax litigation and contact with the Tax Consultant. Due to certain communication gap between the two-three new inducted partners, vis-a-vis existing two partners, this remained out of sight and could not be filed well in time. When a Demand Notice came up, only then it was realised that appeal ought to have been filed.

4. On the other hand, ld. D.R. contended that the assessee should be vigilant about all the issues relating to income-tax proceedings.

5. We have duly considered the rival contentions and gone through the record carefully.

6. Sub-section 5 of Section 253 contemplates that the Tribunal may admit an appeal or permit filing of memorandum of cross-objections after expiry of relevant period, if it is satisfied that there was a sufficient cause for not presenting it within that period. This expression "sufficient cause" employed in this Section has also been used identically in sub-Section 3 of Section 249 of the Act, which provides power to the Id. Commissioner to condone the delay in filing of the appeal before the Commissioner. Similarly, it has been used in Section 5 of the Indian Limitation Act, 1963. Whenever interpretation and consideration of this expression has fallen for consideration before the Hon'ble High Courts as well as before the Hon'ble Supreme Court then, the Hon'ble Courts were unanimous in their conclusion that this expression has to be construed liberally. We may make reference to the following observations of the Hon'ble Supreme court from the decision in the case of *Collector Land Acquisition Vs. Mst. Katiji & Others, 1987 AIR 1353:*

> *"1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.*
>
> *2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.*

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

7. Similarly, we would like to make reference to authoritative pronouncement of Hon'ble Supreme Court in the case of *N.Balakrishnan Vs. M. Krishnamurthy (supra).* It reads as under:

> *"Rule of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and the wasted time would never revisit. During efflux of time newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on public policy. It is enshrined in the maxim*

Interest reipublicae up sit finis litium (it is for the general welfare that a period be putt to litigation). Rules of limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

A court knows that refusal to condone delay would result foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide Shakuntala Devi lain Vs. Kuntal Kumari [AIR 1969 SC 575] and State of West Bengal Vs. The Administrator, Howrah Municipality [AIR 1972 SC 749]. It must be remembered tliat in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the court should lean against acceptance of the explanation. While condoning delay the Could should not forget the opposite party altogether. It must be borne in mind that he is a looser and he too would have incurred quiet a large litigation expenses. It would be a ITA No.201, 202 and 203/Ahd/2020 salutary guideline that when courts condone the delay due to laches on the part of the applicant the court shall compensate the opposite party for his loss."

8. We do not deem it necessary to re-cite or recapitulate the proposition laid down in other decisions. It is suffice to say that the Hon'ble Courts are unanimous in their approach to propound that whenever the reasons assigned by an applicant for explaining the delay, then such reasons are to be construed with a justice oriented approach.

9. In the light of above, if we examine the facts of the present case, then it would reveal that basically the appeal has been filed after 374 days of the ld. CIT's order but almost one year is attributable to COVID period, i.e. 09.03.2021 upto March, 2022. This appeal has been presented before the Tribunal on 24.06.2022. If credit of number of days allowed by the Hon'ble Supreme Court in its order dated September 23, 2021 in Miscellaneous Application No. 665 of 2021 in SMW(C) No. 3 of 2020 regarding cognizance for extension of limitation, then there is no substantial delay at the part of the assessee. Moreover, making the appeal time-barred has not been used by the assessee as a tactics to avoid the litigation with the Revenue because such strategy would not give any benefit to the assessee in this type of litigation. Therefore, we condone the delay and proceed to decide the appeal on merit.

10. The grievance of the assessee is that the ld. CIT has erred in taking cognizance under section 263 of the Income Tax Act and thereby setting aside the assessment order for passing a fresh assessment order.

11. Brief facts of the case are that the assessee has filed its return of income on 01.11.2017 declaring total income at Rs.1,39,246/-. The case of the assessee was selected for scrutiny assessment and a notice under section 143(2) was issued and served upon it. The ld. Assessing Officer thereafter issued show-cause notice inviting explanation of the assessee on number of issues. In other words, a questionnaire under section 142(1) was issued, whose copy is available on pages number 7 to 9 of the paper book. The ld. Assessing Officer has passed the assessment order on 01.02.2019 under section 143(3) of the Income Tax Act.

12. The ld. CIT has gone through the record and formed an opinion that during demonetisation period, there was abnormal increase in cash deposit as compared to average rate of cash deposit during pre-demonetisation period. Hence, ld. CIT was of the view that the ld. Assessing Officer should have investigated this issue more vigorously. Copy of the show-cause notice is available on pages no. 1 & 2 of the second paper book, which reads as under:-

"GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
OFFICE OF THE PRINCIPAL COMMISSIONER OF INCOME TAX
PCIT, Asansol

PAN: AAJFB0050E	*Assessment Year: 2017-18*	*Dated: 08.02.2021*	*DIN & Letter No.: ITBA/COM/F/17/2020-21/1030457472(1)*

Sir/ Madam/ M/s,
Subject: Communication with - Government departments and authorities

Subject:-	*Show-cause notice u/s263 of the I.T.Act, 1961 in the case of M/s. Bharat Tirtha Rice mill, PAN:AAJFB0050E for the A.Y. 2017-18- matter reg.*

Whereas the undersigned had called for and examined the record of your case and it is considered that the impugned assessment order passed u/s 143(3) of the I T Act,1961 on 01.02.2019 for the AY: 2017-18 is, Prima facie, erroneous is so far as it is prejudicial to the interest of the revenue for the following reasons:

- In the instance case the assessment was completed at an income of Rs. 6,74,19Q/-against return income of Rs. 1,39,346/-. The CASS point in the instant case was that there was abnormal increase in cash deposits during demonetization period as compare to average rate of cash deposit during pre-demonetization period. There was no evidence on record wherefrom it can be presumed that the A.O. had verified the issue properly. In fact it appears that the A.O. had passed the order in a very hepaticand sloppy manner. The assessee's submission in course of assessment was also flimsy. The case would have been barred by limitation on 31.12.2019. As such the A.O. should have been more investigative on the source of abnormal case deposit by the assesse firm during the demonetization period.

It emerges from the assessment order that the AO while passing the order had rejected the books of accounts by virtue of section 145(3) of IT Act. Actually, invocation of section 145(3) lies when the A.O. was not satisfied about the correctness or completeness of the account of the assesse. And it was not possible for him to categorize various types of defects which may justify rejection of books of

accounts of an assessee on the ground that the account are not complete or correct. Each case had to be considered on its own peculiar facts, having relates to the nature of business. In the assessment order the A.O had doubted on the actual purchase price of paddy in the absence of proper documentary evidence and assessed the assessment order by accepting average G.P. rate at 3.5%. But there are several instances in the bank accounts where the assesse had received, payments & paid to parties through bank accounts. Name of the parties are also evident from the bank statement. Detailed investigation from the A.O. had escaped.

In view of the above, it appeals that the AO has passed the impugned assessment order without any application of mind nor examined the issue which should have been made in this case.

2. Having regard to the facts and circumstances of the case and in law and accordance with the provisions of section 263(1) of the I.T Act, 1961. You are hereby given an opportunity of being heard to show cause as to why the impugned assessment order passed u/s 143(3) on 01.02.2019 for AY: 2017-18 should not be held as erroneous in so far as it is prejudicial to the interest of revenue. You may accordingly furnish your written submissions u/s 263(1) of the I.T Act, 1961 by 19.02.2021 in this regard elaborating and/ or evidencing your contentions/ submissions. Considering in the pandemic situations arising due to COVID 19, physical attendance is not considered necessary and you are requested to make a written submissions with necessary details through E-mail ID: asansol.pcit@incometax.gov.in and it will be treated as compliance to this notice u/s 263(1).

Sd/-
SAMAR BHADRA PCIT, Asansol"

13. The assessee in response to the show-cause notice gave its explanation, which has been reproduced by the ld. CIT on paragraph no. 4 of the impugned order. The ld. CIT did not agree with the contention of the assessee and set aside the assessment order. The finding recorded by the ld. CIT in paragraphs no. 5 to 12 reads as under:-

"(5) I have considered the facts of the case and gone through submission of the assessee and details available on record. There was abnormal increase in cash deposits during demonetization period as compared to average rate of cash deposit during pre-demonetization period. There was no evidence on record wherefrom it can be presumed that the A.O. had verified the issue properly. The assessee's submission in course of assessment was also incomplete and not supported by any documentary evidence .The assessment order has been passed without making inquiries or verification which should have been made. Clause (a) of explanation 2 of section 263 (1) is attracted in this case. Thereby the order passed by the A.O in the instant case is erroneous so far as prejudicial to the interest of revenue.

(6) Hon'ble Delhi High Court in the case of GEE VEE Enterprise vs. Addl.CIT reported in 99 ITR 375, 386 (Del) has held that the CIT may consider the order of the Assessing Officer to be erroneous not only if it contain some apparent error of reasoning or of law or of fact on the for in the circumstances of the case and it is an order which simply accepted what the assessee has stated in his return of

income on the said issue. It is not necessary for the CIT to make further enquiries before cancelling the assessment order. The Commissioner can regard the order erroneous on the ground that the Assessing Officer should have made further enquiries.

(7) Hon'ble Karnataka High Court in the case of Thalibai F. Jain vs. ITO 101 ITR 1, 6 (Karn) has held that where no enquiries made by the Assessing Officer on the relevant issue, assessment must be held to be prejudicial to the interests of the revenue and what is prejudicial to the interest of the revenue must be held to be erroneous though the converse may not always be true.

(8) Hon'ble Supreme Court in the case of Malabar Industrial Co. Pvt. Ltd vs. CIT reported in (2000) 243 ITR 83, 87-88(SC) affirming the Hon'ble Kerala High Court decision (198 ITR 611) has held that the phrase "Prejudicial to the Interests of the Revenue" is of wide import and is not confined to only loss of taxes. If the A.O. has accepted the claim of the assessee without any enquiries then such assessment order passed by the A.O. was held to be erroneous.

(9) In this regard it is mentioned that mere non enquiry would also render a particular order passed by lower authority as erroneous and prejudicial to the interests of Revenue. This position has been clearly confirmed by Hon'ble Supreme Court in the case of Rampyari Devi Saraogi v. CIT [1968] 67 ITR 84 & Smt. Tara Devi Aggarwai v. CIT [1973] 88 ITR 323 (SC). The reasoning for this proposition has been explained by Hon'ble Delhi High Court in the case of Gee Vee Enterprise v. Addl. CIT [1975] 99 ITR 375 in the following para :-

> *"It is not necessary for the Commissioner to make further inquiries before cancelling the assessment order of the Income-tax Officer. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Income-tax Officer should have made further inquiries before accepting the statements made by the assessee in his return. The reason is obvious. The position and function of the Income-tax Officer is very different from that of civil court. The statements made in the pleading proved by the minimum amount of evidence may be adopted by a civil court in the absence of any rebuttal. The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which come before it. The Income-tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. It is because it is incumbent on the Income-tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word "erroneous" in section 263 includes the failure to make such an enquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the crrder if all the facts stated therein are assumed to be correct."*

10. Further to this it is noticed that there is no appeal right available to the Revenue from the order of assessment passed by Assessing Officer and i.e. why revisionary powers have been given to the Commissioner and such power were held to be of wide amplitude by the Hon'ble Supreme Court in the case of CIT v. Shree Manjunathesware Packing Products & Camphor Works [1998] 231 ITR 53/96

Taxman 1. Therefore, normally when Assessing Officer has not made any enquiry on a particular issue, then such order in view of the above detailed discussion has to be construed as erroneous and prejudicial to the interest of Revenue and therefore, the impugned assessment order is erroneous and prejudicial to the interest of Revenue as Assessing Officer has failed to make any enquiry.

11. *Having regard to the facts and circumstances of the case and in the light of the aforesaid decisions of Hon'ble Supreme Court and Hon'ble High Court, and in accordance with the amendment made in Section-263 of the Act with effect from 01.06.2015, I hold that the impugned assessment order for the A.Y. 2017-18 passed by the A.O. is erroneous in so far as it is prejudicial to the interests of the revenue. I further hold, after giving the assessee an opportunity of being heard, that the impugned assessment order for the A.Y. 2017-18 is liable to be set-aside. Therefore, I set aside the said assessment order directing the A.O. to frame the assessment afresh after considering the aforesaid observations, Hon'ble Supreme Court and Hon'ble High Court decisions and as per law.*

12. *In the result, the assessment order u/s 143(3) for A.Y. 2017-18 is set-aside to the file of the Assessing Officer with a direction to pass a fresh assessment order after considering the aforesaid observations, as per law and after giving an opportunity of being* heard to the assessee".*

14. The ld. Counsel for the assessee while impugning the order of ld. CIT filed written submission running into 11 pages. He pointed out that during the course of assessment proceedings, the ld. Assessing Officer has issued a specific questionnaire and collected specific details on the point for which ld. Commissioner has taken action under section 263. For buttressing this contention, he took us through pages no. 1 to 9, where copy of the notice under section 142(1) and questionnaire annexed with such notice are placed on record. He submitted that the ld. Assessing Officer has called for the details of cash deposits during demonetisation and such details were called for under Serial No. 7 of the Questionnaire and to this question, specific reply was submitted by the assessee. The details are available on pages no. 7 to 9 and these details were submitted to the ld. CIT also, which has been reproduced in the impugned order. He pointed out that the assessee has compiled these details in tabular form in his written submission also are available on pages no. 1 to 3.

15. He submitted that explanation of the assessee about the alleged abnormal cash deposit during demonetisation is that it has withdrawn cash of Rs.1,35,10,000/- from its C.C. Account. This cash was withdrawn

from 19.10.2016. It was withdrawn for the purpose of making purchases of the paddy (i.e. rice). The unutilised amount was deposited in the Bank and a re-conciliation has been put up before the ld. Assessing Officer, which was accepted by the ld. Assessing Officer.

16. On the other hand, ld. CIT(DR) relied upon the order of ld. CIT.

17. We have heard the ld. Representatives and with their assistance gone through the record carefully. Before we embark upon an enquiry on the facts and issues agitated before us to find out whether the action u/s 263 of the Act, deserves to be taken against the assessee or not, it is pertinent to take note of this section. It reads as under:-

> "263(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.
>
> [Explanation.- For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,-
>
> (a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include-
>
> (i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income Tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;

(ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorized by the Board in this behalf under section 120;

(b) "record shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.

Explanation.- In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any

proceeding under this section is stayed by an order or injunction of any court shall be excluded."

18. A bare perusal of the sub section-1 would reveal that powers of revision granted by section 263 to the learned Commissioner have four compartments. In the first place, the learned Commissioner may call for and examine the records of any proceedings under this Act. For calling of the record and examination, the learned Commissioner was not required to show any reason. It is a part of his administrative control to call for the records and examine them. The second feature would come when he will judge an order passed by an Assessing Officer on culmination of any proceedings or during the pendency of those proceedings. On an analysis of the record and of the order passed by the Assessing Officer, he formed an opinion that such an order is erroneous in so far as it is prejudicial to the interests of the Revenue. By this stage the learned Commissioner was not required the assistance of the assessee. Thereafter the third stage would come. The learned Commissioner would issue a show cause notice pointing out the reasons for the formation of his belief that action u/s 263 is required on a particular order of the Assessing Officer. At this stage the opportunity to the assessee would be given. The learned Commissioner has to conduct an inquiry as he may deem fit. After hearing the assessee, he will pass the order. This is the 4th compartment of this section. The learned Commissioner may annul the order of the Assessing Officer. He may enhance the assessed income by modifying the order. He may set aside the order and direct the Assessing Officer to pass a fresh order. At this stage, before considering the multi-fold contentions of the ld. Representatives, we deem it pertinent to take note of the fundamental tests propounded in various judgments relevant for judging the action of the CIT taken u/s 263. The ITAT in the case of Mrs. Khatiza S. Oomerbhoy Vs. ITO, Mumbai, 101 TTJ 1095, analyzed in detail various authoritative pronouncements including the decision of Hon'ble Supreme Court in the case of Malabar Industries 243 ITR 83 and has propounded the following broader principle to judge the action of CIT taken under section 263.

(i) The CIT must record satisfaction that the order of the AO is erroneous and prejudicial to the interest of the Revenue. Both the conditions must be fulfilled.

(ii) Sec. 263 cannot be invoked to correct each and every type of mistake or error committed by the AO and it was only when an order is erroneous that the section will be attracted.

(iii) An incorrect assumption of facts or an incorrect application of law will suffice the requirement of order being erroneous.

(iv) If the order is passed without application of mind, such order will fall under the category of erroneous order.

(v) Every loss of revenue cannot be treated as prejudicial to the interests of the Revenue and if the AO has adopted one of the courses permissible under law or where two views are possible and the AO has taken one view with which the CIT does not agree. If cannot be treated as an erroneous order, unless the view taken by the AO is unsustainable under law.

(vi) If while making the assessment, the AO examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determine the income, the CIT, while exercising his power under s 263 is not permitted to substitute his estimate of income in place of the income estimated by the AO.

(vii) The AO exercises quasi-judicial power vested in him and if he exercises such power in accordance with law and arrive at a conclusion, such conclusion cannot be termed to be erroneous

simply because the CIT does not fee stratified with the conclusion.

(viii) The CIT, before exercising his jurisdiction under s. 263 must have material on record to arrive at a satisfaction.

(ix) If the AO has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation by a letter in writing and the AO allows the claim on being satisfied with the explanation of the assessee, the decision of the AO cannot be held to be erroneous simply because in his order he does not make an elaborate discussion in that regard.

19. In the light of above, let us examine the facts of the present case. A perusal of paper book pages no. 1 to 9 would reveal that the assessee has submitted the complete details during the assessment proceedings. The ld. Assessing Officer has raised specific query about the cash deposit during demonetisation and assessee has explained it. The query raised by the ld. Assessing Officer as well as explanation of the assessee read as under:-

"7. Cash deposit for demonetization period (9th November to 30th December) is reported as per STF reporting-whether the cash deposit has been made from disclosed sources.

Please furnish the details of cash deposited during the FY 2016-17 in each of the bank account in following manners:

(a) Please provide the bank statement along with the ledger copy for the period 01.04.2015 to 08.11.2015, 09.11.2015 to 31.12.2015 and 01.01.2016 to 31.03.2016 and give a short synopsis of the account in following format:

A/c No. & Bank details (IFS Code)	*Cash deposit from 01.04.2015 to 08.11.2015*	*Cash deposit – 09.11.2015 to 31.12.2015*	*Cash deposit from 01.01.2016 to 31.03.2016*	*Other than cash deposit- 01.04.2015 to 31.03.2016*	*Total deposits*

(b) Please provide the bank statement along with the ledger copy for the period 01.04.2016 to 08.11.2016, 09.11.2016 to 31.12.2016 and 01.01.2017 to 31.03.2017 and give a short synopsis of the Account in following format:

A/c No. & Bank details (IFS Code)	*Cash deposit from 01.04.2016 to 08.11.2016*	*Cash deposit – 09.11.2016 to 31.12.2016*	*Cash deposit from 01.01.2017 to 31.03.2017*	*Other than cash deposit- 01.04.2016 to 31.03.2017*	*Total deposits*
	Old currency *New Currency*	*Old currency* *New Currency*	*Old currency* *New Currency*		

(c) Please explain the sources of such cash deposit relevant to the FY 2016-17 and give the details of source thereof. In this connection, you are requested to furnish your cash book or cash trail from 01.04.2015 to 07.11.2016 and from 08.11.2016 to 31.12.2016 respectively.

(d) If you have received such cash from your sale proceeds, please furnish the details of such parties along with ledger and give a short synopsis in following format.…."

In response to the above detailed requisition, the assessee filed point-wise requisite information vide e-response dated 24.01.2019. Copy of the reply enclosed at pages -9 of the p/b.

For ready reference, the same are given below:

"7.B

Account No.	*Cash deposit from 01.04.2016 to 08.11.2016*	*Cash deposit from 09.11.2016 to 31.12.2016*	*Cash deposit from 01.01.2017 to 31.03.2017*	*Other than cash deposit*	*Total deposit*
0541008700004281	*Old currency* *New Currency*	*Old currency* *New Currency*	*Old currency* *New Currency*		
	13,15,300	*0*	*87,36,000*		

Cash deposit for demonetization.

For your kind information for cash deposit, I do hereby enclose an annexure for your perusal as follows:-

Cash withdrawn from Bank (CC A/c.) *Cash deposited in Bank(CC A/c.)*

Date	*Amount(Rs.)*	*Remarks*	*Date*	*Amount(Rs.)*

19.10.2016	18,00,000	From CC	10.11.2016	10,00,000
20.10.2016	18,00,000	From CC	11.11.2016	9,00,000
21.10.2016	18,50,000	From CC	08.11.2016	10,00,000
24.10.2016	18,00,000	From CC	12.11.2016	20,00,000
25.10.2016	18,00,000	From CC	13.11.2016	30,00,000
26.10.2016	19,00,000	From CC	15.11.2016	4,26,000
31.10.2016	2,00,000	From CC	17.11.2016	10,23,000
02.11.2016	50,000	From CC	18.11.2016	2,00,000
04.11.2016	10,00,000	From CC	19.11.2016	50,000
25.10.2016	5,50,000	From CA(Suri)	01.12.2016	1.15,000
26.10.2016	4,00,000	From CA (Suri)	01.12.2016	2,000
27.10.2016	3,10,000	From CA(Suri)	05.12.2016	20,000
03.11.2016	50,000	From CA (Suri)		
Total	1,35,10,000			97,36,000

Rice mill crop year started from October. In that context we withdraw aforesaid amount by cash from our cash credit and current account for the payment of cultivators against paddy purchase. But on 08/11/2016 demonization was affected. So your goodself we are bound to deposit above withdrawal cash in our bank account. It is not related with any sale…….".

As seen from the above, in course of the scrutiny assessment proceeding it was explained before the Ld.AO in details that the source of cash deposit aggregating to Rs.97,36,000/- during the demonetization period i.e. between 08/11/2016 and 30/12/2016, is out of cash withdrawal aggregating to Rs. 1,35,10,000/- during pre-demonetization period i.e. during the month of October, 2016, as detailed above.. It was further explained that in view of the fact the District Controller of Food and Supply starts purchasing of rice from the Mills from October, the assessee [being a rice mill], with the intention to purchase paddy from the farmers/cultivators, withdrew cash from bank during the month of October, 2016, for making cash payments to the farmers/cultivators. It is for this reason that cash aggregating to Rs. 1,35,10,000/- was withdrawn from its cash credit [A/c no. 0541008700004281] and current account [A/c no. 6070002100000448] during October, 2016. However, with the sudden declaration of the demonetization scheme from 08/11/2016, vide which currencies of Rs.1,000/- & Rs.500/- notes were scrapped, the assessee was unable to make payment to the farmers as they refused to accept the defunct currency and under such circumstances, the assessee had no other option but to redeposit the cash aggregating to Rs.97,36,000/- out of the cash withdrawal of Rs. 1,35,10,000/- to its bank account. It was further clarified that such cash deposits were not related to any sale.

20. Apart from the above details, the assessee has filed copy of the bank statements on pages no. 27 to 72. A perusal of the above would indicate that total withdrawals are Rs.1,35,10,000/- out of that Rs.97,36,000/- stands deposited almost in the same period. When this

fact was brought to the notice of ld. Assessing Officer, he was satisfied about the alleged deposit.

21. We have perused the impugned order. The ld. CIT has assigned eight paragraphs in his finding. However, perusal of these eight paragraphs, we find that paragraphs no. 6 to 11 are just cut and paste and has no relevancy with the dispute involved in the present appeal. The only finding relating to this issue, if any, is available in paragraph no. 5 and at the cost of repetition, we take note of it again:-

> *"(5) I have considered the facts of the case and gone through submission of the assessee and details available on record. There was abnormal increase in cash deposits during demonetization period as compared to average rate of cash deposit during pre-demonetization period. There was no evidence on record wherefrom it can be presumed that the A.O. had verified the issue properly. The assessee's submission in course of assessment was also incomplete and not supported by any documentary evidence .The assessment order has been passed without making inquiries or verification which should have been made. Clause (a) of explanation 2 of section 263 (1) is attracted in this case. Thereby the order passed by the A.O in the instant case is erroneous so far as prejudicial to the interest of revenue".*

The allegation of the ld. Commissioner is that there was abnormal increase in cash deposit during demonetisation period as compared to average rate of cash deposit during other period. He further recorded that there is no evidence on record, where from it can be presumed that ld. Assessing Officer had verified the issue properly. This finding is factually incorrect. He himself did not analysis the details, which extracted by him in paragraph 4 of the impugned order. It suggests that there is no logical analysis of the record. The case of the assessee is that it has made sufficient withdrawals starting from 19.10.2016 out of its C.C. facility. The withdrawal before the demonetisation was declared was about Rs.1,35,00,000/-. If it was not used in purchases, then it has to be re-deposited. The abnormal circumstance of high deposit is the reason that such currency could not be retained at home, it has to be sent to the Bank during the given period of time. This fact has not been properly taken note by the ld. CIT while exercising the power under section 263 of the Income Tax Act. The ld. Assessing Officer has made a due enquiry on

this issue during the assessment proceedings. The ld. Commissioner failed to give any plausible reason as to why he did not agree with the opinion of the ld. Assessing Officer and as to how the assessment order is erroneous by simply observing that the assessment order is erroneous is not justifiable action. It has to be demonstrated as how it is erroneous, which has caused a prejudice to the revenue. The ld. CIT totally failed in this area. Therefore, we do not have any hesitation to quash the impugned order. We allow the appeal of the assessee and quash the order of ld. CIT passed under section 263 of the Income Tax Act.

22. In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on October 10, 2022.

Sd/- Sd/-

(Rajesh Kumar) **(Rajpal Yadav)**
Accountant Member **Vice-President (KZ)**

Kolkata, the 10th day of October, 2022

Copies to : *(1)* ***Bharat Tirtha Rice Mill,***
Block-A, 4th Floor, Flat-C, Burdwan Residency,
Burdwan Jailkhana More,
Burdwan-713101, West Bengal

(2) ***Principal Commissioner of Income Tax,***
Asansol,
Parmar Building,
54, G.T. Road, Asansol-713305

(3) *Commissioner of Income Tax, Kolkata- ;*

(4) *The Departmental Representative*
(5) *Guard File*

TRUE COPY

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata

Laha/Sr. P.S.