

आयकरअपीलीयअधिकरण  
मंबईपीठ“आड”  
श्रीविकासअवस्थी. न्यायिकसदस्यएवं  
श्रीएमबालगणेश, लेखाकारसदस्यकेसमक्ष  
IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH “I”, MUMBAI  
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &  
SHRI M. BALAGANESH, ACCOUNTANT MEMBER  
आअसं. 982/मुं/2021 (नि.व. 2014-15)  
ITA NO.982/MUM/2021(A.Y.2014-15)

Juniper Networks International B.V,  
Boeing Avenue 240,  
1119pz Schipol-Rijk,  
Amsterdam,0  
Netherlands  
PAN: AADCJ-0974-G

..... अपीलार्थी/Appellant

बनाम Vs.

Commissioner of Income-tax (IT), Mumbai -3,  
Room No.1601, 16<sup>th</sup> Floor,  
Air India Building, Nariman Point,  
Mumbai – 400 021

.....प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri J.D.Mistry, Sr. Advocate with  
Ms. Prachi Mehta & Shri Sandeep Bhalla  
प्रतिवादी द्वारा/Respondent by : Ms. Surabhi Sharma &  
Shri Milind Chavan  
सुनवाई की तिथि/ Date of hearing : 13/05/2022  
घोषणा की तिथि/ Date of pronouncement : 05/08/2022

**आदेश/ORDER**

**PER VIKAS AWASTHY, JM:**

This appeal by the assessee is against the order of Commissioner of Income Tax(IT), Mumbai -3 [in short ‘the CIT] dated 31/03/2021 passed under section 263 of the Income Tax Act, 1961[ in short ‘the Act’] for the Assessment Year 2014-15.

2. Shri J.D. Mistry appearing on behalf of the assessee submitted that assessee in appeal has assailed the action of CIT in wrongly assuming jurisdiction u/s. 263 of the Act. The CIT has set aside the assessment order where in the Assessing Officer has taken one of the possible views after making necessary enquiries and verification. Thus, the preliminary conditions set out in section 263 of the Act are not satisfied for invoking revisionary powers.

3. Narrating the facts of case the Id. Counsel for the assessee submitted that the assessee is a foreign company( tax resident of The Netherlands) engaged in the business of selling network equipment and providing maintenance services. The assessee is providing maintenance services to Indian customers through channel partners and does not have an office or any other form of presence in India. The assessee has entered into Support Services Specialized Agreement (SSSA) with its channel partners for rendering maintenance services. The assessee filed its original return of income for Assessment Year 2014-15 on 28/11/2014. Thereafter, the assessee filed a revised return of income on 30/03/2016 claiming refund of Rs.8,16,40,560/-. During the course of assessment proceedings the Assessing Officer issued notice u/s. 143(2) of the Act dated 09/09/2016. In response to the said notice assessee filed submissions on 26/10/2016( at pages 4 and 5 of the paper book). The assessee again on 16/11/2016 filed detailed submissions (at pages 6 to 11 of the paper book) explaining business of the assessee and also the mode of operations in India. Thereafter, the Assessing Officer issued notice u/s. 142(1) on 16/11/2016 raising a specific query with respect to income claimed as exempt under the provisions of the Act or the concerned DTAA. A

copy of the said notice and questionnaire is at page 12 to 14 of the paper book. In response to said notice, the assessee filed reply dated 28/11/2016 [at pages 18 to 38 of the paper book.]. Along with the said reply assessee furnished various documents including Declaration of residence and SSSA. The Assessing Officer after considering the submissions of the assessee passed the assessment order dated 30/06/2017 accepting the return filed by the assessee without making any addition. Thus, it is evident from documents on record that the Assessing Officer made detailed enquiry before passing assessment order.

4. The Id. Counsel for the assessee further submitted that the CIT in exercise of his jurisdiction u/s. 263 of the Act issued notice dated 21/02/2020. The same is at page 39 of the paper book. The CIT in the notice alleged that the Assessing Officer has concluded the assessment without examining and verifying facts during the course of assessment in respect of the amount claimed as exempt. The assessee in response to the notice furnished a detailed reply on 11/03/2020 (at page 41 to 51 of the Paper Book). Even during proceedings u/s. 263 of the Act, the assessee filed submissions on 22/02/2021 and 04/03/2021, the same are at pages 68 to 76 and 77 to 125 of the Paper Book. In response to the notice u/s. 263 of the Act and during revision proceedings, the assessee time and again explained its mode of operations and detailed description of the activities carried out by the assessee. The assessee had explained that the income received by the assessee from its services in India are neither taxable under Article-12 of the India – Netherlands DTAA as they are not in the nature of Royalty or FTS, nor such income is taxable under the provisions of the Act. The CIT without

appreciating the submissions of assessee and the correct legal position rejected the submissions made by assessee and invoked Explanation – 2 to section 263 of the Act. The CIT held the assessment order erroneous and prejudicial to the interest of Revenue as the Assessing Officer has failed to make enquiries or verification in respect of the claim made by the assessee.

4.1 The Id. Counsel for the assessee assailed the findings of CIT on four counts:

(i) Since, the Assessing Officer after examining the issue in detail has taken one of the possible views, the CIT cannot substitute his view in proceedings u/s. 263 of the Act. To support this arguments the Id. Counsel for the assessee placed reliance on the following decisions:

(a) CIT vs. Max India Ltd., 166 Taxman 188 (SC)

(b) CIT vs. Gabriel India Ltd., 71 Taxman 585 (Bom)

(c) CIT vs. Nirav Modi, 390 ITR 292 (Bom)

(ii) Merely for the reason that the Assessing Officer has not dealt with the issue in detail in the assessment order it would not make the assessment order is erroneous. In support of above arguments the Id. Counsel for the assessee relied on following decisions:

(a) CIT vs. Gabriel India Ltd. (supra)

(b) CIT vs. Nirav Modi (supra)

(iii) The CIT ought to have conducted necessary enquiry after coming to the conclusion that the Assessing Officer has not carried out desired enquiry. In

support of the above arguments the Id. Counsel for the assessee placed reliance on the following decisions:

(a) PCIT vs. Delhi Airport Metro Express Pvt. Ltd., 398 ITR 8(Del)

(b) Metacaps Engineering Mahindra Construction Co. vs. CIT, 86 taxmann.com 128 (Mum-Trib)

(iv) The Id. Counsel for the assessee pointed that CIT while issuing show cause notice has not invoked Explanation-2 to section 263 of the Act. Once there is no reference to Explanation -2 in the show cause notice, the CIT cannot invoke the same while passing the order u/s 263 of the Act. The Id. Counsel for the assessee placed reliance on the decision of Hon'ble Apex Court in the case of PCIT vs. Shreeji Prints Pvt. Ltd., 282 Taxman 464.

4.2 The Id. Counsel for the assessee further pointed that it is not a case of no enquiry. The Assessing Officer has conducted the enquiry. The CIT was of the opinion that adequate enquiry has not been conducted by the Assessing Officer in assessment proceedings. The CIT should have pointed the defects in the enquiry and also what more Assessing Officer should enquire. To support this argument the Id. Counsel for the assessee placed reliance on the following decisions:

(i) Torrent Pharmaceuticals Ltd. vs. DCIT, 173 ITD 130(Ahd-Trib)

(ii) JRD Tata Trust vs. DCIT 85 ITR 431(Mum-Trib).

(iii) Narayan Tatu Rane vs. ITO, 70 taxmann.com 227 (Mum)

5. Per contra, Ms. Surabhi Sharma representing the Department vehemently defended the impugned order and prayed for dismissing the appeal of assessee. The Id. Departmental Representative submits that the

Assessing Officer might have collected the documents during assessment proceedings but has not examined the same. The Assessing Officer failed to enquire as to why revised return was filed by the assessee resulting in refund of tax paid. The Id. Departmental Representative relied on Explanation -2 to section 263 of the Act to contend that the CIT has rightly directed the Assessing Officer to conduct the enquiry as the Assessing Officer has granted relief without enquiring the claim of assessee. The Id. Departmental Representative in support of his submissions placed reliance on the following decisions:

- (i) Kapil Mehta vs. PCIT in ITA No.533/Del/2021 for A.Y. 2017-18 decided on 11/10/2021.
- (ii) CIT vs. Ballarpur Industries Ltd., 85 taxmann.com 10(Bom)
- (iii) CIT vs. DLF Commercial Developers Ltd. In Income Tax Appeal No.507/2014 decided on 22/02/2018 by Hon'ble Delhi High Court.
- (iv) CIT vs. Jawahar Bhattacharjee 341 ITR 434 (Guwahati)
- (v) ITO vs. DG Housing Project Ltd., 343 ITR 329 (Del)
- (vi) CIT vs. Emery Stone Manufacturing Co., 213 ITR 843(Raj)

6. We have heard the submissions made by rival sides and have examined the orders of the Authorities Below. We have also considered various decisions on which rival sides have placed reliance in support of their respective arguments.

7. A perusal of the impugned order reveals that the CIT has exercised revisional jurisdiction u/s. 263 of the Act primarily for the reason that the Assessing Officer has not made proper enquiries and verification of the claim made in the revised return of the assessee. Hence, the order passed by the

Assessing Officer is erroneous and prejudicial to the interest of Revenue. A perusal of the documents on record reveal that the Assessing Officer during the course of assessment proceedings had issued a detailed questionnaire along with notice u/s. 142(1) of the Act dated 16/11/2016. A specific query i.e. query No.21 was raised by the Assessing Officer asking for the complete details and the supporting documentary evidences in respect of the income claimed as exempt under the provisions of the Act/DTAA. The assessee furnished detailed reply to the query raised by the Assessing Officer on 23/11/2016 and thereafter, on 28/11/2016. Along with the reply, the assessee had also furnished documentary evidence to support its claim. The Assessing Officer after taking cognizance of the reply furnished by the assessee and SSSA accepted the contentions of the assessee. The Assessing Officer in the assessment order has categorically observed that the assessee is eligible for the benefit of India – Netherland DTAA and allowed assessee's claim of refund amounting to Rs.8.16 crores. A perusal of the documents on record and the assessment order shows that the Assessing Officer has applied his mind and has taken conscious decision to accept the revised return of income. Thus, it is not a case of no enquiry by the Assessing Officer .

8. It is a well settled law that every loss of revenue as a consequence of the order by Assessing Officer cannot be considered as prejudicial to the interest of Revenue. If the Assessing Officer has taken one of the possible views which may have resulted in loss of revenue, it cannot be a subject matter of revision. The two conditions mandatory for exercising jurisdiction u/s. 263 of the Act are (i) the order should be erroneous; **and** (ii) prejudicial to the interest of Revenue. Both these conditions have to be satisfied

simultaneously. If any one of the two mandatory conditions is missing special powers conferred on CIT u/s. 263 cannot be invoked.

9. As pointed earlier, the CIT has invoked Explanation -2(a) to section 263 of the Act while passing the order to contend that the assessment order has been passed without making enquiries or verification which should have been made. We observe that the Assessing Officer had made enquiries. The assessee responded to the same and made detailed submissions. If the Assessing Officer has not made detailed discussion on the merits of the issue in assessment order, adverse inference cannot be drawn that the issue was not examined by the Assessing Officer. The Hon'ble Jurisdictional High Court in the case of CIT vs. Nirav Modi (supra) has held that if during assessment proceedings queries were raised and the assessee responded to the same, then even if an assessment order does not mention the same, it does not mean that the Assessing Officer has not applied his mind to the issues. The relevant extract of the observation made by the Hon'ble High Court on this issue are reproduced below:

*"7..... This issue is no longer res Integra as this Court in Idea Cellular Ltd. v. Dy. CIT [2008] 301 ITR 407 (Bom.) has held that if during Assessment proceedings queries were raised and the assessee responded to the same, then even if an Assessment order does not mention the same, it does not mean that the Assessing Officer has not applied his mind to the issues. It would be well-nigh impossible for an Assessing Officer to complete all assessments assigned to him under Section 143(3) of the Act if he is required to deal with all issues which arose during the Assessment Proceedings. Thus, the Assessment Order primarily deal with only those issues in respect of which the Assessee has not been able to satisfy him and give reasons for his conclusion. This would enable the Assessee to challenge the same, if aggrieved. In fact the Gujarat High Court in CIT v. Nirma Chemical Works Ltd. [2009] 309 ITT [67/182 Taxman 183 has observed that if an 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 Officer issued a query memos 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 identities 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”*

The Revenue had filed SLP against the aforesaid order of the Hon’ble High Court. The SLP of Revenue was dismissed by the Hon’ble Apex Court.

10. The Hon’ble Bombay High Court in the case of CIT vs. Gabriel India Ltd. (supra) has held that where the assessee had furnished detailed explanation in response to the queries made by the Assessing Officer and the Assessing Officer after being satisfied with the explanation so furnished passes the assessment order accepting the contentions of the assessee, the assessment order cannot be held to be erroneous simply because the Assessing Officer in his order did not make elaborate discussion. For the sake of completeness the relevant observation made by the Hon’ble High Court are reproduced herein under:

*“13. We. therefore, hold that in order to exercise power under sub-section (1) of section 263 there must be material before the Commissioner to consider that the order passed by the ITO was erroneous insofar 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 ITO 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. Our aforesaid conclusion gets full support from a decision of Sabyasachi Mukharji, J. (as his Lordship then was) in Russell Properties (P.) Ltd. v. A. Chowdhury, Addl CIT [1977] 109 ITR 229 (Cal.). In our opinion, any other view in the matter will amount to giving unbridled and arbitrary power to the revising authority to initiate proceedings for revision in every case and start re-examination and fresh enquiries in matters which have already been concluded under the law. As already stated, it is a quasi-judicial power hedged in with limitation and has to be exercised subject to the same and within its scope and ambit. So far as calling for the records and examining the same is concerned, undoubtedly, it is an administrative act, but on examination 'to consider' or in other words, to form an opinion that the particular order is erroneous insofar as it is prejudicial to the interests of the revenue, is a quasi-judicial act because on this consideration or opinion the whole machinery of re-examination and reconsideration of an order of assessment, which has already been concluded and controversy which has been set at rest, is set again in motion. It is an important decision and the same cannot be based on the whims or caprice of the revising authority. There must be materials available from the records called for by the Commissioner.*

*14. We may now examine the facts of the present case in the light of the powers of the Commissioner set out above. The ITO 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 ITO on being satisfied with the explanation of the assessee. Such decision of the ITO 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 ITO to re-examine the matter that, in our opinion, is not permissible. Further inquiry and/or fresh determination can be directed by the Commissioner only after coming to the conclusion that the earlier finding of the ITO was erroneous and prejudicial to the interests of the revenue. Without doing so, he does not get the power to set aside the assessment. In the instant case, the Commissioner did so and it is for that reason that the Tribunal did not approve his action and set aside his order. We do not find any infirmity in the above conclusion of the Tribunal."*

11. The case of the assessee is that the services rendered by the assessee are mainly in the nature of support services. Since, the services rendered does

not “make available” any technical services, the services are not taxable in line with Article-12 of the India-Netherlands DTAA. The Assessing Officer applied his mind on the same and formed an opinion that fee received by assessee is not taxable in India as ‘Fee for Technical Services’. The Assessing Officer has taken a possible view based on the facts and supported by legal jurisprudence. Thus, it is evident that the Assessing Officer had made enquiries and after examining the documents on record passed the assessment order. Since, the assessment was completed u/s. 143(3) of the Act the presumption is that the Assessing Officer has examined all documents on records before passing the order, even though elaborate discussion is not made in the order.

12. The Department had placed reliance on various decisions. We find that the said decisions are distinguishable on facts. For instance in the case of Kapil Mehta vs. PCIT(supra), the exercise of powers u/s. 263 of the Act was upheld by the Tribunal as it was a case of ‘lack of enquiry’.

In the case of CIT vs. Ballarpur Industries (supra), the Hon'ble High Court upheld exercise of jurisdiction by CIT u/s. 263 of the Act as the assessee failed to make any enquiry before allowing the claim.

Similarly, in the case of CIT vs. DLF Commercial Developers Ltd., the action of CIT in assuming revisional jurisdiction u/s. 263 of the Act was upheld as the Assessing Officer failed to conduct detailed enquiries.

In the instant case, as has been pointed earlier the Assessing Officer made enquiry. The assessee in response to the questionnaire issued by Assessing Officer furnished details. The Assessing Officer after examining the documents furnished by assessee passed the order. Hence, the instant case is

not that of lack of enquiry by the Assessing Officer. Therefore, the ratio of the decisions relied upon by the Revenue would not apply in the facts of the present case.

13. In the light of the facts discussed above, we hold that the CIT has erred in exercising jurisdiction u/s. 263 of the Act. The twin conditions as mandated under section 263 of the Act are not satisfied, hence, the impugned order is quashed and appeal by the assessee is allowed.

14. In the result, appeal by assessee is allowed.

Order pronounced in the open court on Friday the 5<sup>th</sup> day of August, 2022.

Sd/-

( M. BALAGANESH)

लेखाकार सदस्य/ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/Dated 05/08/2022  
Vm, Sr. PS(O/S)

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

**प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/The CIT(A)-
4. आयकर आयुक्तCIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt.Registrar)/  
Sr.Private SecretaryITAT, Mumbai