

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'H' BENCH,
NEW DELHI**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI KUL BHARAT, JUDICIAL MEMBER**

ITA No. 441/DEL/2021 [A.Y 2015-16]

Sherawali Coal Carrier Pvt Ltd
H. No. 1062, Street No. 70
Deva Ram Park, Tri Nagar
New Delhi

Vs.

The Pr. C.I.T
Delhi - 7

PAN: AASCS 4165 P

(Applicant)

(Respondent)

Assessee By : Dr. Rakesh Gupta, Adv
Department By : Shri M. Baranwal, CIT-DR

Date of Hearing : 14.11.2022

Date of Pronouncement : 16.11.2022

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order dated 30.03.2021 framed by the PCIT - 7, Delhi 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 law and on facts in assuming jurisdiction u/s 263 of the Act and further erred in holding the assessment order dated 14.12.2017 as 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. Relevant documentary evidences brought on record duly considered in light of Rule 18(6) of ITAT Rules.

4. The root cause of quarrel lies in the assessment order framed u/s 143(3) of the Act, which was basis for the ld. PCIT for assuming jurisdiction u/s 263 of the Act.

5. Having assumed jurisdiction, the ld. PCIT issued the following show cause notice:

“The case of M/s. Sherawali Coal Carriers P. Ltd., was selected for scrutiny under Complete Scrutiny. The assessment order u/s 143(3) of I.T. Act in this case was passed by the ITO Ward-23(2), New Delhi on 14.12.2017 at a loss of Rs. 31,44,086/- as against the returned loss of Rs. 34,17,165/-. The additions of Rs. 1,23,079/- on account late deposit of EPF and disallowance of loader running expenses amounting to Rs. 1,50,000/- were made in this case.”

2. *The perusal of the records/ledger accounts filed during the assessment proceedings shows that the assessee had made cash payments of Rs. 11,65,000/- as under:-*

S.No	Name of concerned party	Date of transactions	Amount
1.	M/s. Dee Cee Coal carriers Pvt. Ltd.	3.10.2014	Rs. 5,00,000
2.	M/s. Dee Cee Coal carriers Pvt. Ltd.	07.10.2014	Rs. 5,00,000
3.	Air Compressor Machine	30.05.2014	Rs. 55,000
4.	Motor Cycle (8574)	27.02.2014	Rs. 55,000
5.	Motor Cycle(8993)	26.05.2014	Rs. 55,000
		Total	Rs. 11,65,000/-

As per the provisions of section 40A(3) of the I.T. Act, 1961 any expenditure incurred in respect of which a payment is made in a sum exceeding Rs. 35,000/- otherwise than account payee cheque drawn on a bank or by any account payee draft, shall not be allowed as a deduction.

3. *In view of the above, an amount of Rs. 11,65,000/- is required to be added back to your taxable income, being disallowance of expenses in contravention of the provisions of section 40A(3) of the I.T. Act. However in the assessment order dated 14.12.2017, the AO has not made an addition on this*

account therefore, the order passed u/s 143(3) is erroneous in so far as prejudicial to the interest of revenue to the extent of amount mentioned above.

4. Your reply in this matter should reach the undersigned on or before 20/03/2020 either by email or personally in Room no. 397, C.R. Building, I.P. Estate, New Delhi at 11:30 A.M. Please note that if no explanation is received upto the appointed date, it will be presumed that you have no objection to proposed action u/s 263 of the Income Tax Act, 1961.”

6. The ld. PCIT was of the firm belief that since the assessee has made cash payments as mentioned in his notice, thereby violating the provisions of section 40A(3) of the Act, which was not at all examined by the Assessing Officer, making the assessment order erroneous as well as prejudicial to the interest of the Revenue.

7. Referring to various judicial decisions, the ld. PCIT, at Para 11 of his order, held that the assessment order passed by the Assessing Officer without making enquiries or verification, which should have been made, and hence the assessment order is erroneous. Had the enquiries been conducted, it would have made a tax implication in this case and, therefore, the order is prejudicial to the interest of the Revenue. Accordingly, the assessment order was set aside with a

direction to verify the information of cash payment, and after verification, pass a consequential order.

8. We have given thoughtful consideration to the observations of the Id. PCIT. In our considered opinion, the matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further enquiries without a finding that the order is erroneous. Simply remanding the matter to the Assessing Officer would imply that the Id. PCIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the question.

9. Had the PCIT considered the Circular No. 34 dated 05.05.1970 issued by the CBDT, the Id. PCIT would not have taken the view which he has taken. The said Circular reads as under:

“The Board had occasion to deal with several representations from various chambers of commerce, trade associations and businessmen regarding the scope of provisions of section 40A(3) and rule 6DD. Since many of the points raised therein are of an important nature, the clarifications given thereon are summarised below.

2. *The provisions of section 40A(3) would apply in computing the income under the heads "Profits and gains of business or profession" and "Income from other sources" as per section 58(2). All payments in excess of Rs. 2,500 at one time whether for goods or services obtained for cash or credit, which are deductible in computing the income, have to be made by crossed cheque or bank draft. Thus, the price of goods purchased for resale or use in manufacturing process or payments for services will be covered by the provisions of section 40A(3). However, the section will not apply to repayment of loans or payment towards the purchase price of capital assets such as plant and machinery not for resale.*

3. *A large portion of trade in agricultural commodities is channelled through the institution of "arhatias". While the payments made to the cultivators or growers of agricultural produce are specifically excluded from the purview of section 40A(3) by clause (f) of rule 6DD, the payments made to the "arhatiya" for purchases made from him are not so exempted. It is contended that the "arhatiy" is not in a position to pay the cultivators in cash until the cheques are encashed and this procedure involves severe hardship. However, this difficulty can be met by obtaining the advances from the purchasers, which should of course conform to requirements of section 40A(3). The extension of the exemption to the purchases would defeat the objective of the provisions.*

4. *So far as payments made to the railways on account of freight charges or for booking of wagons, and payment of sales tax, excise duty, are concerned, clause (b) of rule 6DD specifically exempts such payments from the purview of section 40A(3) if, under the rules framed by the Government, these are required to be made in legal tender."*

10. A perusal of the aforementioned Circular clearly shows that the provisions of section 40A(3) of the Act will not apply to repayment of loans or payment towards the purchase price of capital assets such as, 'plant and machinery' not for resale.

11. In light of the aforementioned Circular, though the ld. PCIT in his order mentioned that he has perused the record, ledger account filed during the assessment proceedings, but had he appreciated this ledger account in true perspective, he would have come to know that all the payments have been made for purchase of capital assets on which subsequently, depreciation was claimed as is evident from the depreciation chart.

12. It would be pertinent to refer to the observations of the Hon'ble High Court of Delhi in the case of DG Housing Project 343 ITR 329 wherein the Hon'ble High Court, inter alia, observed as under:

“The Assessing Officer is both an investigator and an adjudicator. If the Assessing Officer as an adjudicator decides a question or aspect and makes a wrong assessment which is unsustainable in law, it can be corrected by the Commissioner in exercise of revisionary power. As an investigator, it is incumbent upon the Assessing Officer to investigate the facts required to be examined and verified to compute the taxable income. If the

Assessing Officer fails to conduct the said investigation, he commits an error and the word „erroneous“ includes failure to make the enquiry. In such cases, the order becomes erroneous because enquiry or verification has not been made and not because a wrong order has been passed on merits.

Delhi High Court in [Gee Vee Enterprises vs. Additional Commission of Income-Tax, Delhi-I & Ors.](#), (1975) 99 ITR 375, has observed as under:-

“The reason is obvious. The position and function of the Income-tax Officer is very different from that of a civil court. The statements made in a pleading proved by the minimum amount of evidence may be accepted 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 comes 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. The meaning to be given to the word “erroneous” in [section 263](#) emerges out of this context. 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 inquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct.”

14. In the said judgment, Delhi High Court had referred to earlier decisions of the Supreme Court in [Rampyari Devi Sarogi vs. CIT \(1968\) 67 ITR 84 \(SC\)](#) and [Tara Devi Aggarwal vs. CIT \(1973\) 88 ITR 323 \(SC\)](#), wherein it has been held that where Assessing Officer has accepted a particular contention/issue without any enquiry or evidence whatsoever, the order is erroneous and prejudicial to the interest of the Revenue. After reference to these two decisions, the Delhi High Court observed:-

"These two decisions show that 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."

15. The aforesaid observations have to be understood in the factual background and matrix involved in the said two cases before the Supreme Court. In the said cases, the Assessing Officer had not conducted any enquiry or examined evidence whatsoever. There was total absence of enquiry or verification. These cases have to be distinguished from other cases (i) where there is enquiry but the findings are incorrect/erroneous; and (ii) where there is failure to make proper or full verification or enquiry.

16. In the case of [Commissioner of Income Tax vs. Sunbeam Auto Ltd. \(2011\) 332 ITR 167 \(Del\)](#), Delhi High Court was considering the aspect, when there is no proper or full verification, and it was held as under:-

"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 Commissioner of Income-tax under [section 263](#) of the Income-tax Act. As noted above, the submission of learned counsel for the Revenue was that while passing the assessment order, the Assessing Officer 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 Assessing Officer had not applied his mind on the issue. 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 a different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open. In *Gabriel India Ltd. [1993] 203 ITR 108 (Bom)*, law on this aspect was discussed in the following manner (page 113):*

" . . . From a reading of sub-section (1) of [section 263](#), it is clear that the power of suo motu revision can be exercised by the Commissioner only if, on examination of the records of any proceedings under this Act, he considers that any order passed

therein by the Income-tax Officer is „erroneous in so far as it is prejudicial to the interests of the Revenue“ . It is not an arbitrary or unchartered power, it can be exercised only on fulfilment of the requirements laid down in sub-section (1). 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. ([See Parashuram Pottery Works Co. Ltd. v. ITO \[1977\] 106 ITR 1 \(SC\) at page 10](#)) . . . 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 a conclusion and such a conclusion cannot be formed 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 . . .

We may now examine the facts of the present case in the light of the powers of the Commissioner set out above. 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.”

17. Thus, in cases of wrong opinion or finding on merits, the CIT has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and necessary, before the order under [Section 263](#) is passed. In such cases, the order of the Assessing Officer will be erroneous because the order passed is not sustainable in law and the said

finding must be recorded. CIT cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous. In cases where there is inadequate enquiry but not lack of enquiry, again the CIT must give and record a finding that the order/inquiry made is erroneous. This can happen if an enquiry and verification is conducted by the CIT and he is able to establish and show the error or mistake made by the Assessing Officer, making the order unsustainable in Law. In some cases possibly though rarely, the CIT can also show and establish that the facts on record or inferences drawn from facts on record per se justified and mandated further enquiry or investigation but the Assessing Officer had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further enquiries without a finding that the order is erroneous. Finding that the order is erroneous is a condition or requirement which must be satisfied for exercise of jurisdiction under [Section 263](#) of the Act. In such matters, to remand the matter/issue to the Assessing Officer would imply and mean the CIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question.”

13. From the above observations, it is clear that the PCIT himself could have examined the impugned transactions and if he had done so, he would have come to know that the payments have been made for purchase of capital goods and disallowance could not have been made u/s 40A(3) of the Act as per the CBDT Circular [supra].

14. Considering the facts of the case in totality, we set aside the order of the PCIT dated 30.03.2021 and restore that of the Assessing Officer framed u/s 143(3) of the Act.

15. In the result, the appeal of the assessee in ITA No. 441/DEL/2021 is allowed.

The order is pronounced in the open court on 16.11.2022.

Sd/-

**[KUL BHARAT]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 16th November, 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	