IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND
Ms. PADMAVATHY S, ACCOUNTANT MEMBER

ITA No. 271/Bang/2022
Assessment year : 2017-18

SVS Constructions, No.412, HRBR 1st Block, 9th Main, Kalyan Nagar, Bengaluru – 560 043. **PAN: ACBFS 8143B**	Vs.	The Principal Commissioner of Income Tax, Bengaluru 1, Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri G. Sathyanarayana, CA
Respondent by	:	Shri K. Sankar Ganesh, Jt.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	06.12.2022
Date of Pronouncement	:	12.12.2022

O R D E R

Per Padmavathy S., Accountant Member

This appeal by the assessee is against the order of the Principal Commissioner of Income Tax [PCIT], Bengaluru - 1, Bengaluru, passed u/s. 263 of the Income-tax Act, 1961 [the Act] dated 17.2.2022 for the assessment year 2017-18 on the following grounds:-

"The grounds stated herein are independent and without prejudice to each other:

Ground 1: General

1.1 The impugned order of the learned Pr.CIT is based on incorrect appreciation of facts and incorrect interpretation of law and therefore is bad in law.

1.2 The learned Pr.CIT has erred in law and on facts in directing the learned Assessing Officer to verify the genuineness of the transactions/ agreements made with various parties.

Ground 2: Direction to Assessing Officer

2.1 The learned Pr.CIT is not justified in outright rejecting the documents/ submissions made by the Appellant

2.2 The learned Pr.CIT has errored in law and facts in not understanding the modus operandi adopted in the due course of its business operations and further drawing preconceived/ biased notions without complete and proper appreciation of the established facts under the facts and circumstances of the case.

2.3 The learned Pr.CIT has erred in not taking into account the details arid explanation furnished by the Appellant during the course of the assessment proceedings.

2.4 The learned Pr.CIT has erred in law and on facts without appreciating the fact that Appellant has offered an explanation about the nature of the expenses incurred during the course of the assessment proceedings, which was also accepted by the Assessing Officer.

2.5 The learned Pr.CIT has ignored the agreements/ documents submitted to substantiate the nature of expenses.

2.6 The learned Pr.CIT has erred in law and facts by holding that the conditions of section 36(2) must be followed.

2.7 The learned Pr.CIT has erred in law in concluding that the learned Assessing Officer has not examined the taxability of the advances received in the hands of the recipient while concluding the assessment proceedings of the Appellant.

2.8 The learned Pr.CIT has erred in concluding that the order passed by the Assessing Officer is prejudicial to the interest of the revenue authorities, without providing any reasons.

2.9 Thus, the act of the learned Pr.CIT in acting prejudiced is not tenable in law and under the facts and circumstances of the case.

2.10 The learned Pr.CIT is not justified in placing reliance on the case laws which are purely distinguishable in comparison to the factual matrix of the Appellant's case under the facts and circumstances of the case.

The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before,. or at the time of, hearing of the appeal by the Hon'ble Income Tax Appellate Tribunal, Bangalore."

2. The assessee is a partnership firm engaged in the business of construction and sale of residential apartments on joint development basis and on own land basis. The assessee filed the return of income for AY 2017-18 on 23.2.2018 declaring total income of Rs.1,87,38,950. The case was selected for scrutiny under CASS and the statutory notices were duly served on the assessee. The AO

completed the assessment proceedings u/s. 143(3) accepting the returned income.

3. The PCIT on verification of assessment records noticed that the assessee has debited the P&L account for an amount of Rs.3,89,84,200 as advance written off under the head 'cost of land'. The PCIT further noticed that the AO did not call for any details with regard to the amount written off and the assessee did not furnish any evidence with regard to the advances received towards purchase of land and the reasons for write off. To this extent, the PCIT considered the assessment order to be erroneous and prejudicial to the interests of the revenue and accordingly issued a show cause notice to the assessee. The assessee submitted that during the course of business, the assessee had given land advances to various landlords and land aggregators and in some cases, due to various reasons the land could not be acquired and also the advances could not be recovered. Therefore, the advances were written off in the books of account and claimed as expenditure. The assessee also submitted the copies of agreement and details of parties with regard to advances written off. The PCIT after considering the submissions of the assessee, passed order u/s. 263 by holding that –

> "**3.3** The submission made by the assessee have been carefully considered. It is noticed that assessee has only furnished unregistered copies of sale agreements executed with different parties. The Assessing Officer has also failed to examine that such advance/debt is in compliance with CBDT circular no. 12/2016 dated 30.05.2016 wherein it is held that claim for any debt or part thereof in any previous year, shall be admissible

under section 36(1)(v0 of the Act, if it is written off as irrecoverable in the books of accounts of the assessee for that previous year and it fulfills the conditions stipulated in sub section (2) of section 36 of the Act i.e, such debt or part thereof has been taken into account in computing the income of the assessee of the previous year in which the amount of such debt or part thereof is written off or of an earlier previous year. Further, the taxability of the advances so written off in the hands of the recipients as per provision of Section 51 or Section 56(i)(ix) of the Income Tax Act has also not been examined in this context by the AO.

3.6 The AO has also failed to examine that whether the amount of aforesaid advances so recoverable have been actually reversed in respective ledger accounts of individual allottees/debtors and written off in the books of accounts of the assessee during the previous year relevant to impugned assessment year or not. Hence, the assessment order passed u/s. 143(3) of the Act dated 17-12-2019 is erroneous and prejudicial to the interest of revenue u/s 263 of IT Act.

4.1. The Hon'ble Supreme Court in the case of M/s Deniel Merchants P. Ltd. Vs Income Tax Officer dated 29.11.2017has upheld the action of PCIT in invoking the provisions of Section 263 in a case where the AO had not made proper inquiry while making the assessment and held that:

"....We find that the Commissioner of Income Tax had passed an order under section 263 of the Income Tax Act, 1961 with the observations that the Assessing Officer did not make any proper inquiry while making the assessment and in accepting the explanation of the assessee(s) insofar as receipt of share application money is concerned. On that basis the Commissioner of Income Tax had, after setting aside the order of the Assessing Officer, simply directed the Assessing Officer to carry thorough and detailed inquiry. It is this order which is upheld by the High Court. We see no reason to interfere with the order of the High Court".

Conclusion & Decision:

Considering the facts of the case and the decision of Supreme Court mentioned supra, I am of the opinion that assessment order u/s 143(3) dated 17-12-2019 is erroneous and prejudicial to the interests of the revenue. Accordingly, the assessment order dated 17-12-2019 is set-aside with the directions to the assessing officer to verify the genuineness of the transactions/agreements made with various parties along with applicability of provisions to Section 51/56(1)(ix) in the hands of other parties and then verify that whether the advances written off are in compliance with CBDT Circular No. 12/2016 and whether the conditions laid u/s. 36(2) of Income Tax Act are satisfied. Accordingly, the proceedings u/s.263 is disposed off with above directions."

4. The ld. AR submitted that the advances are written off in the normal course of business of the assessee and therefore the AO has rightly allowed the same considering the nature of business of the assessee. The ld. AR also submitted that the assessee has explained the nature of expenses incurred during the course of assessment and the AO after examining the taxability accepted the contentions of the assessee while concluding the assessment. The ld AR therefore submitted that the order of the AO is not erroneous or prejudicial to the interests of the revenue.

5. The ld. DR submitted that the AO has not conducted proper enquiry with regard to the advances written off and has not called for any details in this regard. Therefore, the ld. DR submitted that as per Explanation to section 263, the order is erroneous and prejudicial to the interests of the revenue.

6. We have heard the rival submissions and perused the material on record. We notice that the AO has completed the assessment accepting the returned income of the assessee. The observations of the PCIT that the major amount that is written off as bad advances ought to have been verified has merits. The assessee is in the business of construction and claimed to have written off the advances no longer recoverable. However it is important that this write off should be factually verified with the necessary documentary evidences and the genuineness of the claim should be examined. In the given case based on the perusal of the available records, we are of the considered view that the AO has accepted the submissions of the assessee and concluded the assessment without factually verifying what is submitted and without calling for any details.

7. We will look at the provisions of Explanation (2) to section 263 which reads as follows:-

> "*Explanation 2*.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer **[***or the Transfer Pricing Officer, as the case may be,***]** shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal [95][Chief Commissioner or Chief Commissioner or Principal] Commissioner or Commissioner,—
>
> (*a*) the order is passed without making inquiries or verification which should have been made;
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> (*b*) the order is passed allowing any relief without inquiring into the claim;
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> (*c*) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or

> (*d*) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person."

8. The phrase 'should have been done' as provided in the newly inserted Explanation means the verification/ enquiry which ought to have been done. In other words, as per clause (a) to Explanation to section 263, the order passed without making enquiries or verification **which should have been made** is erroneous insofar as it is prejudicial to the interests of the revenue. It may be said that the Income Tax Act nowhere provides the exact modalities to be followed to verify a specific claim made by the assessee prerogative of the AO to decide the extent of verification. However, it is necessary for the AO to record the extent of verification carried out by him and to record that he has taken a considered view on the matter by proper application of mind while allowing the claim of the assessee in the matter.

9. We notice that the Hon'ble Karnataka High Court in the case of *CIT v. Infosys Technologies Ltd. (supra)* has considered a similar issue and held that -

> "21. In the present case, while there is no doubt that the assessee is entitled to claim deduction in terms of Articles 23(3)(a) and 23(4) of the agreements between India with Canada and Thailand respectively. the question is one of what exactly the entitlement? In the absence of any discussion either in the assessment order or in the computation claim, particularly as the extent of relief that can be claimed under these two articles is only after a specific exercise and though Sri Sarangan has very vehemently urged that it is not necessary for the assessing authority to make all these things explicit, so long as he is satisfied, on the strength of the

authority of the Supreme Court not only in the ease of Electro House (supra) and to more so on the basis of the observations and law as declared in the case of Malabar Industrial Co. Ltd. (supra) we are fully satisfied that a situation where a deduction of the present nature is allowed or in the sense deducted from out of the tax liability of the assessee without indicating the basis, can definitely be construed as an order both erroneous and prejudicial, has this is definitely a possibility and it is only because it is per se, not discernible in the revisional order, but definitely gives rise to a situation where the commissioner may consider the order as erroneous and prejudicial and the commissioner having remanded the matter to the assessing authority, we are of the clear opinion that it cannot be characterized as a situation beyond the realm of Section 263 of the Act, as the order being erroneous and prejudicial is a clear possibility particularly the assessing authority not disclosing the basis.

22. To test this proposition, if an order which is explicit is passed by the assessing authority and indicating that the assessee is entitled to a particular extent of relief, but if it is with reference to relevant articles of the double taxation avoidance agreements and if it is not either a proper computation or not fully in consonance with the same and if it has resulted in a situation of granting a greater relief than the assessee is otherwise entitled to under these agreements and if the commissioner can revise such an order without any hassle in the exercise of revisional jurisdiction under section 263 of the Act and can correct the order which is erroneous and prejudice to the interest of the revenue, just because the assessing authority does not spell out the reasons and therefore can avoid scrutiny under Section 263 of the Act, is an argument which is not logical or rational and not acceptable and at any rate on the authority of the Supreme Court in the case of Malabar Industries Co. (supra) is not an acceptable submission.

23. Though learned counsel for the assessee have placed strong reliance on two judgments of the Bombay High Court and the Delhi High Court in the cases of Gabriel India Ltd. and Ashish Rajpal (supra) respectively and the Delhi High Court, in fact, has made reference to the decision of the Supreme Court in the case of Max India Ltd. (supra), with great respect, we are unable to

apply the ratio of these two decisions to the present circumstance and we are quite satisfied that the law declared by the Supreme Court not only in the case of Electro House (supra) and also in the case of Malabar Industries Co. (supra) fully covers the situation, no further need to discuss with any greater elaboration on the view expressed by the Bombay and the Delhi High Courts.

24. In the present situation, the Commissioner having only directed the assessing authority to compute it or re-compute it and make it explicit as to the entitlement of the assessee, an order of this nature, in fact, could not have been contended as detrimental to the interest of the assessee, as it was always open to the assessee to justify the claim in terms of the double taxation avoidance agreements. In a situation of this nature, we are also of the opinion that it was not a case which warranted interference by the tribunal, more so for setting aside the order of the commissioner and for ensuring that the order passed by the assessing authority was left in tact.

25. One should bear in mind that a relief which is required to be given to any litigant in any given case should be commensurate to the gravity of the situation, to the needs and necessity of the situation and warranting such relief and with reference to the governing statutory provisions. Just, because the tribunal has appellate jurisdiction over the orders passed by the commissioner, it does not mean that the tribunal should interfere with each and every order of the commissioner when it is really not warranted and in a situation of the present nature, by calling in aid all legal principles, particularly questions of jurisdiction and by interpreting a statutory provision, to limit or curtail the scope and operation of the provision even when there is no need for it.

26. We are also not in a position to accept the submission that, the materials had been placed before the assessing authority and therefore there should be a conclusion that the authority has applied his mind to the same and there was no question of the commissioner interfering by taking a different view etc.

27. Assessing authority performs a quasi-judicial function and the reasons for his conclusions and findings should be forthcoming in the assessment order. Though it is urged on behalf of the assessee by its learned counsel that reasons should be spelt out only in a

situation where the assessing authority passes an order against the assessee or adverse to the interest of the assessee and no need for the assessing authority to spell out reasons when the order is accepting the claim of the assessee and the learned counsel submit that, this is the legal position on authority, we are afraid that to accept a submission of this nature would be to give a free hand to the assessing authority, just to pass orders without reasoning and to spell out reasons only in a situation where the finding is to be against the assessee or any claim put forth by the assessee is denied.

28. We are of the clear opinion that, there cannot be any dichotomy of this nature, as every conclusion and finding by the assessing authority should be supported by reasons, however brief it may be, and in a situation where it is only a question of computation in accordance with relevant articles of a double taxation avoidance agreements and that should be clearly indicated in the order of the assessing authority, whether or not the assessee had given particulars or details of it. It is the duty of the assessing authority to do that and if the assessing authority had failed in that, more so in extending a tax relief to the assessee, the order definitely constitutes an order not merely erroneous but also prejudicial to the interest of the revenue and therefore while the commissioner was justified in exercising the jurisdiction under Section 263 of the Act, the tribunal was definitely not justified in interfering with this order of the commissioner in its appellate jurisdiction.

Therefore, we answer the question posed for our answer in the negative and against the assessee. Both appeals are allowed. Parties to bear their respective cost."

10. We also notice that the Hon'ble Delhi High Court in the case of Gee Vee Enterprises v .ACIT [1975] 99 ITR 375 (Del) has held 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".

11. In the case under consideration the ld. PCIT has exercised the revisionary powers u/s. 263 of the Act since he has noticed that the assessee has written off an amount of Rs.3,89,84,200 as advance written off towards cost of land and there is nothing available on record to show that the AO had made any enquiries in this regard which is required to be done. We are therefore, of the considered view that the AO has not conducted the verification that "should have been conducted" during the course of assessment proceedings.

12. In view of the above discussion and respectfully following the decision of jurisdictional High Court in the case of *Infosys Technologies Ltd. (supra)* and the Hon'ble Delhi High Court in the case of *Gee Vee Enterprises(supra)*, we hold that the PCIT was justified in assuming the jurisdiction u/s 263 of the Act by setting aside the assessment order. We therefore modify the order passed u/s.263 with a direction to the AO to examine the issue afresh and decide the allowability in accordance with law. It is ordered accordingly.

13. In the result, the appeal by the assessee is dismissed.

Pronounced in the open court on this 12th day of December, 2022.

Sd/-	Sd/-
(N V VASUDEVAN) VICE PRESIDENT	(PADMAVATHY S) ACCOUNTANT MEMBER

Bangalore,
Dated, the 12th December, 2022.

/*Desai S Murthy /*

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.