

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH KOLKATA

**BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.554/Kol/2022
Assessment Year: 2016-17**

B. D. Singh P.ORupnarayanpur Bazar, Dist. Bardhaman, West Bengal-713364 (PAN: AAGFB7827A)	Vs.	Principal Commissioner of Income Tax, Asansol.
(Appellant) (Respondent)		

Present for:

Appellant by : Shri J. M. Thard, Advocate
Respondent by : Shri Biswanath Das, CIT

Date of Hearing : 27.12.2022
Date of Pronouncement : 13.03.2023

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the revision order of Ld. Pr.CIT, Asansol passed u/s. 263 of the Income-tax Act, 1961 (hereinafter referred to as the "Act") vide Order No. ITBA/REV/F/REV5/2020-21/1031356452(1) dated 09.03.2021 passed against the assessment order by Income Tax Officer, Ward-1(2), Asansol u/s. 143(3) of the Act dated 21.12.2018.

2. At the outset, we take note of the fact that this present appeal is delayed by 506 days for which petition for condonation of delay is placed on record. The impugned order passed u/s. 263 of the Act is dated 09.03.2021 and the period of limitation for filing the present appeal expires on 08.05.2021. It is noted that the limitation for filing the present

appeal falls during the period of Pandemic of Covid-19. Petition for condonation of delay is placed on record by assessee, explaining the reasons for delay owing to Pandemic of Covid-19 during that time. It is noted that the period of delay falls during the time of Pandemic of Covid-19 which has been excluded by the Hon'ble Supreme Court in the case of *suo moto* Writ Petition (C) No. 3 of 2020 dated 10.01.2022 by which the period from 15.03.2020 to 28.02.2022 has been directed to be excluded for the purpose of limitation. Vide this order a further period of 90 days has been granted for providing the limitation from 01.03.2022. Accordingly, we condone the delay and proceed to admit the appeal for hearing.

3. Assessee has taken five grounds of appeal, all of which relate to assumption of jurisdiction u/s. 263 of the Act and passing the revisionary order thereon.

4. Brief facts of the case are that assessee is a partnership firm engaged in the business of transport contract business, coal lifting, breaking coal into small sizes and filling coal in railway wagons. Return of income was filed on 03.11.2016 reporting total income of Rs.8,85,891/-. Assessment was completed u/s. 143(3) of the Act vide order dated 21.12.2018 wherein total income was assessed at Rs.22,49,714/- after various disallowance. Assessee went in appeal before the Ld. CIT(A) and got substantial relief vide appellate order dated 30.09.2019. Subsequently, Ld. Pr. CIT, Asansol, on examination and verification of assessment records observed that an amount of Rs.50,11,857/- towards exempt income credited to the partners' capital accounts also included an amount of Rs.12,83,610/- as profit earned from one Joint

Venture (JV) called M/s. ARETPL-BDS-PMIW in which assessee had 33% share. Ld. Pr. CIT observed that there was in fact, a loss of Rs.38,89,726/- incurred by the said JV and, therefore, 33% of this loss coming to Rs.12,83,610/- should have been reduced from the capital of partners. According to him, this wrongful addition to the capital of partners has resulted in overstatement of partners' capital in the firm as on 31.03.2016.

4.1. According to Ld. Pr. CIT, this leads to inadmissible payment of interest on the balance of partners' capital amounting to Rs.1,54,033/- (12% of Rs.12,83,610/-) and thus, a potential understatement of income in the subsequent assessment year i.e. AY 2017-18 also. Based on these observations, a show cause notice dated 08.02.2021 was issued u/s. 263(1) of the Act. Assessee furnished a detailed reply asserting that the assessment completed u/s. 143(3) of the Act is neither erroneous nor prejudicial to the interest of the revenue, more particularly in respect of the issue raised by Ld. Pr. CIT in the show cause notice. It was submitted by the assessee that owing to an inadvertent mistake, the amount of loss from the JV was incorrectly taken as profit at the time of arriving at the capital balance of partners in the assessee firm. The details of profit and loss earned/incurred by the assessee firm during the year from five of its JVs are tabulated as under:

Sl. No.	Joint Venture	PAN	% share	Share of Profit	Remarks (if any)
1.	M/s. BTC-BDS-SPS(JV)	AABAB7507P	30	16,34,695.01	
2.	M/s. SPS-BDS-	AAJAS0173Q	32	19,25,619.68	

	NKAS(JV)				
3.	M/s. AMPL-SPS-BDS(JV)	AADAA1797N	33.33	27,906.12	
4.	M/s. AT-BDS-JV	AAEEA4848F	49	1,40,026.02	
5.	M/s. ARETPL-BDS-PMIW(JV)	AAEAA3206F	33	12,83,610	There is no profit but incurred loss of Rs.38,89,726/- only
			Total	50,11,856.83	

4.2. Assessee submitted that it had provided for interest on partners' capital @ 12% p.a. on the opening capital balances of the partners as on 01.04.2015. The amount of interest charged is Rs.10,94,763/- on the opening capital balance at Rs.91,23,020/-. It was submitted that assessee has not charged interest on the closing balance of partners' capital as on 31.03.2006 which is inclusive of the incorrect figure of Rs.12,83,610/-. According to the assessee, interest on partners' capital account has not been paid excessively since it has been computed on the opening balance of capital and not on the closing balance which inadvertently includes the figure of Rs.12,83,610/-. According to the assessee, there is no element of interest which has been claimed on the incorrect figure of Rs.12,83,610/- and, therefore, the order as alleged by Ld. Pr. CIT cannot be termed as erroneous in so far as it is prejudicial to the interest of the revenue. Ld. Pr. CIT did not find favour with the submissions made by the assessee and drew his consideration to set aside the assessment made by the Ld. AO. He directed the Ld. AO to frame the assessment afresh after considering his observations. Aggrieved, assessee is in appeal before the Tribunal.

5. Before us, ld. Counsel for the assessee reiterated the submissions made before the Ld. Pr. CIT. Ld. Counsel

emphasized on the fact that there is no prejudice to the revenue when there is no element of interest charged to the Profit and Loss Account on the amount of Rs.12,83,610/- which has been inadvertently taken as a share of profit instead of share in loss of the aforesaid JV. Thus, the observations made by the Ld. Pr. CIT are on incorrect set of facts. Further, Ld. Counsel objected on the observation of Ld. Pr. CIT that there is a potential understatement of income in the subsequent assessment year i.e. 2017-18 owing to the inadvertent mistake of treating the share in loss as the share in profit while arriving at the balance of capital of the partners at the close of the year. He submitted that the prejudice, if any, relevant to subsequent assessment years, has nothing to do with the present case, more particularly as in the present case itself, there is no prejudice to the interest of revenue as no claim of interest on partners' capital balance at the end of the year has been made by the assessee on this portion of share in profit of the said JV.

6. Per contra, Ld. CIT, DR supported the order of ld. Pr. CIT.

7. We have heard the rival contentions and perused the material available on record. We take note of the fact that assessee while arriving at the balances of capital of the partners in the assessee firm, incorrectly took the share of loss in the aforesaid JVs as share of profit. It is quite understandable that interest on the partners' capital balance must have been calculated on the figure including this wrong

treatment. However, from the factual verification of the claim of interest as submitted by the Ld. Counsel, it is noted that it is computed on the opening balance of the capital of partners in the assessee firm i.e. on 01.04.2015. There was no occasion to include the share in profit/loss for the year from the said file in the opening balance and capital balance of the partners on which interest has been charged. The apprehension of Ld. Pr. CIT that excessive interest has been claimed on the closing balances of capital of partners which includes this claim on account of inadvertent mistake of share of loss in the aforesaid JV. However, the facts do not corroborate the apprehension of the Ld. Pr. CIT. This makes us understand that there is no prejudice to the interest of revenue owing to the inadvertent mistake.

7.1. From the above factual matrix on the issue raised by the ld. PCIT, we find that he has not applied his mind to arrive at a consideration which is erroneous in so far as prejudicial to the interest of the revenue, for passing the impugned order u/s 263 of the Act. We observe that in the course of proceedings u/s 263 of the Act before the Ld. PCIT, assessee had furnished the relevant details and explained the issues raised through the show cause notice issued by the Ld. PCIT, supporting its contentions by corroborative documentary evidences. It is well settled law that for invoking the provisions of section 263 of the Act, both the conditions that the order must be erroneous and prejudicial to the interest of revenue needs to be satisfied. This ratio stands laid down by various Hon'ble Courts.

7.2. For this, let us take the guidance of judicial precedence laid down by the Hon'ble Apex Court in the case of Malabar Industries Ltd.

vs. CIT [2000] 243 ITR 83(SC) wherein their Lordships have held that *twin* conditions need to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer *must be erroneous and in so far as prejudicial to the interest of the Revenue*. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed *on incorrect assumption of fact*; or (ii) *incorrect application of law*; or (iii) Assessing Officer's order is in *violation of the principle of natural justice*; or (iv) if the order is passed by the Assessing Officer *without application of mind*; (v) if the AO *has not investigated the issue* before him; [*because AO has to discharge dual role of an investigator as well as that of an adjudicator*] then in aforesaid any of the events, the order passed by the AO can be termed as erroneous order. Looking at the second limb as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue, one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industries (*supra*) held that this phrase i.e. "*prejudicial to the interest of the revenue*" has to be read in conjunction with an *erroneous order* passed by the AO. Their Lordships held that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue unless the view taken by the Assessing Officer is unsustainable in law.

7.3. We find that the issue in the present case is purely on facts verifiable from the records of the assessee which revealed that the issue raised by the Ld. Pr. CIT for invoking revisionary proceedings are ill founded. We also note that observation made by the Ld. Pr. CIT for the potential under statement of income owing to this inadvertent mistake of treating the share in loss as share in profit of one JV in the subsequent assessment year i.e. 2017-18 does not justify the present proceeding of revision undertaken by the Ld. Pr. CIT u/s. 263 of the Act. The mistake committed by the assessee is rectifiable in its books of accounts and has to be dealt in the respective assessment year. Accordingly, on the issue raised by the Ld. Pr. CIT in the present revisionary proceeding action u/s 263 of the Act is not justifiable, we therefore, quash the impugned order u/s. 263 of the Act.

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

Order pronounced in the open court on 13th March, 2023.

Sd/-
(Rajpal Yadav)
Vice President

Sd/-
(Girish Agrawal)
Accountant Member

Dated: 13th March, 2023

JD, Sr. P.S.

Copy to:

1. The Appellant:
 2. The Respondent:
 3. ITO, Ward-1(2), Asansol
 4. DR, ITAT, Kolkata Bench, Kolkata
- //True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata