IN THE INCOME TAX APPELLATE TRIBUNAL PATNA BENCH
VIRTUAL HEARING AT KOLKATA

BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA No.224/Pat/2022
Assessment Year: 2017-18

North Bihar Power Distribution Company Ltd. Ground floor Vidyut Bhawan, New Beiley Road, Patna-800001. (PAN: AAECN1588M)	Vs.	Pr. Commissioner of Income Tax, Patna-1, Patna.
(Appellant)		**(Respondent)**

Present for:

Appellant by : Shri Ankit Kumar,FCA
Respondent by : Smt. Rinku Singh, Addl. CIT, DR

Date of Hearing : 03.02.2023
Date of Pronouncement : 30.03.2023

O R D E R

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the revision order of Ld. Pr. CIT, Patna-1vide Order No. ITBA/REV/F/REV5/2021-22/1042288650(1) dated 31.03.2022 u/s. 263 of the Income-tax Act, 1961 (hereinafter referred to as the "Act.

2. Appeal of the assessee is time barred by two days. However, from perusal of the records, we find that the impugned order of Ld. Pr.CIT is dated 31.03.2022. The present appeal before the Tribunal was filed on 01.06.2022. Time for filing of the appeal before the Tribunal was to expire on 30.05.2022. Considering these two dates there is a delay of

only two days in filing the appeal. We find that the delay of two days in the present appeal falls during the period 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. The assessee has taken four grounds of appeal which are reproduced as under:

> *"1. Ground 1:*
>
> *The learned PCIT has erred in law, for issuance of notice [DIN & Notice No: ITBA/REV/F/REV1/2021-22/1 038620636(1) Dated 11/01/2022, attachment thereon] and passed order [DIN & Order No: ITBA/REV/F/REV5/2021-22/1042288650(1) dated 31/03/2022] u/s 263 of Income Tax Act 1961 on the basis of opinion formed by revenue audit party as per judicial pronounced in the case of Grasim Industries Ltd. Vs PCIT (ITAT Mumbai) ITA No.1964/Mum/2019.*
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> *2. Ground 2:*
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> *The learned PCIT has erred in law, for issuance of notices and order u/s 263 of Income Tax Act 1961 wherein in the original notice issued by PCIT vide DIN & Notice No : ITBA/REV/F/REV1/2021-22/1038620636(1) Dated 11/01/2022, Wherein, in the Final order while quoting reference of earlier show cause notice, words have been changed from Audit Observed to It was observed, which clearly shows that show cause notice issued by PCIT is not in order as per law and opinion have been formed on the basis of observation made by Revenue Audit party and independent application of mind have not been used by PCIT at the time of issuance of notice u/s 263.*
>
> *3. Ground 3:*
>
> *The learned PCIT has erred in law, and passed an order u/s 263 of Income Tax Act 1961 which is bad in law as the notice which was time barred as Notice under section 263 was issued without jurisdiction as assessment order under section 143(3) issued under CASS (Limited Scrutiny) and as per section 263(2) of Income Tax Act, "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."

4. Ground 4:

The learned PCIT has erred in law, and passed an order u/s 263 of Income Tax Act, 1961 by non-considering replies and legal requirement as per various act applicable on the company and not provided sufficient opportunity to submit additional documents."

4. Brief facts of the case are that assessee is engaged in the business of distribution of electricity. It filed its return of income showing total loss of Rs.856,46,52,052/-. Case of the assessee was selected for complete scrutiny under CASS for which statutory notices were issued and served on the assessee and were duly complied with. Assessment was completed u/s. 143(3) of the Act determining total loss at Rs.807,63,74,159/- after making an addition of Rs.48,82,82,893/-.

4.1. Ld. Pr. CIT subsequently, observed that assessment has been completed without making enquiries and verifications for which a show cause notice was issued u/s. 263(1) of the Act, the contents of the said show cause notice in para 2 are reproduced as under:

2. On examination of records, it was found that the assessment was completed without conducting enquiries into & verifications of the following issues:

(i) As per note 21 (other income) of Profit and Loss Account of the assessee company for the F.Y 2016-17, assessee company received an amount of Rs. 15,13,66,32,000/- as revenue, subsidies and Grants. Further, as per cash flow statement for the year ended 31st March, 2017 capital grant for capital assets received was Rs. 17,66,96,90,269/-. Examination of computation sheet and Note No. 25 (Depreciation & Amortization expenses) of Profit and Loss Account revealed that the assessee claimed depreciation of Rs. 89,75,74,378/- as per Company Act after deducting reserve and Amortization of grant of Rs. 1,02,73,53,413/- from total depreciation of Rs. 1,92,49,27,791/- as per Company Act. Separate depreciation chart as per IT Act was not available on record. However, depreciation of Rs. 4,32,78,43,288/- as per IT Act was claimed. Audit observed that there was a huge difference of Rs. 3,43,02,68,910/- between depreciation as per Company Act and as per IT Act which clearly indicates that deduction of reserve and amortization of grant of Rs. 1,02,73,53,413/- had not been deducted while calculating depreciation as per IT Act. In the absence of details of purchase of asset through subsidies and grant, exact amount of depreciation allowable as per IT Act was not ascertainable. Depreciation is allowable after deducting subsidies and grants of capital assets. The matter was not found verified during assessment proceedings.

(ii) On examination of Note 26 of Profit and Loss Account and IT return revealed that the assessee company debited an amount of Rs. 2,81,08,56,747/- as prior period item under head other expenses. As per section 37 of the IT Act prior period expenses are not allowable expenditure as the method of accounting employed in the previous year was mercantile system. This matter was also found not verified during the assessment proceedings.

4.2. On the contents of the show cause notice extracted above, Ld. Counsel for the assessee has raised ground no. 2 whereby contesting that the words have been changed from "*audit observed" to "it was observed"* and therefore, the show cause notice issued by Ld. Pr. CIT is not in order as per the law and the opinion formed by Ld. Pr. CIT is on the basis of observation made by the revenue audit party without any independent application of mind by the Ld. Pr. CIT for issuing the notice u/s. 263 of the Act. Attention of the Bench was drawn to the

contents of the show cause notice extracted by the Ld. Pr. CIT in the impugned order in para 5 which contains the changed words as stated by the Ld. Counsel. The same are extracted below for ease of reference:

1. *As per note 21(other income) of profit and loss account of the company for the F.Y 2016-17 relevant to A.Y. 2017-18,company received an amount of Rs. 15,13,66,32,000/- as revenue subsidies and grants. Further, as per cash flow statement for the year ended 31.03.2017 capital grant for capital assets received was Rs.17,66,96,90,269/- Examination of the computation sheet and Note No.25(Depreciation & Amortization expenses) of Profit and Loss Account,IT revealed that the assessee company claimed depreciation of Rs.89,75,74,378/- as per company Act after deducting reserve and Amortization of grant of Rs.1,02,73,53,413/-from total depreciation of Rs.1,92,49,27,791 as per company Act. Separate depreciation chart as per IT Act was not available on record. However, depreciation of Rs.4,32,78,43,288/- as per IT Act was claimed. It was observed that there was a huge difference of Rs.3,43,02,68,910/- between depreciation as per company Act and as per IT Act which clearly indicates that deduction of reserve and amortization of grant of Rs 1,02,73,53,413/-had not been deducted while calculating depreciation as per IT Act. In the absence of details of purchase of asset through subsidies and grants exact amount of depreciation allowable as per IT Act was not ascertainable. Depreciation is allowable after deducting subsidies and grants of capital assets. The matter was not found verified during the assessment proceedings.*
2. *Further, on examination of Note no.26 of profit and loss account and IT return revealed that the assessee Company debited an amount of Rs.2,81,08,56,747/- as prior period item under head other expenses. As per section 37 of the IT Act prior period expenses are not allowable expenditure as the method of accounting employed in the previous year mercantile system. This matter was also not found verified during assessment proceedings.*

4.3. Further, Ld. Counsel referred to the letter which was issued by the Ld. Pr. CIT in the impugned revisionary proceeding to the ACIT, Circle-1, Patna (Ld. AO) to submit a fresh report on the submissions made by the assessee. The Ld. AO submitted his reply wherein it is stated that the proposal

for revision u/s. 263 of the Act was submitted following the audit objection made by the revenue audit party. Further, the report contains the observations made by the revenue audit party which are the issues raised by the Ld. Pr. CIT in the show cause notice for initiating the revisionary proceedings. The contents of the report of Ld. AO are extracted below from the order of Ld. Pr. CIT:

> *"Kindly refer to the above. The desired report is submitted hereunder:*
>
> *1. In the captioned case. a proposal for revision (u/s. 263 of the Income Tax Act was submitted following the Audit objection made in the case by the Revenue Audit Party*
>
> *2 The Revenue Audit Party has noted that the depreciation claimed by the assessee as per Income Tax Act was Rs.3430268910/· less than the depreciation claimed as per Companies Act Separate depreciation chart as per Income Tax Act was not available in the assessment folder. Therefore the Audit has concluded that the deduction of reserve and amortization of grant of Rs.1027353413/· has not been deducted while calculating depreciation as per income Tax Act.*
>
> *Further, the Audit has noted that the assessee has debited Rs. 2810856747/- as prior period item under head other expenses which is not allowable u/s 37 of the Income Tax Act.*
>
> *3. The assessee, in its reply dated 31.01.2022 has discussed in details the treatment of government grant and recognition of the same as per IND AS and also as per ICDS. The submission of the assessee has been perused, however the assessee has failed to Justify the huge difference of depreciation as per Companies Act and as per IT Act. Further no evidence or proof has been adduced by the assessee as to why reserve and amortization of grant of Rs.1027353413/- has not been deducted while calculating the deduction as per Income Tax Act. Under the circumstances, the assessee's argument on the above issue is not tenable.*
>
> *4. On the issue of disallowance of Prior Period Expenses, the assessee has made the submissions, the gist of which is reproduced as under:*
>
> *- On the basis of applicable rules and regulations, reversal of sales is required to be done as per regulations issued by the authorities and excess purchase cost paid needs to be revised and exact cost of sales and purchase needs to be accounted for as per applicable accounting standards and rules and regulations applicable on the*

power discoms, section 37 does not apply in the present case when we are looking the transaction in details by way of following the basic principle of accounting which is 'Substance over form'. Substance over form is an accounting principle used to ensure that financial statement give a complete, relevant and accurate picture of transactions and events. If an entity practices the 'substance over form' concept, then the financial statements will convey the overall financial reality of the entity (economic substance) rather than simply reporting the legal record of transactions (form)".

On perusal of the above submissions, it is seen that the assessee bas dwelled more on the requirement of ensuring complete, relevant and accurate financial statements rather than legal provisions governing "Prior Period Expenses". As per the provisions of the Income Tax Act. prior period expenses are not an allowable expense, and hence the assessee's contentions are not acceptable on merit."

4.4 Ld. Counsel thus, strongly contested that the impugned revisionary proceedings have been initiated solely at the instance of the revenue audit party as affirmed in the report of the Ld. AO called by the Ld. Pr. CIT and thus, it is a case of borrowed satisfaction without any independent application of mind by the Ld. Pr. CIT in arriving at the consideration for invoking the provisions of section 263. Accordingly, the impugned order is ought to be quashed. Ld. Counsel placed reliance on the decision of the Coordinate Bench of ITAT, Mumbai in the case of *Grasim Industries Ltd. v. PCIT in ITA No. 1964/Mum/2019* to buttress the submissions made by him. Relevant para 11(c) from the said decision is reproduced below:

11. In view of the aforesaid elaborate observations and respectfully following the various judicial precedents relied upon hereinabove, we hold that –
a)....

b)....

c) The ld AO had defended his original assessment order before the Revenue Audit Party by accepting the contentions of the assessee and by stating that there was no misrepresentation of facts by the assessee. The

evidences in this regard are already on record and already reproduced elsewhere in this order. Hence it could be safely concluded that the revision proceedings u/s 263 of the Act had been apparently triggered only based on borrowed satisfaction i.e Audit Objection and not based on independent application of mind by the ld PCIT. Infact the show cause notice issued by the ld PCIT u/s 263 of the Act also uses the same language used by the Revenue Audit Party in its Audit Objection. Hence revision proceedings could not be invoked by the ld PCIT based on borrowed satisfaction."
[emphasis supplied by us by underline]

5. Per contra, Ld. CIT, DR supported the order of Ld. Pr. CIT and submitted that no prejudice is caused to the assessee to comply with the direction given by the Ld. Pr. CIT for the verification and examination by the Ld. AO on the two issues raised by him in the revisionary proceedings.

6. We have heard the rival contentions and perused the material available on record. From the perusal of the material placed on record in respect of the issues which formed the basis for passing the order u/s. 263 of the Act, we note that it is not a case of lack of enquiry. We observe that Ld. PCIT has not applied his mind to arrive at a consideration which is erroneous in so far as prejudicial to the interest of revenue for passing the impugned order u/s. 263 of the Act. We observe that in the course of proceeding u/s. 263 of the Act, assessee had furnished the relevant details and explained the issues raised through the show cause notice, supporting its contentions by corroborative documentary evidence. 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.

6.1. 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. The aspect of application of mind by the ld. PCIT as contended by the ld. Counsel has been succinctly dealt by the Hon'ble Delhi High Court in the judgment of *DG Housing Finance Co. Ltd. [2012] 20 taxmann.com 587 (Del)* which is dealt hereunder.

7.1. While adverting on the issue, Hon'ble High Court held that the CIT has to come to the conclusion and himself decide that order is erroneous, by conducting necessary enquiry, if required and necessary before the order u/s 263 of the Act is passed. In such cases, the order of the AO will be erroneous because the order passed is not sustainable in law and the said finding must be recorded by CIT who cannot remand the matter to the assessing officer to decide whether the findings recorded are erroneous.

7.2. In cases where there is inadequate enquiry but not lack of enquiry, again the CIT must give and record a finding that the order/enquiry 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 AO, making the order unsustainable in law.

7.3. 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 AO 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 AO to conduct further enquiries without a finding that the order is erroneous, the condition or requirement which must be satisfied for exercise of jurisdiction u/s 263 of the Act. In such matters, to remand the matter/issue to the AO would imply and mean that the CIT has not examined and decided whether or

not the order is erroneous but has directed the AO to decide the aspect/question.

7.4. The Hon'ble Court further held that this distinction must be kept in mind by the CIT while exercising jurisdiction u/s 263 of the Act and in the absence of the finding that the order is erroneous and prejudicial to the interest of revenue, exercise of jurisdiction under the said section is not sustainable. In most cases of alleged "inadequate investigation", it will be difficult to hold that the order of the AO, who had conducted enquiries and had acted as an investigator, is erroneous, without CIT conducting verification/enquiry himself. The order of the AO may be or may not be wrong. CIT cannot direct reconsideration on this ground but only when the order is erroneous. An order of remit cannot be passed by the CIT to ask the AO to decide whether the order was erroneous. This is not permissible. An order is erroneous, unless the CIT holds and records reason why it is erroneous. Therefore, CIT must after recording reasons, hold that order is erroneous. The jurisdictional pre-condition stipulated is that CIT must come to the conclusion that the order is erroneous and is unsustainable in law.

7.5. It was further observed by the Hon'ble High Court that the material, which the CIT can rely up on includes not only the records as it stands at the time when the order in question was passed by the AO but also records as it stands at the time of the examination by the CIT. Nothing prohibits CIT from collecting and relying new/additional material which evidence to show and state that the order of the AO is erroneous.

8. In the present case before us, we observe that in the show cause notice, Ld. Pr. CIT has referred to the observation of audit however, while capturing the same in the impugned

order, there is no such reference. Further, from the perusal of the report from the Ld. AO called by the Ld. Pr. CIT in the revisionary proceedings, it is effectively demonstrated that the audit observations by the revenue audit party had been the basis for invoking the revisionary proceeding in the instant case by the Ld. Pr. CIT.We observe that Ld. Pr. CIT has raised the issues for revision from the observations of the revenue audit party and called for the explanations, both from the assessee and the Ld. AO. He then extracted the submissions of the assessee and the report of the ld. AO and gave direction to the AO as, "*the AO is directed to examine the issue at stake in the light of the above submission of the assessee.*"

8.1. We also note from para 10 of the impugned order that Ld. Pr. CIT has directed the Ld. AO to make a fresh assessment by conducting enquiries, verifications and investigations in respect of the issues raised by the Ld. Pr. CIT. In the entire order of Ld. Pr. CIT, there is nothing stated as to how the assessment made by the Ld. AO is erroneous in so far as prejudicial to the interest of revenue which the Ld. AO has to consider while giving effect to the impugned revisionary order.The extent of enquiry undertaken and replies filed in the assessment proceedings forms part of the records of the case on which ld. PCIT ought to have applied his mind before embarking upon the journey of initiating the revisionary proceedings.

9. Accordingly, on the issues raised by the Ld. PCIT in the revisionary proceedings, no action u/s 263 of the Act is justifiable which in our considered view cannot be sustained under the facts and circumstances

of the present case and judicial precedents dealt herein above. We, therefore, quash the impugned order u/s 263 of the Act and allow the grounds raised by the assessee.

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

Order is pronounced in the open court on 30thMarch, 2023.

Sd/-	*Sd/-*
(Sanjay Garg)	**(Girish Agrawal)**
Judicial Member	**Accountant Member**

Dated: 30th March, 2023

JD, Sr. P.S.
Copy to:

1. The Appellant:
2. The Respondent:.
3. DCIT, Central Circle-2, Patna
4. DR, ITAT, Patna Bench, Patna

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata