

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'G' BENCH,
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER

ITA No. 587/DEL/2022 [A.Y 2017-18]

Shri Sanjay Gupta
16, Amar Bhawan Chowk
Ward - 5 Panipat, Haryana

Vs.

The Pr.C.I.T.
Rohtak

PAN: ACYPG 6979 Q
(Applicant)

(Respondent)

Assessee By : Shri Dr. Rakesh Gupta, Adv
Shri Deepak Garg, Adv

Department By : Shri H.K. Choudhary, CIT- DR

Date of Hearing : 04.05.2023
Date of Pronouncement : 18.05.2023

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is directed towards the order of the PCIT, Rohtak dated 04.03.2022 framed 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 assuming jurisdiction under section 263 of the Act and further erred in holding that the assessment order dated 16.12.2019 framed under section 143(3) of the Act is erroneous and prejudicial to the interest of the revenue.

3. Representatives of both the sides were heard at length. Case records carefully perused. Judicial decisions relied upon by the rival representatives duly considered.

4. Briefly stated, the facts of the case are that the assessee filed return of income electronically on 28.03.2018 declaring total income of Rs. 43,86,700/-. Return was selected for scrutiny assessment and, accordingly, statutory notices were issued and served upon the assessee.

5. A survey operation u/s 133A of the Act was carried out on the business premises of the assessee on 17.08.2016. During the course of survey proceedings, certain loose documents were found, on the basis of which the assessee declared additional income of Rs. 40 lakhs, which was

duly declared in the return of income and accordingly, returned income of the assessee was assessed as such.

6. Assuming jurisdiction cast upon him by provisions of section 263 of the Act, the PCIT issued show cause notice dated 15.02.2022 which reads as under:

“Subject: Notice for Hearing in respect of Revision proceedings u/s 263 of the INCOME TAX ACT, 1961 - Assessment Year 2017-18.

In this regard, a hearing in the matter is fixed on. 23/02/2022 at 11 :00 AM. You are requested to attend in person or through an authorized representative to submit your representation, if any alongwith supporting documents/information in support of the issues involved (as mentioned below). If you wish that the Revision proceeding be concluded on the basis of your written submissions/representations filed in this office, on or before the said due date, then your personal attendance is not required. You also have the option to file your submission from the e-filing portal using the link: incometaxindiaefiling.gov.in

Sub : Show Cause Notice U/s 263(1) of the Income Tax Act, 1961 for the A.Y. 2017-18-reg.

Return declaring income of Rs.43,86,700/- for the A.Y. 2017-18 was filed by you on 28.03.2018. Subsequently, the assessment for the year under consideration was completed u/s 143(3) of the Income Tax Act, 1961 at returned income by the Assistant Commissioner of Income Tax, Circle, Panipat vide order dated 16.12.2019.

2. The assessment record for the period under consideration was called upon and examined. On such examination, it has been noticed that survey action u/s 133A was carried out at your business premises on 17.08.2016 in which you have offered an additional income of Rs. 40,00,000/- apart from normal business income which is largely in the nature of unexplained cash, unexplained purchases & excess stock which is liable to be added u/s 68/69/69A/69B/69C of the Act. As per your ITR, you have shown the surrender income as business income and have paid taxes as per normal slab rates instead of tax payable at the rate of 60% u/s 115BBE of the Income Tax Act, 1961. However, neither you have furnished any proper explanation for paying tax at low rates, nor the AO has called for any documentary evidences/proper explanation for the same. In absence of any supporting documentary evidence and proper explanations, re-computation of tax is required to be made on surrendered income at the rate of 60% u/s 115BBE of the Act.

Failure on the part of the AO to do so renders the assessment order erroneous in so far as it is prejudicial to the interest of revenue.

3. In view of the above, the assessment completed by the AO is, prima facie erroneous in so far as it is prejudicial to the interest of revenue. The same is, therefore, required to be suitably amended/modified u/s 263 of the Income Tax Act, 1961. You are, therefore, required to show cause as to why an appropriate order u/s 263(1) of the Act setting aside the assessment order passed as on 16.12.2019 should not be passed. In this connection, you may send your written reply along-with supporting documentary evidences on the email-id(rohtak.pcit@incometax.gov.in) or through e-proceedings by 23.02.2022. In case of no reply is received, it shall be assumed that you do not wish to say anything in the matter and the matter would be decided as per material on record without any further notice/intimation to you.

*Pratap Singh
PCIT, Rohtak”*

7. In view of the above, the PCIT was of the opinion that the assessment completed by the Assessing Officer is not only erroneous but prejudicial to the interest of the revenue. The same is, therefore, required to be suitably amended /modified u/s 263 of the Act. According to the PCIT, the income has been assessed at normal slab rates instead of tax payable @ 60% under section 115BBE of the Act.

8. It would be pertinent to understand the statement of the assessee recorded at the time of survey which has also been exhibited by the PCIT in the body of his order. In response to Question No. 7, the assessee stated that he is surrendering Rs. 5.87 lakhs additional income over and above his regular business income which was in respect of cash found from the counter.

9. In response to Question No. 9, the assessee stated that since he is not maintaining books of account, whatever is mentioned in the diary, amount of Rs. 24.88 lakhs is surrendered as additional income over and above regular business income and concluding his statement, the assessee again emphasized that he is surrendering Rs. 40 lakhs over and above his regular business income for the financial year to purchase peace of mind.

10. Provisions of section 115BBE read as under:

“ (1) Where the total income of an assessee,—

(a) includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D and reflected in the return of income furnished under section 139; or

(b) determined by the Assessing Officer includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, if such income is not covered under clause (a),

the income-tax payable shall be the aggregate of—

(i) the amount of income-tax calculated on the income referred to in clause (a) and clause (b), at the rate of sixty per cent; and

(ii) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (i).

(2) Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance [or set off of any loss] shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause (a) of sub-section (1).]”

11. A perusal of the above shows that clause (a) refers to income referred u/ss 68, 69, 69A, 69B, 69C and 69D of the Act and clause (b) states that income determined by the Assessing Officer includes income referred to in those sections mentioned hereinabove.

12. A perusal of the assessment order shows that nowhere the Assessing Officer has mentioned any of such sections mentioned in section 115BBE of the Act nor it has come out from the statement of the assessee mentioned elsewhere that the income pertains to any of those sections mentioned u/s 115BBE of the Act.

13. We are of the considered view that the PCIT has simply assumed that income surrendered by the assessee pertains to any of the sections mentioned in section 115BBE of the Act. Moreover, provisions of section 115BBE have been brought into the statute w.e.f 01.04.2017 by Taxation Laws [Second Amendment] Act, 2016, which means that the same was not there in the statute on the date of survey.

14. The moot point is whether the amendment is prospective or retrospective, as on the date of survey, the amended provisions were not there in the statute. In our considered opinion, this is a highly debatable issue, which cannot be subject matter of assumption of jurisdiction under section 263 of the Act. Moreover, a perusal of the assessment order clearly shows that the assessing officer has nowhere invoked the

provisions of sections 68/69 of the Act to impute the tax rate of section 115BBE of the Act.

15. A perusal of section 115BBE of the Act shows that where the total income of the assessee includes any income referred to in sections 68, 69, 69A, 69B, 69C or 69D, the income tax payable shall be @ 30% on income so referred to in the said sections. Further, in terms of amended provisions of section 115BBE of the Act by Taxation Laws, Second Amendment Act 2016, it provides that where the total income of the assessee includes any income referred to in sections 68, 69, 69A, 69B, 69C, and 69D and reflected in the return of income furnished under section 139 or total income of the assessee determined by the assessing officer, any income referred to in sections 68, 69, 69A, 69B, 69C, or 69D if such income is not reflected in the return of income furnished under section 139 of the Act, income tax payable shall be @ 60% on income so referred in the said section.

16. Change which has been brought about in the provisions relates to income so referred to in the afore-stated sections so defined which is either not reflected in the return of income or determined by the

assessing officer and in both the cases it will be covered by the provisions of section 115BBE of the Act and the rate of taxation has been increased from 30% to 60% on such specified income.

17. There is, therefore nothing stated in the pre-amended or post amended provisions of section 115BBE of the Act that where the assessee surrenders undisclosed income during search action for the relevant year, the tax rate has to be charged as per provisions of section 115BBE of the Act. Therefore, the applicability of the amended provisions which prompted the PCIT to assume jurisdiction under section 263 of the Act is highly debatable issue, and therefore, in our understanding of the law, the PCIT has wrongly assumed jurisdiction.

18. The Hon'ble Supreme Court in Malabar Industrial Co. Ltd., 243 ITR 83, has laid down the following ratio:

"A bare reading of [section 263](#) of the Income-tax Act, 1961, makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied of twin conditions,

namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent--if the order of the Income-tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue-- recourse cannot be had to [section 263\(1\)](#) of the Act. The provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous ".

19. The Hon'ble Bombay High Court in the case of Gabriel India Ltd 203 ITR 108 has held as under:

"The power of suo motu revision under subsection (1) is in the nature of supervisory jurisdiction and the same can be exercised only if the circumstances specified therein exist. Two circumstances must exist to enable the Commissioner to exercise power of revision under this sub-section, viz., (i) the order is erroneous; (ii) by virtue of the order being erroneous prejudice has been caused to the interests of the Revenue. It has, therefore, to be considered firstly as to when an order can be said to be erroneous. We find that the expressions "erroneous", "erroneous assessment" and "erroneous judgment" have been defined in Black's Law Dictionary. According to the definition,

"erroneous" means "involving error; deviating from the law". "Erroneous assessment" refers to an assessment that deviates from the law and is, therefore, invalid, and is a defect that is jurisdictional in its nature, and does not refer to the judgment of the Assessing Officer in fixing the amount of valuation of the property. Similarly, "erroneous judgment" means "one rendered according to course and practice of court, but contrary to law, upon mistaken view of law; or upon erroneous application of legal principles".

12. 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 conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. It may be said in such a case that in the opinion of the Commissioner the order in question is prejudicial to the interests of the Revenue. But that by itself will not be enough to vest the Commissioner with the power of suo motu revision because the first requirement, viz., that the order is erroneous, is absent. Similarly, if an order is erroneous but not prejudicial to the interests of the Revenue, then also the power of suo motu revision cannot be exercised. Any and every erroneous order cannot be the subject-matter of revision because the second requirement also must be fulfilled. 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, therefore, hold that in order to exercise power under sub-section (1) of [section 263](#) of the Act there must be material before the Commissioner to consider that the order passed by the Income-tax Officer was erroneous in so far 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 Income-tax Officer 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.

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. 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 Income-tax Officer to re-examine the matter. That, in our opinion, is not permissible. Hence the provisions of section 263 of the Act were not applicable to the instant case and, therefore, the commissioner was not justified in setting aside the assessment order."

20. It is a settled position of law that powers u/s 263 of the Act can be exercised by the Commissioner on satisfaction of twin conditions, i.e., the assessment order should be erroneous and prejudicial to the interest of the Revenue. By 'erroneous' is meant contrary to law. Thus, this power cannot be exercised unless the Commissioner is able to establish that the order of the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. Thus, where there are two possible views and the Assessing Officer has taken one of the possible views, no action to exercise powers of revision can arise, nor can revisional power be exercised for directing a fuller enquiry to find out if the view taken is erroneous. This power of revision can be exercised only where no

enquiry, as required under the law, is done. It is not open to enquire in case of inadequate inquiry. Our view is fortified by the decision of Hon'ble High Court of Bombay in the case of CIT vs. Nirav Modi, [2016] 71 Taxmann.com 272 (Bombay).

21. The Hon'ble High Court of Gujarat in the case of [CIT vs. Nirma Chemical Works Ltd.](#) 309 ITR 67 has observed as under:

"if 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 . A.Y. 2009-10 Officer issued a query memo 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 creditworthiness/capacity 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."

29. We find that the Hon'ble Delhi High Court in the case of CIT Vs Sunbeam Auto reported in 332 ITR 167 has held as held as under:

"12. 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 CIT under s. 263 of the IT Act. As noted above, the submission of learned counsel for the Revenue was that while passing the assessment order, the AO 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 AO had not applied his mind on the issue. There are judgments galore laying down the principle that the AO in the assessing 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 CIT to pass orders under s. 263 of the Act, merely because he has different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open".

30. Considering the facts of the case in totality from all possible angles, we failed to persuade ourselves to accept the contention of the Id. DR who had strongly supported the findings of the PCIT. We are of the considered view that the order framed u/s 263 of the Act deserves to be set aside and that of the Assessing Officer deserves to be restored. We order accordingly."

22. Considering the facts of the case in hand, in totality, in light of judicial decisions discussed here in above, we set aside the order of the PCIT and restore that of the Assessing Officer dated 16.12.2019 framed under section 143C of the Act.

23. In the result, the appeal of the assessee in ITA No. 587/DEL/2022 is allowed.

The order is pronounced in the open court on 18.05.2023.

Sd/-

**[CHALLA NAGENDRA PRASAD]
JUDICIAL MEMBER**

Sd/-

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

Dated: 18th May, 2023.

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	