

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणेमें।  
IN THE INCOME TAX APPELLATE TRIBUNAL  
PUNE BENCHES "B" :: PUNE

BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER  
AND  
DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No.409/PUN/2022  
निर्धारण वर्ष / Assessment Year :2017-18

Span Overseas Private Limited, Office NO.5, Amar Avinash Corporate City 11, Bund Garden Road, Pune – 411006.  PAN: AABCS 4214 N Assessee/ Appellant	Vs	The Principal Commissioner of Income Tax-3, Pune.  Respondent /Revenue
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Assessee by	Shri Ketan Ved – AR
Revenue by	Shri Sardar Singh Meena – DR
Date of hearing	28/04/2023
Date of pronouncement	28/06/2023

**आदेश/ ORDER**

**PER DR. DIPAK P. RIPOTE, AM:**

This appeal filed by the Assessee is directed against the order of ld.Principal Commissioner of Income Tax, Pune-3 dated 30.03.2022 emanating from assessment order under section 143(3) of the Act dated 13.11.2019 for A.Y.2017-18. The Assessee has raised the following grounds of appeal:

*“Span Overseas Private Limited (‘the Appellant’) objects to the order under section 263 of the Income-tax Act, 1961 (‘the Act’) dated March 30, 2022 passed by the learned Principal Commissioner of Income-tax, Pune - 3 (‘Pr. CIT) for the aforesaid assessment year on the following amongst other grounds:*

1. *The order passed by the learned Pr. CIT is ultra vires, bad in law and contrary to the provisions of the Act and facts of the case and hence ought to be quashed.*
2. *The learned Pr. CIT erred in invoking the provisions of section 263 of the Act on the basis that the assessment order under section 143(3) of the Act passed by the learned Assistant Commissioner of Income Tax, Circle 6, Pune ('learned Assessing Officer') is erroneous and prejudicial to the interest of Revenue.*
3. *The learned Pr. CIT erred in holding that the Assessing Officer did not enquire into all the relevant issues to deduce correct taxable income and therefore, held that the order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of Revenue.*
4. *The learned Pr. CIT erred in setting aside the assessment order and directing the Assessing Officer to complete the assessment afresh with respect to verification of disallowance of provision of Sales Tax paid by the Appellant for the earlier years.*
5. *Without prejudice to the above grounds, the learned Pr. CIT erred in making the following observations, which are contrary to the facts of the case and in law:*

*"... As far as the fact of allowance of sales-tax in earlier years is concerned, nothing has been placed to prove that in earlier years the sales-tax that remained unpaid was added to the income. Therefore, this aspect needs to be verified...*

*...As discussed in above Paras, in the present case, the Assessing Officer did not enquire into all relevant issues to deduce correct taxable income and therefore, the order passed by the Assessing Officer is found to be erroneous in so far as it is prejudicial to the interest of revenue...."*

*The Appellant objects to the above observations of learned Pr. CIT, which are contrary to the facts of the case and in law.*

6. *The learned Pr. CIT erred in passing the order under section 263 of the Act without appreciating the submissions made by the Appellant in its correct perspective.*
7. *Without prejudice to the above grounds, the learned Pr. CIT erred in observing that the Assessing Officer failed to verify the claim of deduction of payment under the Sales Tax Amnesty Scheme which has rendered the assessment erroneous and prejudicial to the interest of Revenue.*
8. *Without prejudice to the above grounds, the learned Pr. CIT erred in observing that the aforesaid payment of Sales Tax dues under the Sales Tax Amnesty Scheme is not allowable under section 37(1) of the Act.*
9. *Without prejudice to the above grounds, the learned Pr. CIT erred in making the following observations, which are contrary to the facts of the case and in law:*

*"...Assessee failed to make provisions of liability for the Sales Tax to be paid in the Financial statements though the liability got created vide Revision Order of Assistant Commissioner of Sales Tax vide order dated 12th May, 2003. The Contention that the liability got crystallized only in F.Y. 2016-17 is not correct...*

*... Though the assessee accepted the liability in the F.Y. 2016-17 , that doesn't change the accounting year of the statutory dues. Hence, the expenses were pertaining to the F.Y. 1994-95 , 1995-96 and 1996-97. Hence, the same are not allowable in the year under consideration u/s. 37( 1) of the Income tax Act, 1961...*

*... In the case of assessee, as per Books of accounts, sales tax liability was not at all payable nor any provision for contingent liability was created since the F. Y. 2003-04. And hence it was never disallowed or added back to the total income of the assessee. As it is very much clear that as per financial statement of the assessee for earlier years to the F. Y. 2016-17, it was never liable to pay the sales tax liability. And it was not a*

*liability of the year under the consideration. Hence, the same is not allowable u/s. 43B of the Act...*

*... As far as the fact of allowance of sales-tax in earlier years is concerned, nothing has been placed to prove that in earlier years the sales-tax that remained unpaid was added to the income...*

*... In view of the above, A.O. did not verify the claim of deduction of payment under the Amnesty Scheme of Sales Tax for the F.Ys 1994-95,1995-96 and 1996-97. This non verification and allowing the Claim by the AO has rendered the Assessment erroneous and prejudicial to the interest of Revenue..."*

*The Appellant objects to the above observations of learned Pr. CIT, which are contrary to the facts of the case and in law.*

*Each one of the above grounds of appeal is without prejudice to the other."*

**Brief facts of the case :**

2. The assessee had filed return of Income for AY 2017-18 on 20/11/2017. The Assessing Officer passed an assessment order u/s.143(3) assessing the total income at NIL. The Ld.Principal Commissioner of Income Tax Pune examined the records and observed that Assessee claimed in Profit and Loss account an amount of Rs.2,37,40,562/- towards Sales tax Amnesty Scheme for 1994-95, 1995-96 & 1996-97 and advance. The assessee had claimed an amount of Rs.2,37,40,562/- paid in A.Y. 2017-18, towards Sales Tax Amnesty Schemes for various years as under :

<b>F.Y.</b>	<b>Amount (in Rs)</b>
1994-95	22,98,840/-
1995-96	1,21,67,001/-
1996-97	77,74,721/-
Paid in advance	15,00,000/-
Total	2,37,40,562/-

2.1 The Ld.Pr.CIT observed that these amounts were not disallowed and added back in the respective years, the AO had not verified these facts. Ld.Pr.CIT relied on the decision of ITAT in the case of Deepak Nitrite Ltd Vs. DCIT 139 ITD213 (Ahmedabad). Ld.Pr.CIT invoked the jurisdiction u/s.263 of the Act. Ld.Pr.CIT held that AO had not carried out enquiries into all relevant issues and hence, assessment order was prejudicial to the interest of the Revenue. The Ld.Pr.CIT passed the order u/s.263. Aggrieved by the order u/s.263 the Assessee has filed appeal before this Tribunal.

**Submission of Ld.AR :**

3. Ld.Authorised Representative(Ld.AR) submitted that the Assessing Officer had carried out inquiry during the assessment proceedings regarding the amounts paid by the assessee under the Sales Tax Amnesty Scheme. The LD.AR invited our attention to the notice u/s.142 dated 19/08/2019 issued by the

AO vide which the AO in question number 15 asked the assessee to provide details of statutory payments made u/s.43B of the Act. The said notice is enclosed at page 68 to 73 of the paper book. The Ld.AR invited our attention to page 77 to 83 of the paper book. The Ld.AR explained that assessee had filed copy of the Challan at page 79 of Paper book to explain the payment made. At page 78 of the paper book was a table showing amounts paid and the year under the Amnesty scheme. The Ld.AR pleaded that the assessee had submitted all the details about the amounts paid under the Sales tax Amnesty Scheme before the AO during the Assessment proceedings. The AO had studied these details and after considering the assessee's submission decided not to make any disallowance. The Ld.AR submitted that the Assessment Order was not erroneous and prejudicial to the interest of revenue and hence the ld.Pr.CIT erred in invoking jurisdiction u/s.263. The Ld.AR further pleaded that the Assessee had never collected the Sales Tax from its customers in earlier years, never debited the Sales tax in earlier years hence there is no question of Disallowance u/s.43B in earlier years as claimed by the ld.Pr.CIT.

**Submission of Ld.DR:**

4. Ld.Departmental Representative (ld.DR) relied on the order of the Pr.CIT. Ld DR explained that the AO during the assessment proceedings had not verified the basic facts whether assessee had debited the Sales Tax in the year 1994-95, 1995-96 & 1996-97. The AO had not verified whether assessee had actually collected Sales Tax from customers in these years. These are the crucial facts to determine allowability of the amounts claimed to be paid under Sales Tax Amnesty Scheme. However, in this case, the AO during the year has not verified any of these facts. The ld.DR again took us through the notice under section 142 which is part of the paper book to demonstrate that the AO had asked vague question i.e. “please provide details of statutory payments covered by section 43B”. In reply to this question, the assessee during the assessment proceedings filed copies of the Challan to demonstrate payments made during the year under Sales Tax Amnesty Scheme. However, neither AO asked, assessee nor assessee replied by filing documents to explain whether sales tax was actually collected or not during those respective years i.e.1994-95, 1995-96 & 1996-97.Thus, the basic facts has not been asked by Assessing Officer(AO) during

scrutiny proceedings. Therefore, Id.Pr.CIT was right in invoking provisions of section 263 of the Act.

**Findings & Analysis :**

5. We have heard both the parties and perused the records. The limited question before us is validity of order under section 263 of the Act. The Id.AR pleaded before us that all the details were filed during the assessment proceedings regarding the amounts paid by assessee under Sales Tax Amnesty Scheme. In this case, there is no dispute on the issue that assessee had paid Rs.2,37,40,562/- under Sales Tax Amnesty Scheme for various financial years, as under : -

<b>F.Y.</b>	<b>Amount (in Rs)</b>
1994-95	22,98,840/-
1995-96	1,21,67,001/-
1996-97	77,74,721/-
Paid in advance	15,00,000/-
Total	2,37,40,562/-

5.1 These were Sales Tax Liabilities of 1994-95, 1995-96 & 1996-97, but paid in A.Y. 2017-18 under Sales Tax Amnesty Scheme. In addition to that assessee paid advance Sales Tax of Rs.15,00,000/-. The dispute is whether AO had carried out enquiry to find out whether assessee had disallowed these

amounts in those respective years i.e. 1994-95, 1995-96 & 1996-97 under section 43B as unpaid Sales Tax Liability. It is clear from the record that the AO during assessment proceedings for A.Y. 2017-18 had not verified these facts i.e. whether assessee had disallowed the unpaid sales tax liability for 1994-95, 1995-96 & 1996-97, in those years under section 43B of the Act. As per section 43B unpaid sales tax liability needs to be disallowed and added back. Then only, it will be allowed in the year of actual payment made. The ld.AR submitted before us that assessee had never collected the sale tax from customers in the year 1994-95, 1995-96 & 1996-97 and had never debited sales tax in the year 1994-95, 1995-96 & 1996-97. However, these are mere pleadings of the ld.AR, but no documentary evidence has been filed before us to prove the same. It is also a fact that the AO during the scrutiny proceedings for the A.Y.2017-18 had not verified, whether assessee had debited any sales tax in the year 1994-95, 1995-96 & 1996-97. Therefore, there is no doubt that the AO had failed to carry out proper enquiry related to the issue. The AO has also failed to verify how Advance Sales Tax paid will be allowable!

6. The Explanation 2 to Section 263 was inserted w.e.f. 01/06/2015. The Explanation 2 to Section 263 is reproduced here under :

*"Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer 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 Commissioner or Commissioner,—*

- a) the order is passed without making inquiries or verification which should have been made;*
- b) the order is passed allowing any relief without inquiring into the claim;*
- 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."*

7. Thus, as per Explanation 2 of Section 263 any order which is passed without making inquiries is erroneous and prejudicial to the interest of the revenue. The explanation 2 to section 263 has made it clear that the inquiry or verification which should have been made in the opinion of Commissioner or Id.Pr.CIT. Thus, it is the relative satisfaction of the Id.Pr.CIT on the issue of inquiry or verification which should have been carried out on a particular issue. In this case, as observed by us in earlier para

that specific enquiry has not been carried out by the AO on the impugned issue. Therefore, we are of the opinion that Id.Pr.CIT has rightly invoked provisions of Section 263 of the Act. The Hon'ble Bombay High Court upholding the order u/s.263 in the case of Vedanta Ltd Vs CIT [2021] 279 Taxman 358 (Bombay) has held as under :

*Quote,“ 22. At this stage, it is not possible to accept the contention raised on behalf of the Assessee that several other grounds had, in fact, been urged before the ITAT and that the same were not considered. It is settled position in law that the record before a Court or a Tribunal cannot be challenged in this manner. If the Assessee was indeed serious about this contention, then, a minimum that was expected of the Assessee was to have pointed this out to the ITAT soon after the impugned order was made. It is not uncommon that several grounds are raised in the Appeal Memo, but at the time of arguments, only one or two grounds are actually pressed.*

*23. The CIT, in exercising its revisional jurisdiction, has satisfied the twin requirements as prescribed in Section 263 of the ITAT Act. There was material before the ITAT to at least prima facie infer that there was under-invoicing and that this aspect of under-invoicing was not considered by the AO in making his assessment order. The CIT, in exercising its revisional jurisdiction, has not shut out any of the defences open to the Assessee, but has directed the AO to pass a fresh assessment order after verifying and examining all the relevant facts of the case, legal position and giving adequate opportunity of being heard to the Assessee. 24. In Malabar Industrial Co. Ltd. v. CIT [2000] 109 Taxman 66/243 ITR 86 (SC) the Hon'ble Supreme Court has held that the CIT can pass an order under section 263 of the IT Act even on debatable issues.*

*Similarly, it is clear where the assessment was completed without proper inquiries which circumstances necessitated, it is competent for the CIT to invoke the revisional jurisdiction and direct fresh assessment, after verifying and examining all relevant facts, as well as legal position as may be involved.*

*25. The ruling in Sesa Sterlite Ltd. (supra) relied upon by Mr. Ramani was in the context of challenges to the orders of reopening of the assessment by issuance of notices under section 148 of the IT Act. No doubt, as contended by Mr. Ramani, certain observations in the said Judgment may have some bearing on the assessment and, therefore, it ought to be clarified by us that the Assessee can rely upon the said ruling in case the AO is to be permitted to make a fresh assessment.*

*26. Both, the CIT, as well as the ITAT, have already made clear that adequate opportunity of being heard is required to be extended to the Assessee in the fresh assessment proceedings to be undertaken by the AO. Therefore, no liberty or clarification is necessary. In any case, it is clarified that the Assessee will be entitled to rely upon all legally permissible material, including the decision of this Court in Sesa Sterlite Ltd. (supra) and there is no doubt that the AO, in undertaking the fresh assessment, will take into account all such contentions of the Assessee and make a fresh order in accordance with law, on its own merits. 27. In the aforesaid circumstances, the substantial questions of law are required to be answered against the Assessee and in favour of the Revenue and this appeal is required to be dismissed.” Unquote. (emphasis supplied).*

7.1 The Hon’ble Bombay High Court while upholding the order u/s.263 in the case of PCIT Vs. Zuari Maroc Phosphates Ltd. [2021] 432 ITR 316 (Bombay) held as under :

Quote , “ 27. In several decisions, it has been held that it is incumbent on the AO to investigate the facts stated in the return when the circumstance would make such an inquiry prudent and when the word 'erroneous' in Section 263 includes failure to make an inquiry, the order becomes erroneous when such an inquiry had been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct. *Duggal & Co. v. CIT* [1994] 77 Taxman 331/[1996] 220 ITR 456 (Delhi); *CIT v. Pushpa Devi* [1986] 29 Taxman 377/[1987] 164 ITR 639 (Pat.) and *CIT v. Pushpa Devi* [1988] 40 Taxman 375/173 ITR 445 (Pat.). 28. In *Amitabh Bachchan* case (*supra*), the assessee had initially claimed additional expenses of 30% of the gross professional receipts (Rs. 3.17 Crores). The AO required the assessee to file requisite details. At that stage, the assessee resisted furnishing details by submitting that such details related to his security and any disclosure might be detrimental to his security. Then, by letter dated 13-3-2004, the assessee, asserted that his claim was allowable but since it will not be feasible to substantiate the same, such claim may be treated as withdrawn. Thereafter, a showcase notice was issued to the assessee under section 69C of the said Act as to why these additional expenses claimed not to be treated as an unexplained expenditure. Such withdrawal was accepted by the AO and the proceedings under section 69C were ordered to be closed. The CIT, in such circumstances, exercised revisional jurisdiction under section 263 of the said Act but the High Court, set aside the Commissioner's order on the basis that the view taken by the AO was a possible view and revisional jurisdiction ought not to have been exercised merely because there was another possible view of the matter.

29. The Hon'ble Supreme Court set aside the High Court's order by holding that there was nothing wrong in the exercise of revisional powers particularly because the CIT felt that the matter needed further investigation. Such investigation was necessary because initially, the assessee had himself made such a claim but thereafter sought to withdraw the same without any substantiation. The

*Hon'ble Supreme Court held that making a claim which would prima facie disclose that the expenses in respect of which deduction has been claimed had been incurred and thereafter abandoning/withdrawing the same gives rise to the necessity of further inquiry in the interest of the Revenue. The notice under section 69C of the said Act could not have been simply dropped on the ground that the claim has been withdrawn. The Hon'ble Supreme Court then held that the CIT was perfectly justified in exercising its revisional jurisdiction and such exercise ought not to have been interfered with by the High Court.*

*30. In the present case as well, taking into consideration the reasoning of the CIT, we feel that the ITAT was not justified in interfering with the CIT's order, since, the twin conditions prescribed under section 263 of the said Act were fulfilled. Besides, the CIT, by the impugned order, had quite fairly, granted the assessee an opportunity of being heard whilst directing the AO to verify the claim of the assessee in respect of the allowability of the expenditure and carry forward of the loss of Rs. 1,78,57,950/- in accordance with law. In similar circumstances the Hon'ble Supreme Court, in the case of Daniel Merchants P. Ltd. (supra), upheld that order of the Commissioner which had directed the AO to carry a thorough and detailed inquiry.*

*31. For all the aforesaid reasons we set aside the ITAT's order dated 11-2-2015 and answer the substantial questions of law as framed, in favour of the Revenue and against the assessee.”  
Unquote.*

8. Thus, respectfully following the Hon'ble Bombay High Court (supra), the order u/s.263 is upheld as the Assessing Officer failed to carry out necessary inquiries and hence the Assessment order was erroneous and prejudicial to the interest of

Revenue. Accordingly, the order under section 263 is upheld. Accordingly, **Ground No.1, 2, 3, 4, 5, 6, 7, 9 & 10 are dismissed for the elaborate reasons discussed above.**

**Ground No.8 :**

9. Assessee has claimed that ld.CIT(A) made an erroneous observation that payments made under Sales Tax Amnesty Scheme are not allowable under section 37 of the Act.The ld.Pr.CIT vide para 7 of the order has merely directed the AO to make proper enquiries on the impugned issue and decide the case afresh after giving opportunity to the assessee. Therefore, in this context, the Ground No.8 is academic in nature, hence, we do not intend to adjudicate. Accordingly, Ground No.8 is dismissed as not adjudicated.

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

Order pronounced in the open Court on 28<sup>th</sup> June, 2023.

Sd/-  
(S.S.GODARA)  
JUDICIAL MEMBER

Sd/-  
(DR. DIPAK P. RIPOTE)  
ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 28<sup>th</sup> June, 2023/ SGR\*

**आदेशकीप्रतिलिपिअग्रेषित / Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A), concerned.
4. The Pr. CIT, concerned.
5. विभागीयप्रतिनिधि, आयकर अपीलीय अधिकरण, “बी” बेंच,  
पुणे / DR, ITAT, “B” Bench, Pune.
6. गार्डफ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// TRUE COPY //

Senior Private Secretary  
आयकर अपीलीय अधिकरण, पुणे/ITAT, Pune.