

आयकर अपीलीय अधिकरण 'ए' न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI

माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य एवं
माननीय श्री मनु कुमार गिरि, न्यायिक सदस्य के समक्ष।
BEFORE HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM
AND HON'BLE SHRI MANU KUMAR GIRI, JM

आयकरअपील सं./ ITA No.1319/Chny/2023
(निर्धारणवर्ष / Assessment Year: 2018-2019)

Keller (M) SDN BHD,
7th floor, Centennial Square,
No.6A, Dr. Ambedkar Road,
Kodambakkam,
Chennai 600 024.

Vs. The Deputy Commissioner of
Income Tax,
International Taxation 1(2)
Chennai.

[PAN: AAGCK 8014M]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by

: Shri. Ashik Shah, C.A.

प्रत्यर्थी की ओर से /Respondent by

: Shri. Nilay Baran Som, IRS, CIT.

सुनवाई की तारीख/Date of Hearing

: 19.06.2024

घोषणा की तारीख /Date of Pronouncement

: 28.08.2024

आदेश / ORDER

PER MANU KUMAR GIRI (Judicial Member)

This appeal by the assessee is arising out of the order No.ITBA/COM/F/17/2023-24/1056378513(1),dated 21.09.2023 of the Commissioner of Income Tax (IT), Chennai (in short the 'Id. CIT'). The assessment was framed by the DCIT, International Taxation 1(2) Chennai for the assessment year 2018-19 u/s.147 of the Income Tax Act, 1961 (hereinafter the 'Act'), vide order dated 23.03.2023.

2. The assessee has raised following grounds of appeal:-

"1. General Grounds

1.1. The Ld. Commissioner of Income Tax ("Ld. CIT") has erred in passing an order of revision under section 263 of the Income Tax Act, 1961 ("the Act") which suffers from legal defects such as being passed in violation of principles of natural justice and the provisions of the Act and is devoid of merits and are contrary to facts on record and applicable law and has been completed without adequate inquiries and as such is liable to be quashed.

1.2. The Ld. CIT has finalized the Impugned Order with improper conclusions as a result of misapplying the provisions of the Act and by adopting faulty assessment procedure to finalize the adjustment, without considering the information, arguments and evidence provided by the Appellant.

2. Grounds on validity of revisionary proceedings under section 263 of the Act

2.1. The impugned order passed by the Ld. CIT is without jurisdiction as the twin conditions prescribed under section 263 of the Act, ie. the order of the Ld. AO shall be 'erroneous' and 'prejudicial to the interests of the revenue', are not satisfied.

2.2. The Id. CIT erred in concluding that the reassessment order passed under section 143(3) read with section 147 for the impugned AY is erroneous and prejudicial to the interests of the revenue, without appreciating the material on record and submissions made by the Appellant.

2.3. The Ld. CIT erred in passing the Impugned Order, on the allegation that the Ld. AO had not examined/made inadequate inquiries with respect to provision for subcontracting expenses during the assessment proceedings, without appreciating that the Ld. AO had duly conducted enquiries and verification on subcontracting expenses and had also issued a notice under section 133(6) of the Act on Keller Ground Engineering India Private Limited ("Keller India").

2.4. The Id. CIT erred in passing the Impugned Order, on the allegation that the Ld. AO had not examined the refund claim of the Appellant along with interest, without appreciating that the Ld. AO had duly conducted enquiries and verification on interest claimed along with refund during the proceedings under section 154 of the Act.

3- Disallowance of provision for subcontracting expenses

3.1 The Ld. CIT has, in the facts and circumstances of the case and in law, erred by disregarding the fact that the Appellant had created a provision for warranty based on unbilled revenue recorded by Keller India in percentage of completion method and therefore, the provision created shall be regarded as scientific.

3.2 The Ld. CIT has, in the facts and circumstances of the case and in law, erred by misinterpreting the accounting treatment followed by the Appellant and Keller India and therefore, erroneously commented that the unbilled revenue was not offered to tax by Keller India.

4. Denial of refund claim due to the Appellant

4.1 The Ld. CIT has in the facts and circumstances of the case and in law, erred in directing the Ld. AO to reject the refund determined in the order of the Ld. AO, merely because the Appellant had failed to furnish a return under section 139 of the Act without acknowledging the fact that refund due is a debt owed and payable by the revenue.

4.2 The Ld. CIT has in the facts and circumstances of the case and in law erred in stating that since the Assessee had not furnished a return of income under section 139 of the Act, it would not be eligible for a refund as per the provisions of section 239 of the Act without appreciating the fact that the provisions of section 239 as relied by the Ld. CIT were introduced via Finance Act 2019 with effect from September 01, 2019 only and that the impugned AY i.e. AY 2018-19 would fall outside the preview of the amendment made in Finance Act 2019.

The grounds of appeal raised by the Appellant herein are without prejudice to each other. The Appellant craves leave to add to and/or to alter, amend, rescind, modify the grounds herein above or produce further documents before or at the time of hearing of this Appeal”.

3. Brief facts of the case are as under:-

“Keller (M) SDN BHD ("Keller Malaysia" or "the Company" or "the Appellant"), is company incorporated under the laws of Malaysia and had established a branch office in India on September 21, 2017, for the purpose of carrying out a construction project awarded by Rail Vikas Nigam Ltd.

Owing to the project, the Appellant was cast with a liability under section 139(1) of the Act to furnish its return of income for the subject AY. However, the Appellant was under a bona fide belief that it did not have any obligation to furnish its return of income in India since appropriate withholding of taxes had been deducted.

On being aware that the bona fide belief was incorrect in law and that the Appellant had an obligation to furnish a return of income under the Act, the time limit for furnishing the return of income for the subject AY had expired (i.e., last date to furnish belated return for the impugned AY was March 31, 2019). Given the same, the Appellant had filed an application dated January 18, 2021, before the Hon'ble Board under section 119 of the Act for condonation of delay.

During the pendency of disposal of the condonation application by the Hon'ble Board, the Appellant was served a notice under section 148 of the Act on March 31, 2022. In response to the notice Appellant filed a return of income

on April 28, 2022. Thereafter, the Ld. AO proceeded with the reassessment proceedings. On conclusion of re-assessment proceedings, a reassessment order was passed by the Ld. AO under section 143(3) read with section 147 on March 23, 2023, accepting the returned income under section 148 of the Act. Further, the refund as returned in the return filed under section 148 of the Act ("148 return"), along with applicable interest was determined as due in the said assessment order.

Thereafter, the Ld. AO has proposed to rectify the above order vide notice dated July 26, 2023. The rectification was proposed on the ground that the Appellant was not eligible to interest under section 244A of the Act. The Appellant had responded to the said notice on August 02, 2023, rejecting such a proposal and stating that grant of interest under section 244A of the Act is mandatory. However, the Ld. AO proceeded to pass a rectified order under section 154 of the Act on August 08, 2023 denying the Appellant of interest under section 244A of the Act.

Thereafter, the Ld. Commissioner of Income Tax, ("the Ld. CIT") issued a show cause notice ("SCN") under section 263 of the Act dated August 08, 2023, proposing to revise the order passed by the Ld. AO under section 143(3) read with section 147 of the Act. In the SCN, the Ld. CIT stated that the Ld. AO had not examined/made enquiries with respecting to (i) provision for eligibility of Appellant to claim refund".

4. The Id. Authorised Representative of the assessee filed a chart showing sequence of events which are reproduced hereunder:-

Sl.no	Date	Event	Remarks
I. Condonation of delay proceedings before CBDT			
1	18- Jan 21	Appellant filed petition for condonation of delay in filing return of income with CBDT	
2	05- Jul 23	CBDT notice to the Appellant	
3	03-Aug 23	Appellant's response to above CBDT notice	In the appellant's response it was clarified that 148 return be considered as the return for the purpose of condonation of delay
II Reassessment proceedings under Section 148 of the Act			
4	31-Mar 23	Notice under section 148 of the Act	
5	28-Apr 23	Income tax return filed in response to notice under section 148	

6	09- June 22 to 18 Oct 22	(a) Notice under section 142(1) of the Act dated 09-Jun-22 and 07-Oct-22 were issued against which Appellant filed response dated 20-Jun-22 and 18-Oct-22 respectively b) Notice under section 143(2) dated 03-Oct-22 against which assessee had filed response dated 07-Oct-22.	Query was issued on sub-contracting expense
7	18- Mar 23	Show cause notice ("SCN) issued by AO	
8	21 Mar 23	Response to SCN	
9	10 Mar23	Notice under section 133(6) of the Act issued on Keller Ground Engineering India Private Limited ("Keller India")	Query was raised as to whether Keller India offered the unbilled revenue to tax
10	20 Mar23	Response filed by Keller India against notice under section 133(6) of the Act	
11	23 Mar23	Order under section 147 of the Act	Issue of sub-contracting expense was examined and AO passed a clean order under section 147 of the Act after taking consideration response filed under section 133(6) by Keller India
III. Rectification proceedings under section 154 of the Act			
12	26-Jul-23	Notice for rectification proceedings under section 154 read with section 147 of the Act	Claim of refund was examined
13	02-Aug-23	Response to notice for rectification under section 154	
14	08-Aug-23	Rectification order under section 154 of the Act	AO vide order under section 154 denied interest under section 244A of the Act
IV. Revisionary proceedings under section 263 of the Act			
15	18-Aug-23	SCN under section 263 of the Act	SCN was issued on two issues provision for sub-contracting expense and refund claim

16	31-Aug-23	Response to SCN under section 263 of the Act	
17	21-Sep-23	Order under section 263 of the Act holding Asst order u/s.147 dated 23.03.2023 as erroneous in so far as it is prejudicial to the interest of Revenue	

5. The Id. Authorised Representative referred the order of assessment passed u/s.147 of the Act dated 23.03.2023 and relevant portion is reproduced as under:-

"3. A notice u/s 143 (2) of the IT Act, 1961 dated 30.09.2022 was issued and duly served on the assessee. A notice u/s. 142(1) of the IT Act, 1961 dated 30.09.2022 calling for certain details was issued to the assessee. The assessee replied on 19.10.2022 and submitted as under

".....the Company entered into a contract with Rail Vikas Nigam Limited for the purpose of carrying out a construction project. The said contract was subcontracted to M/s. Keller Ground Engineering India Private Limited and incurred sub-contracting expenses of INR 44,85,06,248/-

4. To verify the claim of the assessee, a notice u/s 133(6) dated 10.03.2023 was issued to the Indian entity M/s. Keller Ground Engineering India Private Limited, requiring to state whether the amount of Rs.44,85,06,248/- received by it had been admitted as income and offered to tax. In response, the Indian company filed the details on 15.03.2023.

5. After duly considering all the materials available on record and details filed by the assessee and the Indian entity, the assessment u/s. 143(3) r.w.s 147 of the IT Act, 1961 is completed as under:

Returned Income: Rs.44,86,960/-

Assessed Income: Rs.44,86,960/-

Income Tax computation sheet and demand notice enclosed".

The Id. AR further referred the paper book consisting of pages (1-375). The Id. AR specifically pointed out page 232 and page 256 at point 3 which speaks of other expenses (sub contract expenses). The Id. AR contended that in reassessment proceeding, the assessee pursuant to notice u/s.133 (6) of the Act has filed reply dated 20.03.2023 and explained the queries raised by the

Id. AO. The Id. AR taken us to the paper book and referred documents relied upon in connection with reassessment proceedings which are as under:-

Sl.no	Particulars	Page No.
	I. Documents relied upon in connection with delay condonation proceedings before the Central Board of Direct Taxes ("CBDT")	
1	Application dated January 18, 2021, for condonation of delay filed before the CBDT	1
	1.1. Form 26AS of the Appellant for AY 2018-19	5
	1.2. Form 26AS of the Appellant for AY 2019-20	9
	1.3. Tax Audit Report in Form 3CA and 3CD of the Appellant for AY 2018-19	13
	1.4. Tax Audit Report in Form 3CA and 3CD of the Appellant for AY 2019-20	25
	1.5. Return of income ("ROI") of the Appellant for AY 2019-20	37
2	Submission dated July 2018, 2023, filed before CBDT in response to letter issued by CBDT dated July 05, 2023	123
	2.1. Letter issued by CBDT dated July 05, 2023	126
	II. Documents relied upon in connection with reassessment proceedings	
3	Notice under section 148 of the Act dated March 31, 2022, issued by the Ld. AO	132
4	ROI filed on April 28, 2022, in response to notice under section 148 of the Act	133
5	Submission dated June 20, 2022, filed with the Ld. AO in response to the notice under section 142(1) of the Act dated June 09, 2022	206
	5.1. Notice under section 142(1) of the Act dated June 09, 2022, issued by the Id. AO	208
6	Submission dated October 07, 2022, in response to notice under section 143(2) read with 147 of the Act	210
	6.1. Notice under section 143(2) read with 147 of the dated October 03, 2022 issued by Ld. AO	213

7	Submission dated October 18, 2022, filed with the Ld. AO in response to the notice dated October 07, 2022	217
	7.1. Notice under section 142(1) of the Act dated October 07, 2022, issued by the Ld. AO	221
	7.2. Statement of computation of income of the Appellant for AY 2018-19	225
	7.3. Financial statements of the Appellant for FY 2017-18	230
8	Submission dated March 21, 2023, filed with the AO in response to the show cause notice ("SCN") dated March 18, 2023 issued by the Ld. AO	233
	8.1 SCN dated March 18, 2023, issued by the Id. AO	238
	8.2 Letter of award issued by Rail Vikas Nigam Ltd. ("RVNL") to the Appellant	239
	Letter of award issued by the Appellant to Keller Ground Engineering India Private Vaunted ("Keller India")	244
	8.4. Invoice raised by the Appellant on RVNL	245
	III. Documents relied upon in connection with proceedings under section 133(6) in the case of Keller India	
9	Submission dated March 20, 2023, filed with the Ld. AO, by Keller India, in response to the notice under section 133(6) dated March 10, 2023	253
	9.1. Notice under section 133(6) dated March 10, 2023, issued on Keller Ground Engineering India Private Limited ("Keller India")	258
	9.2. Extract of the ledger of the Appellant maintained by Keller India in its books for FY 2017- 18	260
	9.3. ROI of Keller India for AY 2018-19 along with statement of computation of Total Income	262
	IV. Documents relied upon in connection with rectification proceedings	
10	Submission dated August 02, 2023, filed with the Ld. AO in response to the notice issued under section 154 of the Act	340
	10.1. Notice under section 154 of the Act dated July 26, 2023, issued by the Ld. AO	345

	10.2. Circular No. 9 of 2015 issued by the CBDT	347
11	Order under section 154 of the Act dated August 08, 2023 issued by the Ld. AO, received vide mail dated August 24, 2023	349
	V. Documents relied upon in connection with proceedings under section 263 of the Act	
12	Submission dated August 31, 2023, filed with the Ld. Commissioner of Income Tax ("Ld. CIT"), in response to the SCN dated August 18, 2023	361
	12.1. SCN under Section 263 of the Act dated August 18, 2023, issued by the Ld. CIT	372
	12.2. Financial statements of Keller India for FY 2017-18	375

The Id. AR referred show cause notice dated 18.03.2023 (Pg 238 of PB) and specific reply dated 21.03.2023 (233 to 237 of PB) by assessee with regard to the sub contract expenses claimed to the tune of Rs.44.85 crores. The Id. AR further taken us to the reply dated 31.08.2023 filed with the Id. CIT in response to show cause notice dated 18.08.2023, the same has been reproduced verbatim by the Id. CIT in his order from pages 4 to 14. Hence, we are reframing reproducing again herein and may be read as part and parcel of this order as arguments of the assessee.

6. The Id. AR relied upon the following cases and contended that the impugned order of Id. CIT is liable to be set aside. The referred cases are reproduced in chart as under:-

A. Revision under Section 263 of the Act:-

Sl.No	Name of the case	Forum	Citation	Page No.
1	Max India Ltd.	Supreme Court	295 ITR 282	3

2	Max India Ltd.	HC-P&H	268 ITR 128	5
3	Malabar Industries Co. Ltd.	Supreme Court	243 ITR 83	7
4	Virtusa Consulting Services (P.) Ltd.	HC-Madras	442 ITR 385	12
5	Sunbeam Auto Ltd.	HC-Delhi	332 ITR 167	22
6	Spectra Shares & Scrips (P.) Ltd.	HC-Andhra Pradesh	354 ITR 35	33
7	Saravana Developers	HC-Karnataka	387 ITR 239	57
8	Chemsworth (P.) Ltd.	HC-Karnataka	119 taxmann.com 358	65
9	Hari Iron Trading Co	HC-Punjab & Haryana	263 ITR 437	69
10	Shriram Properties Limited	ITAT-Chennai	2023 (4) TMI 375	76
11	Cavinkare (P.) Ltd.	ITAT-Chennai	149 taxmann.com 296	97
12	Rajkumar Impex Pvt. Ltd.	ITAT-Chennai	2023 (6) TMI 812	108
13	FCA Engineering India Pvt. Ltd.	ITAT-Chennai	ITA No. 684/CHNY/2023	117

B. Refund cannot be denied merely on account of non-furnishing of the return

Sl.No	Name of the case	Forum	Citation	Page No.
14	Tata Chemicals Ltd.	Supreme Court	363 ITR 658	126
15	R. Seshammal	HC-Madras	237 ITR 185	136
16	Vali Brothers	HC- Allahad	282 ITR 149	138
17	A. Balakrishnan	HC-Karnataka	290 ITR 227	141
18	Daljit Singh Pyare Lal & Co.	HC-P & H	269 ITR 19	146
19	Karnataka State Co-operative Apex Bank Ltd.	HC-Karnataka	130 taxmann.com 114	149
20	C. Kishan Rao & Co.	ITAT Hyderabad	3 ITD 474	155

The Id.Counsel further submitted that the issue which is sought to be revised is already investigated and enquired by the Id.AO in earlier reassessment proceedings. He furthermore, argued that on same material Id. CIT has taken a different view than AO. In fact, the Id.AO on same material available before him already duly inquired and judicially had taken a cogent view in reassessment proceedings. For refund issue, Id. AR referred two cases as *Cargo Service India (P.) Ltd Vs DCIT [(2021) 132 taxmann.com 237 (Mumbai-Trib)]* & *Trinity Charitable Trust Vs ITO [(2014) 51 taxmann.com 44 (Cochin-Trib.)]*.

7. Per contra, the Id. CIT- DR relied upon the order of CIT and contended that in reassessment proceedings enquiry was not done properly. He further contended that prejudice is done while granting refund to assessee.

8. We have heard the rival submissions and gone through the record, paper books and impugned order. We may refer recent judgment of the Hon'ble Delhi High Court dated 01.03.2024 passed in *ITA No.1428/2018 in the case of Pr. Commissioner of Income Tax -2, Delhi Vs M/s Clix Finance India Pvt. Ltd.* which after considering section 263 of the Act and various settled judgments of the Hon'ble Supreme Court and Hon'ble High Courts held as under:

"15. We have heard the learned counsel appearing on behalf of the parties and perused the record.

*16. Vide order dated 06.11.2019, this Court framed the following question of law:-
A. Whether, in the facts and circumstances of the case, the Hon'ble ITAT was justified in quashing the order under Section 263 of the Income Tax Act?*

17. The brief controversy involved in the present appeal pertains to the invocation of revisional jurisdiction under Section 263 of the Act by the CIT to set aside the original assessment order dated 30.03.2005.

18. Before advertng to the merits of the case, it is apposite to refer to the power of the revisional authority of the CIT envisaged as per Section 263 of the Act. For the sake of clarity, the relevant extract of Section 263 of the Act is reproduced as under: "263. Revision of orders prejudicial to revenue (1) The [Principal Chief Commissioner or Chief Commissioner or Principal Commissioner] or Commissioner] may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer [or the Transfer Pricing Officer, as the case may be,] is erroneous in so far as it is prejudicial to the interest of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify,' [including,' (i) an order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment; or (ii) an order modifying the order under Section 92-CA; or (iii) an order cancelling the order under Section 92-CA and directing a fresh order under the said section.] *** [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 [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; (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.] ***'

19. A bare reading of sub-Section (1) of Section 263 of the Act makes it abundantly clear that the said provision lays down a two-pronged test to exercise the revisional authority i.e., firstly, the assessment order must be erroneous and secondly, it must be prejudicial to the interests of the Revenue. Further, Explanation 2 to Section 263 of the Act delineates certain conditions and circumstances when the order passed by the AO can be said to be erroneous and prejudicial to the Revenue.

20. Clause (a) of Explanation 2 to Section 263 of the Act further stipulates that if an order is passed without making an enquiry or verification which should have been made, the same would bestow a revisional power upon the Commissioner. However, the said Clause or any other condition laid down in Explanation 2 does not warrant recording of the said enquiry or verification in its entirety in the assessment order.

21. Admittedly, in the instant case, the questionnaire dated 02.11.2004, which has been annexed and brought on record in the present appeal, would manifest that the AO had asked for the allowability of the claims with respect to the issues in question. Consequently, the respondent-assessee duly furnished explanations thereof vide replies dated 09.12.2004, 20.12.2004 and 06.01.2005. Thus, it is not a case where

no enquiry whatsoever has been conducted by the AO with respect to the claims under consideration. However, this leads us to an ancillary question? whether the mandate of law for invoking the powers under Section 263 of the Act includes the cases where either an adequate enquiry has not been made and the same has not been recorded in the order of assessment or the said authority is circumscribed to only consider the cases where no enquiry has been conducted at all.

22. Reliance can be placed on the decision of this Court in the case of CIT v. Sunbeam Auto Ltd. [2009 SCC OnLine Del 4237], wherein, it was held that if the AO has not provided detailed reasons with respect to each and every item of deduction etc. in the assessment order, that by itself would not reflect a non-application of mind by the AO. It was further held that merely inadequacy of enquiry would not confer the power of revision under Section 263 of the Act on the Commissioner. The relevant paragraph of the said decision reads as under:-

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 Commissioner of Income-tax under section 263 of the Income-tax Act. As noted above, the submission of learned counsel for the Revenue was that while passing the assessment order, the Assessing Officer 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 Assessing Officer had not applied his mind on the issue. There are judgments galore laying down the principle that the Assessing Officer in the assessment 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 Commissioner to pass orders under section 263 of the Act, merely because he has a different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open. In *Gabriel India Ltd. (1993) 203 ITR 108 (Bom)*, law on this aspect was discussed in the following manner (page 113) **

23. A similar view was taken by this Court in the case of CIT v. Anil Kumar Sharma [2010 SCC OnLine Del 838], wherein, it was held that once it is inferred from the record of assessment that AO has applied its mind, the proceedings under Section 263 of the Act would fall in the category of Commissioner having a different opinion. Paragraph 8 of the said decision reads as under:-

8. In view of the above discussion, it is apparent that the Tribunal arrived at a conclusive finding that, though the assessment order does not patently indicate that the issue in question had been considered by

the Assessing Officer, the record showed that the Assessing Officer had applied his mind. Once such application of mind is discernible from the record, the proceedings under section 263 would fall into the area of the Commissioner having a different opinion. We are of the view that the findings of facts arrived at by the Tribunal do not warrant interference of this court. That being the position, the present case would not be one of "lack of inquiry" and, even if the inquiry was termed inadequate, following the decision in *Sunbeam Auto Ltd.* (2011) 332 ITR 167 (Delhi) (page 180) : "that would not by itself give occasion to the Commissioner to pass orders under section 263 of the Act, merely because he has a different opinion in the matter." No substantial question of law arises for our consideration.

24. In Ashish Rajpal as well, this Court was of the view that the fact that a query was raised during the course of scrutiny which was satisfactorily answered by the assessee but did not get reflected in the assessment order, would not by itself lead to a conclusion that there was no enquiry with respect to transactions carried out by the assessee.

25. Further, the decision of the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd., enunciates the meaning and intent of the phrase 'prejudicial to the interests of the Revenue', in the following words:- '8. The phrase 'prejudicial to the interests of the Revenue' is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not confined to loss of tax. The High Court of Calcutta in 'Dawjee Dadabhoy & Co.v.S.P. Jain[(1957) 31 ITR 872(Cal)], the High Court of Karnataka in CITv.T. Narayana Pai[(1975) 98 ITR 422(Kant)], the High Court of Bombay in CITv.Gabriel India Ltd.[(1993) 203 ITR 108(Bom)] and the High Court of Gujarat in CITv.Minalben S. Parikh[(1995) 215 ITR 81(Guj)] treated loss of tax as prejudicial to the interests of the Revenue. 9. Mr. Abraham relied on the judgment of the Division Bench of the High Court of Madras in Venkatakrisna Rice Co.v.CIT[(1987) 163 ITR 129(Mad)] interpreting 'prejudicial to the interests of the Revenue'. The High Court held: '

"In this context, (it must) be regarded as involving a conception of acts or orders which are subversive of the administration of revenue. There must be some grievous error in the order passed by the Income Tax Officer, which might set a bad trend or pattern for similar assessments, which on a broad reckoning, the Commissioner might think to be prejudicial to the interests of Revenue Administration".

In our view this interpretation is too narrow to merit acceptance. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. If due to an erroneous order of the Income Tax Officer, the Revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the Revenue. 10. The phrase "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the

Revenue, for example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the Income Tax Officer is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the Revenue. (See 'Rampyari Devi Saraogiv CIT[(1968) 67 ITR 84(SC)] and in "Tara Devi Aggarwalv.CIT[(1973) 3 SCC 482:1973 SCC (Tax) 318:(1973) 88 ITR 323].) [Emphasis supplied]

26. Recently, the Hon'ble Supreme Court in the case of CIT v. Paville Projects (P) Ltd. [2023 SCC OnLine SC 371], while relying upon Malabar Industrial Co. Ltd., has discussed the sanctity of two-fold conditions for the purpose of invoking jurisdiction under Section 263 of the Act. The relevant paragraph of the said decision reads as under:-

Learned counsel appearing on behalf of the assessee has heavily relied upon the decision of this Court in the case of Malabar Industrial Co. Ltd.(supra). It is true that in the said decision and on interpretation of Section 263of the Income Tax Act, it is observed and held that in order to exercise the jurisdiction under Section 263(1)of theIncome tax Act, 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. It is further observed that if one of them is absent, recourse cannot be had to Section 263(1) of the Act. ***'.

27. Considering the aforesaid judicial pronouncements, it can be safely concluded that inadequacy of enquiry by the AO with respect to certain claims would not in itself be a reason to invoke the powers enshrined in Section 263 of the Act. The Revenue in the instant case has not been able to make out a sufficient case that the CIT has exercised the power in accordance with law. Rather, in our considered opinion, the facts of the case do not indicate that the twin conditions contained in Section 263 of the Act are fulfilled in its letter and spirit.

28. Notably, the ITAT, while making a categorical finding that the CIT had failed to point out any definite or specific error in the assessment order, has satisfactorily explained both the claims in question in Paragraph 8.2 of its order, which reads as under:-

"8.2 In the Impugned Order, the Ld. Commissioner of Income Tax-IV, Delhi held that the AO had not examined the aforesaid two issues properly and, therefore, set aside the issues for further inquiries to be conducted by the AO. As regards the first issue is concerned, we note that out of total provision of Rs. 1114.68 lacs, a sum of Rs. 7,60,76,105/- was suo moto added back in the computation of income and a further sum of Rs. 73,46,160- was disallowed by the AO in the original assessment order dated 30.3.2005. Therefore, out of Rs. 1114.68 lacs, Rs. 834.22 lacs already stood disallowed in the original assessment order. The balance amount represented actual write off

which was palpably clear from page 2 of the impugned order itself. No deduction on account of any such provision was, therefore, allowed to the assessee. Hence, there is no error or prejudice to the interest of revenue. As regards second issue it was noted that interest rate swap was an actual loss and only the net loss of Rs. 114.05 lacs after setting of gain of interest rate swap was claimed as deduction. However, we find that both these issues were duly examined by the AO vide Questionnaire dated 2.11.2004 (Page 1-2 of the Paper Book) to which replies dated 9.12.2004, 20.12.2004 and 6.1.2005 (Page No. 3-39 of Paper Book-1) were furnished and, therefore, the finding of the Ld. CIT that the issues were not examined properly was not correct. Even the Ld. CIT has not pointed out the definite and specific error in the original assessment order and observed that the inquiry made by the AO was inadequate or improper without first pointing out the error in the original assessment order passed by the AO, particularly because both the aforesaid issues were duly examined at the stage of the original assessment proceedings, hence, the impugned order is beyond jurisdiction, bad in law and void-ab-initio”.

29. It is discernible from the aforesaid findings of the ITAT that both the claims were duly examined during the original assessment proceedings itself and neither there was any error nor the same was prejudicial to the interests of the Revenue. Thus, the findings of fact arrived at by the ITAT do not warrant any interference of this Court.

30. So far as the reliance placed by the CIT on Umashankar Rice Mill is concerned, the same is misplaced, particularly in light of the insertion of Explanation 2 to Section 263 of the Act, brought in place by the Finance Act, 2015. The said amendment markedly specifies various conditions to exercise the authority vested in the Commissioner under Section 263 of the Act, leaving no ambiguity in the interpretation of the said provision.

31. In view of the aforesaid, the appeal preferred by the Revenue is dismissed alongwith the pending application(s), if any”.

9. Hence in the light of above judgment and cases cited at bar, we are of the considered view that the impugned order is liable to be set aside for the following reasons:-

- (i) The Id. CIT took into consideration the same set of material which was duly addressed by the AO in reassessment proceedings;
- (ii) The Id. CIT cannot sit in appeal on the reassessment order 23.03.2023

reversing findings of the AO and impose his own view of decision making process on same material;

- (iii) There is legal presumption as per Section 114(f) of the Evidence Act that AO passed the reassessment order properly to the best of his ability. Section 114(f) of the evidence Act says: 'The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case'.
- (iv) The issue of sub-contract expenses admittedly was duly deliberated upon by the AO in Section 147 proceedings after the questionnaire dated 18.03.2023 (Pg 238 of PB) ; The Id.CIT wrong in saying that AO has not done proper enquiry. As discussed supra and as seen from the paper books filed it is clearly discernible that AO has done properly each and every inquiry pertaining to sub-contract etc.;
- (v) The issue of refund was consequential to reassessment order dated 23.03.2023 and there is no specific order by the AO, hence, Id. CIT cannot invoke jurisdiction u/s.263 of the Act; Hence, we hold that the order passed by Id.AO u/s.147 dated 23.03.2023 is not erroneous in so far as it is prejudicial to the interest of the revenue;
- (vi) Since assessee has not challenged order u/s.154 of the Act dated 8th August, 2023, hence not entitled to agitate in this proceedings. Tribunal

order in the cases of Trinity Charitable Trust vs. ITO, Ward 1, Thiruvalla, (2014) 51 taxmann.com 44 (Cochin-Trib) and Cargo Service Centre India (P) Ltd vs. DCIT, Circle 9(2)(1) Mumbai, (2021) 132 taxmann.com 237 (Mumbai –Trib) are de hors the facts of the present case hence not applicable.

Case law cited by the Id. CIT-DR in the case of *DCIT vs. Vasco Sales and Marketing Corporation (W.A.No.1152 of 2013 in WP (c) 24109/2005, dated 01.03.2013* is on different footing than present case, hence ratio of the said decision is not applicable. In the light of entire conspectus of matter, we are inclined to interfere in the impugned order of Id. CIT dated 21.09.2023. Hence, we accordingly set aside the impugned order.

9. In the result, the appeal of the assessee stands allowed.

Order pronounced in the court on 28th day of August, 2024 at Chennai.

Sd/-

(मनोज कुमार अग्रवाल)

(MANOJ KUMAR AGGARWAL)

लेखा सदस्य / ACCOUNTANT MEMBER

चेन्नई Chennai:

दिनांक Dated :28-08-2024

KV

आदेश की प्रतिलिपि अग्रेषित /Copy to :

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त/CIT, Chennai/Coimbatore/Madurai/Salem.
4. विभागीय प्रतिनिधि/DR
5. गार्डफाईल/GF

Sd/-

(मनु कुमार गिरि)

(MANU KUMAR GIRI)

न्यायिक सदस्य / JUDICIAL MEMBER