

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH “E”, MUMBAI
BEFORE SHRI NARENDER KUMAR CHAUDHRY, JUDICIAL MEMBER
AND
SHRI RATNESH NANDAN SAHAY, ACCOUNTANT MEMBER
ITA No.1962/M/2024
Assessment Year: 2018-19**

Kohinoor CTNL Infrastructure Co. Pvt. Ltd. F P No.46, TPS LILL, opp. Sena Bhavan, N C Kelkar Road, Shivaji Park, Dadar (West)- 400028. PAN: AACCK6660P	Vs..	DY Commissioner of Income Tax 6(1)(2) Aaykar Bhavan, Maharshi Karve Road, Mumbai- 400028.
(Appellant)		(Respondent)

Present for :

Assessee by : Shri Jayesh Dadia, A.R.

Revenue by : Shri Biswanath Das- CIT D.R.

Date of Hearing : 06 . 08 . 2024

Date of Pronouncement : 23 . 10 . 2024

ORDER

Per: Ratnesh Nandan Sahay, Accountant Member:

1. This appeal has been filed by the appellant against the Order of the Ld. CIT (Appeals) passed u/s. 250 of the Income Tax Act [the ‘Act’ in short] vide DIN & Order No. ITBA/REV/F/REV5/2023-24/1062397084(1) Dated 11/03/2024 for the Assessment Year 2018-19.

2. Following grounds of appeal have been raised by the appellant:
 1. *“The Ld. Pr Commissioner of Income Tax has erred in law and on the facts of the case in invoking Provision of Section 263 of the Income Tax Act by holding the order of the Assessing Officer as erroneous. The action is unjustified and bad in law.*
 2. *The Ld. Pr Commissioner of Income Tax has erred in law and on the facts of the case in setting-aside the issue relating to allowability of expenses to the Assessing Officer. The action is unjustified and unwarranted as complete details were filed before the Assessing Officer.*
 3. *The Ld. Pr Commissioner of Income Tax has erred in law and on the facts of the case in holding that Assessing Officer has not applied his mind and the order passed is erroneous. The action is unjustified and unwarranted.*
 4. *Your Petitioners carve leave to add, amend, alter and/or withdraw all or any of aforesaid grounds of appeal.”*
3. The facts of the case, in brief, are that the return of income for assessment year 2018-19 was e-filed on 31/10/2018, declaring a total loss of Rs.112,39,40,227/- Intimation u/s. 143(1) of the Act dated 27/12/2018 was issued and loss was calculated at Rs.17,83,68,872/-. The case was, thereafter, selected under CASS and scrutiny assessment order u/s.143(3) of the Act dated 16/04/2021 was passed determining the loss to be carried forward at Rs.112,39,40,227/-.
4. Subsequently, the Ld. PCIT, Mumbai-6 examined the assessment records of the assessee company for the assessment year under consideration and it was found by him from the profit and loss account, computation of

income and tax audit report that the assessee company has debited a sum of Rs.44,08,01,407/- and Rs.13,20,13,322/- under the head “Finance Cost” & “Civil Work” respectively out of which a sum of Rs.24,73,07,991/- was considered as Work-in-Progress (WIP) and the remaining amount of Rs.32,55,06,738/- was allowed as revenue expenditure. It was further, found from the records that the assessee had not offered any sales receipts during the year under consideration when the project was yet to be completed. In view of this, the entire amount of expenses debited under the head “Finance Cost” & “Civil Work” was required to be shown as WIP and should be disallowed. Failure to do so has resulted in excess allowance of Rs.32,55,06,738/- and under assessment of income to that extent.

5. The PCIT, therefore, issued show cause notice u/s. 263 dated 08/02/2024 and 26/02/2024 asking the assessee to justify its claim. In response to the above notice, though, the assessee furnished detailed submissions before the PCIT, however, he was not convinced with the explanations offered by the assessee and accordingly, held that the assessment order passed u/s. 143(3) of the Act on 16/04/2021 is erroneous in so far as it is prejudicial to the interest of revenue and set aside the assessment order to the file of Ld. AO to examine the issue afresh by making necessary

verifications and enquiries after affording adequate opportunity of being heard to the assessee.

6. While passing order u/s. 263 of the Act dated 11/03/2024, the PCIT has stated in its order that it is clear from the assessment record that the issues have not been properly examined and verified by the AO during the course of assessment proceedings and has not applied his mind before completing the assessment. This renders the assessment order dated 16/04/2021 passed u/s. 143(3) of the Act for the assessment year 2018-19 as erroneous and prejudicial to the interest of revenue.
7. While passing order u/s. 263 of the Act, the Ld. PCIT placed reliance on following decisions of the Hon'ble Supreme Court, High Court and Tribunals given as under: -
 1. *“Smt. Taradevi Agarwal vs. Commissioner of Income Tax, 88 ITR 323 (SC)*
 2. *Commissioner of Income Tax vs. Nagesh Knitwears Pvt. Ltd., 345 ITR 135(Delhi HC)*
 3. *Bhushan Steel Ltd vs. Asst. Commissioner of Income Tax, ITAT A Bench, Delhi*
 4. *Commissioner of Income Tax vs. Deepak Kumar Garg, 299 ITR 435(MP)*

5. *Commissioner of Income Tax vs. Mahavar Traders, 220 ITR 167 (MP)*
 6. *Smt. Renu Gupta vs. Commissioner of Income Tax 301 ITR 45 (Rajasthan)*
 7. *PT. Lashkari Ram vs. Commissioner of Income Tax 272 ITR 309(Allahabad)*
 8. *Commissioner of Income Tax, Patiala vs. Himachal Pradesh Financial Corporation 186 Taxman 105 (Himachal Pradesh)*
 9. *Commissioner of Income Tax vs. Jawahar Bhattacharjee (2012) 341 ITR434 (Gauhati)(HC) ME TAY DEPARTNE*
 10. *Commissioner of Income Tax vs. Prafulla C Pant And Dharam Veer JJ 176 Taxman 184 (Uttarakhand)*
 11. *Mofussil Warehouse & Trading Co. Ltd vs. CIT 238 ITR 867 (Madras)*
 12. *Durgalal & Co vs. CIT 220 ITR 456 (Delhi)*
 13. *Commissioner of Income Tax vs. Active Traders (P) Ltd 214 ITR 583(Calcutta)*
 14. *Addl. Commissioner of Income Tax vs. Mukur Corporation, 111 ITR 312(Gujarat) ”*
8. Aggrieved by the impugned order of the PCIT, this appeal has been preferred. During the appellate proceedings before us, the appellant

claimed that the complete details were filed by the appellant before the Ld. AO as and when asked for by him through notices issued u/s 142 (1) of the Act and the assessment order was passed u/s. 143(3) of the Act on 16/04/2021 after considering all the details filed by it. The appellant has also stated that all those details were again submitted before the Ld. PCIT during the proceedings under section 263 of the Act. These details were clearly mentioned in audit financial accounts (Note No.19) that the assessee company has followed 'Percentage Completion Method' for the purpose of revenue recognition and this accounting method has consistently been followed by the assessee in earlier assessment years and the department has been accepting the same. The appellant, therefore, pleaded that since all the details were filed before the Ld. AO during the assessment proceedings, the setting aside of the said assessment order is a change of opinion which is not permissible u/s. 263 of the Act.

9. We have given due consideration to the facts of the case, submissions made by the appellant and the order of the Ld. PCIT passed u/s 263 of the Act. It is found that it is not a case where details were not filed by the assessee, rather all details were filed either along with returns of income or subsequently, in response to the notice issued u/s 142 (1) of the Act, it is a case where no inquiry was made by the AO which was necessary for the purpose of determining correct income of the assessee despite the fact

that the case was selected on this very ground under CASS for complete scrutiny. Thus, we find that the Ld. PCIT was right in holding that the failure to do so, on the part of the AO, has resulted in giving excess allowance to the assessee, leading to under assessment of income to that extent. We have also gone through the various decisions on which the Ld. PCIT has placed reliance including Hon'ble Supreme Court decision in "Smt. Taradevi Agarwal vs. Commissioner of Income Tax, 88 ITR 323 (SC). Further, we find that Hon'ble Supreme Court in Commissioner of Income Tax-7 vs. M/s. Paville Projects Pvt. Ltd. in Civil Appeal No. 6126 OF 2021 (SLP (C) NO. 13380 OF 2018) has laid down the principles for invoking the action u/s 263 of the Act as under:-

"7. In the present case, the Commissioner, in exercise of the powers under Section 263 of the Income Tax Act and in exercise of the revisional jurisdiction, set aside the assessment order by specifically observing that the assessment order was erroneous as well as prejudicial to the interest of the Revenue. However, the High Court by the impugned judgment and order has set aside the order passed by the Commissioner by observing that the Commissioner wrongly invoked the powers under Section 263 of the Act.

7.1 Learned counsel appearing on behalf of the Civil Appeal No. 6126 of 2021 Page 15 of 20 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 263 of the Income Tax Act, it is observed and held that in order to exercise the jurisdiction under Section 263(1) of the Income 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. “What can be said to be prejudicial to the interest of the Revenue” has been dealt with and considered in paragraphs 8 to 10 in the case of Malabar Industrial Co. Ltd. (supra), which are as under:-

“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 Dadabhoj & Co. v. S.P. Jain [(1957) 31 ITR 872 (Cal) , the High Court of Karnataka in CIT v. T. Narayana Pai [(1975) 98 ITR 422 (Kant)] , the High Court of Bombay in CIT v. Gabriel India Ltd. [(1993) 203 ITR 108 (Bom)] and the High Court of Gujarat in CIT v. 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 Venkatakrishna 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.”

10. 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.

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 Saraogi v. CIT [(1968) 67 ITR 84 (SC)] and in Tara Devi Aggarwal v. CIT [(1973) 3 SCC 482 : 1973 SCC (Tax) 318 : (1973) 88 ITR 323] .)”

7.2 Thus, even as observed in paragraph 9 by this Court in the case of *Malabar Industrial Co. Ltd. (supra)* that 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. It is further observed that 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. However, only in a case where two views are possible and the Assessing Officer has adopted one view, such a decision, which might be plausible and it has resulted in loss of Revenue, such an order is not revisable under Section 263.

7.3 Applying the law laid down by this Court in the case of *Malabar Industrial Co. Ltd. (supra)* to the facts of the case on hand and even as observed by the Commissioner, the order passed by the Assessing Officer is erroneous as well as prejudicial to the interest of the Revenue. Having gone through the assessment order as well as the order passed by the Commissioner of Income Tax, we are also of the opinion that the assessment order was not only erroneous but prejudicial to the interest of the Revenue also. In the facts and

circumstances of the case, it cannot be said that the Commissioner exercised the jurisdiction under Section 263 not vested in it. The erroneous assessment order has resulted into loss of the Revenue in the form of tax. Under the Circumstances and in the facts and circumstances of the case narrated hereinabove, the High Court has committed a very serious error in setting aside the order passed by the Commissioner passed in exercise of powers under Section 263 of the Income Tax Act.

8. In view of the above and for the reasons stated above, present appeal succeeds. The impugned judgment and order passed by the High Court is hereby quashed and set aside and that the order passed by the Commissioner passed in exercise of powers under Section 263 of the Income Tax Act is hereby restored.

In result, present appeal is allowed.”

10. Considering the principles laid down by the Hon'ble Supreme Court, we find that the action of the Ld. PCIT to invoke the provisions of section 263 is fully justified because it is not a case where two views are possible but it is a case where the AO was required to examine and inquire certain claims to arrive at the correct income but failure to do so by the AO has resulted in the under assessment of income and thus, there is no doubt that the order of the AO is erroneous and prejudicial to the interest of revenue. We, therefore, hold that the PCIT was right in setting aside the order of the AO u/s 263 of the Act.



11. In the result, the appeal is dismissed.

Order pronounced in the open court on 23.10.2024

Sd/-
NARENDER KUMAR CHOUDHRY
JUDICIAL MEMBER

Sd/-
RATNESH NANDAN SAHAY
ACCOUNTANT MEMBER

Mumbai, Dated: 23.10.2024.

Snehal C. Ayare, Stenographer

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.