

आयकर अपीलीय अधिकरण, कोलकाता पीठ "ए", कोलकाता

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH: KOLKATA

श्री राजेश कुमार, लेखा सटस्य एवं श्री प्रदीप कुमार चौबे, न्यायिक सदस्य के समक्ष
[Before Shri Rajesh Kumar, Accountant Member & Shri Pradip Kumar Choubey, Judicial Member]

I.T.A. No. 1014/Kol/2019
Assessment Year: 2013-14

Graphite India Ltd. (PAN: AAACC 0457 C)	Vs.	PCIT-4, Kolkata
Appellant / (अपीलार्थी)		Respondent / प्रत्यर्थी

Date of Hearing / सुनवाई की तिथि	13.02.2025
Date of Pronouncement/ आदेश उद्घोषणा की तिथि	25.03.2025
For the assessee / निर्धारिती की ओर से	Shri Soumen Adak, CA
For the revenue / राजस्व की ओर से	Shri Subhendu Datta, CITDR

ORDER / आदेश

Per Pradip Kumar Choubey, JM:

This is the appeal preferred by the assessee against the order of Principal Commissioner of Income Tax -4, Kolkata (hereinafter referred to as the Ld. PCIT] dated 12.03.2019 passed u/s 263 of the Income Tax Act, 1961 (hereinafter referred to as the Act) for AY 2013-14.

2. Brief facts of the case of the assessee is that the assessee company filed its return of income for AY 2013-14 declaring total income of Rs. 1,49,52,82,441/- and book profit u/s 115JB at Rs. 2,37,33,07,368/-. The case was selected for scrutiny and notices

u/s 142(1) of the Act was issued. The AO after going over the records and submission determined the assessed income of Rs. 1,65,73,07,934/- and book profit of Rs. 2,37,33,07,368/-. Subsequently the assessment record was called for on the basis of material available on the record and it was found that the order of the assessment was erroneous so far as prejudicial to the interest of the revenue and an order passed u/s 263 directing the AO to pass a afresh assessment order after providing a reasonable opportunity to the assessee company.

Being aggrieved and dissatisfied with the order passed u/s 263 the assessee preferred an appeal before us.

3. The ld. Counsel of the assessee challenges the very impugned order thereby submitting that the assessment order passed was neither erroneous nor prejudicial to the interest of the revenue. The Ld. Counsel further submits that no enquiry was made by the PCIT and no finding had been given to the order passed u/s 143(3) that why the order passed was erroneous and prejudicial to the interest of the revenue, though in the impugned order, the PCIT has held that it is a case of lack of enquiry. The Ld. Counsel further submits that if PCIT is of the view that the AO has not done proper enquiry it is incumbent on the PCIT to conduct such enquiry and require a specific finding that the assessment order was erroneous and prejudicial to the interest of the revenue. The Ld. Counsel cited several decisions of the several High Courts to support his contention. The Ld. AR has also drawn the attention of the Court regarding the documents filed by the assessee at the time of assessment proceedings and submits that the AO after going over the entire documents, assessment order was passed and there is nothing to establish that it was lack of enquiry. The Ld. Counsel cited following decision before us:

i) Decision of Hon'ble Delhi High Court in the case of ITO vs. D G Housing Projects Ltd. reported in [2012] 20 taxmann.com 587 (Delhi)

ii) Decision of Hon'ble Delhi High Court in the case of PCIT vs. Delhi Airport Metro Express Pvt. Ltd. reported in [2018] 99 taxmann.com 382 (Delhi)

iii) Decision of Co-ordinate Bench of Kolkata in the case of Animesh autocorp Pvt. Ltd. vs. PCIT in ITA No. 1121/Kol/2019 for AY 2012-13 dated 1st December, 2022.

4. Contrary to that the ld. DR supports the impugned order.

5. Upon hearing the submission of the counsel of the respective parties, we have perused the order and find that on the following three grounds, the PCIT has held that assessment was erroneous-

a) The AO allowed the long term capital loss of Rs. 2,61,10,823/- claimed on sale of Zero Coupon Bonds to be carried forward for set-off in subsequent years, even though such loss was computed after indexing the cost of acquisition, which was not allowable as per the provisions of Section 48 of the Income Tax Act.

b) The AO allowed the Short term capital loss amounting to Rs. 3,49,54,088/- on "Reliance Income fund Growth Plan-Bonus Option" while profit of Rs. 25,45,912/- has been recorded in the assessee's books of accounts. The Ld. AO has failed to bring material evidences in support of the said loss.

c) Foreign Exchange Fluctuation Loss includes loss suffered for acquisition of capital assets of Rs. 3,14,39,209/- which has been claimed as deduction u/s 37(1) of the Act. The AO has failed to draw any adverse inference in this respect.

6. The Ld. A R has drawn the attention of the Tribunal on the paper book, already filed before the lower authorities i.e. before the AO which are as follows:

- i) Acknowledgement of Return of Income dated 22.11.2013 and relevant extract of ITR-6 along with Computation of Total income and notes forming part of computation of total income.
- ii) Relevant extracts of Audited Accounts of the relevant assessment year
- iii) Offer document of Zero Coupon Bonds sold during the year
- iv) Relevant extracts of Memorandum to Finance Bill, 2005
- v) Relevant extracts of AS-11
- vi) Relevant Extracts of AS-13

- vii) Acknowledgment of Return of Income dated 28.11.2015 along with Computation of total income and computation of Capital Gains for AY 2015-16.

7. We have gone through the paper book and find that the long-term capital loss of Rs. 2,28,57,325/- has already been mentioned in the computation of total income submitted by the assessee before the AO income under the head capital gain. We have also found that the long-term capital loss on sale of ZCB issued by NABARD has also been disclosed in the computation of income. In the statement showing profit of loss on sale of investment. The assessee has also filed notice being the confirming part of the taxable income that reveals thus:

“During the year, unrealized foreign exchange fluctuation loss amounting to Rs. 9,69,00,000/- arising on account of foreign loan has been adjusted with the cost of the assets in the books of accounts. In computing the Total income the above loss has been claimed as allowable deduction since the above fluctuation in the rate of foreign exchange does not alter the actual cost of the asset and is also not covered by the provisions of Section 43A of the Act. Refer CIT vs. Tata Iron & Steel Co. Ltd. [1998] 231 ITR 285 (SC) & CESC Ltd. vs. CIT [1998] 233 ITR 50 (SC). In the event, the same is not allowed, this loss shall form part of actual cost for the purpose of tax depreciation and same may accordingly be allowed.”

We further find that in the present case the assessment proceedings was initiated vide notice u/s 142(1) and in response to the said notice a detailed reply has been filed by the assessee before the DIT and while we have gone through the reply filed by the assessee at query no. 15 the assessee has filed a detailed reply which according to us is essential to reproduce herein below:

“Query 15 Capital Gain

15.1 In case you have disclosed any capital Gains on sale of immovable property (included in either the stock-in-trade or investments or asset schedule), please furnish a copy of agreement for sale and the market value as per the stamp valuation authority. In case the sale consideration is lower than the market value as per the stamp valuation authority. Please explain as to why the market value as per Stamp Valuation Authority should not be adopted as the sale consideration.

In this regard, it is humbly submitted that the assessee has not sold any immovable property during the year.

15.2. In case you have done transaction in shares, please furnish the following information in tabular form: Name of scrips, Date of purchase, Quantity purchased, Rate, Amount paid (purchase price), Date of Sale, Quantity sold, Rate at which sold, Amount received, Date of

Dividend declaration, Amount of Dividend received, STCG/LTCG, Disallowance u/s 94(7), STT paid on transaction.

Details of shares/ units in mutual funds sold during the year have been furnished on 22.07.2016 as Enclosure-2 & 3 to computation of total income and are being enclosed as Annexure- 3 & 4.

Further it is humbly submitted that the assessee has not received any dividend during the year under consideration from the securities sold during the year. Hence, provisions of Section 94(7) does not get attracted. Further no STT has been levied on sale or purchase of any securities.

15.3. Please also explain as to why the provisions of Explanation to Section 73 should not be applied in your case.

In this regard it is humbly submitted that the company has not entered into any speculative transaction and therefore explanation to Section 73 shall not be applicable.

15.4. In case any transaction is in the nature of speculative transaction as per provisions of Section 43(5) or explanation to Section 73, please explain as to why the expenses should not be apportioned proportionately in the ratio of turnover.

In this regard it is humbly submitted that as mentioned above, the assessee has not entered into any speculative transaction and hence provisions of Section 73 or 43(5) shall not be applicable."

8. So far, the next ground(as above) is concerned it appears to us that computation chart has clearly revealed that the short term capital gain of Rs. 2,19,03,091/- includes short term capital loss on sale of utilization income fund. A detailed submission has already filed by the assessee before the AO and AO accepted the contention and did not make adjustment.

9. So far, the points no.3 is concerned in a notice u/s 142(1) query no. 22 the assessee filed a details of valuation fluctuation loss vide its reply dated 14.12.2016.

10. Looking at the order passed by the PCIT it appears to us that no finding was given that why the order u/s 143 was erroneous. No enquiry was made by PCIT, contrary to that the AO has made enquiries and examined the details during the course of assessment which is evident from paragraph no. 1 of the assessment order that specific queries in respect of issue has been made and after satisfying the detailed reply the assessment order has been passed. We have gone through the citation made by the assessee and find that in a case of D. G Housing Projects Ltd. (supra) wherein the Hon'ble Delhi High Court has held that one has to keep in mind the distinction between lack of enquiry and inadequate enquiry and even if there is any enquiry by the AO, even if inadequate

enquiry the PCIT cannot invoke the provision of Section 263 of the Act to give direction to the AO to undertake further enquiries. The Operative portion of the order of the Hon'ble Delhi High Court is thus:

“19. In the present case, the findings recorded by the Tribunal are correct as the CIT has not gone into and has not given any reason for observing that the order passed by the Assessing Officer was erroneous. The finding recorded by the CIT is that “order passed by the Assessing Officer may be erroneous”. The CIT had doubts about the valuation and sale consideration received but the CIT should have examined the said aspect himself and given a finding that the order passed by the Assessing Officer was erroneous. He came to the conclusion and finding that the Assessing Officer had examined the said aspect and accepted the respondent’s computation figures but he had reservations. The CIT in the order has recorded that the consideration receivable was examined by the Assessing Officer but was not properly examined and therefore the assessment order is “erroneous”. The said finding will be correct, if the CIT had examined and verified the said transaction himself and given a finding on merits. As held above, a distinction must be drawn in the cases where the Assessing Officer does not conduct an enquiry; as lack of enquiry by itself renders the order being erroneous and prejudicial to the interest of the Revenue and cases where the Assessing Officer conducts enquiry but finding recorded is erroneous and which is also prejudicial to the interest of the Revenue. In latter cases, the CIT has to examine the order of the Assessing Officer on merits or the decision taken by the Assessing Officer on merits and then hold and form an opinion on merits that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. In the second set of cases, CIT cannot direct the Assessing Officer to conduct further enquiry to verify and find out whether the order passed is erroneous or not.”

11. We have also gone through the order passed by the Co-ordinate Bench of the Kolkata in the case of Animesh Autocorp Pvt. Ltd. vs. PCIT-4, Kolkata in ITA NO. 1121/Kol/2019 for AY 2012-13 dated 1st December, 2022 and find that the Co-ordinate Bench of Kolkata has discussed the Section 263(1) of the Act and also placed reliance in the Co-ordinate bench of ITAT, Kolkata passed in case of Amritrashi Infra Pvt. Ltd. vs. PCIT in ITA NO. 838/Kol/2019 and quashed the order of PCIT by giving observation that it is not sustainable as per law. The relevant paragraph of the order of Co-ordinate bench of Kolkata is thus:

10. As per the provisions of section 263 as enumerated above, after getting the explanation from the assessee, the Ld. Pr. CIT was supposed to examine the contention of the assessee. Before passing an order of modifying, enhancing or cancelling the assessment, he was supposed either to himself make or cause to make such an enquiry as he deems necessary. The words “as he deems necessary”, in our view, do not mean that the Ld. Pr. CIT is left with a choice either to make or not to make an enquiry. As per the relevant provisions of section 263, it was incumbent upon the Ld. Pr. CIT to make or cause to make an enquiry. So far as the words “as he deems necessary” are concerned, the said words suggest that the enquiries which are necessary to form a view as to whether the order of the AO is erroneous and prejudicial to the interest of Revenue or not? A perusal of the impugned order of the Ld. Pr. CIT reveals that the Ld. Pr. CIT had asked the assessee about the validity of the assessment order for want of

necessary enquiries and verifications by the AO relating to share application money and premium, to which the assessee had given a detailed reply. Once a point wise reply was given by the assessee, then a duty was cast upon the Ld. Pr. CIT to examine the reply of the assessee and form a prima-facie opinion as to whether the order of the AO was erroneous so far as it was prejudicial to the interest of Revenue. We further note that the Ld. Pr. CIT did not raise any query as to what enquiries were made by the AO before proceeding to pass the assessment order in question. In our view, once the Ld. Pr. CIT had proceeded to make an enquiry regarding the genuineness of the claim of the assessee, he was supposed to make a prima-facie opinion which may not be a concluding opinion to hold that the order of the AO in his view was erroneous so far as it was prejudicial to the interest of Revenue. The opinion of the Commissioner that the AO had not made proper enquiries or verifications should be based on his objective satisfaction and not a subjective satisfaction from the assessment order. Merely because, the assessment order in question is not a detailed order that itself, does not mean that the AO had not made enquiries in this respect. Admittedly, the AO asked the assessee to furnish the necessary details from time to time which were duly furnished by the assessee and after considering the same the AO passed the assessment order.

11. It is pertinent to mention here that a deeming fiction has been created in section 263 of the Act by the amendment made by Finance Act, 2015 w.e.f. 01.06.15 wherein it has been mentioned that where the Commissioner is of the opinion that the AO had passed the order without making enquiries or a claim has been allowed without enquiring into the claim or that the same is not in accordance with any order or direction or instruction issued by CBDT, that shall be deemed to be erroneous in so far as its prejudicial to the interest of Revenue. The said deeming provisions, in our view, are not applicable for the assessment year under consideration i.e., A.Y. 2012-13.

11.1. Even otherwise, a perusal of the revision order passed by the ld. Pr. CIT shows that the ld. Pr. CIT has not pointed out any error or discrepancy in the evidence furnished by the assessee and without examining such evidence and without counter questioning the assessee on the relevant points and even without considering the submission of the assessee furnished in reply to the show-cause notice, the ld. Pr. CIT, in our view, was not justified in setting aside the order, simply stating that in his view more enquiries were needed to be carried out by the AO. As observed above, the ld. Pr. CIT without examining the details of the share applicants and the evidence furnished by the assessee has passed a general order observing that in his view the order passed by the AO was on an incorrect assumption of facts or incorrect application of law without mentioning as to what facts were incorrect what was the incorrect law, that was applied by the Assessing Officer.

11.2. The ld. Pr. CIT, taking shelter in Explanation 2(c) to Section 263(1) of the Act, held that the order of the AO was erroneous and prejudicial to the interest of the revenue on the ground of lack of enquiry, which, in our view, is a general observation and no specific observation has been made in respect of any of the details or evidence furnished by the assessee and as to why the ld. Pr. CIT was not satisfied about such details/replies furnished by the assessee. Simply because the ld. Pr. CIT felt that the AO should have made further enquiries on the same issue or that the case was to be examined from some another angle, the same, in our view, cannot be a valid ground to set aside the assessment order. If such an action is allowed by the ld. Pr. CIT in revision jurisdiction then, there would be no end to litigation and there would not be any finality to the assessment. The Explanation 2(c) to Section 263(1) of the Act does not give unbridled powers to the ld. Pr. CIT to simply set aside the assessment order by saying that the AO was required to make further enquiries without pointing out as to what was lacking in the enquiries made by the AO and why the ld. Pr. CIT was not satisfied with the reply and evidence furnished by the assessee.”

12. In view of the discussion made above we are in this view that the impugned order of PCIT is not sustainable under the law. We do not find that assessment order was erroneous and prejudicial to the interest of justice to the revenue. Accordingly, we quashed the impugned order.

In the result, the appeal filed by the assessee is allowed.

Order is pronounced in the open court on 25th March, 2025

Sd/-

Sd/-

(Rajesh Kumar/राजेश कुमार)

(Pradip Kumar Choubey /प्रदीप कुमार चौबे)

Accountant Member/लेखा सदस्य

Judicial Member/न्यायिक सदस्य

Dated: 25th March, 2025

SM, Sr. PS

Copy of the order forwarded to:

1. Appellant- Graphite India Ltd., 31, Chowringhee Road, Kolkata-700016
2. Respondent – PCIT-4, Kolkata
3. Ld. Pr. CIT- , Kolkata
4. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata