

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH: 'C': NEW DELHI)**

**BEFORE SHRI S RIFAUR RAHMAN, ACCOUNTANT MEMBER
AND
SHRI SUDHIR PAREEK, JUDICIAL MEMBER**

**ITA No:- 1096/Del/2023
(Assessment Year- 2018-19)**

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| KEI Industries Ltd., D-90, Okhla Industrial Area, Phase-1, New Delhi. | Vs. | Dy. Commissioner of Income Tax, Circle 13(1), Delhi. |
| PAN No: AAACK0251C | | |
| APPELLANT | | RESPONDENT |

Assessee by : Shri Satyan Sethi & Shri A.T. Panda, Advs.
Revenue by : Shri Rishpal Bedi, CIT(DR)
Shri Dayainder Singh Sidhu, CIT(DR)

Date of Hearing : 30.12.2024
Date of Pronouncement : 28.03.2025

ORDER

PER SUDHIR PAREEK, JM

The aforesaid appeal by the Assessee preferred against the order of Ld. Principal Commissioner of Income Tax (Appeals)-, Delhi-4, [hereinafter referred to as the Ld. PCIT(A)] vide order dated

30.03.2023 pertaining to Assessment Year 2018-19. The Assessee has raised the following ground of appeal:

"1. That on the facts and circumstances of the case and in law, the Pr. Commissioner of Income tax Delhi-4, New Delhi [the Pr. CIT] has erred in assuming jurisdiction under section 263 of the Income tax Act, 1961 (the Act) in the case of the Appellant for the assessment year 2018-19, for neither assessment order was erroneous nor prejudicial to the interest of revenue.

2. That on the facts & circumstances of the case and in law, assumption of jurisdiction u/s 263, by three notices on three independent issues was without merit, for vide first notice dated 17.1.2023 deduction of Rs.66,06,500/- allowed u/s 80G was sought be withdrawn and by the second notice dated 17.3.2023, impact of GST demand of Rs.1,59,684/- & 1,70,460/ was alleged to have not gone into and by the third notice dated 23.3.2023, jurisdiction was assumed for the reason that details of generation of scrap was not provided and was not gone into.

3. That on the facts & circumstances of the case and in law, the Pr. CIT did not appreciate that expenditure on CSR is "application of income" and not "expenditure incurred for the purpose of business", whereas, section 80G provides for "deductions to be made in computing total income".

3.1 That on the facts & circumstances of the case and in law, Pr.CIT did not appreciate that though clauses (whk) & (nihil) of section 80G(2) provided that sum paid to "Swachh Bharat Kosh" & "Clean Ganga Fund" would not include the amount spent pursuant to CSR, however in respect of donation to other funds, similar exclusion was not provided, hence, CSR expenses of Rs.1,32,13,000/- were eligible for deduction u/s 80G of the Act.

3.2 That on the facts & circumstances of the case and in law, Pr. CIT erred in not following the ITAT decisions in:

(i) JMS Mining (P.) Ltd. v. Pr. CIT (2021) 190 ITD 702 (Kol),

(ii) Goldman Sachs Services (P.) Ltd. v. Jt. CIT [2020] 117 taxmann.com 535,

(iii) Allegis Services (India) (P) Ltd. v. ACIT [ITA-1693/Bang/2019 dated 29-4-2020).

(iv) FNF India (P) Ltd. v. ACIT [ITA-1565/Bang/2019 dated 5-1-2021]

(v) Naik Seafoods P. Ltd. v. Pr. CIT (ITA No.490/Mum/2021 dated

4. That on the facts & circumstances of the case and in law, scope of security through CASS even under complete security' does not warrant examination / verification of each and every item of balance sheet & profit & loss account, for such an approach is against the very fiber of CASS.

4.1 Without prejudice, on the facts & circumstances of the case and in law, Pr. CIT did not appreciate that:

(1) in the Tax Audit Report, there is no specific column for disclosure of scrap;

(ii) the audited accounts under the head 'inventories' contained details of scrap, for it is part 'closing stock';

(iii) while examining 'closing stock', the issue of scrap was also examined during assessment proceedings,

4.2 Without prejudice, except for the allegation that the issue of scrap was examined, no cause causing pre-judice to the revenue, warranting exercise of power u/s 263 of the Act, either by way of excess scrap or otherwise has been alleged by the Pr. CIT.

4.3 Without prejudice, principle of natural justice were violated in respect of third notice u/s 263 dated 23.3.2023.

That the Appellant craves leave to add, alter, amend or vary any of the ground either at or before the hearing of the appeal.”

2. Brief facts of the case are that the assessee filed return of income for A.Y. 2018-19 through e-filing dated 22/11/2018 declaring total Income of Rs. 1,91,94,51,330/-. Thereafter, the case was selected for Scrutiny through CASS on the following issues:

1. Stock valuation
2. Default in TDS & disallowance for such default
3. ICDS compliance and adjustment
4. Sales turnover / Receipts

5. Expenditure by way of penalty or fine for violation of any law

6. Deduction from total income under chapter IV-A

3. In the course of assessment proceedings, notices u/s 142(1) alongwith questionnaires was issued through e-proceedings facility and persuasion thereof the assessee submitted his explanation electronically through e-proceedings facility. In view of the above replies submitted by the assessee, assessment is completed u/s 143(3) of the Income Tax Act, 1961 at the total income of Rs. 1,91,94,51,330/-, and Computation of income and notice of demand issued.

4. The Ld. PCIT(A) issued notice u/s 263 of the Act to the assessee / appellant on dated 17.01.2023, 17/03/2023 and 23.03.2023 respectively by noticing that the assessee has disallowed CSR expenditure of Rs. 1,32,13,000/-but claimed 50% of CSR expenditure on account of donation u/s 80G of the Act and accordingly, the claim of deduction u/s 80G of Act of Rs. 66,06,500/- is not allowable deduction as per the provision of explanation 2 u/s 37(1) of the Act and no details of generation of

scrap has been provided and stated that the Ld. AO has not made any enquiry regarding source of generation scrap itemwise, quantity and price etc. The Ld. PCIT(A) vide impugned order set aside the order passed by the Ld. AO by expressing that it is erroneous and prejudicial to the interest of Revenue on above-mentioned issues.

5. Heard rival submissions and carefully scanned the material on record.

6. The Ld. AR submitted that the assessee / appellant raised the issue before the Ld. PCIT that the legislature was aware of Explanation 2 to section 37(1) and of interplay between section 37(1) and 80G of the Act and was emphasized that by the Finance Act-2015, any sum paid to “ Swachh Bharat Kosh” and “ Clean Ganga Fund” was excluded from CSR responsibility. It is also contended that payment to “ Swachh Bharat Kosh” & “ Clean Ganga Fund” were made ineligible for deduction u/s 80G of the Act [Clauses 9iii hk) &(iii hk) to section 80G(2)] and in respect of payment to other funds, similar exclusion was not provided. As per submissions, on behalf of the assessee / appellant, since CSR expenses of Rs. 1,32,13,000/- were donations to funds other than

the funds referred to in section 80G(2)(iihk) & (iihl) of the Act, assessee / appellant is entitled to the deduction u/s 80G and deduction cannot be denied for the reason that the donation was towards fulfilment of CSR responsibility.

7. The Ld. PCIT expressed his disagreement with the Ld. AO or the assessee that 50% of the CSR expenses can be claimed u/s 80G of the Act by stating following observation in para 10 of the impugned order:

“ 10. I have perused the submissions of the assessee, the assessment order of the AO, the Tax Audit report etc. of the AO. I am of the opinion that the CSR expenses are statutory expenses to be carried out from the profit of assessee. Hence no deduction of the amount is allowable u/s 30 to 37 of the Act for these expenses. Converting the same to donation and claiming 50% of the amount u/s 80G of the Act defeats the purpose. When the CSR expenses are held not to be allowable as business expenses, the assessee does not have the option to convert the same to donation and claim 50% of the same as expenses. Donation is given basically on charity by an assessee to help a person or organization or institution on their request or voluntarily for a cause. While CSR is a statutory activity compulsorily to be carried out by the assessee spending a certain percentage of its profit for certain work and no deduction of such expenses is allowable. Therefore, I am unable to agree with the AO or the assessee that 50% of the CSR expenses can be claimed u/s 80G of the Act.”

8. The Ld. DR relied upon the impugned order of Ld. PCIT.

9. The Ld. AR further submitted that the issue of deduction u/s 80G in respect of CSR expenses was examined during assessment proceedings and even legally, the issue is settled in favour of the appellant and the Ld. PCIT has not recorded any finding why the case laws relied upon are not applicable.

10. Second issue on which the Ld. PCIT(A), set aside the order passed by the Ld.AO, regarding the issue of generation qualification of scrap, for which the Ld. CIT(A) was of opinion that it had never been verified, as the Ld. AO had not conducted the required enquiry.

11. In this regard, the Ld. AR submitted that in compliance of giving effect the impugned order, the Ld. AO vide order dated 21.03.2024, u/s 143(3) of r/w section 263 of the Act has not drawn any adverse inference on the issue in which specifically observed by the Ld. AO that on the basis of independent verification conducted u/s 13(6) of the Act, no adverse inference is drawn on this issue.

12. The Ld. AR also submitted on this issue that the Ld. PCIT not appreciated that the appellant is engaged in manufacturing of cables and as the business being that of manufacture, it is bound

to be generation of scrap but there was nothing on record to doubt the generation of scrap, its quality, sale price etc. and all the relevant details were duly accounted for in the audited balance sheet and it is vehemently argued that during assessment proceedings, desired details were submitted including generation of scrap which was properly examined and it is quite relevant and material that there has never been any addition in respect of scrap sale either in earlier or later years.

13. The Ld. AR also submitted that there is no any clause in the tax audit report requiring the details of scrap, so non-furnishing of scrap details to the ITR & Tax Audit report may not termed to be an error causing prejudice to the interest of Revenue and the assessee / appellant cannot be held responsible for not doing something that it was not supposed to do.

14. the Ld. AR relied upon the order of the co-ordinate Bench of ITA No. 490/mum/2021, M/s Naik Seafoods Pvt. Ltd. v/s PCIT-2, Mumbai, (in which one of us was author) in which held that the deduction u/s 80G of the Act as claimed by the assessee and issue itself is a debatable issue and the Ld. AO has taken one of the

possible view, then the Ld. PCIT cannot invoke provisions of section 263 of the Act, in order to bring on record his possible view.

15. The Ld. AR also relied upon the order of the Co-ordinate Bench (2023) 150 taxmann.com 467 (Delhi) Zebra Technologies Asia Pacific Pvt. Ltd. Vs. CIT (International Taxation) in which para 24 is reproduced hereby:

“ 24. That being the case, the issue is highly debatable. Therefore, the only because the view taken by the Assessing Officer is not acceptable to the Revisionary Authority or does not matched with the view of the Revisionary Authority, it cannot be said that it is not a possible view. In any case of the matter, when the Assessing Officer had the benefit of the decision of the DRP and the Assessing Officer in assessment year 2016-17, insofar as, the issue of taxability of receipts from rendition of repair and support services and off-shore sales it cannot be said that the assessment order is erroneous. Therefore, one of the conditions of section 263 is not satisfied. While invoking the powers under section 263 of the Act, learned CIT has referred to Explanation 2 to section 263. In this regard, we must observe, Explanation 2 in no way dilutes basic conditions of sub-section to section 163, i.e., twin conditions of 'erroneous' and 'prejudicial to the interest of Revenue' have to be satisfied cumulatively. In our view, the twin conditions are not satisfied in the present case”

16. The Ld. AR also relied upon the order of Hon'ble Delhi High Court in the case of Principal Commissioner of Income Tax vs. M/s Cliks Finance Pvt. Ltd. [2012] (3) TMI 227 dated 01/03/2024 has held as under:

“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 of the Act on the Commissioner. The relevant paragraph of the said decision reads as under:-

"17. 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 intont-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 2024 (3) TMI 157-HC-Pr. Commissioner Of Income Tax-2 Delhi Versus Mis Clex Finance India of tax. The High Court of Calcutta in *Dawjee Dadabhoy & Co. v. S.P. Jain* ((1957) 31 ITR 87 (Cal)), the High Court of Karnataka in *CII v. T. Narayana Pai* (1975) 98 ITR 422 (Kant)), the 3/21/24, 6:32 PM 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."

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 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 323J.)"

[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 twofold conditions for the purpose of invoking jurisdiction under Section 263 of the Act. The relevant paragraph of the said decision reads as under:-

"27. 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 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.*

27. Considering the aforesaid judicial pronouncements, it can be safely concluded that inadequacy 28 2024 (3) TMI 157-HC-Pr Commissioner Of Income Tax-2 Delhi Versus M/s Clix Finance India 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."

17. Foregoing discussion and fact situation leads us to reach this conclusion that deduction u/s 80G of the Act is a debatable issue and the Ld. PCIT was not authorized to take another view in exercising revisionary jurisdiction u/s 263 of the Act, if the Ld. AO already taken possible view in issue and regarding generation of scrap, desired explanation were submitted before the Ld. AO the Ld. AO has not drawn any inference in passing order giving effect of order of Ld. PCIT u/s 263 of the Act.

17. From the bare perusal of the material available on record, the Ld. PCIT has not taken any enquiry as required by law or cite any plausible or cogent reason to reach the conclusion that the impugned assessment order was erroneously and prejudiced to the interest of revenue and instead of enquiry himself, the Ld. PCIT set aside the order with the direction to pass order after revision of assessment. In our humble opinion, that the explanation 2 to section 263 of the Act doesn't give unfettered power to the Ld. PCIT to revise each and every order to examine the issue which is already been properly examined and taken are possible view by the Ld. AO. On the basis of foregoing fact situations, the impugned order

passed by the Ld. PCIT void ab initio and beyond jurisdiction and liable to be set aside and quashed.

18. Consequently, the appeal of assessee is allowed as indicated above.

Order pronounced in the Open Court on 28.03.2025.

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Sd/-
(SUDHIR PAREEK)
JUDICIAL MEMBER

Dated: 28/03/2025
Pooja, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI