

IN THE INCOME TAX APPELLATE TRIBUNAL “G” BENCH, MUMBAI

BEFORE S/SHRI SANJAY ARORA, ACCOUNTANT MEMBER

AND AMARJIT SINGH, JUDICIAL MEMBER

आयकर अपील सं/ I.T.A. No.5507/Mum/2014

(निर्धारण वर्ष / Assessment Year: 2009-10)

Winston Fernandes A-1, Fair Ville Estate, 66A, 12 <sup>th</sup> Road, JVPD Scheme, Juhu, Mumbai - 400049	बनाम/ Vs.	Office of the Commissioner of Income Tax 21 C-11, Pratyakshkar Bhavan, B.K.C., Bandra (E), Mumbai - 400051
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AADPF2541A		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	S.C.Agrawal
Department by:	Mrs. Vidisha Kalra

सुनवाई की तारीख / Date of Hearing: 23.06.2016

घोषणा की तारीख /Date of Pronouncement: 05.10.2016

आदेश / ORDER

**PER AMARJIT SINGH, JM:**

The assessee has filed the present appeal against the order dated 20.03.2014 passed by the Commissioner of Income Tax - 21, Mumbai [hereinafter referred to as the “CIT”] relevant to the A.Y.2009-10.

2. The assessee has raised the following grounds:-

1. That the original assessment was completed u/s.143(3) of the Income Tax Act and in the course of assessment proceedings the issue of depreciation on asset purchase in the month of March 2009 was considered.

2. *That the assessment can not be reopened on the basis of change of opinion or on the basis of opinion of the Audit Party.*
3. *That the assessment can not be reopened on the basis of mere suspicion.*
4. *That the order passed by learned commissioner of Income Tax is bad in law and therefore the appellate prayed that the order may be quashed.*

3. The departmental representative has argued that the present appeal has been filed by the assessee, is barred by the time of 89 days therefore the same is liable to be dismissed. On the other hand the Learned representative of the assessee has refuted the said contention. File perused. The assessee filed an application for condonation of delay along with an affidavit stating that he was out of country from 24.05.2014 to 13.06.2014 for 81 days. So he did not filed an appeal well in time. In view of the reason recorded in the affidavit we are of the view that there are sufficient and reasonable ground on record to condone delay in filing the appeal hence application for condonation of delay is hereby allowed.

4. The brief facts of the case are that in the case assessee the assessment order was passed by the Joint Commissioner of Income Tax, Range 21(2), Mumbai u/s.143(3) of the Income Tax Act, 1961( in short “the Act”) on 28.11.2011 for the A.Y.2009-10. A proposal u/s.263 of the Act dated 20.03.2014 was received from Office of the Commissioner of Income Tax – 21 through Joint Commissioner of Income Tax, Range 21(2) pointing out some

shortcoming and discrepancies in the assessment order. The shortcomings noticed were as under:-

“On verification of the records, it has been observed that you have acquired ten trucks and their mixers from different parties in the month of March between 12.03.2009 and 31.03.2009 and these mixers were required to be mounted on the trucks before utilizing it as transit mixers. As per the details of assets, you had purchased five mixers on 30<sup>th</sup> and 31<sup>st</sup> March, 2009 and they were not put to use before 31<sup>st</sup> March, 2009 for the purpose of business. Therefore, the depreciation claimed on these five transit mixers should have been disallowed.”

5. Thereafter, the notice was given to the assessee and after considering the reply of the assessee, the CIT held the order u/s.143(3) of the Act dated 28.12.2011 to be erroneous and prejudicial to the interest of revenue and directed the Assessing Officer to decide the issue afresh after due verification. Feeling aggrieved, the assessee has filed the present appeal before us.

6. We have heard the arguments advanced by the learned representative of the parties and perused the record. The learned representative of the assessee has argued that the CIT concerned did not apply his mind before invoking jurisdiction u/s.263 of the Act, therefore, in the said circumstances the order dated 20.03.2013 is wrong against law and facts and is liable to be set aside. It is also argued that the assessee purchased the mixer in the month of

March between 12.03.2009 and 31.03.2009 and used the same for business purpose, therefore, the Assessing Officer has rightly allowed the depreciation in accordance with law. It is argued that in the said specific circumstances the CIT was wrong in invoking the provision u/s.263 of the Act. In support of these contention the Ld representative of the assessee has place reliance upon the law settled in M/S AV industries ITA N.3469/M/2010.dated 6.11.2015 and Span overseas Ltd ITA N. 1223/PN/2013.dated 21.12. 2015. However, on the other hand learned representative of the department has strongly placed reliance upon the order passed by the CIT in question. While going through the order dated 20.03.2014 passed u/s.263 of the Act it came to the notice that the CIT invoked the provision u/s.263 of the Act in view of the following grounds:-

“On verification of the records, it has been observed that you have acquired ten trucks and their mixers from different parties in the month of March between 12.03.2009 and 31.03.2009 and these mixers were required to be mounted on the trucks before utilizing it as transit mixers. As per the details of assets, you had purchased five mixers on 30<sup>th</sup> and 31<sup>st</sup> March, 2009 and they were not put to use before 31<sup>st</sup> March, 2009 for the purpose of business. Therefore, the depreciation claimed on these five transit mixers should have been disallowed.”

7. Order dated 28.12.2011 perused, the said order nowhere speaks about these facts that the five mixers purchased on 30<sup>th</sup> and 31<sup>st</sup> March 2009 were put to use on or before 31<sup>st</sup> March, 2009 for the purpose of business to avail the depreciation on the same.

8. The law relied by the learned representative of the assessee speaks about the fact where CIT took the cognizance of the matter without the application of mind merely upon the matter forward by the other Officers for invoking the provision u/s.263 of the Act. But in the instant case Joint Commissioner of Income Tax Range 21(2) , Mumbai, put the short comings / discrepancies before the Commissioner and the Commissioner after receipt of the proposal issued the notice to the concerned parties and thereafter, after due application of his mind, passed the order u/s.263 of the Act, also relying upon certain law mentioned therein. Therefore, in the said circumstances, the law i.e. Span overseas Ltd ITA N. 1223/PN/2013.dated 21.12.2015 relied by the learned representative of the assessee is not applicable to the facts of the present case. So far as the other law relied by the learned representative of the assessee is concerned i.e. M/S AV industries ITA N.3469/M/2010.dated 6.11.2015, it speaks about the possible view which has already been taken by the Assessing Officer whereas in the instant case no view of any kind was taken by the Assessing Officer. Whereas this is the question of due application of mind by him? As discussed above, the Assessing Officer did not take up the issue of purchase of five mixers on 30<sup>th</sup> and 31<sup>st</sup>

March 2009 and to put to use on or before 31.03.2009 for the purpose of business to avail the depreciation on the same therefore in the said circumstances we are of the view that the CIT has rightly invoked the provision u/s.263 of the Act. In this regard we also find support of the law settled by the Full Bench of Gauhati High Court in the case of CIT Vs. Jawahar Bhattacharjee (ITA No.2008) vide its order dated 07.02.2012 wherein it is specifically held that:

“Jurisdiction under section 263 can be exercised whenever it is found that the order of assessment was erroneous and prejudicial to the interest of Revenue. Not holding such inquiry as is normal and not applying mind to relevant material would make the assessment erroneous warranting exercise of revisional jurisdiction. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. Non application of mind and omission to follow natural justice is in same category.”

9. The forgoing infact represents trite law, as explained by the Hon’ble Apex Court in the case of Malabar Industries Co. Ltd., reported at 243 ITR 83 (SC). In view of the above said circumstances we are of the view that the CIT has passed the order judiciously and correctly and invoked the provision u/s.263 of the Act in a right manner and in a right sense which does not require to be interfere with at this appellate stage. With regard to the claim of

depreciation, we may advert to the decision by the Hon'ble Jurisdictional High Court in the case of Dinesh Kumar reported at 267 ITR 768 (Bombay)

10. In the result, the appeal of the assessee is hereby Dismissed.

Order pronounced in the open court 5<sup>th</sup> October, 2016

Sd/-

Sd/-

(SANJAY ARORA)

(AMARJIT SINGH)

लेखा सदस्य / ACCOUNTANT MEMBER

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 5<sup>th</sup> October, 2016

*MP*

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

**आदेशानुसार/ BY ORDER,**

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार** (Dy./Asstt. Registrar)

**आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**