IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH ' C '

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER AND
SHRI JASON P. BOAZ, ACCOUNTANT MEMBER

I.T. A. No.329/Bang/2014
S.P. No.209/Bang/2014
(Assessment Year : 2009-10)

Shri B.N. Malthesh,
M/s. Safety Sign Technologies,
8A/45, Srigandhada Kaval,
Sunkadakatte, Vishwaneedam Post,
Bangalore-560 091 .... Appellant/Petitioner.
PAN ACAPM 2782M

Vs.

Income Tax Officer,
Ward 10(2), Bangalore. ..... Respondent.

Appellant/Petitioner By : Shri S.Ramasubramanian, C.A.
Respondent By : Shri Bijoy Kumar Panda, Addl. CIT (D.R)

Date of Hearing : 12.01.2015.
Date of Pronouncement : 20.03.2015.

O R D E R

Per Shri Jason P. Boaz, A.M. :

This appeal by the assessee is directed against the order of the Commissioner of Income Tax, Bangalore dt.18.02.2014 for Assessment Year 2009-10 passed under Section 263 of the Income Tax Act, 1961 (herein after referred to as 'the Act').

2. The facts of the case, briefly, are as under :-

2.1 The assessee, in the business of manufacture and supply of sign boards, filed its return for Assessment Year 2009-10 on 24.9.2009 declaring total income of Rs.9,65,729. The case was

selected for scrutiny and the assessment was completed under Section 143(3) of the Act vide order dt.19.12.2011 wherein the income of the assessee was determined at Rs.12,72,236. The order of assessment for Assessment Year 2009-10 reads as under :-

> " 2.1.1 The assessee filed return of income for the A.Y. 2009-10 on 24.9.2009 declaring total income at Rs.9,65,729. The return was processed and selected for scrutiny under CASS. In response to notices under Section 143(2) and 142(1). Shri Malthesh, assessee appeared from time to time and produced the details called for and case was discussed.
> 2.1.2 The assessee did not produce books of accounts stating that the books have been seized by Customs and Excise Department. In view of this, the income of the assessee from the business of manufacture and supply of sign boards is estimated at 5% of the turnover. The difference between the income returned form the business of manufacturing of sign boards and which is estimated at 5% works out to Rs.3,06,507 which is added back to the total income."

2.2 Subsequently, the ld. CIT, on an examination of the records of assessment, observed that the Assessing Officer had completed the assessment by estimating 5% of the turnover as the income of the assessee from the business of manufacture and supply of sign boards, in view of the assessee's failure to produce his books of accounts for the relevant period for the reason that the same had been seized by the Dept. of Customs & Central Excise. The ld. CIT further observed that prior to the completion of the assessment, the Assessing Officer had written a letter dt.13.12.2011 to the assessee proposing to estimate his income at 8% of the gross receipts; in reply to which the assessee vide letter dt.19.12.2011 justified its declared net profit of 3.8% but however suggested that, in the absence of its books of accounts, the profit be adopted at 4% to 5%. The ld. CIT observed that the Assessing Officer thereafter completed the assessment adopting the rate of 5% of the turnover as the assessee's taxable income without rendering any reasoned explanation as to why he did not adopt 8% as proposed to the assessee in the letter dt.13.12.2011.

2.3 In this view of the matter, the ld. CIT proceeded to initiate proceedings under Section 263 of the Act and issued a show cause notice dt.31.12.2013 to the assessee stating that the order of assessment for Assessment Year 2009-10 dt.19.12.2011 was erroneous and prejudicial to the interest of revenue for the following reasons :-

> " As per the 3CD Report, the turnover for Assessment Year 2009-10 in Rs.2,58,71,930. Due to non-submission of books of accounts during the course of assessment proceedings, the Assessing Officer was forced to assess the income at 5% and assessment concluded accordingly whereas on non-production of books of account your income ought to have been taxed @ 8% as per the provisions contained in Section 44AD of the Income Tax Act, 1961."

2.4 In response thereto, the assessee appeared before the ld. CIT on 31.1.2014 and submitted written submissions praying for the dropping of the proceedings initiated under Section 263 of the Act, contending that the order of assessment for Assessment Year 2009-10, in the case on hand, was neither erroneous nor prejudicial to the interest of revenue; in view of the following submissions :-

> *"2.1 It is submitted that the revision under 263 is permissible only when the assessment order is erroneous in so far it is prejudicial to the interests of the revenue. The Hon'ble Supreme Court in Malabar Industrial Co. Ltd. Vs CIT 243 ITR 83 explained the scope of the expression "Erroneous in so far as it is prejudicial to the interest of revenue." At page 88 of the report the Hon'ble Supreme Court observed as under :*
> *For example, when an 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 interest of the Revenue, unless the view taken by the Income Tax Officer is unsustainable in law.*
> *It is submitted tha the Assessing Officer has estimated the income by adopting a method of estimate which he considered to be appropriate. Therefore, the learned Commissioner has no jurisdictionto invoke section 263 on the ground that the Assessing Officer should have adopted some other method. It is submitted that the proposed action under Section 263 of the Act does not satisfy the conditions laid down by the Hon'ble Supreme Court in Malabar Industrial Company's case.*
> *2.2 It is further submitted that the learned Commissioner has no jurisdiction under Section 263 of the Act on the ground that the estimate made by the Assessing Officer is on the lower side. It is not permissible to revise the estimate made by the Assessing*

Officer by invoking jurisdiction under Section 263 of the Act. We rely on the following decisions for the above proposition.

2.3 We draw your kind attention to the observations of the Hon'ble Bench in Gabriel India Ltd.'s case 203 ITR 108 at page No.115 reads as under :

This section does not visualize a case of submission of the judgment of the Commissioner for that of the Income Tax Officer, who passed the order, unless the decision is held to be erroneous. Cases may be visualized where the Income Tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income Tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure. It is because the Income Tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at a conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion.

2.4 Without prejudice to the submissions made in the paragraph 2.1 and 2.2 above, we further submit that no reasons have been given in the notice. It merely reproduces the relevant portion of the assessment order and comes to a conclusion that the order is erroneous and prejudicial to the interests of the Revenue. No reasons have been stated as why it is so. It is submitted that the notice under Section 263 of the Act should clearly specify the reasons as to why the learned Commissioner considers the assessment order to be erroneous and prejudicial to the interest of Revenue. Hence, on this ground also the notice is bad in law.

2.5 We also submit even on the merits that the Assessing Officer made a proper estimate of the income on the facts and circumstances of the case. It is well settled that the estimate of income has to be made on a reasonable basis. It is also well settled that the past records of the assessee is a valuable guide in making a reasonable estimate. In this connection, we draw your kind attention to the decision of Karnataka High Court in Venkanna (P.) Ltd V CIT 72 ITR 328. We further rely on the following decisions for the above proposition;

i. CIT V Ranicherra Tea Co. Ltd. 207 ITR 979 (Cal)

ii. Ratnalal Omprakash V CIT 132 ITR 640 (Ori)

We are enclosing herewith the audited balance sheet and profit and loss account for the years ended 2006, 2007 and 2008. The profit has a percentage of sales. (Business income returned as a percentage of sales).

It can be seen that the profit percentage for the last three years is approximately 4%. Therefore, the estimate of 5% made by Assessing Officer is quite reasonable. In view of the above submissions it is prayed that the learned Commissioner be pleased to drop the proceedings."

2.5 The ld. CIT after considering the submissions of the assessee, was of the view that the explanation given by the assessee suggesting the rate of income at 4% is a general explanation without any specific basis. The ld. CIT while observing that in the absence of the books of accounts, the Assessing Officer had no option but to estimate the profit, was of the view that since the Assessing Officer had failed to give any basis for the scaling down of his estimate from the proposed 8% to 5%, as adopted in the order of assessment, this had resulted in the order of assessment for Assessment Year 2009-10 becoming erroneous and prejudicial to the interest of revenue.

3.1 The learned Authorised Representative while impugning the order of the ld. CIT reiterated the contentions in the submissions put forth before the CIT in revision proceedings (supra at para 2.4 of this order). It was contended by the ld. A.R. that for invoking the jurisdiction under Section 263 of the Act, the order passed by the Assessing Officer must be both erroneous and prejudicial to the interest of revenue. It is contended that the order of the Assessing Officer was not erroneous but rather sustainable in law as the estimate of income @ 5% of turnover by the Assessing Officer was appropriate since he did so after making enquiries and taking into account the material before him. It was contended that the ld. CIT has no jurisdiction to invoke the provisions of section 263 of the Act merely because he was of the opinion that the estimate made by the Assessing Officer at 5% was on the lower side and that left to himself the ld. CIT would estimate the income at the higher rate of 8%. In support of this proposition, the ld. A.R. relied on the decision of the Hon'ble Apex Court in Malabar Industrial Co. Ltd. (243 ITR 83) and of the Hon'ble Bombay High Court in Gabriel India Ltd.

(203 ITR 108). The ld. A.R. further submitted that neither in the notice issued in proceedings invoking section 263 of the Act nor in the impugned order, has the ld.CIT given any reason, whatsoever for his coming to the conclusion as to how the estimate of income @ 5% by the Assessing Officer is erroneous. The ld. CIT has also not given any reason as to why and how the order of assessment for Assessment Year 2009-10 is erroneous and prejudicial to the interest of revenue. In view of the above, it was contended that this assumption of jurisdiction by the ld.CIT under Section 263 of the Act was unsustainable.

3.2 On merits, the learned Authorised Representative submitted that the assessing officer's estimation of income @ 5% was proper and reasonable in the facts and circumstances of the case and even the past records of the assessee's profits (reproduced at para 2.4 of this order) show that its profits from Assessment Year 2006-07 to 2009-10 was in the range of 4.16% to 3.8% and turnover in all these years was in excess of Rs.2 Crores. It is submitted that, even on merits, the ld. CIT had given no reasons or finding to show that the Assessing Officer's estimation of income @ 5% was erroneous or unsustainable on facts, considering the admitted profits for the year under consideration were 3.8%. Further, the ld. CIT has also failed to justify how the estimation of income @ 8% as proposed by him was correct in the facts and circumstances of the case.

3.3 The learned Authorised Representative contends that in view of the above submissions it is clear that the order of the ld. CIT is unsustainable both on in respect of the assumption of jurisdiction under Section 263 of the Act and also on merits of the case and therefore the impugned order under Section 263 of the Act requires to be cancelled.

4. Per contra, the learned Departmental Representative supported the order of the ld. CIT.

5.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial decisions cited. Before embarking on an inquiry of the facts on record and how to construe them, it would be relevant to take note of the fundamental principle for judging the action taken by the ld. CIT under Section 263 of the Act. The Tribunal, Mumbai Bench in the case of Khatija S Oomerbhoy V ITO reported in 101 TTJ 1095, analysed in detail the various authoritative pronouncements including the decision of the Hon'ble Apex Court in the case of Malabar Industries Co. Ltd. (supra) and propounded the following broader tests :

(i) The CIT must record satisfaction that the order of the AO is erroneous and prejudicial to the interest of the Revenue. Both the conditions must be fulfilled.

(ii) Sec. 263 cannot be invoked to correct each and every type of mistake or error committed by the AO and it was only when an order is erroneous that the section will be attracted.

(iii) An incorrect assumption of facts or an incorrect application of law will suffice the requirement of order being erroneous.

(iv) If the order is passed without application of mind, such order will fall under the category of erroneous order.

(v) Every loss of revenue cannot be treated as prejudicial to the interests of the Revenue and if the AO has adopted one of the courses permissible under law or where two views are possible and the AO has taken one view with which the CIT does not agree. If cannot be treated as an erroneous order, unless the view taken by the AO is unsustainable under law

(vi) If while making the assessment, the AO examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determine the income, the CIT, while exercising his power under s 263 is not permitted to substitute his estimate of income in place of the income estimated by the AO.

(vii) The AO exercises quasi-judicial power vested in his and if he exercises such power in accordance with law and arrive at a conclusion, such conclusion cannot be termed to be erroneous simply because the CIT does not fee stratified with the conclusion.

(viii) The CIT, before exercising his jurisdiction under s. 263 must have material on record to arrive at a satisfaction.

(ix) If the AO has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation by a letter in writing and the AO allows the claim on being satisfied with the explanation of the assessee, the decision of the AO cannot be held to be erroneous simply because in his order he does not make an elaborate discussion in that regard.

5.2 In the case on hand, we find that the basic grievance of the assessee is with regard to the validity of the assumption of jurisdiction under Section 263 of the Act. In the case on hand, when the assessee did not produce the books of account for examination before the Assessing Officer in assessment proceedings, since they were seized by the Dept. of Customs & Central Excise, the Assessing Officer proceeded to estimate the income @ 5% of turnover as against profit @ 3.8% returned by the assessee in the period under consideration. This was done after issuing a show cause notice to the assessee and considering the assessee's reply in the matter. The view of the ld. CIT was that since the Assessing Officer proposed estimation of the income @ 8% of turnover in the notice to the assessee, he ought to have adopted the income @ 8% of turnover. By adopting it @ 5% of turnover without any justification, except for the assessee's reply suggesting that the income be adopted @ 4% to 5% based on the assessee's records for the past few years; the order of assessment is rendered both erroneous and prejudicial to the interest of revenue. Per contra, the contentions of the assessee before

us is that the ld. CIT's assumption of jurisdiction under Section 263 of the Act is itself unsustainable as he has not established how the Assessing Officer's estimation of income @ 5% of turnover is erroneous or prejudicial to revenue, considering that the estimation @ 5% was based on the assessee's reply to the A.O's notice / queries and the fact that the assessee's past records indicate that its profits are in the range of 4.16% to 368% was taken into account. It is further contended that the ld. CIT has also failed to provide any basis or justification as to why the income is to be estimated at 8% of turnover when the returned profit of the assessee for the year under consideration was admittedly 3.8%

5.3 In our view, section 263 of the Act does not visualise a case substitution of the judgement of the ld. CIT for that of the Assessing Officer who passed the order of assessment, unless the order is erroneous. In the case on had, we find that the ld. CIT has failed to establish that the order of the Assessing Officer was erroneous in estimating income @ 5% of turnover in the facts and circumstances of the case. The said estimation, we find, has been made after enquiry by the Assessing Officer with the assessee in this regard and on the basis of material on record. While the ld. CIT on perusal of the records may be of the opinion that the Assessing Officer's estimation of income @ 5% of turnover may be on the lower side and that left to himself he would have estimated the income @ 8% of turnover, in our view, this would not vest the ld. CIT with the power to re-examine and estimate the income at the higher figure of 8% of turnover; moreover when the ld. CIT has himself failed to justify and establish the error in estimation of the income @ 5% of turnover. This view of ours is based on the fact that the Assessing Officer in his exercise of quasi-judicial powers vested in him has arrived at a

conclusion that cannot be viewed as erroneous simply because the ld.CIT is not in agreement with his finding. Thus, in our considered view, the assumption of jurisdiction under Section 263 of the Act by the ld.CIT was not correct since he has not established that the order of the Assessing Officer in estimating the income of the assessee @ 5% of turnover was either erroneous or prejudicial to the interest of revenue.

5.4 In coming to this view, we draw support from the observations of the Hon'ble Bombay High Court in the case of Gabriel India Ltd. (supra); which are as under :-

" ……This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is held to be erroneous. Cases may be visualised where the Income-tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure. It is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. It may be said in such a case that in the opinion of the Commissioner the order in question is prejudicial to the interests of the Revenue. But that by itself will not be enough to vest the Commissioner with the power of suo motu revision because the first requirement, viz., that the order is erroneous, is absent. Similarly, if an order is erroneous but not prejudicial to the interests of the Revenue, then also the power of suo motu revision cannot be exercised. Any and every erroneous order cannot be the subject-matter of revision because the second requirement also must be fulfilled. There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed.

As observed in Dawjee Dadabhoy and Co. v. S. P. Jain [1957] 31 ITR 872 (Cal), at page 881, "the words prejudicial to the interests of the Revenue have not been defined, but it must mean that the orders of assessment challenged are such as are not in accordance with law, in consequence whereof the lawful revenue due to the State has not been realised or cannot be realised. It can mean nothing else". The aforesaid observations were also applied by the Gujarat High Court in Addl. CIT v. Mukur Corporation [1978] 111 ITR 312. We are of the opinion that the aforesaid interpretation given by the Calcutta High Court to the expression "prejudicial to the interests of the Revenue" is the correct interpretation.

We, therefore, hold that in order to exercise power under sub-section (1) of section 263 of the Act there must be material before the Commissioner to consider that the order passed by the Income-tax Officer was erroneous in so far as it is prejudicial to the interests of the Revenue. We have already held

what is erroneous. It must be an order which is not in accordance with the law or which has been passed by the Income-tax Officer without making any enquiry in undue haste. We have also held as to what is prejudicial to the interests of the Revenue. An order can be said to be prejudicial to the interests of the Revenue if it is not in accordance with the law in consequence whereof the lawful revenue due to the State has not been realised or cannot be realised. There must be material available on the record called for by the Commissioner to satisfy him prima facie that the aforesaid two requisites are present. If not, he has no authority to initiate proceedings for revision. Exercise of power of suo motu revision under such circumstances will amount to arbitrary exercise of power. It is well-settled that when exercise of statutory power is dependent upon the existence of certain objective facts, the authority before exercising such power must have materials on record to satisfy it in that regard. If the action of the authority is challenged before the court it would be open to the courts to examine whether the relevant objective factors were available from the records called for and examined by such authority. Our aforesaid conclusion gets full support from a decision of Sabyasachi Mukharji J. (as his Lordship then was) in Russell Properties Pvt. Ltd. v. A. Chowdhury, Addl. CIT [1977] 109 ITR 229 (Cal). In our opinion, any other view in the matter will amount to giving unbridled and arbitrary power to the revising authority to initiate proceedings for revision in every case and start re-examination and fresh enquiries in matters which have already been concluded under the law. As already stated it is a quasi judicial power hedged in with limitation and has to be exercised subject to the same and within its scope and ambit. So far as calling for the records and examining the same is concerned, undoubtedly, it is an administrative act, but on examination "to consider" or in other words, to form an opinion that the particular order is erroneous in so far as it is prejudicial to the interests of the Revenue, is a quasi-judicial act because on this consideration or opinion the whole machinery of re-examination and reconsideration of an order of assessment, which has already been concluded and controversy which has been set at rest, is set again in motion. It is an important decision and the same cannot be based on the whims or caprice of the reviving authority. There must be materials available from the records called for by the Commissioner."

5.5 Following the observations of their Lordships in the aforesaid decision of the Hon'ble Apex Court in Malabar Industries Co. Ltd. (supra); of the Hon'ble Bombay High Court in Gabriel India Ltd. (supra), and the tests propounded by the ITAT, Mumbai Bench in the case of Khatija S Oomerbhoy (supra), we are of the view and hold that the ld. CIT, in the impugned order under Section 263 of the Act, has failed to record any cogent reasons to establish that the order of the Assessing Officer was both erroneous and prejudicial to the interests of revenue and therefore the ld. CIT having assumed jurisdiction under Section 263 wrongly, the impugned order under Section 263 of the Act is cancelled.

6. The assessee has preferred a Stay Petition No.209/Bang/2014, which is purportedly in respect of the order under Section 263 of the Act for Assessment Year 2009-10. Since no demand can be raised in an order under Section 263 of the Act, this stay petition is not maintainable and is accordingly dismissed.

7. In the result, the assessee's appeal for Assessment Year 2009-10 is allowed and the stay petition filed by the assessee is dismissed.

Order pronounced in the open court on 20th March, 2015.

Sd/-	Sd/-
(RAJPAL YADAV)	**(JASON P BOAZ)**
Judicial Member	Accountant Member

*Reddy gp

Copy to :

1. Appellant
2. Respondent
3. C.I.T.
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard File.

(True copy) By Order

Asst. Registrar, ITAT, Bangalore