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INCOME TAX APPEAL No. 107 of 2015
Commissioner of Income Tax, Meerut
Vs.
Vam Resorts & Hotels Pvt. Ltd.

Hon'ble Bharati Sapru, J.
Hon'ble Rohit Ranjan Agarwal, J.

(By Rohit Ranjan Agarwal, J.)

1. This appeal under Section 260-A of the Income Tax Act, 1961 (hereinafter referred to as the Act) has been filed assailing the judgment and order dated 14.11.2014 passed by the Income Tax Appellate Tribunal, Delhi Bench "H", New Delhi. This appeal was admitted on 16.2.2017 on the following questions of law:

(1) Whether the ITAT passed a perverse order in setting aside the order U/s 263 on grounds that A.O. had already conducted inquiry on issues on which order U/s 263 was passed when no such embargo has been put in the language of the Section, the intention of the legislature was never such so as to render the revenue remediless against erroneous orders of the A.O. nor make the revenue suffer a continuous wrong.

(2) Whether the ITAT erred in law in interpreting the provisions of Section 263 which says "Commissioner may call for and examine the records of the proceedings if he considers any order passed therein, by the A.O. is erroneous in so far as prejudicial to the interest of revenue" hence the view of the ITAT in the present case that A.O. had already conducted inquiry is unsustainable.

(3) Whether the ITAT erred in law in curbing the power of the CIT granted by the legislature to examine and correct the orders of the A.O. especially when this is the only remedy available with the department to correct the wrong of the A.O.

(4) Whether the ITAT erred in law in deleting the order U/s 263 on the issue of development expenses when it was clear that only a small portion of such development expenses was actually related to land development receipts.

(5) Whether the ITAT erred in law in deleting the order U/s 263 on the issue of agricultural income when it was clear that assessee had only purchased a land on which crops were shown and sale proceeds of such crops does not constitute agriculture income.

(6) Whether the ITAT erred in law in allowing the appeal of the assessee ignoring the fact that there was a difference between the Gross Receipts as per 26AS and Gross Receipts declared by the assessee when the assessee did not furnish any reconciliation statement to explain the difference.

2. The case relates to the assessment year 2008-09. The assessee which is a Company, filed return of income on 27.9.2008 declaring income at Rs.14,71,900/-. The said return was processed under Section 143(1) of the Act. The case of the Company was selected for scrutiny and notices under Section 143(2) and 142(1) were issued. The assessee produced the books of account and replied the various queries raised by the Assessing Officer. As the assessee had shown development expenses of Rs.7,16,62,142/- in the profit and loss account, the A.O. found Rs.1,20,000/- as excessive and disallowed the same, and added to the income of the assessee. The Order under Section 143(3) of the Act was passed by the assessing officer on 18.11.2010.

3. The assessee challenged the assessment order passed under Section 143(3) of the Act by filing Appeal No.192/10-11 before the CIT(A) under Section 250 of the Act. On 5.6.2013, the CIT(A) allowed the appeal of the assessee on the ground that addition made by A.O. was without any basis, as the word "appear" to be excessive was stated in the order of the A.O. and such addition made in a cavalier and casual manner cannot be sustained.

4. During the pendency of the appeal the Commissioner of

Income Tax, Meerut exercising power under Section 263 of the Act, issued notice to the assessee. The notice was replied by the assessee, and on 25.3.2013 Commissioner of Income Tax directed the A.O. to look into applicability of Section 40-A(3) and Section 40(a)(ia) of the Act.

5. After the remand A.O. again issued notice under Section 142(3)/263 of the Act to the assessee. It appears that the assessee did not appear before the assessing authority and the assessing officer passed assessment order on 7.3.2014 under Section 263/143(3) of the Act on total income of Rs.17,47,323,650/-.

6. While the remand proceedings were pending before the assessing authority the assessee approached the Income Tax Appellate Tribunal, (Delhi Bench "H"), New Delhi (hereinafter called as "ITAT") challenging the order under Section 263 of the Act passed by the Commissioner of Income Tax, Meerut. The ITAT allowed the appeal of the assessee setting aside the order passed by the CIT, Meerut under Section 263 of the Act.

7. Sri Subham Agarwal defending the order passed by the Commissioner of Income Tax, Meerut under Section 263 of the Act submitted that the assessing officer has disallowed the expenses of Rs.1,20,000/- only, without any inquiry and has accepted the rest of the amount as land development expenses in the profit and loss account, as such, the CIT had rightly remanded the matter to the assessing authority exercising revisional power as the order of A.O. was erroneous and pre-judicial to the interest of revenue. He further submitted that after the remand order, A.O.

again has passed assessment order on 7.3.2014 and now the addition of Rs.7,16,62,142/- on account of land development expenses had been made as the assessee did not avail the opportunity despite repeated reminders and failed to produce the books of account and comply the order of the assessing authority. He contended that Tribunal has passed the order impugned after assessment order has been passed by the assessing authority after remand, and Tribunal should not have set aside the same, but should have relegated the matter to assessing authority directing the assessee to appear before the same and produce books of account to verify the queries so raised.

8. Per contra, counsel for the assessee submitted that the assessment order dated 18.11.2010 was passed after notice under Sections 143(2) and 142(1) of the Act was issued to assessee raising various queries and the assessee had appeared before the Assessing Officer number of times and furnished books of account and replied. Further, the CIT in its show cause notice dated 6.2.2013 has accepted the fact that on examination of record, assessment order was passed after inquiry which according to him was not proper. Thus, proceedings under Section 263 of the Act cannot be invoked by the CIT when there is no material to hold that order was erroneous and pre-judicial to the interest of revenue and it would not be invoked to correct each and every type of mistake and error committed by A.O. He further relied upon paragraph nos.7 and 9 of judgment of the Apex Court in the case of **Malabar Industrial Co. Ltd. vs. Commissioner of Income Tax, 243 ITR 83 (SC)**, which are extracted hereunder:

“7. There can be no doubt that the provision cannot be invoked

to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous that the section will be attracted. **An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous.** In the same category fall orders passed without applying the principles of natural justice or without application of mind.

9. 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 Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an ITO adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the ITO 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 ITO is unsustainable in law."**

9. The second limb of argument of counsel for the assessee is that appeal before the CIT(A) was pending, as such, the CIT has no jurisdiction to revise the order, in view of Clause (c) of Explanation-1 to Section 263 of the Act, which provides that when appeal is pending before the Commissioner, the exercise of jurisdiction under Section 263 of the Act is barred. He relied upon the judgment in the case of **Smt. Renuka Philip vs. ITO (2018)409 ITR 567 (Mad)**, the relevant paragraphs of which are extracted hereunder:

"21. With regard to the merits of the case, the learned counsel for the assessee referred to a decision of the Division Bench of this Court in **Dr.P.K.Vasanthi Rangarajan v. CIT [2012] 23 taxmann.com 299/209 Taxman 628 (Mad.)**, wherein, the Hon'ble Division Bench held that there is no inhibition in the assessee claiming the benefit of investment made in four flats thereby gaining the benefit under Section 54F of the Act. The Court took note of the decision in TCA No. 656 of 2005 dated 04.01.2012. However, we are not examining the merits of the matter at this juncture since, we are only called upon to answer the Substantial Question of Law with regard to the

assumption of jurisdiction of the Commissioner under Section 263 of the Act. The power under Section 263 of the Act is not exercisable under certain circumstances. In this regard, we refer to Section 263(1) explanation 1(c), which reads as follows:

“Revision of orders prejudicial to revenue

263(1)...

(a) to (b)

(c)Where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal [filed on or before or after the 1st day of June, 1988], the powers of the Commissioner under this Sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.”

22. The above explanation makes it clear that when the appeal is pending before the Commissioner, the exercise of jurisdiction under Section 263 of the Act is barred. The Commissioner in the order dated 14.03.2012 states that the appeal pertains to the claim made by the assessee under Section 54 of the Act and it has got nothing to do with the order passed by the Assessing Officer under Section 54F of the Act. The said finding rendered by the Commissioner is wholly unsustainable, since the assessee went on appeal against the re-assessment order dated 31.12.2009 stating that his claim for deduction under Section 54 of the Act should be accepted.”

10. It has also been contended that remand by the CIT as far as the non-deduction of TDS is concerned, was wrong, as payment was made by the Company, i.e., ERA Land-mark Ltd., and as per Section 194(c) of the Act the TDS was deducted.

11. It was further submitted that all the documents in evidence as proofs and the queries so raised by the assessing officer was submitted and replied by the assessee and the CIT wrongly invoked the jurisdiction under Section 263. Reliance has been placed upon the decision of this Court in the case of **CIT vs.**

Krishna Capbox Ltd, (2015) 372 ITR 310, relevant paragraphs of which are extracted hereunder:

9. *The Tribunal further considered the question whether discussion of queries and reply received from assessee, in assessment order, is necessary or not. Relying on two judgments of Delhi High Court in **CIT Vs. Vikash Polymers [2012] 341 ITR 537/ [2010] 194 Taxman 57** and **CIT v. Vodafone Essar South Ltd. [2012] 28 taxmann.com 273/ [2013] 212 Taxman 184 (Delhi)**, it held that once inquiry was made, a mere non discussion or non- mention thereof in assessment order cannot lead to assumption that Assessing Officer did not apply his mind or that he has not made inquiry on the subject and this would not justify interference by Commissioner by issuing notice under Section 263 of the Act.*

10. *In **Vikash Polymers** (supra) relevant part of the observations in this regard read as under (page 548 of 341 ITR):*

"This is for the reason that if a query was raised during the course of scrutiny by the Assessing Officer, which was answered to the satisfaction of the Assessing Officer, but neither the query nor the answer was reflected in the assessment order, that would not, by itself, lead to the conclusion that the order of the Assessing Officer called for interference and revision."

11. *Further, the relevant observation made in **Vodafone Essar South Ltd.** (supra) in this regard reads as under (page 531 of 1 ITR-OL):*

"The lack of any discussion on this cannot lead to the assumption that the Assessing Officer did not apply his mind."

12. *Learned counsel for the Department could not place any other authority before this Court wherein any otherwise view has been taken. On the contrary, learned counsel for assessee has placed before us a decision of Bombay High Court in **Income Tax Appeal No.296 of 2013 (CIT v. Fine Jewellery (India) Ltd.) [2015] 372 ITR 303/230 Taxman 641/55 taxmann.xom 514 (Bom.)** decided on February 3, 2015, wherein also Bombay High Court, following its earlier decision in **Idea Cellular Ltd. Vs. Dy. CIT [2008] 301 ITR 407 (Bom.)** has taken a similar view and said as under (page 307 of 372 ITR):*

".....if a query is raised during assessment proceedings and responded to by the assessee, the mere fact that it is not dealt with in the Assessment Order would not lead to a

conclusion that no mind had been applied to it."

12. Similarly in the case of CIT vs. Mahendra Kumar Bansal, 2008(297)ITR 99 (Ald), this Court held that merely because the **income tax officer** had not written lengthy order, it would not establish that the assessment order passed under Section 143(3)/148 of the Act is erroneous and pre-judicial to the interest of the revenue. Relevant paragraph of which is extracted hereunder:-

*"In the case of **Goyal Private Family Specific Trust [1988] 171 ITR 698**, this court has held that the order of the Income-tax Officer may be brief and cryptic, but that by itself is not sufficient reason to brand the assessment order as erroneous and prejudicial to the interests of the Revenue and it was for the Commissioner to point out as to what error was committed by the Income-tax Officer in having reached to its conclusion and in the absence of which proceedings under Section 263 of the Act is not warranted.*

*In the case of **Belal Nisa [1988] 171 ITR 643** the Patna High Court has held that where the Income-tax Officer had not carried out the necessary enquiry enjoined by section 143(1) of the Act the Commissioner is within his power in taking action in terms of Section 263(1) of the Act. Similar view has been taken in by the Patna High Court in the case of **Smt. Kaushalya Devi [1988] 171 ITR 686**.*

The principle laid down by the Patna High Court in the aforesaid two cases are not applicable to the facts of the present case in view of the provisions of Section 143(1) of the Act and as the Central Board of Direct Taxes had already issued the circular referred to above that action under Section 263 of the Act is not warranted and this circular appears to have not been brought to the notice of the Patna High Court which is binding upon the departmental authorities.

*As held by this Court in the case of **Goyal Private Family Specific Trust [1988] 171 ITR 698**, we are of the considered opinion that merely because the Income- tax Officer had not written lengthy order it would not establish that the assessment order passed under Section 143(3)/148 of the Act is erroneous and prejudicial to the interests of the Revenue without bringing on record specific instances, which in the present case, the Commissioner of Income Tax has failed to do."*

13. Lastly, the counsel for the assessee submitted that the argument of counsel for the Department relying upon fresh assessment order made by the assessing officer under Section 263/143(3) of the Act dated 7.3.2004 for the purpose of Section 263 of the Act is not sustainable, as according to him definition of expression "record" as per Clause (b) of Explanation to Section 263 of the Act includes all the records relating to Section 263 proceedings available at the time of examination by the CIT only, and not in subsequent order or fresh order passed thereafter under Section 263/143(3) of the Act, which could justify the proceedings under Section 263 carried out by the CIT.

14. We heard Sri Shubham Agarwal, learned counsel for the Department, Sri Suyash Agarwal, learned counsel for the respondent-assessee and have perused the record.

15. The revenue in this appeal has tried to establish that ITAT was not correct in setting aside the order passed by the Commissioner under Section 263 of the Act, on the ground, that assessee had not furnished entire details regarding the contracts, which was cancelled and also the A.O. not looking into the provisions of Section 40(a)(i-a) of the Act whereby such expenses on which the T.D.S. was liable to be deducted, but was not actually deducted were required to be disallowed and added back under the said provisions of the Act.

16. On the other hand, the contention of assessee that the A.O. after considering the entire books of account and the reply furnished by the assessee passed the assessment order under Section 143(3) of the Act. Further, from perusal of the assessment

order dated 18.11.2010, it is clear that the A.O. had considered all the books of account and further on 13.5.2010 it had required the assessee, the entire information for the relevant assessment years along with copy of bank statement, narration of debit and credit entries, and other details.

17. On 7.7.2010, the assessee had replied the said notice and made available all the documents as required by the A.O. The Tribunal being the last fact finding Court, in paragraph 7 of its judgment, had noted that details of the documents produced before the A.O. included computation of income along with return and details of TDS, copy of balance sheet, trading and profit and loss account, details of sundry debtors as well as copies of the orders issued by the debtors to the assessee.

18. Thus, the case in hand is not a case where the CIT found that the assessment order was erroneous and it is prejudicial to the interest of the revenue, as the A.O. after the case of the assessee was selected in scrutiny had required the assessee to furnish all the documents and only after the production of the said documents and his satisfaction the assessment order was passed under Section 143(3) of the Act. The Apex Court in the case of **Malabar Industrial Co. Ltd. (supra)** while considering the prerequisite for exercising power by the Commissioner under Section 263 of the Act, held as under:

“A bare reading of Section 263 of the Income Tax Act, 1961 makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suo moto under it, is that the order of the Income-tax Officer is erroneous insofar as it is prejudicial to the interests of the revenue. 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. If one of them is absent - if the order of the Income-tax Officer is erroneous but is not prejudicial to the revenue or if it is not erroneous but is prejudicial to the Revenue - recourse cannot be had to Section 263(1) of the Act. The provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous that the section will be attracted.”

19. Similar view has been taken by the Bombay High Court in the case of **Commissioner of Income Tax vs. Development Credit Bank Ltd., 323 ITR 83(SC)**, relevant paragraph of the same is extracted below:

“Held, dismissing the appeal, that there was no basis or justification for the Commissioner to invoke the provisions of Section 263. The Assessing Officer after making an enquiry and eliciting a response from the assessee came to the conclusion that the assessee was entitled to depreciation on the value of securities held on the trading account. The Commissioner could not have treated this findings to be erroneous or to be prejudicial to the interests of the Revenue. The observation of the Commissioner that the Assessing Officer had arrived at a finding without conducting an enquiry was erroneous, since an enquiry was specifically held with reference to which a disclosure of details was called for by the Assessing Officer and furnished by the Assessing Officer and furnished by the assessee. The Tribunal was justified in holding that recourse to the powers under Section 263 was not warranted in the facts and circumstances of the case.”

20. In the case of **CIT vs. Arvind Jewellers, 259 ITR 502 (Gujrat)**, it was held that once the A.O. after issuing notice had considered all the material on record, there was no basis for invocation of jurisdiction under Section 263 of the Act. Relevant paragraph of the said judgment is extracted hereunder:

‘Held, that the finding of fact by the Tribunal was that the assessee had produced relevant material and offered explanation in pursuance of the notices issued under Section 142(1) as well as section 143(2) of the Act and after considering the material and explanations, the Income-tax Officer had come to a definite conclusion. Since the material was there on record and the said material was considered by

the Income-tax Officer and a particular view was taken, the mere fact that different view can be taken should not be the basis for an action under Section 263. The order of revision was not justified.”

21. The Bombay High Court in the case of **CIT vs. Gabriel India Ltd., 203 ITR 108 (Bombay)**, held that the order of the A.O. would not become erroneous simply because he did not make elaborate discussion. The relevant paragraph of the said judgment is extracted hereunder:

“Held, that the Income-tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation in that regard by a letter in writing. All these were part of the record of the case. Evidently, the claim was allowed by the Income-tax Officer on being satisfied with the explanation of the assessee. This decision of the Income-tax Officer could not be held to be "erroneous" simply because in his order he did not make an elaborate discussion in that regard. Moreover, in the instant case, the Commissioner himself, even after initiating proceedings for revision and hearing the assessee, could not say that the allowance of the claim of the assessee was erroneous and that the expenditure was not revenue expenditure but an expenditure of capital nature. He simply asked the Income-tax Officer to re-examine the matter. That was not permissible. The Tribunal was justified in setting aside the order passed by the Commissioner of Income-tax under Section 263.”

22. The Division Bench of this Court in the case of **J.P.Srivastava & Sons vs. CIT, 111 ITR 326 (Ald)** had taken a similar view. The relevant paragraph is extracted hereunder:

“We are of opinion that the approach of the Commissioner is erroneous. The failure of the Income-tax Officer to deal with the claim of the assessee in the assessment order may be an error, but an erroneous order by itself is not enough to give jurisdiction to the Commissioner to revise it under Section 33B. It must further be shown that the order was prejudicial to the interests of the revenue. It is not each and every order passed by the Income-tax Officer which can be revised under Section 33B.

Section 33B contemplates a notice to the assessee. In response to the notice the assessee may show to the Commissioner that the order sought to be revised is not prejudicial to the interests of the revenue. In that event, the Commissioner would have no jurisdiction to take any further action. He would be competent to take action only if he rejects the plea of the assessee. It thus becomes necessary for the Commissioner to examine the merits of the objection raised by the assessee. He cannot delegate that power to the Income-tax Officer by setting aside the assessment order and directing him to make a fresh assessment after taking into consideration the objection of the assessee.”

23. In the present case, the Tribunal rightly arrived at the finding that all the material in regard to land development expenses was before the Assessing Officer who had required the assessee to produce all the documents in relation to the same and after inquiring about the details of contract and the contract executed by assessee, the bill submitted and payment schedule made, the Assessing Officer accepted the books of account and only disallowed Rs.1,20,000/- and added to the income of the assessee, which was also set aside by order of the CIT(A) while exercising the power under Section 263 of the Act CIT did not have any material for invoking the said provision and it merely did the same on suspicion and presumption. The Punjab and Haryana High Court in the case of **CIT vs. Ram Narain Goel, 224 ITR 180 (P & H)** held that suspicion however drawn cannot take place on evidence or proof. This case was followed in the case of **CIT vs. Faqir Chaman Lal, 262 ITR 295 (P & H)**.

24. The argument raised by counsel for the revenue that the Tribunal should have send back the matter to the assessing authority to decide afresh is a fallacy, as the CIT itself on 5.6.2013, while deciding the appeal of the assessee under Section 250 of the Act set aside the assessment order dated 18.11.2010 to the

extent of addition of Rs.1,20,000/- made in the assessment proceedings. Further, the appeal before the Tribunal emanated from the order of the Commissioner of Income Tax exercising power under Section 263 of the Act, as such the Tribunal was correct in limiting its scope to decide whether the exercise of power made by the Commissioner was in consonance with provision of Section 263 and relied upon the decision of **Malabar Industrial Co. Ltd.** (supra).

25. As, Clause (c) of Explanation 1 to Section 263 of the Act provides that when an appeal is pending before the Commissioner, the exercise of jurisdiction under Section 263 of the Act by CIT is barred. Thus, in the present case, the CIT wrongly exercised jurisdiction under Section 263 of the Act by remanding back the matter to assessing authority on 25.3.2013, while the appeal was decided by CIT (A) on 5.6.2013. Thus, the order passed by the ITAT does not suffer from any irregularity and needs no interference.

26. As far as the word "record" appearing in Clause (b) of Explanation-1 to Section 263 is concerned, it means the record available at the time of examination by the Commissioner of Income Tax and not any material or record available subsequent to his examination or exercise of power under Section 263. Thus, any order passed by the AO in the assessment proceedings after the remand by the CIT cannot be looked upon and the argument made by the counsel for the revenue for relying upon the fresh assessment order made on 7.3.2004 under Section 263/143(3) of the Act cannot be accepted in view of the above provision of law.

27. In the present case, the Tribunal had recorded specific finding of fact that the assessing authority had examined each and every aspect of the case on which the remand order hinges, as such the remand order was not sustainable in the eyes of law.

28. Considering the facts and circumstances of the case, we are of the considered opinion, that the revenue has failed to make any case for interference in the order of the ITAT, as the CIT had proceeded to remand the matter back to the assessing authority while the appeal of the assessee was pending under Section 250 and the power of exercise under Section 263 was barred by Clause (c) to Explanation 1 of Section 263 of the Act. Further, the remand order by the CIT was based merely on suspicion and presumption.

29. The appeal is devoid of merit and is hereby **dismissed**. The question of law is, therefore, answered against the revenue and in favour of the assessee.

Dated:- 20.8.2019
AKJ