IN THE INCOMETAX APPELLATE TRIBUNAL
JODHPUR BENCH: JODHPUR

(BEFORE SHRI HARI OM MARATHA, JUDICIAL MEMBER AND
SHRI N.K. SAINI, ACCOUNTANT MEMBER)

I.T.A. No. 404/Jodh/2014
(A.Y. 2010-11)

M/s Meditech House No. 42, K. Block Sriganganagar	Vs	The J.C.I.T Sriganganagar
PAN No.AALFM 9700 E		
(Appellant)		(Respondent)

Assessee by :- Shri Rakesh Gupta
Department by :- Shri O.P. Meena, CIT- D.R.

Date of hearing : 19/09/2014
Date of pronouncement : 25/09/2014

O R D E R

PER HARI OM MARATHA, J.M. :

This appeal of the assessee, for A.Y. 2010-11 passed u/s 263 of the Income-tax Act, 1961 ['the Act' for short] is directed against the order of ld. CIT(A) dated 30.06.2014.

2. Briefly stated the facts of the case are that assessment in this assessee's case for A.Y. 2010-11 was completed u/s 143(3) of the Act on 20.12.2012 at a total income of Rs. 3,88,889/-. The A.O has added a sum of Rs. 2529/- in the total income declared at Rs. 386360/- in the return of income filed by the assessee firm for this year. The ld. CIT called for records of this order u/s 263 of the Act and after examining the same, he found that the order is erroneous and prejudicial to the interest of the Revenue on five grounds. Accordingly, he issued show cause notice u/s 263 of the Act vide order dated 6.2.2014. The points taken in this notice read as under:

I. *Assessee runs its business from 42 K Block, Sri Ganganagar, but there is neither expenses on account of payment of rent nor any building is shown in the balance-sheet. Hence, without own building or rental building how one can run business, this important aspect remained unexamined.*

II. *Assessee has claimed exemption u/s 10 B amounting to Rs. 2,33,59,690/- and as per provision of section 10 B (3) of the IT Act, 1961 read with rule 16 E of the IT Rules, assessee has to furnish the report of Accountant in form 56 G certifying that the deduction has been correctly claimed, but this requisite report has not been filed.*

III. *As per section 10B(3) of the IT Act, 1961, assessee has to bring the export proceeds in convertible foreign exchange within six months from the end of financial year. Further, explanation - 2 of the section provides facility to credit the amount of sale proceeds into separate bank account maintained outside India with the approval of Reserve Bank of India. In the case of assessee, though amount is credited in Paypal bank, USA but no evidence for obtaining approval of RBI is on record. It is also noticed that an amount of Rs. 5457/- due from Mental Health Clinic, USA in March, 2010 was paid on 5/11/2010 after the prescribed period of six months, therefore exemption u/s 10 (B) (3) on this amount is not allowable.*

IV. *On examination of statement of account of ORL INC, Sydney, the export proceeds were credited to the account of M/s Ganpat Infoline Pvt. Ltd. on 14/7/2009, 08/09/2009 and 16/10/2009, whereas the same should be credited in the bank account of the assessee then only it is eligible for deduction u/s 10 B.*

V. *New Capital of Rs. 10 lacs and Rs. 50000/- have been credited in the capital accounts of Sh. Amit Mittal and Jitender Mittal respectively, but source of these deposits remained unexamined.*

3. The assessee replied before the ld. CIT(A) through written submissions dated 27.2.2014 as under:

I. *The first defect pointed out by you is regarding the nonpayment of rent for the building which is used by the assessee for business. In this regard it is stated that the property 42 K block, Sri Ganganagar is owned by Smt. Prabha Devi Mittal, mother of all three partners of the assessee firm. Smt. Prabha Devi has allowed her sons to use her property for business purposes that also without charging any rent for the same. This is the sole reason for not showing the rent to anybody. It is fact that the assessee firm is running the business from the building situated at 42 K Block. It is therefore requested that your observation that the business is running without any building is not correct though it is fact that the assessee firm has not paid any rent for the premises for the reason mentioned above.*

II. *Regarding non filing of form No 56G giving the report of the auditor in respect of the exemption u/s 10B, it is stated that as per the knowledge of the assessee, the report was filed with the audit report but there is every possibility that by oversight the same could not be filed with the audit report. Sir this is a mistake which is curable as per explanation (e) of section 139(9). The assessee is attaching herewith a copy of the audit report on Form No. 56 G.*

This being the mistake by oversight may please be excused and it is requested that for such a petty default such a strong action may not be adopted.

III. *Regarding your 3rd observation that one item of receipt amounting to Rs. 5457/- could not be brought in India within 6 months from the end of the financial year, it is stated that while preparing the chart of the bills raised and payment received relating to M/s Mental Health Clinic, USA the date of receipt was by oversight was mentioned 05/11/2010 in place of 11/05/2010. In this way the payment have been received well within 6 months from the end of the financial year. In support of the contention, I am attaching herewith the correct chart of the party and also the copy of the bank statement with HDFC Bank. From the copy of the bank statement your good self will please find that the payment has been received on 11-05-2010 and not on 05/11/2010. This being clerical mistake may please be ignored.*

In this point, your next observation is that the Explanation-2 of the section provides for the facility to credit the amount of sale proceeds into separate bank account maintained outside india with the approval of the Reserve Bank of India. On this basis you have observed that the payments in the Paypal Bank, USA but no evidence for obtaining approval of RBI is filed by the assessee. In this regard it is stated that the paypal is actually not a foreign bank but it is international gateway for payment in India from

foreign countries. Though the Paypal is a gateway for international payments still it is recognized by the Reserve bank of India. The 'Paypal' is also having it's office in India in Chennai and so also it cannot be said that this is a bank situated out of India.

In this regard the assessee has sent a query to the Paypal and in response to that received the reply by Email. A copy of the Email received from Paypal is attached herewith for your ready reference and records. Besides this also the assessee has downloaded the list of the branches of the Paypal world wide and in this the name of India is also appearing. The copy of the same is attached herewith for your ready reference. From the documents filed you will please observe that basically the 'Paypal' is not a bank but only a service provider, who provides the payments and money transfer to be made electronically and also having the RBI approved branch in India.

In view of the above it is requested that no action on these points may please be taken.

IV. Regarding the account of ORl INC, Sydney it is stated that earlier the partner's of the assessee firm were running a company under the name and style of M/s Ganpati Infoline Pvt. Ltd. and M/s ORL INC, Sydney was having the dealing with that company also. You have mentioned the three receipt of the payment which were received in the bank account of M/s Ganpati Infoline Pvt. Ltd. Regarding these payments, the bills were issued by the

assessee firm but M/s ORL INC., USA, by oversight, have sent the payment in the name of the company. All these payments were transferred in the bank account of the assessee firm, immediately, after receipt. In support of the contention the assessee is attaching herewith the copy of account of M/s ORL INC, USA, M/s Ganpati Infoline Pvt Ltd. and also the copies of the bills issued by the assessee firm.

From the above your good self will please find that there is no mistake on the part of the assessee but the mistake was on the part of M/s ORL INC, USA. The payment was ultimately received in the bank account of the assessee and so this mistake may please be ignored.

V. In the original proceedings, the assessee has filed the copies of return of all the three partners. It is true that at that time the source of deposit was not asked and furnished. Now the assessee is submitting the necessary explanation and also the necessary evidences of the credit. The details are as under:-

<u>Jitender Mittal</u>:- In this account there is credit of Rs. 50,000/-. Sh. Jitender Mittal was having F.D.R. with HDFC Bank which was matured and out of the maturity proceeds he has deposited Rs. 50,000/- with the assessee firm. In support of the above the assessee is attaching herewith the copy of bank statement of Sh. Jitender Mittal from HDFC Bank. The copy of ITR-V in support of

filing of return of income and computation of Total Income of Sh. Jitender Mittal are also attached herewith.

Amit Mittal:- In this account there are four credit totaling to Rs. 10,00,000/-. The details are Rs. 1,00,000/- on 13-04-2009; Rs. 6,00,000/- on 21-04-2009; Rs. 50,000/- on 16-02-2010 and Rs. 2,50,000/-/- on 31-03-2010. In support of the same the assessee is attaching herewith a chart showing the details of the entries giving the details of the source of deposit and also the copy of bank statement of Sh. Amit Mittal from HDFC Bank.

Both the partners are regular income-tax payee and filing their respective return of income and so this point may please be excused for the purposes of your proceedings."

4. After considering the submissions of the assessee, the ld. CIT has finally found this assessment order on the above points to be erroneous as well as prejudicial to the interest of the Revenue and has set aside the assessment order dated 20.12.2012 passed u/s 143(3) with the direction to make fresh assessment order. This order has been challenged before the Appellate Tribunal by raising the following grounds:

"1. That the order passed u/s 263 of the Act by the ld. CIT is bad in law, illegal and against facts.

2. That the ld. CIT erred in passing the order u/s 263 of the Act even when all the issues were properly dealt by the JCIT at the time of assessment proceedings."

5. We have heard both sides in detail. We have also perused carefully the entire evidences available on record. It is trite that an order can be revised only and only if twin conditions of 'error in the order' and 'prejudice caused to the Revenue' co-exist. The subject of 'revision under section 263' has been vastly examined and analyzed by various Courts including that of Hon'ble Apex Court. The revisional power conferred on the CIT vide section 263 is of vide amplitude. It enables the CIT to call for and examine the records of any proceeding under the Act. It empowers the CIT to make or cause to be made such an enquiry as he deems necessary in order to find out if any order passed by Assessing Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The only limitation on his powers is that he must have some material(s) which would enable him to form a prima facie opinion that the order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the Revenue. Once he comes to the above conclusion on the basis of the 'material'

that the order of the Assessing Officer is erroneous and also prejudicial to the interests of the Revenue, the CIT is empowered to pass an order as the circumstances of the case may warrant. He may pass an order enhancing the assessment or he may modify the assessment. He is also empowered to cancel the assessment and direct to frame a fresh assessment. He is empowered to take recourse to any of the three courses indicated in section 263. So, it is clear that the CIT does not have unfettered and unchequred discretion to revise an order. The CIT is required to exercise revisional power within the bounds of the law and has to satisfy the need of fairness in administrative action and fair play with due respect to the principle of audi alteram partem as envisaged in the Constitution of India as well as in section 263. An order can be treated as 'erroneous' if it was passed in utter ignorance or in violation of any law; or passed without taking into consideration all the relevant facts or by taking into consideration irrelevant facts. The 'prejudice' that is contemplated under section 263 is the prejudice to the Income Tax administration as a whole. The revision has to be done for the purpose of setting right distortions and prejudices caused to the Revenue in the above context. The fundamental principles which emerge from the several cases regarding the powers of the CIT under section 263 may be summarized below:

(i) The CIT must record satisfaction that the order of the Assessing Officer is erroneous and prejudicial to the interests of the revenue. Both the conditions must be fulfilled.

(ii) Section 263 cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer and it is 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 for the requirement or 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 interest of the revenue and if the Assessing Officer has adopted one of the courses permissible under law or where two views are possible and the Assessing Officer has taken one view under with which the CIT does not agree, it cannot be treated as an erroneous order, unless the view taken by the Assessing Officer is unsustainable under the law.

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

(vii) The Assessing Officer exercise quasi-judicial power vested in him and if he exercise such power in accordance with law and arrives as a conclusion, such conclusion cannot be termed to be erroneous simply because the CIT does not feel satisfied with the conclusion.

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

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

6. Adverting to the facts of the case, we have found that the assessee firm is engaged in the business of providing services of medical transcription to the hospital and doctors abroad for preparing case history of the patients. The services rendered by the assessee are monitored by the Software Technology Park of India which is working under the Ministry of Communication and Information Technology, Government of India. It is found that the assessee had submitted complete details before the A.O at the time of framing of assessment. On similar and identical facts, the A.O has been framing assessment regularly and the copies of assessment orders for A.Ys. 2008-09 and 2009-2010 are placed on record. There being no change in the facts of the case from preceding A.Ys. which were framed after scrutiny u/s 143(3) of the Act, the A.O has allowed the desired relief consistently. Exemption u/s 10B of the Act had been allowed in the earlier A.Ys also. Mere filing of return in Form No. 56G is not a default which could make the order erroneous. The ld. CIT has referred to various case laws in support of his order which read as under:

1) Schenectady Beck India Ltd. Vs. CIT (2005) 272 ITR 103
2) Tara Devi Agarwal Vs. CIT (1973) 88 ITR 323
3) Jagdish Kumar Gulahti Vs. CIT (2005) 28 SITC 137 (All)

4) CIT Vs. Shree Manjunathesware Packing Products & Camphor Works (1998) 231 ITR 53(SC)
5) Malabar Industrial Co. Ltd. Vs. CIT (2000)243 ITR 83 (SC)
6) CIT Vs. Emery Stone Mfg., Co. (1995) 213 ITR 843 (Raj.)
7) Venkata Krishna Rice Co. Vs. CIT 163 ITR 129 (Mad.)
8) Smt. Renu Gupta, Bikaner A.Y. 2001-02, DBIT No. 16/2006

7. In support of his submissions, the ld. A.R has distinguished the above said cases and relied on the following decisions:

"The facts of the above mentioned cases except M/s Malabar Industrial Co. Ltd. Vs. CIT (2000)243 ITR 83 (SC) are distinguish from the case under consideration. In the case of M/s Malabar Industrial Co. the Ld. C.I.T. has considered only part of the order, that's why he has referred this case but the complete findings in this case are different.

Recourse to Section 263(1) cannot be taken if the impugned order is erroneous but not prejudicial to the interest of the revenue; or if it is prejudicial to the interest of the revenue but not erroneous. The twin conditions are required to be satisfied simultaneously.

Malabar Industrial Co. Limited v. CIT [2000] 243 ITR 83 (SC), CIT v.Vikash Polymers [2010] 194 Taxman 57 (Delhi) (HC)

S. Murugan v. ITO [2012]135 ITD 527 (Chennai) (Trib.), J. K. Construction Co. v. ITO [2007]162 Taxman 46 (Jodhpur) (Trib)

In the case of CIT v. G. R. Thangamaligai [2003] 259 ITR 129 (Mad.) (HC) held that in absence of any finding that there is loss of revenue, interference under section 263 is not justified. In the case under consideration there is no tax effect even after revision by the CIT as the income of the assessee is exempt u/s 10B of the Income Tax Act, 1961.

In the case of Punjab Wool Syndicate v. ITO [2012] 17 ITR 439 (Chandigarh) (Trib.) held that where the tax effect because of an order passed by the Assessing Officer is NIL, such order even if erroneous being prejudicial to the interest of the revenue, is not open to revision under Section 263 of the Act. In the instant case, tax effect after passing the assessment order is NIL.

In the case of Antala Sanjay kumar Ravjibhai v. CIT [2012] 135 ITD 506 (Rajkot) (Trib.), Manish Kumar v. CIT [2012] 134 ITD 27 (Indore) (Trib.) held that section 263 does not visualize a case of substitution of judgment of Commissioner for that of the Assessing Officer, unless the decision is held to be erroneous.

In the case of Allied Engineers v. CIT [2009] 180 Taxman 70 (Mag.) (Delhi) (Trib.) held that order passed by the Assessing Officer in accordance with law, judicial pronouncements and after considering relevant replies duly supported by evidence cannot be branded as erroneous, merely because the Commissioner is of other view or in his opinion order passed is weak and not a detailed order.

In the case of Religare Finvest Ltd. v. CIT [2013] 152 TTJ 647 (Delhi) (Trib.) held that as the Commissioner did not consider the merits of the objections raised by the assessee to the show cause notice, the matter was remanded to CIT for adjudication and to record his findings on the objections of the assessee.

In the case of CIT v. Max India Limited [2007] 295 ITR 282 (SC) held that when the Assessing Officer takes one of the two views permissible in law and which the Commissioner does not agree with and which results in a loss of revenue, it cannot be treated as erroneous order prejudicial to the interest of revenue, unless the view taken by the Assessing Officer is completely unsustainable in law.

In the case of CIT v. Escorts Ltd. [2011] 338 ITR 435 (Delhi) (HC) held that the department is not entitled to reopen an assessment based on a fresh inference of transactions accepted

by the revenue for several preceding years on the pretext of dubbing them as erroneous.

In the following cases Antala Sanjaykumar Ravjibhai v. CIT [2012] 135 ITD 506 (Rajkot) (Trib.), Roshan Lal Vegetable Products (P) Ltd. v. ITO [2012] 51 SOT 1 (URO) (Asr.)(Trib.), Fine Jewellery (India) Ltd. v. ACIT [2012] 19 ITR 746 (Mum.)(Trib.) held that in these cases, since the Assessing Officer made proper enquiry and examined accounts, it could not be said that there was non-application of mind by him. Hence, the action under Section 263 was held invalid.

In the case of Salora International Ltd. v. Addl. CIT [2005] 2 SOT 705 (Delhi) (Trib.) held that merely because from a perfectionist point of view, it is felt that some more enquiries and verifications could have been made by the Assessing Officer while making assessment/assessment order cannot be declared to be erroneous and prejudicial to interest of revenue.

In the case of Amrik Singh v. ITO [2003] 127 Taxman 87 (Mag.) (Chd.) (Trib.), Baljees v. ACIT [2003] 127 Taxman 150 (Mag.) (Chd.) (Trib.) held that assessment framed under section 143(3) cannot be revised on ground that desired inquiry was not made.

In the case of CIT v. Ashish Rajpal [2009] 320 ITR 674 (Delhi) (HC), CIT v. Vikash Polymers [2010] 194 Taxman 57 (Delhi) (HC) held that where the Assessing Officer during the scrutiny assessment proceeding raised a query which was answered by the assessee to the satisfaction of the Assessing Officer but the same

was not reflected in the assessment order by him, a conclusion cannot be drawn by the Commissioner that no proper enquiry with respect to the issue was made by the Assessing Officer, and enable him to assume jurisdiction under section 263 of the Act.

In the case of Anil Shah v. ACIT [2007] 162 Taxman 39 (Mum.)(Trib.) held that if the Assessing Officer allows the claim, on being satisfied with the explanation of assessee, on an enquiry made during the course of Assessment Proceedings, the decision of the Assessing Officer cannot be held to be erroneous, on ground that there is no elaborate discussion in that regard in the order. It is the practice that whenever any claim of the assessee is accepted, the A.O may not discuss the same in his order".

8. Furthermore, the assessee replied to each and every ground raised in the show cause notice u/s 263 of the Act and properly replied them. Therefore, in the totality of the facts and in the circumstances of the case and keeping in view the regular claim by the assessee and the consistent view taken by the A.O on the claims made year after year, we are of the considered opinion that this is not a case where the twin conditions of section 263 of the Act coexist in this case. The order cannot be said to be erroneous on any of the above points. The opinion of the A.O is based on his consistent view and there being no change of facts in this year, he has accordingly passed the order.

Accordingly, we set aside the impugned order and restore the assessment order.

9. In the result, the appeal of the assessee in ITA No. 404/JU/2014 for A.Y. 2010-11 stands allowed.

Order Pronounced in the Court on 25th September, 2014.

Sd/-	Sd/-
(N.K.SAINI)	**[HARI OM MARATHA]**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated : 25th September, 2014

VL/-

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT*
4. *The CIT(A)*
5. *The DR*

By Order

Senior Private Secretary
ITAT, Jodhpur