IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "A", MUMBAI

Before Shri G S Pannu, Accountant Member
& Shri Ram Lal Negi, Judicial Member

ITA No.3563/Mum/2016
Assessment Year : 2010-11

Ambuja Cements Limited (Formerly known as Gujarat Ambuja Cement Limited), Elegant Business Park, MIDC Cross Road B, Andheri (E), Mumbai 400 059. PAN AACG0569P	Vs.	CIT LTU, Mumbai.
(Appellant)		Respondent)

Appellant By : Shri Soumen Adak
Respondent By : Shri R P Meena

Date of Hearing :05.09.2017		Date of Pronouncement : 10.11.2017

O R D E R

Per G S Pannu, Accountant Member

This appeal by the assessee is directed against the order passed by the CIT(LTU) [in short the Commissioner], Mumbai, dated 29.03.2016, holding the assessment order passed by the Assessing Officer u/s. 143(3) of the Act, dated 28.02.2014, as erroneous in so far as it was prejudicial to the interests of the Revenue u/s. 263 of the Income tax Act, 1961(hereinafter referred to as "the Act")

2. The appellant before us is a company incorporated under the provisions of the Companies Act, 1956 and is, inter-alia, engaged in the business of cement manufacturing, etc. For the assessment year under consideration the return of

income filed by it was subject to scrutiny assessment u/s. 143(3) of the Act, dated 28.02.2014, wherein the total income was assessed at ₹ 9,94,52,94,305/- under the normal provisions of the Act and the book profit u/s. 115JB of the Act was determined at ₹ 19,13,21,89,572/-. Subsequently, the Commissioner invoked his revisionary jurisdiction and issued a notice u/s. 263 of the Act, dated 26.02.2016, proposing that the assessment order, dated 28.02.2014 (supra), was erroneous in so far as it was prejudicial to the interests of the Revenue, in as much as incorrect allowance of Provision for slow moving inventories of spares amounting to ₹ 52.80 cores had led to under assessment of income. In this context, the relevant discussion by the Commissioner shows that his examination of record showed that the assessee had debited in the Profit & loss Account a sum of ₹ 52.80 crores as a 'Provision for slow moving inventory' and read with note 18 of the Notes forming part of the Accounts, it reflected that such a provision was made for slow moving inventories based on the age of the inventory and it was consequent to a change in policy of recognizing provisions for slow moving inventories of spares. The Commissioner further noticed that this provision was created for the first time and was meant for temporary diminution in the value of spares meant for plant and machinery and, hence, related to capital in nature. Thus, according to the Commissioner, it was an incorrect allowance made in the assessment order dated 28.02.2014 (supra).

3. In reply to the show cause notice, a copy of which has been placed in the paper-book at page 64, the assessee resisted the action of the Commissioner and, inter alia, furnished written submissions dated 14.03.2016, copy of which has been

placed in the paper-book at pages 65 to 69. The appellant company resisted the action of the Commissioner both on the point of assumption of jurisdiction as well as on the merits of the issue. In paras 2 to 3.3 of his order, the Commissioner has briefly noted the submissions put-forth by the assessee. However, the Commissioner was not satisfied with the submissions put-forth and held that the requisite conditions prescribed for invoking section 263 of the Act were fulfilled in the present case and he justified the invoking of section 263 of the Act.

4. In so far as the merits of the issue was concerned, the Commissioner directed the Assessing Officer to withdraw the allowance of such provision and his relevant discussion is contained in para 5 of his order, which we would reproduce and refer to it in detail later in this order.

5. In conclusion, the Commissioner held the assessment order, dated 24.02.2014, to be prejudicial to the interests of the Revenue to the above extent and directed the Assessing Officer to modify the assessment order.

6. Against such a decision assessee is in appeal before the Tribunal. At the time of hearing, the learned representative of the assessee has made various submissions, but a pertinent point has been raised, which is based on the ratio of the judgment of Hon'ble Supreme Court in the case of CIT vs. Amitabh Bachchan [384 ITR 200]. It is sought to be emphasized that the basis on which the Commissioner has found the assessment order to be erroneous in his order is quite different from the point raised in the show cause noticed issued u/s. 263 of the Act, and that in fact the error finally established in the impugned order was not put to

the assessee at all. On this basis, it has been argued that the order of the Commissioner is untenable in law. In support of his proposition, he has relied upon the following discussion in para 11 of the judgment of Hon'ble Supreme Court in the case of CIT vs. Amitabh Bachchan (supra)

> *"11. It may be that in a given case and in most cases it is so done a notice proposing the revisional exercise is given to the assessee indicating therein broadly or even specifically the grounds on which the exercise is felt necessary. But there is nothing in the section (section 263) to raise the said notice to the status of a mandatory show-cause notice affecting the initiation of the exercise in the absence thereof or to require the Commissioner of Income-tax to confine himself to the terms of the notice and foreclosing consideration of any other issue or question of fact. This is not the purport of section 263. Of course, there can be no dispute that while the Commissioner of Income-tax is free to exercise his jurisdiction on consideration of all relevant facts, a full opportunity to controvert the same and to explain the circumstances surrounding such facts, as may be considered relevant by the assessee, must be afforded to him by the Commissioner of Income-tax prior to the finalisation of the decision."*

7. In order to appreciate the point sought to be raised by the assessee, we may refer to the relevant contents of the show cause notice dated 26.02.2016, as under:

> *"2. … verification of records revealed that the assessee had debited a provision of ₹ 52.80 crore for slow moving inventories. Vide Schedule P read with notes 18 to the accounts, it is stated that consequent of change in policy of recognizing, provisions for slow moving inventories of spares, based on the age of inventories, the company has made a provision of Rs.52.80 crore for slow moving inventories. This provision was created for the first time having effect on profit for relevant assessment year. Further, the provision is meant for temporary diminution in the value of spares meant for plant and machinery and related to capital in nature. The same was allowed by the Assessing Officer in the order under reference. The incorrect allowance of this provision led to under assessment of income of Rs.52.80 crore, involving tax effect of Rs.17.95 crore. As a result, the order passed by the A.O., seems to be erroneous in so far as it is prejudicial to the interest of revenue."*

In terms of the aforesaid, what the Commissioner has sought to make out is that the Provision for slow moving inventories of spares is 'Capital in nature' and, therefore, it has been incorrectly allowed by the Assessing Officer in the assessment order dated 28.02.2014 (supra). Thus, in the show cause notice, the Commissioner had found the assessment order erroneous in so far as it is prejudicial to the interests of the Revenue for the aforesaid reason.

8. Now, we may touch upon the manner in which the Commissioner has justified the fulfilment of conditions prescribed in section 263 of the Act in his order. Pertinently, and as has also been explained by the Hon'ble Supreme Court in Malabar Industrial Co. Ltd. vs. CIT [243 ITR 83], invoking of section 263 of the Act can be justified only on satisfaction 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 trite position of law that even if one of the aforesaid conditions is absent in a given case, then invoking of section 263 of the Act would be untenable in law. In this background, we may now examine the manner in which the Commissioner has dealt with the conditions prescribed u/s. 263 of the Act in his order. The relevant discussion is contained in para 4 & 5 of his order, which reads as under:

> *"4. I have carefully considered the issue and perused the records. The allegation of the AR that revisiting the inventory for its categorization amounts to taking alternative view, is ill founded. Unlike reopening of assessment u/s 148 beyond 4 years, there is no requirement u/s 263 that the item should not have been in place before the AO in original assessment proceedings. There is no doubt that the provision is wrongly made for inventory and the same is accepted by the AO, resulting in prejudice caused to the Revenue. The conditions for Section 263 are fulfilled and the same is rightly invoked.*

> *5. Coming to the merits of the case, it is seen that the assesses places reliance on Dr. Aswath N. Rao's case to say that spare parts purchase for existing machineries has to be treated as revenue expenditure as these spare parts are purchased for maintenance of existing equipments. But at the same time, part of spare parts are capitalized and in the name slow moving inventory, provision of 30%, 50% or 80% is made. The assessee does not have any scientific basis for fixing the percentage of which provision is made. Such provisioning is not supported by Accounting Standard, and hence deserves to be disallowed, The AO is directed to withdraw the allowance of such provisions."*

Ostensibly, in para 4, the Commissioner concludes that the provision has been wrongly accepted by the Assessing Officer and the reason advanced is that '*There is no doubt that the provision is wrongly made for inventory and the same is accepted by the AO, resulting in prejudice caused to the Revenue'.* In so far as discussion in para 5 is concerned, he refers to the judgment of Hon'ble Karnataka High Court relied upon by the assessee before him in the case of Dr Aswath N Rao vs. ACIT [326 ITR 188]. The assessee had relied upon the said judgment for the proposition that the cost of spare parts procured for the maintenance of the existing machineries were to be treated as revenue expenditure. The Commissioner notes that part of the spares are capitalized and that assessee was also making the provision for slow moving inventories of spares, which were being debited to the Profit & loss account. The Commissioner concludes that there is no scientific basis for fixing the percentage on which the provision has been made and, therefore, he inferred that the provision deserves to be disallowed. It is this finding of the Commissioner, which has formed the basis for the learned representative to argue before us that such a basis for treating the assessment order as erroneous was not put to the assessee and, therefore, no opportunity was allowed to the assessee to

explain the circumstances in which the assessment has been held to be erroneous in so far it was prejudicial to the interests of the Revenue ultimately.

9. When the aforesaid was put across to the learned CIT-DR, at the time of hearing, his only plea was that the said aspect was very much emerging from the show cause notice u/s. 263 dated 26.02.2016 (supra), and, therefore, it cannot be said that the assessee was not made aware about such a point. The aforesaid plea of the learned DR, in our view, is quite contrary to the factual situation in as much as the non-satisfaction of the Commissioner about the scientific basis of creating the provision, has not been referred to in the notice, dated 26.02.2016, at all, whose relevant portion has been reproduced by us in the earlier part of the order. Therefore, the preliminary point which is sought to be raised by the assessee based on the judgment of Hon'ble Supreme Court in the case of Amitabh Bachchan (supra) is very much applicable in the given facts of the present case. Notably, section 263(1) of the Act obligates the Commissioner to give the assessee an opportunity of being heard before passing of his order. No doubt the Commissioner is not disentitled to consider a point which is not stated in the notice so issued. However, the obligation to given an opportunity to the assessee of being heard on the point on the basis of which he finds it expedient to treat the assessment order erroneous in so far as it is prejudicial to the interests of the Revenue, is definitely cast on the Commissioner, as opined by the Hon'ble Supreme Court in the case of Amitabh Bachchan (supra). Considering the aforesaid, in our view, in the present case the basis on which the Commissioner has found the assessment order as erroneous in so far as it is prejudicial to the interests of the Revenue, namely, absence of any

scientific basis for fixing the percentage to make the provision for slow moving inventories of spares, does not appear to have been put to the assessee, as is emerging from the material before us. Thus, on this point itself, we find the impugned order of the Commissioner to be untenable in the eyes of law.

10. The aforesaid proposition can also be understood in the present case from a different angle. As observed by us earlier, in the show cause notice the Commissioner considered the assessment to be erroneous in so far as it was prejudicial to the interests of the Revenue on the ground that the provision in question was capital in nature and, thus, the same was incorrectly allowed in the assessment order, dated 28.02.2014. Notably, while passing the impugned order, after considering the submissions of the assessee, the Commissioner find faults with the allowance of Provision because according to him there was no scientific basis for fixing the percentage for making the Provision. Notably, his earlier stand in the show cause notice of the Provision being capital in nature has been impliedly given a go-by. Ostensibly, the Commissioner found fault with the quantification/basis of making the Provision, which impliedly conveys that he accepted the plea of the assessee of the Provision being in the nature of revenue item charged to the Profit & loss account. Of course, the Commissioner is free to exercise his revisionary power u/s. 263 of the Act on any ground but what is of essence is that the assessee ought to have been allowed an opportunity to explain the circumstances on the ground formulated by the Commissioner to treat the assessment being erroneous in so far as it was prejudicial to the interests of the Revenue. The change in the stand of the Commissioner from that put to the assessee in the show cause notice and the

basis which he has ultimately adopted to treat the assessment as erroneous and prejudicial to the interests of the Revenue, has not been put to the assessee and, thus, it is inconsistent with the understanding placed on section 263 of the Act by Hon'ble Supreme Court in the case of Amitabh Bachchan (supra), as detailed above. Therefore, the impugned order of the Commissioner is untenable in the eyes of law.

11. Before parting, we may also refer to the merit of the dispute in slight detail because the Commissioner has decided the issue on merits and held that the said provision is disallowable. In this context, the relevant facts are that the appellant is engaged in the manufacture of cement. In its submissions before the Commissioner, the assessee explained that in its line of business strict supervision of quality was required and, therefore, for regular up gradation of machineries used in the process of production, the assessee effected purchase of spares, which were of two kinds. Firstly the stores and spares which are meant for regular up-keep of plant and machinery and not relatable to any specific plant and machinery, for instance, nuts bolts, cables, washer, screws, filters, tubes, electrodes, spring etc. Such stores and spares, whenever issued were treated as revenue in nature and charged to Profit & loss account. With regard to the inventories of such type of spares, it made a provision of 30%, 50% and 80% depending upon the item of inventory, which is lying unused for more than one, two and three years respectively. It is this Provision, which is the subject matter of dispute. The second kind of spares were those which were specific to particular plant & machinery and their use was expected to be irregular and assessee had capitalized the purchase of such spares. In so far as the latter type of spares is concerned, there is no dispute

and the only controversy is with regard to the stores and spares, which are not capitalized but are treated as part of the inventories and charged to Profit & loss account. The relevant discussion in the order of the Commissioner reveals that he has not disputed the factual matrix brought out by the assessee but has sought to deny the deduction only because, in his opinion, there was no scientific basis for fixing the percentage of provision. The objection of the Commissioner, in our view, is quite untenable in as much as the basis for making the provision was explained by the assessee to be the aging analysis of the spares lying in the inventory. Why and how the Commissioner does not find it to be a scientific basis is not elaborated. In fact, it is a case where the basis put forth by the assessee has been given a complete go-by without any cogent reasoning. Therefore, in our opinion, even the reason advanced by the Commissioner to treat the assessment order as erroneous is devoid of merit and does not deserve to be affirmed. We hold so.

12. Before parting, we may also refer to an argument put-forth by the learned CIT-DR based on the judgment of Hon'ble Gauhati High Court in the case of CIT vs. Shri Jawahar Bhattacharjee in ITA No.2 of 2009 and the order of Mumbai Bench of the Tribunal, dated 05.12.2012, in the case Alka Rajesh Agarwal vs. CIT in ITA No.5007/Mum/2009 for assessment year 2005-06. According to the CIT-DR there was no inquiry made by the Assessing Officer in the course of assessment proceedings on the points raised by the Commissioner and, therefore, invoking of section 263 was quite justified. On this point, we find enough potency in the rebuttal provided by the learned representative which was to the effect that the lack

of inquiry by the Assessing Officer was not the basis formulated by the Commissioner to invoke the jurisdiction u/s. 263 of the Act. Therefore, in our view, the plea of the learned CIT-DR does not help the case of the Revenue in as much as what is required to be examined, at this stage is the validity of assumption of jurisdiction by the Commissioner u/s. 263 of the Act on the basis of the error and prejudice brought out by him. The efficacy of the action of the Commissioner has to be tested only with respect to the basis adopted by him and cannot be further supplemented by the Revenue on any other new point. Thus, we find no merit in the submissions put forth by the learned CIT-DR, which is hereby rejected.

13. Resultantly, we set aside the order of the Commissioner and restore the assessment order, dated 28.02.2014 (supra), qua the issue relating to the provision for slow moving inventories. Appeal is allowed.

Order pronounced in the open court on this day of 10th November, 2017.

Sd/-	**Sd/-**
(Ram Lal Negi)	**(G S Pannu)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dated : 10th November, 2017.
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Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT(A), Mumbai.
4. The CIT , Mumbai.
5. The DR, 'A' Bench, ITAT, Mumbai

BY ORDER

//True Copy//

(Assistant Registrar)
Income Tax Appellate Tribunal, Mumbai