

आयकर अपीलीय अधिकरण "C" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI

**BEFORE SHRI SHAILENDRA KUMAR YADAV, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

श्री शैलेंद्र कुमार यादव, न्यायिक सदस्य एवं श्री श्री रमित कोचर, लेखाकार सदस्य का

समक्ष ।

आयकर अपील स।I.T.A. No. 1994/Mum/2013

(निर्धारण वर्ष / Assessment Year : 2007-08)

आयकर अपील स।I.T.A. No. 2836/Mum/2014

(निर्धारण वर्ष / Assessment Year : 2007-08)

M/s Crompton Greaves Ltd., 6 th floor, C.G. House, Dr. A.B. Road, Worli, Mumbai - 400 030.	बनाम/ v.	CIT - 6, Mumbai, 5 th floor, Aayakar Bhavan, M.K. Road, Mumbai - 400 020.
स्थायी लखा सा./PAN : AAACC3840K		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by	Shri Pradeep N. Kapasi
Revenue by :	Shri C.W. Angolkar

सुनवाई की तारीख / **Date of Hearing** : 29-10-2015

घोषणा की तारीख / **Date of Pronouncement** : 01-02-2016

आदश / ORDER

PER RAMIT KOCHAR, ACCOUNTANT MEMBER:

These two appeals by the assessee company are related to the assessment year 2007-08, ITA No. 1994/Mum/2013 is directed against the order dated 06.02.2013 passed u/s 263 of the Income Tax Act, 1961 (Hereinafter called "the Act") by the learned Commissioner of Income Tax - 6 , Mumbai (Hereinafter called "the CIT") while ITA No. 2836/Mum/2014 is

directed against the order dated 24.02.2014 passed u/ 143(3) of the Act read with Section 263 of the Act passed by learned assessing officer (Hereinafter called "the AO") . Both these appeals are heard together and disposed of by this common order for the sake of convenience and brevity.

2. We are first taking up the appeal for the assessment year 2007-08 vide ITA No. 1994/Mum/2013 arising from the order dated 06.02.2013 passed u/s 263 of the Act by the CIT. The following grounds of appeal have been raised by the assessee company in the memo of appeal filed with the Tribunal as under :-

“1. INVALID REVISION u/s 263

a. The Ld. CIT erred in law and facts of the case in initiating revisionary proceedings u/s 263 and thereafter in passing an order u/s 263 ignoring the fact that the order passed by the Ld. AO. u/s 143(3) dt. 28.12.2010 was neither erroneous nor prejudicial to the interest of the revenue in as much as the Ld. A.O. had applied his mind and had made proper inquiries to his satisfaction before passing the assessment order.

b. Your appellant submits that;

i. The Id. AO had completed the assessment for AY.2007-08 after detailed inquiry and appreciation of the facts, evidences and the law. The provisions made on account of warranty, liquidated damages, sales tax and excise duty represented lawful business expenditures of the company and provisions were made in accordance with AS 29 of the ICAI and were allowed by the AO. only after due consideration of the fact and of the law of allowability of such expenses and in that view of the matter the order could not have been termed as erroneous or prejudicial to the interest of the law.

ii. The company had made complete disclosure of the facts in its financial statements under schedule 16 which are duly audited, and particularly vide Note no.33 of schedule B of Notes to accounts. The adequacy of the provisions and the need and the justification thereof was ascertained by the auditors and was approved by them without any qualifications in their report.

c. Your appellant pleads that such an order of CIT be held to be bad in law and be quashed.

2. SERIOUS VIOLATION OF NATURAL JUSTICE

a. The Ld. CIT erred in law and on facts in completing the revisionary proceedings in a complete haste and without giving sufficient time and opportunity and erred in law in ignoring all the evidences and proofs and documents available on records and further erred in treating the order passed by AO as erroneous and prejudicial to the interest of the revenue and setting aside the same without bringing any material of whatsoever nature in record.

b. Your appellant submits that proper procedure as required by law was not followed before passing of order u/s 263.

c. Your appellant pleads that an assessment made in violation of the provisions of natural justice be quashed.

3. CLAIM FOR DEDUCTION FOR EXPENSES MADE ON ACCOUNT OF WARRANTY, LIQUIDATED DAMAGES, SALES TAX AND EXCISE DUTY.

a. The Ld. CIT erred in law and on facts in directing ld.AO to disallow the claim for deduction for expenditures in respect of warranty, liquidated damages, sales tax and excise duty.

b. Your appellant submits that;

i. During the year the company had accounted for expenses on warranty amounting to Rs. 5,53,40,000 (Rs.8,47,60,000 - Rs.2,94,20,000) and liquidated damages amounting to Rs. 9,08,90,000. The assessee company gave warranties on certain products and services in the nature of repairs/replacement, which fail to perform satisfactorily during the warranty period. Debited to account, represented the amount of the expected cost of meeting such obligation on account of rectification/replacement and was based upon the sales made during the year. The company regularly accounts for warranty at varied rates depending upon the product sold. The company had accounted for warranty expenses in proportion to sales. Unutilized amounts are regularly accounted as income.

ii. Expenses for liquidated damages has been made on contracts which were executed by the company beyond the agreed delivery dates and the compensation payable by the company for delay was computed in reasonable and prudent manner.

iii. These expenses for warranty and liquidated damages have been quantified based on past experience of the company. In addition, the

company has a policy to write back all the unused amounts and offer the same for taxation on expiry of the relevant period for warranty and liquidated damages.

iv. There is no leakage of revenue. Further, the company is being taxed at a flat rate of 30%.

v. During the year the company has accounted for sales tax amounting to Rs. 2,67,00,000 representing sales tax liability on account of non-collection of declaration forms under the Act/Rules.

vi. During the year the company has accounted for excise duty amounting to Rs. 43,00,000 representing the differential duty liability that has materialized in respect of matters contested in appeal.

vii. Without prejudice kindly note that all of the expenses under consideration were quantified and accounted by following the sound accounting principles and the policies followed were mandated by Accounting Standard 29 of the ICAI r.w.s. 209 of the Companies Act.

viii. Accounting was compulsory and statutory and in the circumstances the liability had arisen in respect of the concerned expenses and in that position, each of the expenditure for which provisions were made satisfied the test of S.37 and of S.28 for being allowed in computation of total income for the year under consideration.

ix. The method of accounting followed was mercantile and in following the method the sound accounting principles and policies were applied by keeping in mind the concepts of AS 1 namely 'prudence' and 'conservatism.'

x. The method followed was consistently employed from year to year and the provisions were made there under, consistently and regularly for the above mentioned expenses and liabilities.

xi. The company had made complete disclosure of the facts in its financial statements which are duly audited, under schedule 16 and particularly vide Note no.33 of schedule B of Notes to accounts. The adequacy of the provisions and the need and the justification thereof was ascertained by the auditors and was approved by them without any qualifications in their report.

c. Your appellant pleads that appellant's claim for deduction on account of warranty, liquidated damages, sales tax and excise duty be allowed.

All the above grounds are independent and without prejudice each other.”

3. Although, the assessee company has raised grounds 1 to 3 with sub-clauses, but in sum and substance , the assessee company has challenged the legality and validity of the order dated 06.02.2013 passed by the CIT u/s 263 of the Act.

4. The facts in brief are that the assessee company is engaged in the business of manufacturing, marketing and operating turnkey projects over a diverse portfolio that includes power systems, industrial systems and consumer products, networking and telecommunication equipments. The assessee company filed its return of income with Revenue for the assessment year 2007-08 on 29-10-2007 and thereafter filed revised return on 24-03-2009. The case was selected for scrutiny and assessment was framed by the AO vide assessment order dated 28.12.2010 passed u/s 143(3) of the Act. Thereafter, the CIT issued notice dated 06.12.2012 u/s 263 of the Act observing that the assessment u/s 143(3) of the Act was made by the AO in a routine and perfunctory manner. The CIT observed that the A.O. failed to carry out the necessary enquiry as warranted by the facts and circumstances of the case for proper completion of the assessment u/s 143(3) of the Act. The CIT noticed from the assessment records that the assessee company has claimed deduction for expenditure in respect of provisions on account of “Warranty, Sales Tax, Excise and Liquidated Damages”. The CIT observed that it is a settled principle of law that no expenditure in nature of contingent expenditure or provisions for expenditure can be allowed u/s 28 or 37 of the Act , unless the assessee company followed mercantile system of accounting and liability claimed on accrual basis has crystallized during the previous year relying on decision of Shri Sajjan Mills Limited v. CIT 156 ITR 585(SC). The CIT noticed from the schedule 16 read with note 33 to schedule 13, that

the expenditure of Rs. 17.72 crores claimed by the assessee company was nothing but “provisions” for expenditure. The CIT observed that the A.O. failed to make relevant and meaningful enquiry to the fact that liabilities in this regard (liability relating to Warranty, Sales Tax, Excise and Liquidated Damages) has crystallized to the extent deduction has been claimed in the return of income during the previous year relevant to the assessment year 2007-08 for which deduction has been claimed. The CIT vide notice dated 6.12.2012 intended to set aside the assessment for the assessment year 2007-08 framed by the AO u/s 143(3) of the Act vide orders dated 28.12.2010 as it was observed by the CIT that the A.O. has acted in a routine and perfunctory manner and failed to carry out relevant and necessary inquiries and examination as warranted by the facts of the case and made an assessment order which is erroneous and prejudicial to the interest of the Revenue by relying on the decisions in the case of Malabar Industrial Co. Ltd. v. CIT, 243 ITR 83 (SC), in the case of CIT v. Max India Ltd., 295 ITR 282 (SC), CIT v. Mangal Castings, 303 ITR 23 (P&H) and CIT v. MEPCO Industries Ltd., 294 ITR 121 (Mad.).

In reply to the notice dated 06.12.2012 u/s 263 of the Act, the assessee company submitted that both on merits as well as on technical grounds the assessment order dated 28.12.2010 passed u/s 143(3) of the Act by the AO was neither erroneous nor prejudicial to the interest of the Revenue. The assessee company relied upon various decisions in support of its contention. The assessee company submitted that provision for warranty and liquidated damages was in accordance with Accounting Standard 29 read with section 209 of the Companies Act , 1956 and it was not a contingent liability and it was made in accordance with the settled law. In support, the assessee company relied upon the following decisions:-

- i) CIT v. Vintec Corpn. (P) Ltd. (2005) 146 taxman 313 (Delhi)(HC)

- ii) Rotork Controls India P. Ltd. v. CIT (2009) 314 ITR 62 (SC)
- iii) CIT v. Infosys Technologies Ltd, (2012) 349 ITR 610 (Karn)(HC)
- iv) CIT v. Nokia Siemens Networks India (P) Ltd. (2011) 14 taxmann.com 84 (Kar)(HC).

The assessee company further submitted that in the earlier years , this expenditure was claimed and allowed by the A.O.. Therefore, there is no reason for taking a different view for this assessment year and it is against the ratio laid down by the Hon'ble Bombay High Court in the case of CIT v. Gopal Purohit, 336 ITR 237 (Bom-HC) and Hon'ble Supreme Court in the case of Radhasoami Satsang v. CIT (1992) 193 ITR 321 (SC). The assessee company also relied on decision of Kolkata Tribunal in the case of Hamilton Research and Technologies (P) Ltd. v. ACIT (2005) 142 Taxman 79 (Mag)(Kol)(Trib) in support and contended that even on estimate basis if provision for warranty was made by the assessee company following mercantile system of accounting, the expenditure was allowable expenditure and the assessment order cannot be treated as erroneous and prayed that the proceedings u/s 263 of the Act should be dropped.

5. The CIT, however, held that the A.O. was required to examine that provisions made for warranty etc. was based on estimates which were realistic and based on the past experience of the assessee company. The CIT held that the A.O. was required to examine the actual outgoing during the year and that excess provisions if any made in the earlier year was duly written back as income in the following years, but he A.O. did not examine the basis for provisions made for sales tax and excise duty liability and on what account these provisions were justified. For claim of deduction for warranty, the A.O. has not examined the contract and find out when the warranty was expiring, the justification for allowing the provision cannot be made out. The CIT held that the A.O. was required to examine the normal range of the failure of the products of the company and in how many cases the assessee was required to

carry out repairs/replace the goods and only then the A.O. could decide about the genuineness and reasonableness of the provision of warranty. However, the A.O. has not considered these basic details and allowed the claim of the assessee company in full without making these elementary inquiries and without going into the issue as to whether any disallowance was required to be made by the A.O. and if yes, as how much disallowance out of the claim for provisions for warranty etc. should have been made, but the A.O. did not carry out all these relevant inquiries. Under these circumstances, the CIT by relying on the cases of Malabar Industrial Co. Ltd., Max India Ltd., Mangal Castings and MEPCO Industries (supra) , treated the order passed by the A.O. as erroneous and prejudicial to the interest of Revenue and set aside the assessment order dated 28.12.2010 passed by the AO u/s 143(3) of the Act, by directing the A.O. to assess the income of the assessee in accordance with the provisions of law after gathering all the necessary details to arrive at the correct income after giving reasonable opportunity of being heard to the assessee company , vide his order dated 6-2-2013 passed u/s 263 of the Act.

6. Aggrieved by the orders dated 06.02.2013 passed u/s 263 of the Act by the CIT, the assessee company is in appeal before Tribunal.

7. The ld. Counsel for the assessee company reiterated its submissions as made before the CIT and further submitted that the CIT erroneously invoked the provisions of section 263 of the Act and it cannot be invoked until the original order dated 28.12.2010 u/s 143(3) of the Act is revised by the orders of the Tribunal in the first round and it is only the revised order u/s 143(3) of Act after giving appeal effect to the orders of the Tribunal , can be subject matter of revision by the CIT u/s 263 of the Act . The ld. Counsel submitted that the A.O. has framed an assessment order dated 24.02.2014 u/s 143(3) of the Act read with Section 263 of the Act, in pursuance to the order dated 06.02.2013 passed by the CIT u/s 263 of the Act, whereby disallowance for

provisions for warranty, excise duty , sales tax and liquidity damages were made by the AO. The Id. Counsel for the assessee company submitted that in the first round of assessment framed u/s 143(3) of the Act by the AO vide orders dated 28.12.2010, the A.O. has not made any disallowance with regard to provisions for warranty, excise duty , sales tax and liquidity damages while in the second round, disallowance was made by the AO vide orders dated 24.02.2014 passed u/s 143(3) of the Act read with Section 263 of the Act on the following heads:-

- i. Provision for Warranty Rs. 5,53,40,000/-
- ii. Provision for Liquidity damages Rs. 9,08,90,000/-
- iii. Provision for Sales tax Rs. 2,67,00,000/-
- iv. Provision for Excise duty Rs. 43,00,000/-

The Id. Counsel of the assessee company submitted that the assessee company has now conceded with respect to the disallowance made by the A.O. in respect of warranty, excise duty and sales tax which is not pressed before the Tribunal while the assessee company is challenging and contesting the additions on account of provisions for liquidated damages of Rs. 9,08,90,000/- made by the A.O. u/s 143(3) of the Act read with Section 263 of the Act, vide orders dated 24.02.2014 . The Id. Counsel of the assessee company submitted that the original assessment order dated 28.12.2010 passed by the A.O. u/s 143(3) of the Act is neither erroneous nor is prejudicial to the interest of Revenue , as the A.O. had carried out necessary , proper and detailed enquiries while framing the order dated 28.12.2010 passed u/s 143(3) of the Act. The Id. Counsel of the assessee company submitted that the Tribunal in the case of Colorcraft Kashimira Ceramic Compound v. ITO [2007] 105 ITD 599 (Mum) partly quashed the order passed u/s 263 of the Act and hence the Tribunal has power to quash the order u/s

263 of the Act dated 06-2-2013 with respect to the directions given by CIT in setting aside the assessment order dated 28.12.2010 and directing the AO to make enquiries with respect to the provisions for liquidated damages while upholding the rest of the order u/s 263 of the Act, dated 06.02.2013 with respect to set aside of the assessment orders dated 28.12.2010 passed u/s 143(3) of the Act by the AO with respect to the provisions for warranty, sales tax and excise duty. The ld. Counsel submitted that Tribunal in the case of K.C.P. Ltd. v. ITO, 34 ITD 50(Hyd.SB) held that since there was a breach of contract by reason of delay in performance, the damages arose at the point of breach and at that point of time liability accrued, provision for liquidated damages was to be allowed as deduction. The ld. Counsel of the assessee company contended that the assessee company has been earlier allowed in preceding assessment year, the claim of liquidated damages by the Revenue and based on the principles of consistency the same should be allowed in the current assessment year. It was also contended that no disallowance has been made in the first round while framing of assessment order u/s 143(3) of the Act, dated 28.12.2010.

8. The ld. D.R., on the other hand relied upon the orders of the CIT and submitted that the CIT has rightly invoked the provisions of section 263 of the Act as no enquiry was made by the A.O. with respect to the claim of deduction of the assessee company with respect to the provisions for warranty, sales tax, excise duty and liquidity damages while computing income under the Act, made by the assessee company in the books of accounts and as claimed as deduction from the income computed under the Act. The ld. DR submitted that, on perusal of the assessment order dated 28.12.2010 passed u/s 143(3) of the Act by the AO, no enquiry has been made by the A.O. and the assessment order has been passed in a routine and perfunctory manner hence the CIT has rightly set aside the orders dated 28.12.2010 passed u/s 143(3) of the Act by the AO.

9. We have considered the rival contentions and carefully gone through the orders of the authorities below. We have also deliberated upon the judicial pronouncements referred by the lower authorities and also cited by the Id. A.R. during the course of hearing before us, in the context of factual matrix of the case. We have observed that the original assessment order was framed u/s 143(3) of the Act vide order dated 28-12-2010. On perusal of the said assessment order dated 28.12.2010, we have observed that the A.O. has not made any enquiry with respect to the claim of deduction of the assessee company with respect to provisions for warranty charges, excise duty, sales tax and liquidity damages amounting to Rs.17.72 crores claimed as deduction by the assessee company from the income of the assessee company and the claim made by the assessee company was accepted by the A.O. without any further enquiry, examination or verification as was warranted. Further, on perusal of the audited accounts of the assessee company reflects that the said expenses of Rs.17.72 crores was reflected under the head 'other Provisions' in Schedule 16 and Schedule 33 reflecting disclosures of 'Provisions, Contingent Liabilities and Contingent Assets' in pursuance to Accounting Standard 29. It was all the more incumbent on the AO to have made proper and necessary enquiries, examination and verifications as the amount is reflected under the head 'Provisions and contingent liabilities' as provisions and contingent liabilities prima-facie cannot be claimed as expenses as it is settled law under the Act that deductions while computing income under the Act can only be claimed for known and ascertained liabilities having crystallized during the assessment year which are incurred wholly and exclusively for the purposes of business. Section 263 of the Act stipulates as under:

“E.—Revision by the [Principal Commissioner or] Commissioner

Revision of orders prejudicial to revenue.

263. (1) The [Principal Commissioner or] Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the [Assessing] Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

[Explanation 1.]—For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,—

- (a) an order passed [on or before or after the 1st day of June, 1988] by the Assessing Officer shall include—
- (i) an order of assessment made by the Assistant Commissioner²[or Deputy Commissioner] or the Income-tax Officer on the basis of the directions issued by the [Joint] Commissioner under [section 144A](#);
 - (ii) an order made by the [Joint] Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the [Principal Chief Commissioner or] Chief Commissioner or [Principal Director General or] Director General or [Principal Commissioner or] Commissioner authorised by the Board in this behalf under [section 120](#);
- (b) "record" [shall include and shall be deemed always to have included] all records relating to any proceeding under this Act available at the time of examination by the [Principal Commissioner or] Commissioner;
- (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 [Principal Commissioner or] 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.]

[Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—

- (a) the order is passed without making inquiries or verification which should have been made;*
- (b) the order is passed allowing any relief without inquiring into the claim;*
- (c) the order has not been made in accordance with any order, direction or instruction issued by the Board under [section 119](#); or*
- (d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.]*

[(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.]

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, [National Tax Tribunal,] the High Court or the Supreme Court.

Explanation.—In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to [section 129](#) and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded.”

We have observed that w.e.f. 1st June, 2015 by Finance Bill 2015, Explanation 2 to section 263 was inserted to declare the law which reads as under:-

“ [Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—

- (a) the order is passed without making inquiries or verification which should have been made;*

- (b) *the order is passed allowing any relief without inquiring into the claim;*
- (c) *the order has not been made in accordance with any order, direction or instruction issued by the Board under [section 119](#); or*
- (d) *the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.]”*

We would like to refer at this stage to the meaning of ‘Explanation’ as inserted in the Act whereby the Hon’ble Supreme Court in the case of Sundaram Pillai v. Pattabiram reported in (1985) 1 SCC 591, whereby Fazal Ali , J culled out from earlier cases the following as objects of an explanation to a statutory provision (Reference Page 214-215,Principles of Statutory Interpretation by Justice G.P.Singh ,13th Ed.):-

- (a) *To explain the meaning and intendment of the Act itself ,*
- (b) *Where there is any obscurity or vagueness in the main enactment to clarify the same so as to make it consistent with the dominant object which it seems to subserve,*
- (c) *To provide an additional support to dominant object of the Act in order to make it meaningful and purposeful,*
- (d) *an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act if it can help or assist the Court in interpreting the true purport and intendment of the enactment, and*
- (e) *It cannot, however , take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same.*

It is profitable at this stage to refer to the Memorandum to Finance Bill 2015 and notes to clauses to Finance Bill, 2015 which are as under:

“Memorandum to Finance Bill 2015

Revision of order that is erroneous in so far as it is prejudicial to the interests of revenue

The existing provisions contained in sub-section (1) of section 263 of the Income-tax Act provides that if the Principal Commissioner or Commissioner considers that any order passed by the assessing officer is erroneous in so far as it is prejudicial to the interests of the Revenue, he may, after giving the assessee an opportunity of being heard and after making an enquiry pass an order modifying the assessment made by the assessing officer or cancelling the assessment and directing fresh assessment.

The interpretation of expression "erroneous in so far as it is prejudicial to the interests of the revenue" has been a contentious one.

In order to provide clarity on the issue it is proposed to provide that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—

- (a) the order is passed without making inquiries or verification which, should have been made;
- (b) the order is passed allowing any relief without inquiring into the claim;
- (c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or
- (d) the order has not been passed in accordance with any decision, prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in

the case of the assessee or any other person.

This amendment will take effect from 1st day of June, 2015.”

“Notes on Clauses Finance Bill 2015

Clause 65 of the Bill seeks to amend section 263 of the Income-tax Act relating to revision of orders prejudicial to revenue.

The existing provisions contained in sub-section (1) of section 263 provide that if the Principal Commissioner or Commissioner considers that any order passed by the assessing officer is erroneous in so far as it is prejudicial to the interest of revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made an enquiry, as he deems necessary, pass an order modifying the assessment made by the assessing officer or cancelling the assessment and directing fresh assessment.

It is proposed to amend sub-section (1) of the aforesaid section to insert an Explanation so as to provide that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—

- (a) **the order is passed without making inquiries or verification which, should have been made;***
- (b) the order is passed allowing any relief without inquiring into the claim;*
- (c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or*
- (d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or*

Supreme Court in the case of the assessee or any other person.

This amendment will take effect from 1st June, 2015.”

Now, as can be seen above , the amendment to section 263 of the Act by insertion of Explanation 2 to Section 263 of the Act is declaratory & clarificatory in nature and is inserted to provide clarity on the issue as to which orders passed by the AO shall constitute erroneous and prejudicial to the interest of Revenue ,it is , inter-alia, provided that if the order is passed without making inquiries or verifications by AO which, should have been made or the order is passed allowing any relief without inquiring into the claim; the order shall be deemed to be erroneous and prejudicial to the interest of Revenue. The Hon'ble Supreme Court in the case of Malabar Industrial Company Limited v. CIT (2000)109 Taxman 66 (SC) held that if the AO has accepted the entry in the statement of account filed by the taxpayer without making enquiry , the said order of the AO shall be deemed to be erroneous in so far as it is prejudicial to the interest of the Revenue. In our considered opinion, the facts of the case of the assessee company are similar to the facts in the case of Malabar Industrial Co. Limited(supra) whereby no enquiry/verification is made by the AO whatsoever with respect to claim of deduction of Rs. 17.72 crores with respect to the provisions for warranty, excise duty , sales tax and liquidated damages. Moreover, now Explanation 2 to Section 263 of the Act is inserted in the statute which is declaratory and clarificatory in nature to declare the law and provide clarity on the issue whereby if the A.O. failed to make any enquiry or necessary verification which should have been made, the order becomes erroneous in so far as it is prejudicial to the interest of revenue.

A proviso added from 01-04-1988 to Section 43B of the Act from 01-04-1984 came up for consideration in Allied Motors Private Limited v. CIT (1997) 91 taxman 205(SC) before Hon'ble Supreme Court and it was given retrospective effect from the inception of the section on the reasoning that the proviso was added to remedy

unintended consequences and supply an obvious omission so that the section may be given a reasonable interpretation and that in fact the amendment to insert the proviso would not serve its object unless it is construed as retrospective . In CIT v. Podar Cement Pvt. Limited (1997) 92 Taxman 541(SC) , the Hon'ble Supreme Court held that amendment introduced by the Finance Act,1987 in so far the related to Section 27(iii) ,(iiia) and (iiib) which redefined the expression 'owner of house property', in respect of which there was a sharp divergence of opinion amongst the High Courts, was clarificatory and declaratory in nature and consequently retrospective. Similarly , in Brij Mohan Das Laxman Das v. CIT (1997) 90 Taxman 41(SC), explanation 2 added to section 40 of the Act was held to be declaratory in nature and , therefore , retrospective.(Reference Page 569-570,Principles of Statutory Interpretation by Justice G.P.Singh ,13th Ed.).

In our considered view, the CIT has rightly invoked the provisions of section 263 of the Act as the A.O. failed to make proper enquiry, examination and verifications as warranted for the proper completion of the assessment, with respect to claim of deduction of Rs.17.72 crores with respect to the provisions for warranty, excise duty,sales tax and liquidated damages. Regarding the contentions of the assessee company that the CIT should have set aside the orders passed by the AO after giving appeal effect to the orders of the tribunal in the first round has to be rejected as the basic facts remains that the AO has not made any enquiry, examination or verification of the claim of the assessee company with respect to claim of deduction of provision of Rs 17.72 crores with respect to provisions for warranty, sales tax, excise duty and liquidated damages , the order of the Tribunal would have adjudicated issues arising out of the orders of the authorities below whereby the facts still remains that the AO has not made any enquiry, examination or verification of the claim of the assessee company with respect to claim of deduction of provision of Rs 17.72 crores with respect to provisions for warranty, sales tax, excise duty and liquidated damages. The order of the Tribunal in the first round of

litigation has not been incidentally enclosed by the assessee company in the documents/paper book filed with the Tribunal. It is an established principle under the Act that provisions and contingent expenses are not allowed as deduction while computing the income of the assessee. It is only an ascertained liability which has crystallized during the year and which is wholly and exclusively incurred for the purpose of business of the assessee company, is allowed as deduction while computing income under the Act. The A.O. was under duty to make necessary and proper enquiry, examination and verification's with respect to Provisions of Rs. 17.72 crores with respect to the claim of deduction of the assessee company for provisions for liquidity damages, warranty, sales tax and excise duty, while on perusal of the assessment orders u/s 143(3) of the Act dated 28.12.2010 and other documents filed before us, we have observed that the AO has not made any enquiry whatsoever with respect to the claim of deduction of expenses of Rs.17.72 crores towards Provision for Warranty, Sales tax and excise duty and liquidated damages claimed by the assessee company while computing the income of the assessee company and the claim of the assessee company was accepted without any inquiry, examination or verification whatsoever by the AO and In the absence thereof of enquiry, examination and verification of the claim of the assessee company for deduction of provisions for Warranty, Sales tax and excise duty and liquidated damages amounting to Rs.17.72 crores, we find no infirmity in the order dated 06.02.2013 of the CIT passed u/s 263 of the Act setting aside the assessment order dated 28.12.10 passed u/s 143(3) of the Act as erroneous in so far as prejudicial to the interest of the Revenue and directing the AO to assess the income of the assessee company after making necessary enquiries, examination and verifications, which order of the CIT dated 06.02.2013, we uphold. We order accordingly.

10. In the result, the appeal of the assessee company is dismissed.

ITA No. 2836/Mum/2014 for A.Y. 2007-08.

11. This appeal filed by the assessee company is arising out of the orders u/s 143(3) read with Section 263 of the Act dated 24-2-2014 passed by the AO in pursuance to the order dated 06.03.2013 passed u/s 263 of the Act.

12. The assessee company has raised the following grounds of appeal in the memo of appeal filed with the Tribunal:-

“DISALLOWANCE OF CLAIM FOR DEDUCTION OF LIQUIDATED DAMAGES OF RS. 9,08,90,000

a. The Ld. A.O. erred in law and on facts in disallowing the claim for deduction for expenditure/loss in respect of liquidated damages of Rs. 9,08,90,000 by carrying out direction of CIT in his order dt. 06.02.2013 passed u/s. 263 without applying his mind to the facts of the case.

b. Your appellant submits that :

i. During the year the company had accounted for expenses/loss on, liquidated damages amounting to Rs. 9,08,90,000/- towards delayed expectation of contracts which were executed by the company beyond the agreed delivery dates and the compensation payable by the company for delay was computed in a reasonable and prudent manner based on past experience of the company and the company has a policy to write back the unused amounts and offer the same for taxation on expiry of the relevant period for claim of damages and there is no leakage of revenue as the company is being taxed at a flat rate of 30%.

ii, The claim under consideration were quantified and accounted by following the sound accounting principles and the policies followed were mandated by Accounting Standard 29 of the ICAI r.w.s. 209 of the Companies Act.

c. Your appellant pleads that appellant's claim for deduction on account of liquidated damages of Rs. 9,08,90,000 be allowed.

2. DISALLOWANCE OF CLAIM FOR DEDUCTION FOR EXPENSES ON ACCOUNT OF SALES TAX OF RS. 2.67.00,000

a. The Ld. A.O. erred in law and on facts in disallowing the claim for deduction for expenditure on sales tax of Rs. 2,67,00,000 by carrying out the directions of the CIT, without application of mind, issued while passing order dt. 06.02.2013 u/s. 263 of the Act.

b. Your appellant submits that during the year the company has accounted for sales tax amounting to Rs. 2,67,00,000 representing sales tax liability on account of non- collection of declaration forms under the Act/Rules which expenses under consideration was quantified and accounted by following the sound accounting principles and the policies followed were mandated by Accounting Standard 29 of the ICAI r.w.s. 209 of the Companies Act.

c. Your appellant pleads that appellant's claim for deduction on account of sales tax of Rs. 2,67,00,000 be allowed.

DISALLOWANCE OF CLAIM FOR DEDUCTION FOR EXPENSES ON ACCOUNT OF EXCISE DUTY OF RS. 43,00,000.

a The Ld. AO. erred in law and on facts in disallowing the claim for deduction for expenditures in respect of excise duty of Rs. 43,00,000 without application of mind by carrying out the directions of the CIT vide his order dt. 06.02.2013 passed u/s. 263 of the Act.

b. Your appellant submits that during the year the company has accounted for excise duty amounting to Rs. 43,00,000 representing the differential duty liability that has materialized in respect of matters contested in appeal and the expenses under consideration were quantified and accounted by following the sound accounting principles and the policies followed were mandated by Accounting Standard 29 of the ICAI r.w.s. 209 of the Companies Act.

c. Your appellant pleads that appellant's claim for deduction on account of excise duty of Rs. 43,00,000 be allowed.

4. LEVY OF INTEREST U IS. 234 D

a. The Ld. AO. erred in law and on facts in levying interest u/s. 234D of Rs. 37,93,211 without giving any opportunity of hearing and further erred in law in not passing any speaking order for the levy of interest.

b. Your appellant denies any liability of payment of interest and further submits that the interest was charged in violation of the provision of Natural Justice in as much as no opportunity for hearing was given.

c. Your appellant pleads that the interest levied be deleted.

5. SERIOUS VIOLATION OF NATURAL JUSTICE

a. The Ld. AO. erred in law and on facts in completing the proceedings in a complete haste and without giving sufficient time and opportunity

and erred in law in ignoring all the evidences and proofs and documents available on records. Further erred in treating the order passed by A.O. as erroneous and prejudicial to the interest of the revenue and setting aside the same without bringing any material of whatsoever nature in record.

b. Your appellant submits that proper procedure as required by law was not followed before passing of order.

c. Your appellant pleads that an assessment made in violation of the provisions of natural justice be quashed.

ORDER PASSED IN PURSUANCE OF AN INVALID ORDER u/s 263

The Ld. A.O. erred in law and facts of the case in passing an order dt. 24.02.2014 to give effect to an order u/s 263 dt. 06.02.2013 ignoring the fact that the order passed by the Ld. A.O. u/s 143(3) dt. 28.12.2010 was neither erroneous nor prejudicial to the interest of the revenue in as much as the Ld. A.O. had applied his mind and had made proper inquiries to the satisfaction before passing the assessment order.

b. Your appellant submits that;

i. The Id. AO had completed the assessment for A.Y. 2007-08 vide his order dt. 28.12.2010 after detailed inquiry and appreciation of the facts, evidences and the law. The provisions made on account of liquidated damages, sales tax and excise duty represented lawful business expenditures of the company and provisions were made in accordance with AS 29 of the ICAI and were allowed by the A.O. only after due consideration of the fact and of the law of allowability of such expenses and in that view of the matter the order could not have been termed as erroneous or prejudicial to the interest of the law.

ii. The company had made complete disclosure of the facts in its financial statements which are duly audited, under schedule 16 and particularly vide Note no.33 of schedule B of Notes to accounts. The adequacy of the provisions and the need and the justification thereof was ascertained by the auditors and was approved by them without any qualifications in their report.

c. Your appellant pleads that the order dt. 24.02.2014 passed by Ld A.O. u/s. 143(3) r.w.s. 263 be held to be bad in law and be quashed.”

13. We have observed that the A.O. has passed an order dated 24.02.2014 u/s 143(3) of the Act read with Section 263 of the Act, in pursuance to the

directions vide order dated 06-02-2013 of the CIT u/s 263 of the Act . We have observed that the assessee company has preferred an first appeal directly before the Tribunal against the order dated 24.02.2014 passed u/s 143(3) read with Section 263 of the Act. A bare perusal of section 253(1) of the Act will reveal that following appeals can be filed before the Tribunal:-

“Appeals to the Appellate Tribunal.

253. (1) Any assessee aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order—

(a) an order passed by a [Deputy Commissioner (Appeals)] [before the 1st day of October, 1998] { or, as the case may be, a Commissioner (Appeals)] under [***] [[section 154](#)], [***] [section 250](#), [[section 271](#), [section 271A](#) or [section 272A](#)]; or

[(b) an order passed by an Assessing Officer under clause (c) of [section 158BC](#), in respect of search initiated under [section 132](#) or books of account, other documents or any assets requisitioned under [section 132A](#), after the 30th day of June, 1995, but before the 1st day of January, 1997; or]

[(ba) an order passed by an Assessing Officer under sub-section (1) of [section 115VZC](#); or]

(c) an order passed by a [Principal Commissioner or] Commissioner [under [section 12AA](#) [or under clause (vi) of sub-section (5) of [section 80G](#)] or] under [section 263](#) [or under [section 271](#)] [or under [section 272A](#)] [***] or an order passed by him under [section 154](#) amending his order under [section 263](#)] [or an order passed by a [Principal Chief Commissioner or] Chief Commissioner or a [Principal Director General or] Director General or a [Principal Director or] Director under [section 272A](#); [or]]

[(d) an order passed by an Assessing Officer under sub-section (3), of [section 143](#) or [section 147](#) [or [section 153A](#) or [section 153C](#)] in pursuance of the directions of the Dispute Resolution Panel or an order passed under [section 154](#) in respect of such order;]

(e) [***]

Following clause (e) shall be inserted after clause (d) of sub-section (1) of section **253** by

the Finance Act, 2013, w.e.f. 1-4-2016 :

- (e) *an order passed by an Assessing Officer under sub-section (3) of [section 143](#) or [section 147](#) or [section 153A](#) or [section 153C](#) with the approval of the ³³[Principal Commissioner or]Commissioner as referred to in sub-section (12) of [section 144BA](#) or an order passed under [section 154](#) or [section 155](#) in respect of such order;*
- [(f) *an order passed by the prescribed authority under sub-clause (vi) or sub-clause (via) of clause (23C) of [section 10.](#)]*”

We have observed that an appeal arising from the order u/s 143(3) of the Act read with Section 263 of the Act does not find place in section 253(1) of the Act with respect to the appeal against the orders passed u/s 143(3) of the Act read with Section 263 of the Act .

However, on a perusal of section 246A of the Act, we have observed that appeals against the orders passed u/s 143(3) of the Act shall lie with the Commissioner of Income Tax (Appeals) (hereinafter called “the CIT(A)”) . The Section 246A of the Act reads as under:-

“ *[Appealable orders before Commissioner (Appeals).*

246A. (1) Any assessee ³⁹[or any deductor] ^{39a}[or any collector] aggrieved by any of the following orders (whether made before or after the appointed day) may appeal to the Commissioner (Appeals) against—

- (a) *an order [passed by a Joint Commissioner under clause (ii) of sub-section (3) of [section 115VP](#) or an order] against the assessee where the assessee denies his liability to be assessed under this Act or an intimation under sub-section (1) or sub-section (1B) of [[section 143](#) or [sub-section (1) of [section 200A](#) or sub-section (1) of [section 206CB](#), where the assessee or the deductor or the collector] objects] to the making of adjustments, or any order of assessment under sub-section (3) of [section 143](#) [[except an order passed in*

- pursuance of directions of the Dispute Resolution Panel [***] [or an order referred to in sub-section (12) of section 144BA]]] or [section 144](#), to the income assessed, or to the amount of tax determined, or to the amount of loss computed, or to the status under which he is assessed;*
- [(aa) an order of assessment under sub-section (3) of [section 115WE](#) or [section 115WF](#), where the assessee, being an employer objects to the value of fringe benefits assessed;*
- (ab) an order of assessment or reassessment under [section 115WG](#);*
- (b) an order of assessment, reassessment or recomputation under [section 147](#) [[except an order passed in pursuance of directions of the Dispute Resolution Panel [***] [or an order referred to in sub-section (12) of [section 144BA](#)]]] or [section 150](#);*
- [(ba) an order of assessment or reassessment under [section 153A](#) [[except an order passed in pursuance of directions of the Dispute Resolution Panel]] [***] [or an order referred to in sub-section (12) of [section 144BA](#)];]*
- [(bb) an order of assessment or reassessment under sub-section (3) of [section 92CD](#);*
- (c) an order made under [section 154](#) or [section 155](#) having the effect of enhancing the assessment or reducing a refund or an order refusing to allow the claim made by the assessee under either of the said sections [***] [except an order referred to in sub-section (12) of [section 144BA](#)];*
- (d) an order made under [section 163](#) treating the assessee as the agent of a non-resident;*
- (e) an order made under sub-section (2) or sub-section (3) of [section 170](#);*
- (f) an order made under [section 171](#);*
- (g) an order made under clause (b) of sub-section (1) or under sub-section (2) or sub-section (3) or sub-section (5) of [section 185](#) in respect of an assessment for the assessment year commencing on or before the 1st day of April, 1992;*
- (h) an order cancelling the registration of a firm under sub-section (1) or under sub-section (2) of section 186 in respect of any assessment for the assessment year commencing on or before the 1st day of April, 1992 or any earlier assessment year;*
- [(ha) an order made under [section 201](#);*

- [(hb) an order made under sub-section (6A) of [section 206C](#);
- (i) an order made under [section 237](#);
- (j) an order imposing a penalty under—
- (A) [section 221](#); or
- (B) [section 271](#), [section 271A](#), ⁵⁸[[section 271AAA](#),] ⁵⁹[[section 271AAB](#),] [section 271F](#), ⁶⁰[[section 271FB](#),] [section 272AA](#) or [section 272BB](#);
- (C) [section 272](#), [section 272B](#) or [section 273](#), as they stood immediately before the 1st day of April, 1989, in respect of an assessment for the assessment year commencing on the 1st day of April, 1988, or any earlier assessment years;
- [(ja) an order of imposing or enhancing penalty under sub-section (1A) of [section 275](#);
- (k) an order of assessment made by an Assessing Officer under clause (c) of [section 158BC](#), in respect of search initiated under [section 132](#) or books of account, other documents or any assets requisitioned under [section 132A](#) on or after the 1st day of January, 1997;
- (l) an order imposing a penalty under sub-section (2) of [section 158BFA](#);
- (m) an order imposing a penalty under [section 271B](#) or [section 271BB](#);
- (n) an order made by a Deputy Commissioner imposing a penalty under [section 271C](#)⁶²[, [section 271CA](#)], [section 271D](#) or [section 271E](#);
- (o) an order made by a Deputy Commissioner or a Deputy Director imposing a penalty under [section 272A](#);
- (p) an order made by a Deputy Commissioner imposing a penalty under [section 272AA](#);
- (q) an order imposing a penalty under Chapter XXI;
- (r) an order made by an Assessing Officer other than a Deputy Commissioner under the provisions of this Act in the case of such person or class of persons, as the Board may, having regard to the nature of the cases, the complexities involved and other relevant considerations, direct.”

On perusal of Section 246A of the Act, we have observed that appeal against the orders passed u/s 143(3) read with Section 263 of the Act shall lie with the CIT(A)

u/s 246A(1)(a) of the Act being an order passed by learned assessing officer u/s 143(3) of the Act.

Appeal under the Act is a statutory right which emanates only from the statute. The assessee does not have a vested right to appeal unless provided for in the statute. Reference is drawn to the decision of Hon'ble Supreme Court in the case of CIT v. Ashoka Engineering Co. (1992) 194 ITR 645(SC) whereby the Hon'ble Supreme Court held that :

“7. We have heard the counsels for both the parties. The question at issue is regarding a right of appeal. It is true that there is no inherent right of appeal to any assessee and that it has to be spelt from the words of the statute, if any, providing for an appeal. But it is an equally well-settled proposition of law that, if there is a provision conferring a right of appeal, it should be read in a reasonable, practical and liberal manner.”

Hence, in our considered view, this instant appeal bearing ITA No. 2836/Mum/2014 cannot be adjudicated by the Tribunal as the first appeal against the orders dated 24.02.2014 passed by the AO u/s 143(3) of the Act read with Section 263 of the Act shall lie and fall within the jurisdiction of the CIT(A) u/s 246A(1)(a) of the Act. We have observed that the first appeal is filed directly by the assessee company in ITA No. 2836/Mum/2014 before the Tribunal, which the Tribunal is not competent to adjudicate as per provisions of Section 253(1) of the Act because the first appeal lies before the CIT(A) u/s 246A(1)(a) of the Act and hence the appeal filed by the assessee company is hereby dismissed. However, the assessee company is at liberty to file an appeal before the CIT(A) u/s 246A(1)(a) of the Act for adjudication on merits. The CIT(A) shall consider the relevant fact that in the intervening period the assessee company was pursuing the appeal with the Tribunal albeit at wrong forum with the Tribunal instead of filing the first appeal with the CIT(A) as provided u/s 246A(1)(a) of the Act, which relevant fact shall be considered liberally by the CIT(A) while adjudicating the condonation application, if

filed by the assessee company , while adjudicating the appeal on merits . We order accordingly.

14. In the result, the appeals filed by the assessee company in ITA no. 2836/Mum/2014 is dismissed.

15. In the result, both the appeals filed by the assessee company are dismissed.

Order pronounced in the open court on Ist February, 2016.

आदश की घोषणा खुलान्यायालय में दिनांक: 01-02-2016 को की गई ।

Sd/-
(SHAILENDRA KUMAR YADAV)
JUDICIAL MEMBER

sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 01-02-2016

I

व.नि.स./ R.K., Ex. Sr. PS

आदेश की प्रतिलिपि अद्येषित/Copy of the Order forwarded to :

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai