

आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।  
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

श्री विकास अवस्थी, न्यायिक सदस्य एवं श्री प्रदीप कुमार केडिया, लेखा सदस्य के समक्ष ।  
BEFORE SHRI VIKAS AWASTHY, JM AND SHRI PRADIP KUMAR KEDIA, AM

आयकर अपील सं. / ITA No. 1223/PN/2013

निर्धारण वर्ष / Assessment Year: 2008-09

Span Overseas Ltd.,  
Office No. 5, Amar Avinash Corporate City,  
Bund Garden Road, Pune – 411001

PAN : AABCS4214N

.....अपीलार्थी / Appellant

**बनाम / V/s.**

Commissioner of Income Tax-III,  
Pune

.....प्रत्यर्थी / Respondent

Assessee by : Shri Ketan Ved  
Revenue by : Shri S.K. Rastogi

सुनवाई की तारीख / Date of Hearing : 29-09-2015

घोषणा की तारीख / Date of Pronouncement : 21-12-2015

**आदेश / ORDER**

**PER VIKAS AWASTHY, JM :**

The present appeal of the assessee is directed against the order of Commissioner of Income Tax-III, Pune dated 26-03-2013 passed u/s. 263 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for the assessment year 2008-09. In appeal, the assessee has assailed the impugned order on account of invoking jurisdiction u/s. 263 by Commissioner of Income Tax, as well on merits.

2. The brief facts of the case are : The assessee is a company and is engaged in the business of trading, indenting agent and export of goods. The assessee filed its return of income for the assessment year 2008-09 on 26-09-2008 declaring income of Rs.4,39,86,108/-. During the course of scrutiny assessment, the Assessing Officer made certain additions/disallowances and assessed the total income of the assessee at Rs.4,84,82,800/- vide order dated 30-12-2010. The Commissioner of Income Tax invoked his jurisdiction u/s. 263 and issued notice to the assessee on 03-05-2011 for the impugned assessment year. The assessee filed reply to the said notice on 21-07-2011. Thereafter, the Commissioner of Income Tax passed the impugned order setting aside the assessment order dated 30-12-2010 and directed the Assessing Officer to pass fresh assessment order.

Aggrieved by the order of Commissioner of Income Tax passed u/s. 263, the assessee is in appeal before the Tribunal.

3. Shri Shri Ketan Ved appearing on behalf of the assessee submitted that the Commissioner of Income Tax has erred in invoking the jurisdiction u/s. 263 without any substance and material. The Id. AR submitted that a perusal of show-cause notice which is at pages 83 to 85 of the paper book would show that the only reason for initiating proceedings u/s. 263 by the Commissioner of Income Tax is that the assessment order has been passed without making proper enquiry. The Commissioner of Income Tax has erred in holding that the assessment order was passed without proper enquiry as the issues raised by the Commissioner of Income Tax in show-cause notice were enquired into by the Assessing Officer during the course of scrutiny assessment proceedings. The Assessing Officer had given detailed

questionnaire to the assessee at the time of original assessment which was duly answered and the assessee had submitted all the relevant documents in support of its contentions. The ld. AR referred to the certified copy of questionnaire dated 28-07-2010 which is placed at pages 129 to 134 of the paper book. The ld. AR also referred to the official notings recorded by the Assessing Officer (pages 135 to 137 of paper book) and at the time of assessment and submitted that a perusal of the noting sheets would show that the Assessing Officer had raised queries in respect of all the issues which have been mentioned by the Commissioner of Income Tax in revision proceedings u/s. 263 of the Act. The ld. AR submitted that the Patna Bench of the Tribunal in the case of Vijay Kumar Megotia Vs. Commissioner of Income Tax reported as 195 Taxman 63 (Pat.) (MAG) has held that the Commissioner of Income Tax cannot set aside the assessment merely on the ground that proper enquiry was not made by the Assessing Officer. Thus, the Commissioner of Income Tax was not correct in cancelling the assessment and directing the Assessing Officer to make fresh assessment.

3.1 The ld. AR further submitted that the Commissioner of Income Tax has erred in holding that the Assessing Officer has not applied his mind and the matter requires re-examination without giving any finding on the merits. The ld. AR submitted that the Commissioner of Income Tax has not pointed out any error in the assessment order allegedly prejudicial to the interest of Revenue. In support of his submissions, the ld. AR placed reliance on the following decisions:

- i. Commissioner of Income-tax Vs. Gabriel India Ltd., 203 ITR 108 (Bom); and

- ii. Umraosingh Ostwal Vs. The Commissioner-Central, Pune, ITA No. 8857/Mum/2011 decided on 10-05-2013.

3.2 The ld. AR contended that the Commissioner of Income Tax has to independently apply his mind for invoking jurisdiction u/s. 263 of the Act. The ld. AR submitted that a perusal of show-cause notice would show that the notice has been issued on the proposal made by the Dy. Commissioner of Income Tax, Circle-6, Pune. The Commissioner of Income Tax has stated in the show-cause notice that, “the Dy. Commissioner of Income Tax has pointed out the following deficiencies in the assessment order”. Thereafter, the Commissioner of Income Tax has merely reproduced the alleged shortcoming pointed out by Dy. Commissioner of Income Tax. As per the provisions of section 263 the Commissioner of Income Tax has to form independent opinion that the order passed by the Assessing Officer is erroneous as well prejudicial to the interest of the Revenue. To substantiate his contentions the ld. AR placed reliance on the decision of Mumbai Bench of the Tribunal in the case of Vinay Pratap Thacker, Vs. Commissioner of Income Tax in ITA No. 2939/Mum/2011 decided on 27-02-2013. The ld. AR further submitted that the Commissioner of Income Tax cannot assume jurisdiction u/s. 263 of the Act only on the ground of inadequate enquiry. The provisions of section 263 cannot be invoked to make a mere fishing and roving enquiry. In support of this argument, the ld. AR draws attention to the decision of Ahmedabad Bench of the Tribunal in the case of M/s. J B Experts Vs. Commissioner of Income Tax in ITA No. 1646/Ahd/2010 decided on 16-12-2010 and the decision of Hon'ble Calcutta High Court in the case of Commissioner of Income Tax Vs. Pradeep Kumar Todi reported as 325 ITR 96 (Calcutta).

The ld. AR submitted that on merits the assessee had filed a detailed reply on the issues on which the Commissioner of Income Tax has initiated revision proceedings u/s. 263. The Commissioner of Income Tax has pointed out that while computing disallowance u/s. 14A of the Act, the Assessing Officer has made error while taking the average value of investment for the purpose of making disallowance u/s. 14A r.w. Rule 8D(iii). The Assessing Officer while computing the disallowance strictly followed the provisions u/s. 8D(iii) which provides that only investments, the income from which does not form part of the total income has to be considered. The Commissioner of Income Tax has further erred in coming to the conclusion that the commission paid Rs.88,21,760/- was excessive and the assessee company had hardly any business activity during the year. The Commissioner of Income Tax has erred in not considered the fact that the assessee had received commission to the tune of Rs.5,47,10,562/- during the assessment year 2008-09 and has paid commission of Rs.88,21,770/- which is only 16.12% of the commission earned. The observation of the Commissioner of Income Tax that the assessee company has hardly any business is unfounded. The Assessing Officer during the scrutiny assessment proceedings raised query with regard to the payment of commission which was answered to by the assessee. Accordingly, no addition/disallowance was made by the Assessing Officer on this ground. The Commissioner of Income Tax has further raised doubt over the amount of incentive Rs.42,00,500/- paid. During the course of assessment proceedings this issue was also raised by Assessing Officer and the assessee had given employee wise details of the commission paid. The ld. AR submitted that the details of the incentive paid are given at page 104 of the paper book. The ld. AR submitted

that the Commissioner of Income Tax has also raised question over deductibility of compensation paid to the family of deceased employee. This issue was also examined by the Assessing Officer during the course of assessment proceedings. The Assessing Officer was satisfied with the explanation furnished by the assessee for payment of compensation Rs.27,50,000/- and accordingly allowed the same. The ld. AR further submitted that Commissioner of Income Tax has also raised doubt over genuineness and admissibility of travelling expenses Rs.33,91,004/- and rent paid Rs.17,50,680/-. Both these issues were discussed by the Assessing Officer at the time of assessment proceedings. The assessee had given the details of all these expenditure including the traveling expenses and the rent paid. Therefore, the observations of the Commissioner of Income Tax that the aforesaid expenditure have been allowed without proper enquiry or without any basis is wrong. The ld. AR prayed for setting aside the impugned order.

4. On the other hand Shri S.K. Rastogi representing the Department vehemently supported the impugned order. The ld. DR submitted that the Assessing Officer has simply collected the information and thereafter has not applied his mind thereon. There is no discussion by the Assessing Officer in the order with regard to issues highlighted by the Commissioner of Income Tax. This clearly shows that the Assessing Officer has not applied his mind on the issues raised by the Commissioner of Income Tax in revision proceedings. The Commissioner of Income Tax is justified in invoking the provisions of section 263 of the Act, as the order of Assessing Officer is erroneous as

well as prejudicial to the interest of revenue. The ld. DR placed reliance on the following decisions in support of his submissions:

- i. M/s. Malabar Industries Vs. CIT, 243 ITR 83 (SC);
- ii. Appollo Tyres Ltd. Vs. Dy. CIT, 360 ITR 36 (Ker); and
- iii. CIT Vs. RKBK Fiscal Services (P) Ltd., 358 ITR 228 (Calcutta)

5. We have heard the submissions made by the representatives of rival sides and have perused the orders of authorities below as well as the documents placed on record. The Commissioner of Income Tax initiated revisional proceedings u/s. 263 by issuing show cause notice dated 03-05-2011. The show cause notice issued by the Commissioner of Income Tax reads as under:

*“To  
The Principal Officer,  
Span Overseas Pvt. Ltd.,  
Office No.5, 3<sup>rd</sup> floor,  
Amar Avinash Corporate City,  
11, Bund Garden Road,  
Pune 411 001.*

*Sir,*

*Sub: Show-cause Notice u/s.263 of the I.T. Act, 1961 –  
Asst. year 2008-09 – reg.*

*The Dy. Commissioner of Income-tax. Circle 6, Pune, has submitted a proposal u/s.263 of the Income-tax Act, 1961, seeking cancellation of assessment order dated 30.12.2010 for A.Y. 2008-09 made u/s.143(3), as this order suffers from certain deficiencies because of which it is erroneous in so far as it is prejudicial to the interest of revenue. The Dy. Commissioner of Income Tax has pointed out the following deficiencies in the assessment order:-*

- i. *Your Company has received substantial income which is exempt from income-tax. An amount of Rs.15,29,167/- was voluntarily disallowed u/s.14A of the Income-tax Act, 1961 out of expenses being related to earning of exempt income. The Addl.*

Commissioner of Income-tax, Range 6, Pune, who made the assessment, computed disallowance of Rs.56,76,732/- u/s.14A read with rule 8D of the Income Tax Rules, 1962. It is observed that for the purpose of working of disallowance, average value of investment was taken at Rs.6,72,66,798/-, 0.50% of which was considered for disallowance. The Balance-Sheet, however, shows the values of investment as on 1.04.2007 and 31.03.2008 respectively at Rs.26,02,44,413/- and at Rs.34,67,26,761/-. Average of these two amounts works out to Rs.30,34,85,587/-, 0.50% of which would be Rs.15,17,428/-. However, in the computation The AO has taken this amount at Rs.3,36,334/-. This has resulted into short disallowance of Rs.11,81,094.

- ii. Your company claimed Rs.88,21,760/- on account of commission. No enquiry was carried out in this regard before accepting the claim. Your company had hardly any business activity during the year and income earned was mostly from other sources. It is also observed from the Balance-sheet that a sum of Rs.1,91,57,738/- is shown as outstanding on account of commission. In view of the fact that your company had little business activity, the genuineness of commission expense needed verification more so in view of the fact that provisions made in the pass have mostly remained unpaid.
- iii. Your company claimed an amount of Rs.42,00,500/- as incentive. Record; show that no verification of this claim was carried out to examine its genuineness and also its admissibility. Since your company had little business activity during the year, nature of the incentive expense and genuineness thereof was required to be inquired into which was not done.
- iv. Your company claimed to have paid Rs.27,50,000/- as compensation to deceased employee. Records do not show that the Assessing Officer made enquiries about admissibility of this amount. Records also do not show that your company was under any obligation to make this payment. This claim was prima-facie not in the nature of expense deductible u/s. 37(1) of the Income-tax Act, 1961 and hence was not allowable.
- v. Your company has claimed Rs.33,91,004/- as traveling expenses. Since not much business activity was carried out by your

company during the year and the receipt credited in the accounts was in the nature of other income, the Assessing Officer was required to examine the genuineness and admissibility of this expense which was not done.

- vi. Your company had paid amounts of Rs.17,50,680/- and further Rs.1,68,540/- to related parties. Expenditure of this nature had substantially increased during the current year in comparison with the preceding year. The Assessing Officer is found to have not made any verification with regard to reasonableness and admissibility in the light of provisions of section 40A(2)(b) of the Income-tax Act, 1961.

2. It is thus observed that the Assessing Officer has erroneously computed disallowance u/s.14A read with Rule 8D which is lower by Rs.11,81,094/-. She has also not made any enquiry with regard to expenses on commission, incentive, compensation to the deceased employee, traveling and rent though such enquiry was warranted on the basis of the facts on record. She has accepted the claims of your company without application of mind. The assessment order is, therefore, erroneous in so far it is prejudicial to the interest of revenue and the provisions of section 263 of the Income-tax Act, 1961 are attracted. In view of these facts and circumstances, you are hereby requested to explain as to why not the provisions of section 263 of the Income-tax Act, 1961 be involved and the assessment order dated 30-12-2010 be cancelled.

3. You are hereby given an opportunity of being heard in person or through an Authorized Representative on 18.05.2011 at 11 a.m. in my office at the address given in this notice. In case you prefer to furnish a written explanation in this regard, please ensure that the same reaches this office on or before that date.

Yours faithfully,

Sd/-

(*डॉ. प्रयाग झा*)

(Dr. Prayag Jha)

Commissioner o Income Tax-III, Pune”

A perusal of the show cause notice shows that the Commissioner of Income Tax has invoked the provisions of section 263 on the proposal submitted by the Dy. Commissioner of Income Tax and deficiencies in the assessment order pointed out by the Dy. Commissioner of Income Tax.

6. As per the provisions of section 263 it is the Commissioner of Income Tax who has to examine the records and thereafter form an independent opinion that the order passed by the Assessing Officer is erroneous in so far as it prejudicial to the interest of revenue. In the present case we find that the Commissioner of Income Tax has not exercised his independent judgment for invoking revisional powers.

For assuming the revisional jurisdiction, the Commissioner of Income Tax first has to call for the records of any proceedings under the Act and examine the same. After examining the records, if the Commissioner of Income Tax considers that the order passed by Assessing Officer is erroneous in so far as it is prejudicial to the interest of the revenue, he may issue show cause notice to the assessee. After giving an opportunity of hearing to the assessee and conducting enquiry as may be necessary, the Commissioner of Income Tax shall pass order as the case may be including enhancing or modifying the assessment or cancelling the assessment. The Commissioner of Income Tax has to pass a speaking order highlighting deficiencies in the assessment order with reasons.

7. A perusal of the impugned order shows, that the Commissioner of Income Tax in the instant case has merely reproduced the deficiencies pointed out by the Dy. Commissioner of Income Tax in the assessment

order. The Commissioner of Income Tax has not given the reasons as to how the findings of the Assessing Officer are erroneous in so far as prejudicial to the interest of revenue. The contention of the assessee is that all the relevant documents were placed on record by the assessee during the course of assessment proceedings. The Assessing Officer has passed the order after considering the same. The duty of the assessee is bring all the relevant documents before the Assessing Officer. The manner in which the order is to be passed is the prerogative of the Assessing Officer.

8. The order of the Assessing Officer may be brief and cryptic but that by itself is not sufficient reason to hold that the assessment order is erroneous and prejudicial to the interest of revenue. It is for the Commissioner to point out as to what error was committed by the Assessing Officer in taking a particular view. In the case in hand, the Commissioner of Income Tax has failed to point out error in the assessment order. For invoking revisionary powers the Commissioner of Income Tax has to exercise his own discretion and judgment. Here the Commissioner of Income Tax has invoked the provisions of section 263 at the mere suggestion of the Dy. Commissioner of Income Tax, without exercising his own discretion and judgment.

9. The Mumbai Bench of the Tribunal in the case of Vinay Pratap Thacker Vs. Commissioner of Income Tax (supra) has set aside the order of Commissioner of Income Tax passed u/s. 263 on the ground that the Commissioner of Income Tax had not used his own discretion and judgment in assuming the revisional jurisdiction. The relevant extract of the order of the Tribunal is reproduced here-in-under:

*“22. We have heard the contentions of both the parties and have also perused the material placed before us, including the case laws cited by either side. On going through the submissions of the assessee, SCN and Audit Objection, we find that the issue had been dealt with by the AO in regular assessment proceedings and thereafter an audit objection was raised, which was used by the AO to convince the CIT to invoke his jurisdiction under section 263. When we read the section, which reads, as,*

*“(1) The 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”.*

*This clearly shows, that the CIT must himself come to a conclusion, after applying his own mind, because, the words used in the section are, “..... and if he considers .....”, here, application of his own mind becomes important. It is important to examine the similarity of the expression used under section 147(1) and 263(1). Under section 147(1), the expression used is “has reason to believe” and under section 263(1), the expression used is “if he considers”. Though the expressions used are not verbatim pari materia, but the meaning which is to be drawn in both the expressions are pari materia, i.e., an independent, unpolluted and unadopted application of mind by the officer, invoking the provision.*

*23. We have seen from the impugned order of the CIT, dated 11.02.2011, the CIT admits, “A proposal was received on 10.06.2010 from the AO under section 263 of the Income Tax Act, 1961, pointing out some discrepancies/short comings in the assessment order”. This clearly shows that in so far as the CIT was concerned, he did not apply his own mind, which the Hon’ble Supreme Court of India has said in ICICI Bank (supra) that there should be an independent application of mind.”*

10. In view of the fact that the Commissioner of Income Tax has invoked the provisions of section 263 without applying his own independent judgment and merely at the behest of proposal forwarded

by the Dy. Commissioner of Income Tax is against the spirit of Act.  
Thus, the impugned order is liable to be set aside.

11. In the result, the impugned order is set aside and the appeal of the assessee is allowed.

Order pronounced on Monday, the 21<sup>st</sup> day of December, 2015.

Sd/- (Pradip Kumar Kedia)	Sd/- (Vikas Awasthy)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 21<sup>st</sup> December, 2015

RK

**आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant.
  2. प्रत्यर्थी / The Respondent.
  3. आयकर आयुक्त (अपील) / The CIT-III, Pune
  4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच,  
पुणे / DR, ITAT, "A" Bench, Pune.
  5. गार्ड फ़ाइल / Guard File.
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आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary,  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune