IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH : KOLKATA

[Before Hon'ble Shri J.Sudhakar Reddy, AM & Hon'ble Smt. Madhumita Roy, JM]

I.T.A No. 1014/Kol/2017

Assessment Year : 2012-13

M/s ITT Shipping Pvt. Ltd. -vs- Pr. CIT-3, Kolkata
[PAN: AAACI 5499 Q]

(Appellant) (Respondent)

For the Department : Shri Anikesh Banerjee, Advocate
Mrs. Saswati Mitra (Dutta), Advocate
For the Appellant : Shri G. Hangshing, CIT

Date of Hearing : 31.05.2018

Date of Pronouncement : 01.06.2018

ORDER

Per J.Sudhakar Reddy, AM

1. This appeal filed by the assessee directed against the Ld. Principal of Commissioner of Income Tax-3, Kolkata for the assessment year 2012-13, wherein he has revised the order passed u/s 143(3) by the Assessing officer on 24.02.2015 by exercising his jurisdiction u/s 263 of the Income Tax Act, 1961(the Act) on 8th March, 2017.

2. The assessee is a company and is engaged in the business of shipping. It also provides services to foreign ships. Due to its nature of business, the assessee is required to undertake foreign currency transactions for running its business.

3. During the impugned assessment year, the assessee claimed 'Forward Contract Loss' as normal "business loss" amounting to Rs. 2,34,10,636/-. The forward contract in question, was entered into by the assessee with Indusind Bank for hedging future foreign currency fluctuation. The assessing officer accepted this claiming business loss, in the order passed u/s 143(3) of the Act. The Ld. CIT initiated a proceedings u/s 263 of the Act by issuing a show cause notice to the assessee proposing to hold the "Forward Contract Loss" incurred in connects with Indusind Bank, as a speculation loss and not normal business loss, by relying on amongst others the CBDT Instruction No. 3 of 2010 dated 23.03.2010. In reply the assessee contended that, this issue was examined by the assessing officer during the course of assessment proceedings u/s 143(3). It was further submitted that the assessee is in the business of running ships and providing services to the foreign ships and hence has to conduct its business regularly in foreign exchange also and hence the loss on hedging is a business loss and is out of the purview of Instruction No. 3 of 2010 dated 23.03.2010. The ld. Pr. CIT rejected the contentions of the assessee in his detailed order. At para 13 held as follows:

> *"13. It may be further noticed, that in order to clarity on the issue of 'erroneous in so far as it is prejudicial to the interest of the revenue', a new explanation has been inserted to clarify 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.*
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> *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 Hon'ble Supreme Court in the case of the assessee or any other person.*
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> *This amendment takes effect from 01.06.2015."*

Thereafter he set aside the order to the file of the AO and directed the AO to pass a fresh order, after considering the observations made by the Pr. CIT in his order and

thereafter giving an opportunity of being heard to the assessee. Aggrieved the assessee is before us on the following grounds:

1. *For that the Ld. Pr. CIT-3, Kolkata erred in initiating proceedings u/s 263 when the assessment was completed after due enquiry and in accordance with law.*
2. *For that the Ld. Pr. CIT-3, Kol erred in setting aside the assessment when the order passed by the AO was neither erroneous nor prejudicial to the interest of revenue and both the conditions to invoke sec. 263 were not present.*
3. *For that the Ld. Pr. CIT-3, Kolkata with considering the submission of assessee duly filed on 01.03.2017 had passed the order which is arbitrary & bad in law.*
4. *For that without considering the fact the expenses was disallowed u/s 43(5) of the Act by the Ld. Pr. CIT.*
5. *For that the ld. Pr. CIT erred in invoking provisions of sec. 263 for payment to the bank related forward contract considering the volume & nature of the business and even otherwise the same was duly certified by the Auditor to have been incurred for business purposes and there was no evidence on record that the claim was not genuine.*
6. *For that your petitioner prays to place any additional ground/s before completion of appeal hearing.*

4. The ld. Counsel for the assessee Mr. Anikesh Banerjee submitted that the assessing officer has enquired into this issue of "Loss on Forward Contract" during the course of assessment proceedings u/s 143(3) of the Act. He filed a paper book running into 85 pages and drew attention to the copy of the order sheet which is placed at pages 23 to 26 of the paper book specifically to the hearing on 15.12.2014 and 06.01.2015. He referred to the explanation filed by the assessee vide letter dated 06.01.2015 [para (xiii)] which was placed at page 29-30 of the paper book. He submitted the copies of entire set of papers relating to forward contracts, foreign exchange entered into with Indusind Bank were filed before the Assessing officer, which includes, statement of account of Indusind Bank, loss from forward contract which was paid to the Bank, the copy of the sanctioned letter of forward cover limit etc. He submitted that the ld. Assessing officer has taken a possible view on this issue and hence the revision u/s 263 of the Act is bad in law. He relied on a number of judgments for the proposition that, the order passed by

the Assessing officer should not only be erroneous but also prejudicial to the interest of revenue for the Ld. Pr. CIT to invoke his powers u/s 263 of the Act. We would discuss these judgments as and when necessary.

5. Further Mr. Anikesh Banerjee submitted that the loss in question is not a speculative loss and does not fall within the term ' Marked to Market Losses' with which Instruction No. 3 of 2010 dated 23.03.2010 refers to. He vehemently contended that the assessee is in the business of shipping as well as in servicing of foreign ships and hence part of the transaction have to be conducted in foreign exchange and as a matter of prudence, the assessee entered into hedging contract for Indusind Bank and that the loss in question has arisen in the course of such contracts and that it cannot be considered a speculation loss within the definition of Section 43(5) of the Act. For this proposition, he relied on a number of decisions which will be dealing with as and when necessary.

6. The ld. Counsel for the assessee further submitted that the ld. Pr. CIT has come to a conclusion in his order u/s 263 of the Act that the loss in question is speculative loss and has directed the assessing officer to keep this observation in mind and pass a fresh assessment order, after giving opportunity to the assessee. He submitted that such a set aside of assessment leaves no choice to the subordinate assessing officer and that it binds him to determine the loss in question as "speculative loss". The assessee submits that this is not an open remand and hence the order should be cancelled as this binding observation of the ld. Pr. CIT are against the facts of the case.

7. The ld. DR Mr. G. Hangshing on the other hand vehemently controverted the submissions of the assessee and submitted that the assessing officer in his order u/s 143(3) has not examined the loss in question from the angle as to whether it is a normal business loss or "Speculative Loss". He submitted that the assessing officer has also not

considered the binding instruction of Board referred by the ld. Pr. CIT. He relied on the order of the Ld. Pr. CIT and submitted that non-application of mind by the assessing officer to the issue, in the manner it has to be looked into, makes the order erroneous and prejudicial to the interest of revenue. He submitted that when a transaction is settled, otherwise then by actual delivery or transfer of the commodity etc. , it would be considered a "Speculative Transaction". He relied on the case law cited by the ld. Pr. CIT in his order and submitted that an order of the ld. Pr. CIT passed u/s 263 has to be upheld. He submitted that the issue was only remanded to the assessing officer for fresh adjudication by the ld. Pr. CIT and hence the assessee should not have any grievance and can make his submission before the AO.

8. In reply the ld. Counsel for the assessee submitted that this is not an open remand and that the judgment of the Hon'ble Supreme Court in the case of CIT vs. Shantilal Pvt. Ltd. reported in 14 Taxmann 1(SC) which was relied by the ld. Pr. CIT, was in favour of the assessee.

9. Rival contentions heard. On careful consideration of the facts and circumstances of the case and perusal of the papers on record and the orders of the authorities below as well as case law cited, we hold as follows.

10. The assessing officer has, during the original assessment proceedings, on 15.12.2014, requested the assessee to file details, among others of "Loss on Forward Contract". The assessee filed the necessary documents along with reply on 06.01.2015. The reply of the assessee on this issue is extracted for early reference:

"xiii) <u>Forward Contract Loss</u>

Since the company was engaged in rendering service of freight to foreign customers along with domestic customers, exposure to loss arising out of fluctuation in foreign currency is quite evident. To hedge against such loss, the company entered into forward contract agreement with Indusind Bank Ltd. As per the agreement (copy enclosed- Annexure-12) the company referred to as 'counter party had to provide

documentary evidence or a declaration for the underlying transaction for which the contract was booked.

The terms and conditions in the Sanction Letter of Indusind Bank clearly stipulated that contract would be booked only on submission of documentary evidence of underlying exposure to the satisfaction of the Bank.

Hence it is quite evident that contract has been entered in connection with the business of the assessee and will not constitute loss u/s 43(5) but was incidental to the assessee's business and allowable as such.

The transaction in foreign exchange were incidental to the assessee's regular course of business and the loss was not a speculative transaction.

The matter has been emphasized by the Bombay High Court in the case of Badridas CIT vs. Badridas Gauridu (P) Ltd. 92003) 261 ITR and the Gujrat High Court in CIT vs. Friends and Friends Shipping (P) Ltd. and the Calcutta High Court in the case of Soorajmull Nagarmull."

11.a) In the case of CIT vs. Badridas Gauridu Pvt. Ltd. reported in 134 Taxmann 376 (Bomb) which is relied upon by the assessee before the ld. AO, the Hon'ble Bombay High Court followed the judgment of the Jurisdictional High Court and at para 3 held as follows:

"3. The assessee was not a dealer in foreign exchange. The assessee was a cotton exporter. The assessee was an export house. Therefore, foreign exchange contracts were booked only as incidental to the assessee's regular course of business. The Tribunal has recorded a categorical finding to this effect in its order. The Assessing Officer has not considered these facts. Under section 43(5) of the Income Tax Act, 'speculative transaction' has been defined to mean a transaction in which a contract for the purchase or sale of a commodity is settled otherwise than by the actual delivery or transfer of such commodity. However, as stated above, the assessee was not a dealer in foreign exchange. The assessee was an exporter of cotton. In order to hedge against losses, the assessee had booked foreign exchange in the forward market with the Bank. However, the export contracts entered into by the assessee for export of cotton in some cases failed. In the circumstances, the assessee was entitled to claim deduction in respect of Rs. 13.50 lakhs as a business loss. This matter is squarely covered by the judgment of the Calcutta High Court with which we agree, in the case of CIT vs. Sooraj Mull Nagarmull (1981) 129 ITR 169."

b) The Hon'ble Gujrat High Court in the case of CIT vs. Friends and Friends Shipping Pvt. Ltd. reported in (2013) 35 Taxmann533 (Guj.)which was also relied upon before

the AO, the court had followed the judgment of the Hon'ble Bombay High Court as well as the Hon'ble Calcutta High Court and held at para 7 as follows:

> *"7. Before the Calcutta High Court, the assessee was a firm engaged in the business of import and export of jute. In course of business, the assessee would enter into forward contract in foreign exchange in order to cover the loss which may arise due to difference in foreign exchange valuation. In one such contract, the assessee had to pay to the Bank difference of Rs. 80,491/- which was claimed by the assessee as revenue expenditure. The Assessing Officer disallowed the claim. The High Court held that the assessee was not a dealer in foreign exchange and the foreign exchange were only incidental to the assessee's regular course of business and the loss was thus not a speculative loss but incidental to the assessee's business and allowable as such. Facts in the present case are very similar. Admittedly, the assessee is not a dealer in foreign exchange. For the purpose of hedging the loss due to fluctuation in foreign exchange while implementing the export contracts, the assessee had entered into forward contract with the Banks. In some cases, the export could not be executed and the assessee had to pay certain charges to the Bank and thereby incurred certain expenses. These expenses the assessee claimed by way of expenditure towards business. We do not find that the transaction can be stated to be in speculation as to cover under sub-section (5) of Section 43 of the Act."*

c) Similarly the jurisdictional High Court in the case of CIT vs. Soorajmull Nagarmull reported in (1981) 5 Taxman 289 (Kol) which was also relied upon in the reply extracted above, the court has held as follows:

> *"Held*
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> 1. *A contract for foreign exchange can undoubtedly be treated as a contract for commodity. In the instant case, the assessee was carrying on business of export and import of jute goods. There was no finding that entering into foreign exchange contracts was the assessee's line of business. In order to carry out its business transactions, the assessee had to enter into foreign exchange contracts and the assessee was not a dealer in foreign exchange as such. Foreign exchange contracts were only incidental to the assessee's regular course of business of export and import of goods. If any loss occurred in these foreign exchange contracts then such a loss referable to an related to the business carried on by the assessee. Further a claim based on breach of contract did not come within the meaning of 'contract settled' as used in Explanation 2 to section 24(1). The expression 'contract settled' meant contract settled before breach of contract. After breach of contract, the cause of action 'was no longer based on the contract itself but on its breach.*

2. *It was undoubtedly true that the claim of the impugned sum arose in 1952. The liability to pay this sum was, however, disputed and it was finally settlement in the year of account, therefore, though the claim related to the breach alleged to have occurred in 1952 , the settlement of liability was done by agreement between parties in the year of account. It was well-settled that where the claim for damages was the liability to pay damages under dispute, unless the dispute was adjudicated or settled between the parties, the claim could not be said to have arisen. Hence, this loss was referable to the instant assessment year, even though the assessee maintained its books on mercantile system.*

3. *Therefore, the Tribunal was right in holding (i) that the impugned sum was not a speculation loss but was incidental to the carrying on of the assessee's business and as such allowable on revenue account, and (ii) that the liability for the impugned sum accrued and became ascertained only in 1956 when the claim was settled and consequently allowable in the assessment year 1956-57."*

12. On consideration of this explanation and the case law cited by the assessee, the assessing officer in his order passed u/s 143(3) has not held that the "Forward Contract Loss" claimed by the assessee is to be treated as Speculative loss. The AO accepted the expenditure of the assessee. Under these circumstances, it cannot be said that there was non-application of mind by the assessing officer to this issue or that the order was passed without making adequate enquiries or verification which should have been made or that the order was passed allowing relief without enquiring into the claim. It is also not a case where the AO has not examined this issue in the manner it has to be examined.

13. We now discuss the propositions in law, laid down in the judgments of various High Courts as well as the Hon'ble Supreme Courts on the issue of revisionary powers of the CIT u/s 263 of the Act.

i) *"The Hon'ble Andhra Pradesh High Court in the case of Spectra Shares and Scrips Pvt. Ltd. V CIT (AP) 354 ITR 35 had considered a number of judgments on this issue of exercise of*

jurisdiction u/s 263 of the Act by the Principal Commissioner of Income Tax and culled the principles laid down in the judgments as below :

> *"24. In **Malabar Industrial Co.Ltd. (2 Supra),** the Supreme Court held that a bare reading of Sec.263 makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suomotu under it, is the order of the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent – if the order of the Income Tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but it is prejudicial to the Revenue – recourse cannot be had to Sec.263 (1) of the Act. It also held at pg-88 as follows:*
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> *"The phrase "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue: or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income-tax Officer is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the Revenue. RampyarideviSaraogi v. CIT (1968) 67 ITR 84 (SC) and in Smt. Tara Devi Aggarwal V. CIT (1973) 88 ITR 323 (SC)".*
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> *25. In **Max India Ltd.** (3 Supra)**,** reiterated the view in **Malabar Industrial Co.Ltd.** (2 Supra) and observed that every loss of Revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income Tax Officer is unsustainable in law. On the facts of that case, Sec.80HHC(3) as it then stood was interpreted by the Assessing Officer but the Revenue contended that in view of the 2005 Amendment which is clarificatory and retrospective in nature, the view of the Assessing Officer*

was unsustainable in law and the Commissioner was correct in invoking Sec.263. But the Supreme Court rejected the said contention and held that when the Commissioner passed his order disagreeing with the view of the Assessing Officer, there were two views on the word "profits" in that section; that the said section was amended eleven times; that different views existed on the day when the Commissioner passed his order; that the mechanics of the section had become so complicated over the years that two views were inherently possible; and therefore, the subsequent amendment in 2005 even though retrospective will not attract the provision of Sec.263.

*26. In **Vikas Polymers** (4 Supra), the Delhi High Court held that the power of suomotu revision exercisable by the Commissioner under the provisions of Sec.263 is supervisory in nature; that an "erroneous judgment" means one which is not in accordance with law; that if an Income Tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as "erroneous" by the Commissioner simply because, according to him, the order should have been written differently or more elaborately; that the section does not visualize the substitution of the judgment of the Commissioner for that of the Income Tax Officer, who passed the order unless the decision is not in accordance with the law; that to invoke suomotu revisional powers to reopen a concluded assessment under Sec.263, the Commissioner must give reasons; that a bare reiteration by him that the order of the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, will not suffice; that the reasons must be such as to show that the enhancement or modification of the assessment or cancellation of the assessment or directions issued for a fresh assessment were called for, and must irresistibly lead to the conclusion that the order of the Income Tax Officer was not only erroneous but was prejudicial to the interests of the Revenue. Thus, while the Income Tax Officer is not called upon to write an elaborate judgment giving detailed reasons in respect of each and every disallowance, deduction, etc., it is incumbent upon the Commissioner not to exercise his suomotu revisional powers unless supported by adequate reasons for doing so; that if a query is raised during the course of the scrutiny by the Assessing Officer, which was answered to the satisfaction of the Assessing Officer, but neither the query nor the answer were reflected in the assessment order, this would not by itself lead to the conclusion that the order of the Assessing Officer called for interference and revision.*

*27. In **Sunbeam Auto Ltd.**(5 Supra), the Delhi High Court held that the Assessing Officer in the assessment order is not required to give a detailed reason in respect of each and every item of deduction, etc.; that whether there was application of mind before allowing the expenditure in question has to be seen; that if there was an inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under Sec.263*

merely because he has a different opinion in the matter; that it is only in cases of lack of inquiry that such a course of action would be open; that an assessment order made by the Income Tax Officer cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately; there must be some prima facie material on record to show that the tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation, a lesser tax than what was just, has been imposed. In that case, the Delhi High Court held that the Commissioner in the exercise of revisional power could not have objected to the finding of the Assessing Officer that expenditure on tools and dies by the assessee, a manufacturer of Car parts, is revenue expenditure where the said claim was allowed by the latter on being satisfied with the explanation of the assessee and where the same accounting practice followed by the assessee for number of years with the approval of the Income Tax Authorities. It held that the Assessing Officer had called for explanation on the very item from the assessee and the assessee had furnished its explanation. Merely because the Assessing Officer in his order did not make an elaborate discussion in that regard, his order cannot be termed as erroneous. The opinion of the Assessing Officer is one of the possible views and there was no material before the Commissioner to vary that opinion and ask for fresh inquiry.

28. In ***Gabriel India Ltd.*** *(6 Supra), the Bombay High Court held that a consideration of the Commissioner as to whether an order is erroneous in so far as it is prejudicial to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. It held that the Commissioner cannot initiate proceedings with a view to start fishing and roving inquiries in matters or orders which are already concluded; that the department cannot be permitted to begin fresh litigation because of new views they entertain on facts or new versions which they present as to what should be the inference or proper inference either of the facts disclosed or the weight of the circumstance; that if this is permitted, litigation would have no end except when legal ingenuity is exhausted; that to do so is to divide one argument into two and multiply the litigation. It held that cases may be visualized where the Income Tax Officer while making an assessment examines the accounts, makes inquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the account or by making some estimate himself; that the Commissioner, on perusal of the record, may be of the opinion that the estimate made by the Officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income Tax Officer; but that would not vest the Commissioner with power to*

reexamine the accounts and determine the income himself at a higher figure; there must be material available on the record called for by the Commissioner to satisfy him prima facie that the order is both erroneous and prejudicial to the interests of the Revenue. Otherwise, it would amount to giving unbridled and arbitrary power to the revising authority to initiate proceedings for revision in every case and start re-examination and fresh inquiry in matters which have already been concluded under law.

*29. In **M.S. Raju**(15 Supra), this Court has held that the power of the Commissioner under Sec.263 (1) is not limited only to the material which was available before the Assessing Officer and, in order to protect the interests of the Revenue, the Commissioner is entitled to examine any other records which are available at the time of examination by him and to take into consideration even those events which arose subsequent to the order of assessment.*

*30. In **Rampyari Devi Saraogi**(21 Supra), the Commissioner in exercise of revisional powers cancelled assessee's assessment for the years 1952-1953 to 1960-61 because he found that the income tax officer was not justified in accepting the initial capital, the gift received and sale of jewellery, the income from business etc., without any enquiry or evidence whatsoever . He directed the income tax officer to do fresh assessment after making proper enquiry and investigation in regard to the jurisdiction. The assessee complained before the Supreme Court that no fair or reasonable opportunity was given to her. The Supreme Court held that there was ample material to show that the income tax officer made the assessments in undue hurry; that he had passed a short stereo typed assessment order for each assessment year; that on the face of the record, the orders were pre-judicial to the interest of the Revenue; and no prejudice was caused to the assessee on account of failure of the Commissioner to indicate the results of the enquiry made by him, as she would have a full opportunity for showing to the income tax officer whether he had jurisdiction or not and whether the income tax assessed in the assessment years which were originally passed were correct or not"*

31. From the above decisions, the following principles as to exercise of jurisdiction by the Commissioner u/s.263 of the Act can be culled out:

a) The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If erroneous but is not prejudicial to the Revenue or if it is not erroneous but it is prejudicial to the Revenue – recourse cannot be had to Sec.263 (1) of the Act.

b) Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue: or where two views are possible and

the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income-tax Officer is unsustainable in law.

c) To invoke suomotu revisional powers to reopen a concluded assessment under Sec.263, the Commissioner must give reasons; that a bare reiteration by him that the order of the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, will not suffice; that the reasons must be such as to show that the and must irresistibly lead to the conclusion that the order of the Income Tax Officer was not only erroneous but was prejudicial to the interests of the Revenue. Thus, while the Income Tax Officer is not called upon to write an elaborate judgment giving detailed reasons in respect of each and every disallowance, deduction, etc., it is incumbent upon the Commissioner not to exercise his suomotu revisional powers unless supported by adequate reasons for doing so; that if a query is raised during the course of the scrutiny by the Assessing Officer, which was answered to the satisfaction of the Assessing Officer, but neither the query nor the answer were reflected in the assessment order, this would not by itself lead to the conclusion that the order of the Assessing Officer called for interference and revision.

e) The Commissioner cannot initiate proceedings with a view to start fishing and roving inquiries in matters or orders which are already concluded; that the department cannot be permitted to begin fresh litigation because of new views they entertain on facts or new circumstance; that if this is permitted, litigation would have no end except when legal ingenuity is exhausted

f) Whether there was application of mind before allowing the expenditure in question has to be seen; that if there was an inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under Sec.263 merely because he has a different opinion in the matter; that it is only in cases of lack of inquiry that such a course of action would be open; that an assessment order made by the Income Tax Officer cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately; there must be some prima facie material on record to show that the tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation, a lesser tax than what was just, has been imposed.

g) The power of the Commissioner under Sec.263 (1) is not Commissioner is entitled to examine any other records which are available at the time of examination by him and to take into consideration even those events which arose subsequent to the order of assessment.

Now we examine the following judgements. :-

ii) DIRECTOR OF INCOME TAX vs. JYOTI FOUNDATION 357 ITR 388 (Delhi High Court)

It was held that revisionary power u/s 263 is conferred on the Commissioner/Director of Income Tax when an order passed by the lower authority is erroneous and prejudicial to the interest of the Revenue. Orders which are passed without inquiry or investigation are treated as erroneous and prejudicial to the interest of the Revenue, but orders which are passed after inquiry/investigation on the question/issue are not per se or normally treated as erroneous and prejudicial to the interest of the Revenue because the revisionary authority feels and opines that further inquiry/investigation was required or deeper or further scrutiny should be undertaken.

iii) INCOME TAX OFFICER vs. DG HOUSING PROJECTS LTD343 ITR 329 (Delhi)

Revenue does not have any right to appeal to the first appellate authority against an order passed by the Assessing Officer. S. 263 has been enacted to empower the CIT to exercise power of revision and revise any order passed by the Assessing Officer, if two cumulative conditions are satisfied. Firstly, the order sought to be revised should be erroneous and secondly, it should be prejudicial to the interest of the Revenue. The expression "prejudicial to the interest of the Revenue" is of wide import and is not confined to merely loss of tax. The term "erroneous" means a wrong/incorrect decision deviating from law. This expression postulates an error which makes an order unsustainable in law.

The Assessing Officer is both an investigator and an adjudicator. If the Assessing Officer as an adjudicator decides a question or aspect and makes a wrong assessment which is unsustainable in law, it can be corrected by the Commissioner in exercise of revisionary power. As an investigator, it is incumbent upon the Assessing Officer to investigate the facts required to be examined and verified to compute the taxable income. If the Assessing Officer fails to conduct the said investigation, he commits an error and the word "erroneous" includes failure to make the enquiry. In such cases, the order becomes erroneous because enquiry or verification has not been made and not because a wrong order has been passed on merits.

Thus, in cases of wrong opinion or finding on merits, the CIT has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and necessary, before the order under s. 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order passed is not sustainable in law and the said finding must be recorded. CIT cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous. In cases where there is inadequate enquiry but not lack of enquiry, again the CIT must give and record a finding that the order/inquiry made is erroneous. This can happen if an enquiry and verification is conducted by the CIT and he is able to establish and show the error or mistake made by the Assessing Officer,

making the order unsustainable in Law. In some cases possibly though rarely, the CIT can also show and establish that the facts on record or inferences drawn from facts on record per se justified and mandated further enquiry or investigation but the Assessing Officer had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further enquiries without a finding that the order is erroneous. Finding that the order is erroneous is a condition or requirement which must be satisfied for exercise of jurisdiction under s. 263 of the Act. In such matters, to remand the matter/issue to the Assessing Officer would imply and mean the CIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question.

This distinction must be kept in mind by the CIT while exercising jurisdiction under s. 263 of the Act and in the absence of the finding that the order is erroneous and prejudicial to the interest of Revenue, exercise of jurisdiction under the said section is not sustainable. In most cases of alleged "inadequate investigation", it will be difficult to hold that the order of the Assessing Officer, who had conducted enquiries and had acted as an investigator, is erroneous, without CIT conducting verification/inquiry. The order of the Assessing Officer may be or may not be wrong. CIT cannot direct reconsideration on this ground but only when the order is erroneous. An order of remit cannot be passed by the CIT to ask the Assessing Officer to decide whether the order was erroneous. This is not permissible. An order is not erroneous, unless the CIT hold and records reasons why it is erroneous. An order will not become erroneous because on remit, the Assessing Officer may decide that the order is erroneous. Therefore CIT must after recording reasons hold that the order is erroneous. The jurisdictional precondition stipulated is that the CIT must come to the conclusion that the order is erroneous and is unsustainable in law. It may be noticed that the material which the CIT can rely includes not only the record as it stands at the time when the order in question was passed by the Assessing Officer but also the record as it stands at the time of examination by the CIT. Nothing bars/prohibits the CIT from collecting and relying upon new/additional material/evidence to show and state that the order of the Assessing Officer is erroneous.

iv) COMMISSIONER OF INCOME TAX vs. J. L. MORRISON (INDIA) LTD. 366 ITR

As regard the submission on behalf of the Revenue that power under Section 263 of the Act can be exercised even in a case where the issue is debatable, it was held that the case of CIT vs. M. M. Khambhatwala was not applicable. The observation that the Commissioner can exercise power under Section 263 of the Act even in a case were the issue is debatable was a mere passing

remark which is again contrary to the view taken by the Apex Court in thecase of Malabar Industrial Company Ltd. & Max India Ltd. If the Assessing Officer has taken a possible view, it cannot be said that the view taken by him is erroneous nor the order of the Assessing Officer in that case can be set aside in revision. It has to be shown unmistakably that the order of the Assessing Officer is unsustainable. Anything short of that would not clothe the CIT with jurisdiction to exercise power under Section 263 of the Act. CIT vs. M. M. Khambhatwala reported in 198 ITR 144; CIT vs. Ralson Industries Ltd. reported in 288 ITR 322 (SC), not applicable; Malabar Industrial Co. Ltd. v. CIT reported in 243 ITR 83, relied on.

(Para 72)

As regard the third question as to whether the assessment order was passed by the Assessing Officer without application of mind, it was held that the Court has to start with the presumption that the assessment order was regularly passed. There is evidence to show that the assessing officer had required the assessee to answer 17 questions and to file documents in regard thereto. It is difficult to proceed on the basis that the 17 questions raised by him did not require application of mind. Without application of mind the questions raised by him in the annexure to notice under Section 142 (1) of the Act could not have been formulated. The Assessing Officer was required to examine the return filed by the assessee in order to ascertain his income and to levy appropriate tax on that basis. When the Assessing Officer was satisfied that the return, filed by the assessee, was in accordance with law, he was under no obligation to justify as to why was he satisfied. On the top of that the Assessing Officer by his order dated 28th March, 2008 did not adversely affect any right of the assessee nor was any civil right of the assessee prejudiced. He was as such under no obligation in law to give reasons. The fact, that all requisite papers were summoned and thereafter the matter was heard from time to time coupled with the fact that the view taken by him is not shown by the revenue to be erroneous and was also considered both by the Tribunal as also by us to be a possible view, strengthens the presumption under Clause (e) of Section 114 of the Evidence Act. A prima facie evidence, on the basis of the aforesaid presumption, is thus converted into a conclusive proof of the fact that the order was passed by the assessing officer after due application of mind. Meerut Roller Flour Mills Pvt. Ltd. vs. C.I.T., ITA No. 116 /Coch/ 2012; CIT vs. Infosys Technologies Ltd., 341 ITR 293 (Karnataka); S.N. Mukherjee vs. Union of India, AIR 1990 SC 1984; A. A. Doshi vs. JCIT, 256 ITR 685; Hindusthan Tin Works Ltd. Vs. CIT, 275 ITR 43 (Del), distinguished.

(Paras 90-92, 102)

v) COMMISSIONER OF INCOME TAX vs. SOHANA WOOLLEN MILLS 296 ITR 238 (P&H HC)

A reference to the provisions of s. 263 shows that jurisdiction thereunder can be exercised if the CIT finds that the order of the AO was erroneous and

prejudicial to the interest of Revenue. Mere audit objection and merely because a different view could be taken, were not enough to say that the order of the AO was erroneous or prejudicial to the interest of the Revenue. The jurisdiction could be exercised if the CIT was satisfied that the basis for exercise of jurisdiction existed. No rigid rule could be laid down about the situation when the jurisdiction can be exercised. Whether satisfaction of the CIT for exercising jurisdiction was called for or not, has to be decided having regard to a given fact situation. In the present case, the Tribunal has held that the assessee had disclosed that out of sale consideration, a sum of Rs. 1 lakh was to be received for sale of permit. If that is so, there was no error in the view taken by the AO and no case was made out for invoking jurisdiction under s. 263."

14. Applying the propositions of law laid down in the above discussed case law, to the facts of the case, we have to necessarily hold that the order in question passed by the assessing officer u/s 143(3) on 24.02.2015, on this issue of 'Loss on Forward Contract' is neither erroneous nor prejudicial to the interest of revenue.

15. We now examine the issue whether, on merits, the transaction in question can be called a speculative transaction. Reliance has been placed by the ld. Pr. CIT on Instruction No. 3 of 2010 dated 23.03.2010. Para 2 of this Instruction refers to "Marked to Market Losses". This instruction applies to loss on account of speculative transactions as contemplated in section 43(5) of the Act. From the case laws discussed by us in the case of Badridas Gauridu Pvt. Ltd. (supra), Soorajmull Nagarmull (supra) and Friends and Friends Shipping pvt. Ltd.(supra), it is clear that, when the assessee is not dealer in foreign exchange and as a part of his normal business activity, enters into hedging contracts of foreign exchange, the loss in question is normal business loss and cannot be held a "Speculation Loss" as covered by Section 43(5) of the Act. The Vishakhapatnam Bench of the ITAT in the case of DCIT, Circle-1(2), vs. B Enterprise Pvt. Ltd. reported in (2017) 80 Taxman 362 (Vishakhapatnam Trib.) at para 16 and 17 held as follows:

"16. The next issue that came up for our consideration for the assessment year 2009-10 is towards disallowance on loss of forward contracts. The AO disallowed loss on forward contracts on the ground that loss incurred by the assessee is in the nature of speculative transaction, which cannot be allowed as deduction against business income. According to the AO, as per the provisions of section 43(5) of the Act, only eligible transactions which are not in the nature of speculative transaction as defined u/s 43(5) of the Act, only qualify for deduction. The AO referred to the CBDT circular and observed that any eligible transaction in respect of trading in derivatives referred to in clause (ac) to section (2) of the Securities Contracts (Regulation Act, 1965), that has been carried out in a recognized stock exchange shall not be treated as speculative transaction. But, the transactions carried on by the assessee are not covered by the said exceptions, therefore, loss incurred by the assessee towards forward contracts is not eligible of deduction. It is claim of the assessee that it had entered into forward exchange contracts to hedge the possible loss in fluctuation in currency in the course of export turnover and the resultant loss on account of settlement of hedging transactions is treated as revenue expenditure. The assessee further contended that during the financial year relevant to assessment year 2009-10, its export turnover is more than the value of forward exchange contracts, therefore, any loss suffered on forward exchange contracts not in the nature of speculative transactions is allowable as deduction against business income.

17. Having heard both the parties and considered the materials on record, we find that the assessee has entered into a forward exchange contracts with its bankers to hedge the export receivables in foreign currency, in order to safeguard against price fluctuation in realization of trade debtors. During the year, in respect of such hedging contracts, the assessee incurred loss of an amount of Rs. 3,41,583/-. We further observed that the assessee has achieved an export turnover of over Rs. 100 crores. We further observed that the transaction entered into by the assessee with its bankers is not in the nature of speculative transaction as defined u/s 43(5)(d) of the Act. Therefore, we are of the view that any loss incurred on forward contracts entered with its bankers to hedge the export receivables, in order to safeguard against price fluctuations in realization of trade debtors is in the nature of business loss, but not speculation loss as defined u/s 43(5)(d) of the Act. The Ld. CIT(A) after considering the relevant details has rightly deleted additions made by the AO. We do not find any infirmity in the order of the Ld. CIT(A), hence we inclined to uphold Ld. CIT(A)'s order and reject the ground raised by the assessee."

Hence the issue in question is covered by a decision of Co-ordinate Bench of the Tribunal. We respectfully following the same as no contrary judgments have been brought to our notice by the ld. CIT DR.

16. Hence even on merits the loss in question is allowable as a normal business loss during the year and this loss is not "Speculation Loss". In view of the above discussion we allow this appeal of the assessee and set aside the impugned order passed by the ld. Pr. CIT passed u/s 263 of the Act on 08.03.2017.

17. In the result, the appeal of the assessee is allowed.

Order pronounced in the Court on 01.06.2018

Sd/-	Sd/-
[Madhumita Roy]	[J.Sudhakar Reddy]
Judicial Member	Accountant Member

Dated : 01.06.2018

SB, Sr. PS

Copy of the order forwarded to:
1. M/s ITT Shipping Pvt. ltd, 1st Floor, 4, Fairlie Place, Kolkata-01.
2. Pr. CIT-3, Kolkata, P-7, Chowringhee Square, Aayakar Bhawan, Kolkata-69.
3..C.I.T.(A)- , Kolkata 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches