

**In the Income-Tax Appellate Tribunal,
Delhi Bench 'B', New Delhi**

**Before : Shri Amit Shukla, Judicial Member And
Shri L.P. Sahu, Accountant Member**

**ITA No. 2287 & 2288/Del/2015
Assessment Years: 2010-11 & 2011-12**

Ankush Garg, H.No. 1636, Ward No. 5, Pech Nand Lal Kapoor Chand, Railway Road, Rohtak. (PAN- ALWPG9030H (Appellant)	vs.	C.I.T., Rohtak (Respondent)
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Appellant by	Sh. Naveen Gupta, Advocate
Respondent by	Ms. Nidhi Srivastava, CIT/DR

Date of Hearing	18.03.2019
Date of Pronouncement	21.05.2019

ORDER

Per L.P. Sahu, A.M.:

These two appeals have been filed by the assessee against the orders padded by the CIT, Rohtak dated 27.03.2015 for the assessment years 2010-11 and 2011-12. Since the issue involved in both the appeals is identical, therefore, for the sake of convenience, we decide both the appeals by this consolidated order and take the appeal for A.Y. 2011-12 first, the decision on which shall equally apply to the appeal for A.Y. 2010-11.

The grounds raised in appeal for A.Y. 2011-12 read as under :

1. *That the order of the Ld. CIT is against law and facts.*

2. *That the Ld. CIT erred in invoking Sec. 263 of the I T Act and set aside the assessment order passed by the Ld. AO u/s 143(3) and directing him to make fresh assessment, although neither the order of Ld. AO was erroneous nor prejudicial to the interest of revenue.*

3. *That the Ld. CIT erred in giving directions u/s 263 of the Act to the Ld. AO on the issues which were not raised by him in his notice u/s 263 and it is settled law that no direction can be given u/s 263 on the issues which were not raised in the notice.*

4. *Without prejudice to Ground no. 3, the Ld. CIT erred in giving directions u/s 263 of the Act to the Ld. AO, although the issues were duly considered by the Ld. AO during assessment proceedings and after examining all the documents/submissions, one of the possible view was taken.*

2. The brief facts of the case are that the assessee filed return of income on 05.03.2012 declaring income at Rs.1,58,434/- filed in ITR-2. The assessee derives income under the head 'short term capital gain on shares and income from other sources. The case was selected for scrutiny under CASS and statutory notices were issued to the assessee. During the course of scrutiny proceedings, the assessee submitted that the assessee has maintained three bank accounts, out of which two are personal accounts – one with IndusInd Bank and other one with UCO Bank and third one with ICICI Bank Delhi for cash collection from different parties. As per AIR information, it was noticed that in the ICICI Bank account No. 629201509369, there was a cash deposit of Rs.26,72,650/-. The assessee was asked to explain the source and purpose for withdrawal. In response, the assessee submitted written reply dated 25.10.2013 stating therein that ICICI Bank account is used for collection of payment on commission basis on behalf of other parties by visiting different

places or through continuous follow up on telephone with the party and advice them to deposit the amount in his own account and same is withdrawn for making the payment of the concerned parties. The assessee was asked to produce the list of parties from whom cash deposit was received, for verification, but the assessee failed to do so. He submitted that the assessee has not maintained any books of account. The assessee to purchase peace of mind, surrendered the amount of cash deposit in ICICI bank as his turnover and offered income on it @ 8% amounting to Rs.2,09,732/-. The assessee had already shown income from cash collection activities of Rs.1,28,700/-. Therefore, the difference of Rs.81,032/- was offered for taxation. Later on, the Id. CIT, after assuming the revisionary jurisdiction u/s. 263, issued show cause notice on 12.03.2015. The AR of the assessee submitted its reply. The CIT after considering the facts of the case, assessment order and submissions of the assessee, set aside the assessment order finding it as erroneous in so far as prejudicial to the interest of revenue and directed the Assessing Officer to make fresh assessment after making certain enquiries as mentioned in the impugned order. Aggrieved, the assessee is in appeal before the Tribunal.

3. The Id. AR reiterated the submissions made before the CIT. He submitted that the Assessing Officer had done adequate enquiry in respect of the amount deposited in the bank account and the profit shown by the assessee on the bank deposits. He further submitted that where two views are possible and the Assessing Officer has taken one possible view, no revision can be done u/s. 263 of the Act. The assessee had already offered commission income on cash collection activities which was below 8% of the total cash

deposit in the bank account, but now the assessee for purchase of peace of mind, accepted the deposits as its turnover and offered the income derived there from at the profit rate of 8%. Therefore, there was complete enquiry by the Assessing Officer in the original assessment proceedings. Many case laws support the case of assessee that the assessment order was neither erroneous nor prejudicial to the interest of Revenue. It was submitted that the Id. CIT has wrongly exercised jurisdiction u/s. 263 of the IT Act.

4. On the other hand, the Id. DR relied on the order of the Id. CIT and submitted the gist of various case laws relied upon. He further submitted that the order of Assessing Officer was erroneous and prejudicial to the interest of revenue which has been rightly revised by the Id. CIT. The Id. DR has also filed a written synopsis giving the gist of various case laws in support, which reads as under :

“Submissions of Revenue on provisions of Income Tax Act & position of law on the issue of Section 263

The Order of PrCIT under section 263 is well within the ambit of law

The order of Pr CIT under section 263 of the Income Tax Act, 1961 is well within the ambit of law and in keeping with the provisions of Income Tax Act.

The provisions of section 263 are clear and unambiguous. Section 263(1) provides that:

The [Pr 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 interest of 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 purposes of this sub-section –

(b) 'record'[shall include and shall deemed always to have included all records relating to any proceeding under the Act available at the time of examination by the [Principal Commissioner] Commissioner

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 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 is a clear-cut case wherein no inquiry has been made by the AO and is hence erroneous within the meaning of clause (a) of explanation 2 to Section 263. It is also prejudicial to interest of revenue as revenue due to the Government has not been paid.

In case an assessment order is erroneous and prejudicial to the interest of the Revenue, Revenue is entitled to and can invoke power under Section 263 of the Act. This aspect and position has been highlighted in CIT vs. DLF Powers Limited, ITA 973/2011 decided on 29th November, 2011 and **BLB Limited vs. ACIT** Writ Petition (Civil) No. 6884/2010 decided on 1st December, 2011. In the last decision it has been observed:

13. Supervisory and revisionary power under Section 263 of the Act is available, if an order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. An erroneous order contrary to law that has caused prejudiced can be corrected, when jurisdiction under Section 263 is invoked.

15. Thus where an Assessing Officer incorrectly or erroneously applies law or comes to a wrong conclusion and income chargeable to tax has escaped assessment, resort to Section 263 of the Act is available and should be resorted to.

As regards the scope and ambit of the expression "erroneous", Hon'ble Bombay High Court in CIT vs. Gabriel India Ltd., (1993) 203 ITR 108 (Bombay), while referring to Black's Law Dictionary that an "erroneous judgment" means "*one rendered according to course and practice of Court, but contrary to law, upon mistaken view of law; or upon erroneous*

application of legal principles" There must be material on record to show that tax which was lawfully exigible has not been imposed as held in *Gabriel India Ltd.* (supra).

Non application of mind to relevant material or an incorrect assumption of facts or an incorrect application of law **will satisfy the requirement of order** being erroneous. *CIT v. Jawahar Bhattacharjee* [2012] 341 ITR 434 (Gauhati) (HC) (FB)

The expression "prejudicial to the interest of the revenue", as held by the **Hon'ble Supreme Court in the Malabar Industrial Co. Ltd., 243 ITR 83(SC)**, is not an expression of art and is not defined in the Act and, therefore, must be understood in its ordinary meaning. It is of wide import and is not confined to only the loss of revenue. The words "prejudicial to the interest of the revenue", as observed in *Dawjee Dadabhoy and Co. vs. S.P. Jain*, 31 ITR 872 (Calcutta), can only mean that "the orders of assessment challenged are such as are not in accordance with law, in consequence whereof the lawful revenue due to the State has not been realized or cannot be realized."

In this case the Pr CIT has rightly invoked revisional jurisdiction under the provisions of section 263 of the Act as the Commissioner on examining the records came to the conclusion that the earlier finding of the AO was erroneous and prejudicial to the interest of the revenue and that fresh determination of the assessment was necessary. There was adequate material to justify the Commissioner's finding that the order of the assessment was erroneous insofar as it was prejudicial to the interest of the Revenue.

The term "prejudice" contemplated under section 263 is prejudice to the income-tax administration as a whole.

Pratap Footwear v. ACIT [2003] SOT 638 (Jabalpur) (Trib.). In the case of *CIT v. Bhagwan Das* [2005] 272 ITR 367 (All.) (HC), the High Court held that non application of mind by the Assessing Officer was prejudicial to the interest of the revenue.

Reliance on certain judgments by Revenue:

PVS Multiplex India Ltd V CIT 815 Taxpundit 50

If we analyse facts and circumstances of the present case, wherein the Assessing Officer conducted the assessment proceeding and passed impugned assessment order accepting the return of income of the assessee, we clearly observe that the Assessing Officer has not made inquiry on the issue of interest free advances and proportionate disallowance of interest thereon, on the issue of verification on TDS and on the claim and calculation of the assessee for the purpose of deduction u/s 80IB(7A) of the Act specially on the issue of exclusion of income/receipt on sale of shop and FDR interest. In this situation, we have no hesitation to hold that the order of the AO which is apparently very precise and cryptic, was not passed after due examination and verification of certain issues and therefore, there was an error on the part of AO which leads to a correct conclusion of the CIT that the

order of the AO is not only erroneous but also prejudicial to the interest of Revenue. We may further point out that the assessment order suffers from lack of necessary enquiry on certain important issues which have been raised by the CIT in the notice issued to the assessee and impugned order u/s 263 of the Act. Therefore, we reach to a conclusion that the assessment order is not sustainable and in accordance with the provisions of the Act which is not only erroneous but also prejudicial to the interest of the Revenue.

Hence, we are inclined to hold that the issuance of notice u/s 263 of the Act and impugned order passed by the CIT u/s 263 of the Act is validly assumed jurisdiction of revisional powers u/s 263 of the Act which cannot be alleged as invalid assumption of jurisdiction or bad in law and we confirm the same.

The first question raised is whether the order under Section 263 of the Act is justified and in accordance with law. Section 263 has been elucidated and explained in Commissioner of Income Tax versus Nagesh Knitwears Private Limited, (2012) 345 ITR 135 (Delhi). In the said decision, reference was made to Malabar Industrial Company Limited versus CIT, (2000) 243 ITR 83 (SC) and decisions of Delhi High Court in Nabha Investments Private Limited versus Union of India, (2000) 246 ITR 41 (Delhi) and ITO versus DG Housing Projects Limited, (2012) 343 ITR 329 (Delhi). It has been observed in Nagesh Knitwears Private Limited (Supra):

"10. Section 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.

Delhi High Court in *Gee Vee Enterprises v. Additional Commission of Income-Tax, Delhi-I*, (1975) 99 ITR 375, has observed as under:

"The position and function of the Income-tax Officer is very different from that of a civil court. The statements made in a pleading proved by the minimum amount of evidence may

be accepted by a civil court in the absence of any rebuttal. The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which comes before it. The Income-tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. The meaning to be given to the word "erroneous" in section 263 emerges out of this context. It is because it is incumbent on the Income-tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word "erroneous" in section 263 includes the failure to make such an inquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct."

Reference was also made to decisions of the Supreme Court in Rampyari Devi Saraogi versus CIT, (1968) 67 ITR 84 (SC) and Tara Devi Aggarwal (Smt) versus CIT, (1973) 88 ITR 323 (SC) wherein it has been observed that where the Assessing Officer had accepted a particular contention or issue without inquiry whatsoever, the order was erroneous and prejudicial to the interest of Revenue.

These two decisions were explained in the case of **DG Housing Project Limited (supra)** in the following words:

"These two decisions show that it is not necessary for the Commissioner to make further inquiries before cancelling the assessment order of the Income- tax Officer. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Income-tax Officer should have made further inquiries before accepting the statements made by the assessee in his return.

14. The aforesaid observations have to be understood in the factual background and matrix involved in the said two cases before the Supreme Court. In the said cases, the Assessing Officer had not conducted any enquiry or examined evidence whatsoever. There was total absence of enquiry or verification. These cases have to be distinguished from other cases (i) where there is enquiry but the findings are incorrect/erroneous; and (ii) where there is failure to make proper or full verification or enquiry." **361 ITR 505 (Delhi) COMMISSIONER OF INCOME TAX (CENTRAL-II) vs. GOETZE (INDIA) LIMITED HIGH COURT OF DELHI**

Reliance is also placed on the following recent judgements of ITAT, Delhi:

- NUT v CIT (Central) [2015] 60 taxmann.com 313 (Delhi)

28.2.... An inquiry which is just a farce or mere pretence of inquiry cannot be said to be an inquiry at all, much less an inquiry needed to reach the level of satisfaction of the AO on the given issue. The level of satisfaction would obviously mean that he has conducted the inquiry in a manner whereby he places on record the material enough to reach satisfaction, which a rational person, being informed of the nuances of tax laws would reach after due appreciation of such material.

38.5 The broad principle that emerges from various decisions is that if AO has merely accepted the assessee's explanation on various issues without proper inquiry then the same would come within the ambit of 'lack of inquiry' and not 'inadequate inquiry'

- Deepak Maurya ITA 4271/Del/14 A.Y 2011-12. (Copy enclosed)

In the light of the above, the Hon'ble Bench may kindly dismiss the appeal.

5. After hearing both the parties and going through the material on record, we find that the Id. CIT has rightly revised the impugned assessment order by resorting to the provisions of section 263 of the IT Act. For ready reference, the findings of the Id. CIT are reproduced as under :

"I have considered the matter. Perusal of the assessment records shows that the AO has not made adequate enquiry and has simply accepted the submission of the assessee. It was abundantly clear that during the assessment proceedings assessee had furnished inaccurate particulars and had tried to conceal the true facts on several occasions. One of the bank account, where several lacs of cash has been deposited by the assessee, was deliberately not disclosed to the department till the assessee filed its return of income for the relevant assessment year. Assessee has even not disclosed this bank account before issuance of notice u/s 143 (2) on 31.07.2012. Even after issuance of notice u/s 143(2) and specific requisition of the details of bank account was made in the questionnaire dated 03.05.2012, in the assessment proceedings for AY 2010-11, he had not disclosed to the assessing officer that he had been maintaining an undisclosed bank account with ICICI Bank.

The submission of the assessee during the assessment proceedings that he is maintaining 3 bank accounts, vide his submission dated 25.10.2013, is much after the completion of the assessment proceedings for AY 2010-11. Further, that the income offered in the AY 2011-12 is out of cash collection activity is not shown in the return of income. It is only through a self serving statement filed along with his submission dated 25.10.2013; where the income offered under the head "Income from other sources" is claimed to be out of income from cash collection activity.

When the facts of the case are same for both assessment years i.e. the transactions are related to cash deposits and withdrawals made through the same bank account, which was found as undisclosed bank account, how the treatment would be different in next assessment year. By adjusting the income shown in the return of income and later on claimed to be earned as cash collection activity should not have been adjusted against the Income taken as 8% of the total cash deposit made in the undisclosed bank account.

Examination to ascertain the nexus between the nature of so-called activity of collection of payments on commission basis and cash deposits made in the bank account has never been attempted by the AO. It is submitted in one of the submission during the assessment proceedings for AY 2010-11 that more than 300 transactions have taken place and cash has been deposited on these occasions but assessee failed to bring any one of such parties for verification. Thorough examination of the credit entries could have brought the truth behind such cash deposits.

In the submission filed by the assessee, taken on record on 25.10.2013, it was stated that he does not maintain a personal phone. It is hard to accept that a person who claims that he is engaged in some activity where parties call him to collect payment on their behalf, conducts the affair without a phone. AO should have sensed the false statement made by the assessee and would have conducted independent enquiries to unveil the truth.

Further, even after it is considered that assessee was engaged in certain activity which is not in the nature of adventure in business, the amount of capital available to the assessee to conduct such activity should have been taken into account as undisclosed money available to the assessee and should have been added to the total income.

It was held in the case of Ram Pyari Devi Saraogi Vs. CIT [1968] 67 ITR 84 [SC] and Tara Devi Aggarwal Vs. CIT(1973) 88 ITR 323 (SC) that in a stereo-typed order which simply accepts what the assessee has stated and fails to make enquiries which are called for in the circumstances is erroneous. In another order in the case of K.A. Ramaswami Chettiar Vs. CIT (1966) 220 ITR 657 (Mad), it was also held that will the officer is accepted to make an inquiry of a particular item of income and if he does not make an inquiry as expected, that would be a ground to interfere u/s 263 as such an order passed by the assessing officer is erroneous and prejudicial to the interest of revenue.

On considering the entire facts of the case, I am of the opinion that the AO, by not making adequate inquiries and considering the nature of transactions differently in two assessment years for the same bank account, for the same activity and for similar cash deposits and withdrawals, has made the order erroneous and prejudicial to the interest of revenue. The order u/s 143(3) dated 20.11.2013 is,

therefore, set-aside and the AO is directed to carry out thorough and adequate inquiries in this case in following lines :-

(i) He should bring every details on record, as asked in the questionnaire dated 14.05.2013, and examine the facts thoroughly. Since, assessee has furnished inaccurate particulars in regard to bank account in which substantial cash was deposited, AO is directed to conduct independent inquiry in this regard.

(ii) Assessee had declared that he is involved in investment of shares. Thorough enquiry should be conducted by obtaining all De-mat accounts in his name to ascertain the instances of capital gain. Source of investments for doing such activity should also be examined.

(iii) Assessee claims that no vehicle is maintained by him during the year under consideration. Since assessee has furnished inaccurate particulars in regard to undisclosed bank accounts, independent inquiry should be made from the office of RTO to find out the correct facts. If any vehicle, either in his own name or in the name of other family members/firm etc. is found, source of investment should be examined. Insurance premium and running expenses should also be taken into consideration.

(iv) Similar enquires are required to be conducted in regard to the expenses on account of telephone and mobile. It is hard to accept that the assessee is doing activities of collection of payment on commission basis without having a personal phone.

(v). It is probable that credit cards may be issued by the bank with whom assessee is maintaining bank accounts. A.O. is directed to conduct enquiry from all three banks where assessee is maintaining bank accounts and examine the source of expenses through credit cards, if any.

(vi). There is no nexus between the alleged activity claimed by the assessee and the cash deposited and withdrawn in the bank account with ICICI Bank. Hence, the income offered in the return of income under the head "Income from other sources" will not be adjusted against the undisclosed income to be determined @ 8% on the cash deposited in the undisclosed bank account with ICICI Bank. Further, addition on account of peak credit of the total cash deposited in the ICICI bank is also required to be made.

It is proved on record that assessee had maintained bank account with ICICI bank which was not disclosed by assessee upto filing of return, but the same was declared to the Assessing Officer in his submissions filed in response to notice issued by the Assessing Officer. On perusal of the bank statement

submitted by the assessee, we notice that there are cash deposits at various occasions and same has been withdrawn mostly through ATM. In the assessment year 2011-12, the assessee has also offered income of Rs.1,28,700/- as commission income from cash collection activities, but during the course of assessment proceedings, the assessee was unable to explain the name of the depositors in the bank account. Later only, he accepted before the Assessing Officer that total deposit is a business turnover of the assessee. Earlier, the assessee submitted before the Assessing Officer that various parties deposited the cash in the name of assessee to facilitate the cash collection. These facts have not been examined by the Assessing Officer. The assessee was unable to substantiate the source of deposits and he accepted 8% net profit of the total deposits. The Assessing Officer is not only an adjudicator, but also an investigator. It is the duty of the Assessing Officer to ascertain true facts stated in the return when the circumstances of the case are such as to provoke any enquiry. From the order of the Assessing Officer, it is clear that the assessee has taken different stands at different points of time. At once occasion, the assessee states that different parties deposited cash in assessee's account so as to facilitate the payments by withdrawing the same through ATM while at other place, the assessee admitted the entire deposit as his business turnover and offered it for taxation @ 8%. The Assessing Officer had, however, not made any enquiry as to the actual business of the assessee. He has also failed to investigate the source of deposits in assessee's bank account, but straightway accepted the contention of the assessee without ascertaining the truth behind the cash deposits. The Assessing Officer has only endorsed the offer of the assessee without making any enquiry. Therefore, it is

a case of lack of enquiries on the part of Assessing Officer before accepting the offer of the assessee in the instant case. The case laws relied by the assessee do not render any help to the assessee on account of distinguishing facts. However, the decisions relied by the Id. CIT and by Id. DR in its written submissions go to support the conclusion of the Id. CIT. We, accordingly, do not find any justification to interfere with the impugned order. Accordingly, the appeal of the assessee deserves to be dismissed.

6. Since the facts in A.Y. 2010-11 are identical, our above decision shall equally apply to this appeal too.

7. In the result, both the appeals of the assessee are dismissed.

Order pronounced in the open court on 21.05.2019.

Sd/-

(Amit Shukla)
Judicial member

Sd/-

(L.P. Sahu)
Accountant Member

Dated: 21.05.2019

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Copy of order forwarded to:

(1)	<i>The appellant</i>	(2)	<i>The respondent</i>
(3)	<i>Commissioner</i>	(4)	<i>CIT(A)</i>
(5)	<i>Departmental Representative</i>	(6)	<i>Guard File</i>

By order

*Assistant Registrar
Income Tax Appellate Tribunal
Delhi Benches, New Delhi*