INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No.2989/Del/2015
Asstt. Year: 2011-12

M/s. Delhi Aviation Services Pvt. Ltd. New Udaan Bhawan, Opp. Terminal-3, Indira Gandhi International Airport, New Delhi – 110 037 PAN AACCD6349L	Vs.	Pr. CIT Delhi-3, Room No. 394-A, C.R. Building, I.P. Estate New Delhi – 110 002
(Appellant)		**(Respondent)**

Assessee by:	Shri Ankit Agarwal, CA
Department by :	Shri S.S. Rana, CIT (DR)
Date of Hearing	09/12/2019
Date of pronouncement	30/12/2019

O R D E R

PER SUDHANSHU SRIVASTAVA, JM:

This appeal is preferred by the assessee against order dated 27.3.2015 passed by the Ld. Principal Commissioner of Income Tax, Delhi-3 {Pr. CIT} for assessment year 2011-12 wherein, vide the impugned order, the Ld. Pr. CIT has held that the original assessment order in the assessee's case passed u/s 143(3) of the

Income Tax Act, 1961 (hereinafter called 'the Act') vide order dated 11.12.2013 was passed without proper appreciation of facts of the case and without due application of provision of law in so far as depreciation was allowed at 100% and finance cost was allowed as deduction although it was attributable to the period prior to the commencement of business.

2.0 Brief facts of the case are that the assessee had filed its return of income showing a loss of Rs. 54,53,847/-. Thereafter, the return was revised declaring a loss of Rs. 41,89,49,543/-. The assessment was completed u/s 143(3) of the Act at the revised loss of Rs. 41,89,49,543/-.

2.1 Thereafter, on scrutiny of assessment records it was seen that the assessee company was engaged in managing operations of ground power unit and pre-conditioned air unit at Indira Gandhi International Airport, New Delhi. It was further seen that in the original return of income, the assessee had claimed depreciation on Ground Power Unit (GPU) and Pre Conditioned Air Unit (PCA) at normal rate of depreciation i.e. 15% for plant and machinery. However, in the revised return of income, the assessee had claimed 100% depreciation on these

two items. In the original return, the depreciation claimed was Rs. 7,30,02,697/- whereas in the revised return it was in the Rs. 486,498,393/-. It was further seen that during the year the assessee has debited finance expense of Rs. 43,046,771/- to its profit and loss account. It was the observation of the Ld. Pr. CIT that although the assessee company was incorporated in 2007, it has not commenced its business until it had entered into Concession Agreement on 30.7.2010 with Delhi International Airport Pvt. Ltd. The Ld. Pr. CIT was of the opinion that, therefore, part of finance cost attributable to the period when the assessee had not commenced business was required to be disallowed. The Ld. Pr. CIT noted that the AO had accepted the assesee's claim for depreciation without properly examining the issue and had similarly not made a proportionate disallowance of the finance expenses on account of capitalisation of a part of expenses for the period prior to the commencement of the business. A show cause notice u/s 263 of the Act was issued on these two issues.

2.2 It was the assessee's response to the show cause notice that as far as the issue of depreciation was concerned, DGCA Circular No. 23-11/2011 – AED dated 26th May, 2011 had

specified that airlines should make use of aerobridge mounted fixed electrical ground power for parked aircrafts to address the problem of environment pollution environment and that both the GPU and PCA indirectly reduced the problem of noise and emission at IGI Airport. It was further submitted by the assessee that as per section 32 read with Rule 5 of the Income Tax Rules, 1962, 100% depreciation was allowable for air pollution control equipment and water pollution control equipment and, therefore, claim for 100% depreciation had been made. Similarly with respect to the claim of finance expenses the assesse's submission was the claim of interest included bank charges.

2.3 After considering the submissions of the assessee, the Ld. Pr. CIT came to the conclusion that the GPU and PCA units could not be equated with equipment eligible for 100% depreciation as they were not functionally identical. The Ld. Pr. CIT noted that the assessee had not brought any evidence on record to establish that GPU and PCA caused lesser pollution. The Ld. Pr. CIT concluded that there was excess allowance of depreciation by the AO thereby making the order erroneous and prejudicial to the interest of revenue. Similarly, with respect to the finance expenses, the Ld. Pr. CIT observed that from the

documents available on record it could not be ascertained whether the entire claim of interest pertained to post commencement period or not. The Ld. Pr. CIT observed that as the AO has failed to examine the matter, the order was erroneous and prejudicial to the interest of the revenue. The assessment order dated 11.12.2013 was set aside and the AO was directed to reframe the assessment order in accordance with the directions given in the impugned order after making the required verification.

2.4 The assessee is now in appeal against this order passed u/s 263 of the Act.

3.0 The Ld. AR submitted that the AO had made due inquiry during the course of assessment proceedings with respect to the claim of depreciation. He drew our attention to the submissions of the assessee dated 26th September, 2013 which were given in response to query No. 1 of the questionnaire along with the notice issued u/s 142 (1) of the Act. It was submitted that similarly, in query No. 8 of the questionnaire, the AO had asked the details of additions made to and sale of fixed assets along with copies of bills/evidences of transactions above Rs. 1

lac and the exact date of the assets being put to use for business purpose was also asked. It was submitted that these queries were duly responded to by the assessee and further a certificate issued by M/s. M. Choudhary & Associates, Chartered Engineers certifying that the GPU and PCA units were pollution controlling equipment also was submitted. It was also submitted that the AO had specifically asked for the reasons for revising the return of income and the assessee, vide submission dated 10th December 2013, had categorically stated that the return had been revised in order to claim 100% depreciation on GPU and PCA. It was submitted that it was only after the AO had made detailed inquiries and had duly verified the submissions and details submitted by the assessee, that the assessee's enhanced claim of depreciation was allowed. It was submitted that, therefore, the Ld. Pr. CIT had incorrectly invoked jurisdiction u/s 263 of the Act. It was submitted that it was incorrect observation of the Ld. Pr. CIT that the AO had allowed depreciation without examining the facts because the same had been allowed after due examination of the documents. It was further submitted that the AO had taken one of the two plausible views that the GPU and PCA units fell under the category of pollution control equipment

and the revisionary power u/s 263 could not have been invoked merely for the reason that the Ld. Pr. CIT had a different opinion in the matter.. It was submitted that it was only after the AO had made detailed inquiries and had duly verified the submissions and details submitted by the assessee, that he allowed the assessee's enhanced claim of depreciation. It was submitted that, therefore, Ld. Pr. CIT had incorrectly assumed jurisdiction u/s 263 of the Act. It was submitted that it was incorrect observation of the Ld. Pr. CIT that the AO had allowed depreciation without examining of the facts because the same had been allowed after due examination of the documents.

3.1 It was further submitted that providing for 100% depreciation was a beneficial provision for providing incentive to the assessee for installing air pollution control equipment and, therefore, the same should have been interpreted liberally. It was also submitted that the tax audit report filed by the assessee had not been negated by the Ld. Pr. CIT and, therefore, the jurisdiction u/s 263 could not be invoked. The Ld. AR also argued that the order could not be erroneous and prejudicial to the interest of the revenue only for the reason that no detailed discussion had been made in the assessment order whereas

detailed inquiries had been made by the AO. It was further submitted that it was at the most a case of inadequate inquiry and not a case of 'no inquiry' and, therefore, Explanation 2 to section 263 could not have been invoked.

3.2 With respect to the issue relating to the interest expense, it was submitted that during the year assessee had paid finance charges to DIAL and IDBI and based on the period for which the loan has been taken, the assessee had *suo moto* capitalised the interest pertaining to the period prior to the commencement of business. It was also submitted that in this regard detailed inquires had been made by the AO during the course of the assessment proceedings and our attention was drawn to submissions of the assessee before the AO vide dated 26th September, 2013 wherein the details of finance expenses had been given. It was submitted that it was factually incorrect on the part of the Ld. Pr. CIT to have held that the prior period interest had not been capitalised. In light of the above submissions it was prayed that the order passed u/s 263 of the Act be quashed.

4.0 In response, the Ld. CIT (DR) submitted that in view of the newly inserted Explanation 2 to section 263 w.e.f. 1.6.2015,

an assessment order would be subject to revision if it is passed without making inquiry or verification which should have been made if the order is passed allowing any relief without inquiry into any claim etc and, therefore, in the present case, since the AO had not verified and examined the claim of depreciation and interest, the order was erroneous in much as was prejudicial to the interest of the revenue. The Ld. CIT (DR) also pointed out that query No. 8 to which Ld. AR has referred to does not specifically raised the query about the depreciation claim @ 100% but it was a general query. It was further submitted that the assets under question do not fall under the category of air pollution equipment and, therefore, the assessment order was prejudicial to the interest of the revenue. It was further submitted that only the return of income had been revised but the tax audit report had not been revised as was evident from the record.

4.1 With respect to the issue of interest, it was submitted that there was no specific query on this issue also by the AO and, therefore, Explanation 2 could have been invoked. The Ld. CIT (DR) also submitted that in all cases where the AO had allowed the claim of the assessee without any examination and application of mind, the orders could be revised u/s 263 of the

Act. It was submitted that the order u/s 263 deserved to be upheld.

5.0 We have heard the rival submissions and have also perused the material on record. There are two issues on which the Ld. Pr. CIT has held that the order of the AO was erroneous and prejudicial to the interest of the revenue. The first issue is the assesee's claim of depreciation. In the original computation of income and the tax audit report, depreciation had been claimed on ground power unit and pre conditioned air unit @ 15% while in the revised return the assessee claimed depreciation @ 100% by holding that the same fell under the category of air pollution control equipment which was eligible for 100% depreciation. The AO allowed the claim of the assessee. The Ld. Pr. CIT was of the view that the assessee's claim of depreciation at enhanced rate has been allowed by the AO without making due inquiries in this regard. It is the assessee's contention that the AO had raised query in this regard and the assessee had filed submissions in response thereto and the AO had allowed the claim after duly considering the assessee's submissions. We have gone through the questionnaire issued by the AO and the responses submitted by the assessee. However, we note that there is no specific query

raised by the AO with respect to the assessee's claim of depreciation @ 100%. The AO has simply asked for details pertaining to fixed assets. No specific query has been raised by the AO as to why the ground power unit and the preconditioned air unit fell in the category of air pollution control equipment eligible for depreciation @ 100%. The assessee has also relied on a certificate of from Chartered Engineers wherein it has been stated that these two equipments fall under the category of air pollution control equipment. This certificate is placed at page 63 of the assessee's paper book. However, why and how this certificate was filed before the AO is not clear because no specific query has emanated from the AO in this regard. We also note that section 32 provides for depreciation at the enhanced rate of 100% on air pollution control equipment. However at serial No. 3 (viii) of part A (III) of New Appendix I of Rule 5 of the Income Tax Rules, 1962 air pollution control equipments have been defined as being –

(a) Electrostatic precipitation systems

(b) Felt-filter systems

(c) Dust collector systems

(d) Scrubber-counter current / venture / packed bed / cyclonic scrubbers

(e) Ash handling system and evacuation system

5.1 It is seen that GPU and PCA do not fall under any of the above 5 categories. We also note that although the assessee has filed revised return of income, the assessee has not filed any revised tax audit report wherein the depreciation at enhanced rate was stated to be eligible. Thus, apparently in our considered opinion, it is a case of clear non-application of mind by the AO. We also do not agree with the contention of the Ld. Authorised Representative that the AO took one out of the two plausible views because if the GPU and PCA equipment do not fall under the category of air pollution control equipment at all, the only view possible is that depreciation is to be allowed @ 15% only. The assessee has also contended that this being a beneficial provision should be construed liberally but for that purpose the assessee should first fulfil the eligibility condition at the threshold as even a beneficial provision cannot be applied without due and proper examination of the facts. Therefore, it is very much apparent that in the present case the AO has allowed

depreciation at the enhanced rate without examining the eligibility of the same. The Hon'ble Delhi High Court in the case of BSES Rajdhani Power Ltd. vs. PCIT reported in (2017) 399 ITR 228 (Delhi) had held that the non consideration of larger claim of depreciation and consideration of only part of it by the AO who did not go into the issue with respect to the whole amount was an error that could be corrected u/s 263 of the Act. In this case it is our considered view that the AO has not examined the complete aspect of the case and has allowed the assessee's claim without any inquiry. The action of the Ld. Pr. CIT is bound to be upheld. The Hon'ble Apex Court in the case of Deneal Merchants Pvt. Ltd. vs. ITO and another in SLP No. 2396/2017 has categorically held that where the Commissioner of Income Tax had passed an order u/s 263 of the Act with observation that the AO did not make any proper inquiry while making the assessment and had accepted the explanation of the assessee, such order was to be upheld. Thus, we uphold the validity of section 263 proceedings on the issue of enhanced depreciation claimed by the assessee at 100% on alleged air pollution control equipment.

5.2 As far as the second issue regarding assessee's claim of interest is concerned, it is the assessee's contention that the assessee has duly bifurcated the interest expense between pre and post business commencement period and has made disallowance accordingly. Again, no specific query has been raised by the AO in this regard and the AO has simply relied on the details provided in the audited financial statements. Although the assessee submits that the AO has raised a specific query at serial No. 23 of the questionnaire dated 9.9.2013 with regard to interest expenses, we find that such assertion is incorrect in as much as the said question requires the assessee to file complete details of expenses exceeding Rs. 10 lacs and Rs. 1 lacs for similar transactions along with reasons for increase over the last year. In query No. 24, the assessee was asked for a complete chart of loans and advances given showing opening balance along with details of interest, TDS expenses and closing balances. Thus, this question also does not specifically asked for break-up of interest into post and pre business commencement period. Similarly, it has been submitted that the assessee had submitted the confirmation of loans as well as details of interest expenses which are placed on page 69 of the paper book. A perusal of the

same shows that the reply contains the total interest paid to IDBI. However the break up between pre and post business commencement has again not been disclosed. Therefore, in this regard also we agree with the contention of the Ld. Pr. CIT that the AO did not examine the issue in the manner in which it was expected from him in this regard and, therefore, the impugned action u/s 263 of the Act is entirely justified.

5.3 Accordingly, it is our considered opinion that the Ld. Pr. CIT was perfectly justified in invoking the provisions of section 263 of the Act in the assessee's case and we uphold his action accordingly.

6.0 In the final result the appeal of the assessee stands dismissed.

Order pronounced in the open court on 30th December, 2019.

Sd/-	Sd/-
(N.K.BILLAIYA)	**(SUDHANSHU SRIVASTAVA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 30/12/2019

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Copy forwarded to

1. Applicant
2. Respondent
3. CIT

4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi