IN THE INCOME TAX APPELLATE TRIBUNAL
JABALPUR BENCH, JABALPUR
(through web-based video conferencing platform)

BEFORE SHRI SANJAY ARORA, HON"BLE ACCOUNTANT MEMBER &
SHRI MANOMOHAN DAS, HON'BLE JUDICIAL MEMBER

I.T.A. No. 11/JAB/2021
(Asst. Year: 2010-11)

M.K.S. Engineering Company Pvt. Ltd., 1, Namak Kothi, North Civil Lines, Jabalpur. [PAN : AADCM 1192 R]	vs.	Principal CIT-1, Jabalpur.
(Appellant)		(Respondent)

Appellant by : Shri Dhiraj Ghai, FCA
Respondent by : Smt. Neeraja Pradhan, CIT-DR

Date of hearing : 10/11/2022
Date of pronouncement : 17/01/2023

O R D E R

Per Sanjay Arora, AM:

This is an Appeal by the Assessee agitating the revision order dated 17/3/2021 under section 263 of the Income Tax Act, 1961 („the Act" hereinafter) by the Principal Commissioner of Income Tax-1, Jabalpur („Pr. CIT", for short) in respect of it"s assessment for Assessment Year (AY) 2010-11 u/s. 147 read with section 144 of the Act vide order dated 28/12/2017.

2. The background facts of the case are that the assessee, a company in the construction business, returned it"s income for the year on 22/01/2011. The same, returned at Rs. 86,43,200, was assessed with an *ad hoc* disallowance of Rs. 4 lacs in respect of four expenses, claimed at Rs. 1010.37 lacs in assessment u/s. 143(3) dated 18/3/2013 in pursuance to notice u/s. 143(2) dated 06/9/2011 issued for

complete scrutiny. Notice u/s. 148 of the Act was issued on 28/3/2017 for bringing the following „incomes", inferred as having escaped assessment, to tax:

a) Finance charges, claimed at Rs. 45.77 lacs, to the extent paid to finance companies without deduction of tax at source u/s. 194A, i.e., Rs. 15,84,011;

b) Wage expenses, claimed at Rs. 518.27 lacs, for non-deduction of provident fund, a mandatory condition on wages to the employees where their number exceeds 10, which was the case.

The assessee purportedly complied with the said notice on 18/4/2017 by relying on it"s original return filed on 31/7/2010 (vide receipt no.143180410310710). It, though did not respond to the notices u/s. 142(1) dated 11/4/2017 & 29/5/2017, finally represented through his counsel, Shri Ghai, the ld. counsel for the assessee before us, toward the fag-end of the proceedings. The gist of the submissions made and the Assessing Officer (AO)"s finding in the matter are as under:

„3. On perusal of the submission of the assessee vis-à-vis the assessment records it is observed that referred ITR 31/07/2010 bearing acknowledgement no. 143180410310710 pertains to *M.K.S. Engineering Company* (PAN: AAHFM 3633). Accordingly, it can"t be treated as ITR in compliance to notice u/s. 148 of the Income Tax Act, 1961 and, accordingly, it is denied that the assessee did not file any ITR in compliance to the notice u/s. 148 of the Income Tax Act, 1961.

4. to 6…..

7. Further, Shri Dhiraj Ghai, CA/AR of the assessee, appeared *suo motu* on 08/12/2017 and given written submissions along with certificate from the Chartered Accountant as per the provisions of s. 201 of the Income Tax Act, 1961. On perusal of the material available on records, it is observed that the assessee has claimed that Rs. 15,84,011/- was paid to various companies as finance charges whereas as per the certificates this amount comes to Rs. 15,50,694/-. Accordingly, the difference of Rs. 33,317/- is being added to the total income of the assessee.

8. In respect of deduction of EPF on wages payment of Rs. 5,18,26,230/- it is stated that these payments have been made *to the casual labours for which deduction of PF is not mandatory*." (emphasis, ours)

Accordingly, assessment was completed by him at Rs. 86,76,577, i.e., by making disallowance in the afore-referred sum of Rs. 33,317/- to the returned income vide order dated 28/12/2017 (PB pgs.124-127).

3. Subsequently, notice u/s. 263 was issued on 26/02/2020 for the same two reasons that had led to the initiation of reassessment proceedings (PB pgs.16-18), being:

a). non-deduction of the tax at source in respect of finance charges or interest paid by the assessee to finance companies, warranting, thus, disallowance u/s. 40(a)(ia);

b). non-verification of the assessee‟s claim of wages, on which no provident fund stands contributed, including with the EPFO, so that the claim was apparently incorrect.

The assessee, in response (PB pgs.1-15), furnished a detailed reply on 09/3/2020, submitting in effect the same reasons as in the assessment proceedings in support of it‟s claims. While *qua* the former, it furnished certificates from the CA to the effect that the payee companies had indeed discharged their tax liability on the impugned sums, for the latter, it claimed that no provident fund was attracted in view of the wages being paid to casual labour, which could not be regarded as „employment‟ in view of the decision by the Apex Court in *RPFC v. T.S. Hariharan*, AIR 1971 SC 1519.

The ld. Pr. CIT was, however, not impressed, and set aside the impugned assessment for a *de novo* consideration inasmuch as the AO had failed to make proper enquiries and, accordingly, did not apply his mind in the matter, placing reliance on *Explanation 2(a)* to s. 263, inserted on the statute by Finance Act, 2015 w.e.f. 01/6/2015, whereby an order passed without making enquiries or verification which should have been made is deemed erroneous insofar as it is prejudicial to the interest of the Revenue, liable for revision u/s. 263.

4. We have heard the parties, and perused the material on record.

4.1 Our first observation is that non-compliance of notice u/s. 148 is admitted, and which also explains the framing of the impugned assessment u/s. 144; the return dated 31/7/2010, referred to by the assessee vide it‟s reply dated 18/4/2017, being of another assessee (refer para 2). Our second observation in the matter is

that the notice u/s. 263 having been issued on 26/02/2020, the revision under reference would be governed by law as amended by Finance Act, 2015.

4.2 We next consider the arguments advanced before us, as follows:

a). The fact of disallowance in assessment, made on „verification" in respect of expenditure claimed, including on wages, would oust the jurisdiction of the revisionary authority *qua* the said expenditure: Even as the same would normally find acceptance, the argument is misleading in the instant case. The disallowance was made *qua* four expenses aggregating to Rs. 1010.37 lacs, i.e., in an *ad hoc* manner, at a total of rs. 4 lacs, with it being even not clear as to the extent, if at all, the disallowance was made in respect of wages. The same being *sans* any finding in the matter, made ostensibly, as it seems, and as indeed inferred by the first appellate authority, to check leakage of revenue, the same does not meet the requirement of law and, in fact, *does not qualify to be a judicial order*. No wonder the same stood deleted in first appeal (vide order dated 04/10/2017 / PB pgs.182-193). In fact, the assessment was subject to reassessment on the same two issues. How could, then, one may ask, if indeed considered in original assessment and, further, subject to adjudication in appeal, be the same subject to reassessment? Even as the scope of appellate proceedings was only the validity of the disallowance as made, the appellate order dated 04/10/2017 is thus rather a confirmation of the assessment having been made without application of mind, The argument is on facts without any legal basis.

b). The next argument before us was that the revision proceedings were initiated on the same two grounds that informed the reassessment proceedings. Now, if an assessment u/s. 143(3) could be subject to revision u/s. 263, what we wonder prevents an assessment u/s. 147, which in the instant case is u/s. 144, as not so, i.e., in principle. *The validity of the argument could thus only be with reference to facts, and not on principle*. The law in the matter is well-settled, and if proper enquiry, i.e., as should have been made in the facts and circumstances of

the case, has not been, the order is *per se* erroneous and prejudicial to the Revenue, and which is precisely what the law w.e.f. 01/6/2015 deems, and which is therefore to that extent declaratory of law as it always stood – being in fact the subject matter of several decisions by the Hon'ble Apex Court. The same, i.e., lack of inquiry, vitiating an order for non-application of mind, represents, as explained by it in *Malabar Industrial Co. Ltd. v. CIT* [2000] 243 ITR 83 (SC), one of the four infirmities that make an order vulnerable to be deemed as erroneous and prejudicial to the interests of the Revenue; the other three being: wrong assumption of facts; incorrect application of law; and omission to observe the principles of natural justice. As explained in *Gee Vee Enterprises vs. Asst. CIT* [1975] 99 ITR 375 (Del) – also relied upon by the ld. Pr. CIT, rendered with reference to judicial precedents, including three by the Apex Court itself, 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 a 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. It is only where on facts it is found by the appellate authority that the AO had indeed made proper inquiries during assessment, arriving at a fair and reasonable basis for assessment by issuing definite finding/s of fact, that, inasmuch as he cannot review his order, the principle of change of opinion would operate to exclude the jurisdiction of the revisionary authority. Why, each of the several decisions by the Hon'ble jurisdictional High Court quoted by the assessee before him, viz. *CIT v. Ratlam Coal Ash Co*. [1988] 171 ITR 141 (MP); *CIT v. Shri Govindram Seksariya Charitable Trust* [1987] 166 ITR 580 (MP); *CIT v. Associated Food Products (P.) Ltd*. [2006] 280 ITR 377 (MP), in principle, representing their ratio, confirm this, and toward which we may reproduce the quoted part of the decision in *Ratlam Coal Ash Co*. (supra), as follows:

„*It is well settled* that where the ITO made the assessment in undue hurry, accepting what the assessee stated in the return without making any enquiries, in the circumstances of the case, the CIT would be justified in holding the order of the ITO to be erroneous. In the instant case, however, ….."

We may toward the same cite some more decisions by the Hon'ble Court, viz. *CIT vs. Deepak Kumar Garg* [2008] 299 ITR 435 (MP); *CIT v. Kohinoor Tobacco (P.) Ltd.* [1998] 234 ITR 557 (MP); *CIT vs. Mahavar Traders* [1996] 220 ITR 167 (MP). A difference in verdicts is thus only due to a factual finding as to proper inquiry having been made, or not so, in the facts and circumstances of the case.

4.3 We next consider the issues arising on merits, which were, after the preliminary objections, argued by Shri Ghai during hearing, as under:

a) Section 40(a)(ia): The AO has clearly accepted the CA certificate/s filed by the assessee before him, i.e., as mandatory by law w.e.f. 01/04/2013, i.e., AY 2013-14 onwards. He has not stated any reason for applying the law, which came in force later, for the instant, a preceding, year. His order, thus, cannot be regarded as a speaking order, a precondition for it's validity as a judicial order (refer, *inter alia*, *CIT (Pr.) v. Bajaj Herbals (P.) Ltd*. [2022] 443 ITR 230 (SC); *CIT (Pr.) v. Motisons Entertainment India (P.) Ltd*. [2022] 443 ITR 6 (SC)). Why, the Hon'ble Apex Court regularly exhorts the adjudicating authorities to decide matters per reasoned orders and in accordance with law.

Continuing further, no reason for the same has been stated even before the revisionary authority; rather, the assessee's argument before him overlooks reference to the date from which the law stands amended (PB pgs.80-83). The assessee before him taking a plea to the effect that the word „payable" in s. 40(a)(ia) is only with reference to the amount not paid by the end of the year, is a different aspect all together. The same was not brought to our notice during hearing by either side, and which is unfortunate. The argument in any case stands rejected by the Apex Court in *Palam Gas Service v. CIT* [2017] 394 ITR 300 (SC). *How can, under the circumstances, one wonders, the revision order be faulted*

with? The impugned assessment is clearly without due application of mind. We, accordingly, uphold the revision *qua* this aspect. We are conscious that there may be decisions holding the amendment by Finance Act, 2012, to the retrospective. None, however, stand cited before the revisionary authority, or even before us. It being an open set aside, the assessee shall have an opportunity to clarify this aspect of the matter in the set aside proceedings. We may add that the Jabalpur Bench of the Tribunal per it‟s recent decision in *Sagar Tobacco Industries Pvt. Ltd. v. Asst. CIT* (I.T.A. No. 48/JAB/2017, dated 13/9/2022) has held the said amendment to be retrospective. It is however not for us to, in the instant proceedings, travel outside the mandate of the impugned order, which only requires proper consideration and adjudication. The same, being by the jurisdictional Tribunal, shall though be binding on the AO, unless of course there is a contrary decision by a higher forum.

b) Wages (Rs. 518.27 lacs): The assessee in assessment claimed to have engaged casual labour, which being not in regular employment, did not attract the provisions of the Employee Provident Fund & Miscellaneous Provisions Act, 1952 (EPF Act) (refer para 2). The same found acceptance by the AO, albeit without any verification, and it is this acceptance that stands assailed in the revisionary proceedings. The issue before us, thus, is if the acceptance of the argument, as by the AO, is merited in the facts and circumstances of the case (also see para 4.4).

We firstly observe absence of any verification and, consequently, any finding by the AO, *so that revision is per se valid in law*. No argument contesting this was also made before us. The matter is liable to be considered by us on merits only where the same has been considered by the assessing authority, and it is rather this deficiency (of non-consideration) in assessment that guides the revision. This is particularly so as the same reason informed the reassessment proceedings as well. The said proceedings having since attained finality, the question of it being a valid ground for revision, more so in the absence of any adjudication by the assessing authority, much less any basis thereof (in view of absence of any

verification and/or finding by him), does not survive, nor indeed was raised before us.

Qua the merits of the argument, the same has two aspects to it, both glossed over by the AO. We enumerate both, as under:

(i) The applicability of the argument *per se*, i.e., assuming the labour incurred being, as stated, „casual labour";

(ii) The validity of the argument on facts, i.e., if the assessee, a construction company, could be regarded as having incurred it's entire expenditure on wages, a prime factor of production, through casual labour.

We may state our observations *qua* both, in seriatim.

(i) This itself raises, beginning with as to what constitutes „casual labour", several questions, which have been fortunately answered by no less than the Hon'ble Apex Court itself in the context of EPF Act; ESI Act; and other beneficial legislations. Reference in this regard may be made, *inter alia*, to it's decision in *Royal Western India Turf Club Ltd. v. ESI Corp*. (in CA 49 of 2016, dated 29/01/2016). Like-wise for EPF, where the EPFO itself has issued a Circular on 19/3/2016, following decisions in *J.P. Tobacco Products & Ors. v. UoI* [1996] ILLJ 822 (SC); *Builders Association of India v. UOI & Ors*. (in WP(C) No. 7905/2011, dated 11/3/2016) by the Hon'ble Kerala HC, and *Builders Association of India v. UOI & Ors*. (in WA (MD) No. 478/2008, dated 31/3/2016) by the Hon'ble Madras HC (Madurai Bench), quoting as under from the last decision, while confirming the applicability of EPF on casual labour:

> „Since the Hon'ble Supreme Court has already dealt with the amended paragraph 26(2) of the Employees' Provident Scheme, 1952, the same cannot be challenged in the present writ petition and, further, as per section 2(f) of the EPF & MP Act, 1952, *the same is applicable to casual workers*."

The matter, as it appears, is no longer *res integra*, and the assessee's argument, in law, inapplicable. The assessee has before the revisionary authority claimed to have engaged workers on daily wage basis. Apart from the fact that the same is only a manner of remuneration, the same amounts to contractual labour, on which,

again, both ESI & EPF are applicable. We have already noted a complete absence of verification by the AO of the assessee‟s claims, i.e., even as to there being no continuous employment for 60 days, which is stated for the provisions of the EPF Act to be applicable. Why, there is even no confirmation by him of the said provisions. Even if the labour is contractual, hired direct or through the contractors, the same, as afore-noted, may attract EPF & ESI Acts, besides such payment being subject to tax deduction at source u/ss. 194C/194J, and which has a bearing on the deductibility of the expenditure through sec. 40(a)(ia).

(ii) The second aspect of the matter, without prejudice to the first, is if the assessee‟s statement could be, quite apart from it being not verified for its veracity, accepted as a valid statement in the given facts and circumstance of the case. We are, quite frankly, appalled; rather, amazed at the assessee‟s claim of it‟s entire wage expense of Rs. 518.27 lacs as expended by way of casual labour. Construction activity on the scale being undertaken would rather suggest the assessee-company as having it‟s own technical staff, i.e., civil engineer/s, architect/s, etc. for designing the civil structures as well as the interiors, keeping in view the functional needs and different operational parameters, which itself entail specializations in different aspects of construction, as well as supervisory staff, who oversee the work, i.e., apart from skilled workforce. Modern day construction, as for any other industry, is highly technical, requiring highly skilled workforce; in fact, for each area of work, viz. foundation (which includes levelling), masonary, plumbing, electrical, air-conditioning/cooling, etc., all requiring manpower aware of the latest methods and materials, with rather each area of work itself having sub-areas of specialisation. Such work-force, if only constituting a part of the total work force deployed, is imperative. And to think that the assessee claims undertaking construction on the scale it does with casual workforce, whose availability for, and therefore commitment to, work is uncertain! A person may attend today and not tomorrow. How could, one may ask, one plan and execute

work which – the projects being time consuming, with construction periods extending to several months and even over few years, is required to be scheduled for weeks, if not months, in advance, work on the basis of such fluid workforce and uncertain state of affairs? In fact, it is not uncommon to see construction companies set-up temporary residential camps/quarters for workers at the project sites, or arranging for their transportation to such sites. Working as a casual worker makes little sense from the stand-point of the labour as well, who would rather seek regular work and, consequently, regular income. It is in fact only in such a case that he would have stability and, further, be able to perform his work with regularity, developing his skills and income. One can understand a case where a part – the extent of which may also depend on, among others, the level of skill-set required therefor, of the workforce is constituted by such casual labour, i.e., for menial and unskilled jobs. It is this labour, who being paid minimum wages, or perhaps not even that, which is easily tempted to relocate or seek better work avenues/opportunities. Even here, the casual labour, stated in revisionary proceedings to be on daily wages, is understandable as part of the contract labour, sourced through labour contractors, even as there is no claim toward the same, nor anything on record to so suggest. In other words, the contention as raised is, as it appears to us, *ex facie*, both technically and operationally unfeasible. The construction, or the output of any industry for that matter, to be economically viable, has to, besides observing industry standards as to quality, be cost effective, both imperatives suggesting a committed workforce, which in fact is the real resource or asset of any business enterprise.

The validity of the assessee‟s claim in the matter, in view of the foregoing, is in serious doubt. Though the assessee claims to have furnished the wage record in reassessment proceedings, there is nothing on record to exhibit this (reply at PB pgs. 80-83). What better proof of a complete non-application of mind than the acceptance of the assessee‟s claim, which is on the face of it fraught, without any verification, addressing none of the several questions arising in the matter?

4.4 The matter surely requires proper verification, followed by clear and definite findings. This was all the more incumbent on the AO as this was one of the two aspects for which reassessment had been initiated in the assessee"s case. There is clearly no application of mind by the AO in accepting the assessee"s claim/s. Rather, in the absence of any finding by the AO, required *qua* different aspects of the matter, how, as afore-stated (para 4.2), could the revision be in law contested?

We may, however, before parting with the matter, make it clear that our observations aforesaid (para 4.3) may not be regarded as our final findings. The same are only in the nature of our observations, raising several questions and doubts on being confronted with the assessee"s reply, not examined by the AO, only whereupon the same came to the fore. The same have, as their object, highlighting the areas of concern, emphasizing the need for verification. We are conscious and, accordingly, clarify that the ground of non-payment of EPF (or even ESI) on wages is relevant only insofar as, and to the extent, it is indicative of the said expenditure being not genuine, or incurred wholly and exclusively for business purposes. This is as it could well be that the assessee having incurred the said expenditure, has though violated the provisions of the ESI and/or EPF Act on either the whole or a part of the labour expenditure, in which either case, no part of the said expenditure, claimed u/s. 37(1), where genuine, could be disallowed. Non-verification apart, the assessee"s reply, ostensibly based on „facts", that no part of the expenditure attracts EPF as it has engaged only casual labour on daily wage basis, reinforces the doubts about the genuineness of the expenditure, providing further relevance, as it were, thereto. This is also apart from the relevance of the said ground being, as afore-noted, not in dispute inasmuch as the same formed the basis of reassessment, which proceedings have since attained finality. The absence of any verification and, concomitant finding, i.e., *qua* genuineness of the (entire) expenditure, incurred in cash, by the assessing authority lends further relevance to the said ground, and which is also the reason for our having discussed the matter in some detail. Reference be drawn to the decision in *Gee Vee Enterprises* (supra).

We may therefore not be construed as having issued any finding/s, much less determined the matter, but only that, on the face of it, the claim of expenditure by the assessee cannot be accepted, while the same has been so without conducting even a preliminary verification, as with reference to the labour details and the applicable provisions of the EPF Act. That is, our purview and finding is that the matter requires proper verification, justifying the revision on the lines made. Nothing more and, nothing less. The matter shall be examined by the AO in its entirety, including the conduct of business in the past, as well as with reference to the specific issues, if any, facing construction industry, and for which reference could also be made by him to the enterprises in the organised sector; construction, it may be noted, has since been granted the status of an Industry. The decisions cited at para 4.3, it is notable, are in respect of construction industry. Whether some relaxation or guideline/s has been issued by the Government in the matter, taking cognizance of the peculiar nature and demands of the industry, none though have been brought to notice by the assessee, would also be, where so, relevant, and required being looked into; the purport being to decide the issue on the basis of obtaining facts and circumstances by issuing definite findings, as indeed the applicable law, and not by adopting the word of the assessee, as has been the case, which cannot be regarded as final, particularly where the same is wholly unsubstantiated or, in any case, unverified. The onus to establish it"s claims, needless to add, is on the assessee.

4.5 We decide accordingly.

5. In the result, the assessee"s appeal is dismissed.

Order pronounced in open Court on January 17, 2023

Sd/-	Sd/-
(Manomohan Das)	(Sanjay Arora)
Judicial Member	Accountant Member

Dated: 17/01/2023
vr/-

Copy to:

1. The Appellant: M.K.S. Engineering Company Pvt. Ltd., 1, Namak Kothi, North Civil Lines, Jabalpur.
2. The Respondent: Principal CIT-1, Jabalpur.
3. The CIT-DR, ITAT, Jabalpur.
4. Guard File.

By order

(VUKKEM RAMBABU)
Sr. Private Secretary,
ITAT, Jabalpur.