THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "D" BENCH

Before: Shri Waseem Ahmed, Accountant Member
And Shri Siddhartha Nautiyal, Judicial Member

ITA No. 169/Ahd/2022 **Assessment Year 2017-18**

Reckitt Benchkiser Healthcare India Pvt. Ltd., Plot No. 49, Institutional Area, Sector-32, Gurgaon, Haryana, India-122001 PAN: AAACP9268J (Appellant)	Vs	Principal Commissioner of Income Tax-3, Ahmedabad (Respondent)

Assessee by: **Shri Dhinal Shah, A.R.**
Revenue by: **Shri Samir Sharma, CIT-D.R.**

Date of hearing : 03-11-2022
Date of pronouncement : 25-01-2023

आदेश/ORDER

PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-

This is an appeal filed by the assessee against the order passed by Principal CIT u/s 263 of the Act dated 17/03/2022.

2. The assessee has raised the following grounds of appeal:-

"1. On the facts and in the circumstances of the case and in law, learned Principal Commissioner of Income Tax ('PCIT') has erred in law by passing the order under section 263 of the Income Tax Act, 1961 ('Act') and directing the learned Assessing Officer ('AO') to pass the fresh assessment order for AY 2017-18, without appreciating the fact that on similar issue of disallowance of expenses under section 40(a)(ia) or section 40(a)(i) on account of alleged non/short deduction of taxes, the proceedings under section 263 of the Act were initiated for immediately preceding year (AY 2016-17) and after considering the submissions filed by the Appellant, the said proceedings were dropped.

2. On the facts and in the circumstances of the case and in law, learned PCIT has erred in exercising the revisionary powers under section 263 of the Act and partly setting aside the order passed by learned AO under section 143(3) of the Act dated 19/12/2019.

3. On the facts and in the circumstances of the case and in law, learned PCIT has erred in holding that the assessment order passed by learned AO is erroneous as well as prejudicial to the interest of the Revenue, without appreciating the fact that assessment order under section 143(3) of the Act was passed by learned AO after making necessary inquiries.

4. On the facts and in the circumstances of the case and in law, learned PCIT has erred in holding that learned AO has failed to make necessary enquiries, despite the fact that the details relating to compliances of tax deduction at source ('TDS') were asked by learned AO and same were furnished by the Appellant and thereafter, the assessment order was passed after due verification of the details furnished.

5. On the facts and in the circumstances of the case and in law, learned erred in law by not appreciating the argument of the Appellant that the disallowance under section 40(a) (ia) or section 40(a)(ia) of the Act cannot be made in a situation where TDS has been made by the Appellant and there is merely a difference of opinion as regards applicability of the relevant section or the rate at which the tax is to be deducted.

6. On the facts and in the circumstances of the case and in law, learned PCIT has grossly erred in law by holding that Appellant has deducted and deposited the TDS at lower rate of 1% on advertisement expenses, without appreciating the fact that section 194C itself provides for deduction of TDS at the rate of 1% if the payments are made to Individual or Hindu Undivided Family or 2% if payments are made to other payees.

7. On the facts and in the circumstances of the case and in law, learned PCIT has grossly erred in law by holding that TDS at the rate of 10% is applicable under section 194J of the Act in respect of payment of Rs. 25,06,642 made to Lothar Bohm Associates Ltd. a UK based company for availing the designing services, without appreciating the fact that:

- *Lothar Bohm Associates Ltd is a non resident entity, hence provisions contained in section 194J of the Act are not attracted .*

- *TDS was not required to be deducted in terms of provisions contained in India-UK double tax avoidance agreement.*

8. On the facts and in the circumstances of the case and in law, Learned PCIT has erred in law by not appreciating the fact that amount of Rs. 9,44,798 paid to Reckitt Benckiser [Brand] Limited, towards services charges is claimed as expenditure on accrual basis, in accordance with section 37(1) of the Act and reversal thereof is offered as income in subsequent period.

The Appellant craves leave to add, alter, amend or withdraw any of the above grounds at or before the hearing of the appeal.

All the grounds of appeal stated above are without prejudice to each other."

3. The brief facts of the case are that Principal CIT initiated proceedings under section 263 of the Act on the ground that firstly, on examination of assessment records, it was noticed that the assessee company had defaulted in making timely deposit of employee's contribution to ESIC and PF within the stipulated time and hence the same are not allowable under section 36(1)(va) of the Act and secondly the assessee during the year under consideration had debited a sum of ₹ 76.24 crores towards advertisement expenditure, legal and professional fees and service charges, however, as per form 3CD report, TDS u/s 194J for professional and technical services was only deducted on payment of ₹ 18.85 crores and accordingly on the

remaining payment of ₹ 57.39 crores no TDS was deducted and hence the same was to be disallowed under section 40(a)(ia) of the Act. Since the AO did not examine these aspects during the course of assessment proceedings, the assessee was asked to explain as to why the order passed by the AO should not be held to be prejudicial to the interests of the revenue. In the 263 proceedings, the assessee placed its submissions on record and Principal CIT accepted the assessee's contention regarding late deposit of PF/ESI and agreed that the same were filed within the due date prescribed and accordingly initiation of 263 proceedings on this ground were dropped. However, with respect to the ground regarding non-deduction of TDS, the Principal CIT held that the order passed by the AO is erroneous and prejudicial to the interest of revenue for the reason firstly that during the course of assessment, the AO did not examine in detail the issue regarding deduction of TDS and also pointed out certain infirmities in the submissions placed on record by the assessee on the applicable rate regarding deduction of TDS and also the non-examination of certain payments made by the assessee to overseas non-resident entities on the applicability of the India-UK DTAA in respect of the same. Accordingly, Principal CIT set aside the assessment order on the ground that the same is erroneous and prejudicial to the interests of the revenue.

4. Before us, the counsel for the assessee submitted that firstly the issue regarding TDS on various payments was examined by the AO during the course of assessment proceedings and drew our attention to notice issued by the AO dated 20-06-2019, wherein specific query regarding TDS on various payments was made by the AO. The counsel for the submitted that in

response to the same, the AO gave details of payment made and the applicable TDS compliance thereon by way of letter dated 10 December 2019. Accordingly, it is not a case where the AO did not make the relevant enquiry or that there was absence of response on behalf of the assessee. In the instant facts, due enquiry was made by the AO on the issue of TDS applicability on various payments and assessee had filed a response to the query made by the AO. The Ld. Counsel for the assessee further drew attention to the fact that in the immediately preceding year on absolutely identical facts 263 notices was issued by Principal CIT on non-examination of deduction of TDS by the AO and the proceedings were subsequently dropped by Principal CIT. On facts, the counsel for the assessee drew our attention to the fact that complete reconciliation of TDS with regard to advertisement expenses, professional expenses and service expenses was submitted before Principal CIT. He submitted that TDS was deducted on approximately 92% of the advertisement expenses of ₹ 61.60 crores- on some of the payments TDS was deducted at 1% or 2% u/s 194C and in some cases TDS was deducted at 2.5% or 10% u/s 194J of the Act. In one case TDS was not deducted since no TDS was required to deducted under the India UK DTAA on account of 'make available' clause in respect of technical services rendered by the non-resident entity. Further, with respect to legal and professional expenses, the counsel for the assessee submitted that TDS was deducted at the rate of 10% on most of the payments made and only in some of the cases TDS was not deducted, being below the threshold. In response, DR placed reliance on the observations made by the Principal CIT in the 263 order.

5. We have heard the rival contentions and perused the material on record. In our considered view, this is not a case where there is an absolute lack of enquiry made by the AO in respect of TDS payments. As submitted above, the AO issued notice asking the assessee to provide details of TDS payments and in response to such query, the assessee gave a reply which was duly considered and admitted by the AO and no disallowance under section 40(a)(ia) of the Act was made during the course of assessment proceedings. On the merits of the case, we observe that the assessee during the course of 263 proceedings had submitted that almost all payments had been subject to TDS and a reconciliation of payments and TDS thereon was submitted during course of 263 proceedings, which was also produced before us for our consideration. We note that in respect of advertisement expenses, approximately 90% of the expenses were subject to TDS at the applicable rates and in some cases where TDS was not deducted, the assessee has been able to satisfactorily explain the same. The legal and professional expenses were also subject to TDS at the rate of 10% on most of the payments and in some cases TDS was not deducted since the payments were below the threshold limit or on account of non-applicability of TDS in respect of overseas payment in view of the applicable provisions of the India-UK Tax Treaty.

5.1 On the scope and extent of enquiry by the AO, an inquiry made by the Assessing Officer, considered inadequate by the Commissioner of Income Tax, cannot make the order of the Assessing Officer erroneous. In our view, the order can be erroneous if the Assessing Officer fails to apply the law rightly on the facts of the case. As far as adequacy of inquiry is considered,

there is no law which provides the extent of inquiries to be made by the Assessing Officer. It is Assessing Officer's prerogative to make inquiry to the extent he feels proper. The Commissioner of Income Tax by invoking revisionary powers under section 263 of the Act cannot impose his own understanding of the extent of inquiry.

5.2 The Delhi High Court in the case of **CIT Vs. Sunbeam Auto 332 ITR 167 (Del.)**, made a distinction between lack of inquiry and inadequate inquiry. The Hon'ble court held that where the AO has made inquiry prior to the completion of assessment, the same cannot be set aside u/s 263 on the ground of inadequate inquiry

> "*12..... There are judgments galore laying down the principle that the Assessing Officer in the assessment order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate, that would not by itself, give occasion to the Commissioner to pass orders under section 263 of the Act, merely because he has different opinion in the matter. It is only in cases of "lack of inquiry", that such a course of action would be open.* ———

From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. 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 more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is held to be erroneous. Cases may be visualised where the Income-tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. ***The Commissioner, on perusal of the records, 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. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure.*** *It is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. There must be some prima facie material on record to show that 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.

*15**. Thus, even the Commissioner conceded the position that the Assessing Officer made the inquiries, elicited replies and thereafter passed the assessment order. The grievance of the Commissioner was that the Assessing Officer should have made further inquires rather than accepting the explanation. Therefore, it cannot be said that it is a case of 'lack of inquiry'**."*

5.3 In **Gabriel India Ltd. [1993] 203 ITR 108 (Bom)**, law on this aspect was discussed in the following manner (page 113)

"*The 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. **The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce***

repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity.

5.4 We note that during the course of assessment proceedings, the Ld. AO had issued notice to the assessee and had made enquiry on the issue of applicability of TDS on various payments made which was replied to by the assessee. Therefore, it was not the case where there was absolute lack of enquiry or non-application of mind by the AO. On the aspect of late deposit of PF/ ESI, the Principal CIT dropped the 263 proceedings accepting the submissions made by the assessee. With respect to TDS applicability on various payments, the assessee gave a detailed Chart regarding payments made towards advertisement expenditure, legal and professional fees and service charges, which, according to Principal CIT was not satisfactorily explained by the assessee. At appropriate places, the assessee also obtained lower withholding tax certificate from the payee and deducted taxes at the rates mentioned in the certificate. As noted in various judicial precedents highlighted above, the Principal CIT, on perusal of the records, 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. That would not vest the Commissioner with power to re-visit the entire assessment and determine the income himself at a higher figure. In our view, this is not a case where no enquiry has been made by the assessee officer during the course of assessment proceedings. It is also not the case of the Pr. CIT that the Ld. AO failed to apply his mind to the issues on hand or he had omitted to make enquiries altogether or had taken a view which was not legally

plausible in the instant facts. Further, even before the Principal CIT as well as before us, the Ld. Counsel for the assessee gave a complete reconciliation on the TDS on various payments made and gave a detailed explanation on applicability of TDS with respect to various payments along-with the applicable rate. In our view, s 263 of the Act does not visualise a case of substitution of the judgment of the Principal CIT for that of the Assessing Officer, who passed the order unless the decision is held to be wholly erroneous.

5.5 In the result, we are of the view that Principal CIT has erred in facts and in law in holding that the order passed by the Ld. Assessing Officer is erroneous and prejudicial to the interests of the Revenue, in the instant facts. The Grounds of appeal raised by the assessee are thus allowed.

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

Order pronounced in the open court on 25-01-2023

Sd/-	**Sd/-**
(WASEEM AHMED)	**(SIDDHARTHA NAUTIYAL)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad : Dated 25/01/2023

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद