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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: October 01, 2014

+ ITA 19/2013

COMMISSIONER OF INCOME TAX-XII Appellant
 Through Mr.Kamal Sawhney, Sr. Standing
 Counsel with Mr.Sanjay Kumar and
 Mr.Jatin Sehgal, Advocates

versus

INDO RUB INDUSTRIES Respondent
 Through

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J (ORAL)

This appeal by the Revenue pertains to assessment year 2008-09. The respondent assessee was subjected to scrutiny assessment for the said assessment year and assessment order dated 20.08.2010 under Section 143(3) of the Income Tax Act, 1961 ('Act' for short) was passed accepting income tax return declaring nil income. The assessment order mentions that the respondent assessee was engaged in manufacturing of rubber hose pipes, industrial and hydraulic hoses etc. It records that upon examination of the documents and details, the income of the respondent assessee firm stood accepted. Details of computation i.e. profit in the Profit and Loss A/c, depreciation, bonus etc. stand recorded. Disallowance under Section



40(a)(ia) of the Act of Rs.5,45,691/- was made by the respondent assessee.

2. Subsequently notice under Section 263 of the Act was issued by the Commissioner of Income Tax, Delhi-XIII. The relevant portion of the notice is reproduced below:-

“On perusal of the assessment record and the assessment order dated 20.08.2010 for the assessment year 2008-09 at NIL income which was also the returned income in your case, it is found that assessment made u/s 143(3) is erroneous in so far as prejudicial to the interest of revenue as the Assessing Officer has while framing the assessment neglected glaring and prima facie issues and material before him without making due inquiries and rather framed the assessment on the basis of partial and technical compliance ignoring the substance of the issue before him which clearly goes against the framing of such order.

2. On examination of assessment record, it is found that the Assessing Officer did not verify the following issues:-

(i) The Assessing Officer had called for details in respect of addition to fixed assets during the year, amounting to Rs. 5,36,73,181/- in the first half of the F.Y. and Rs. 69,31,924/- in the second half of the F.Y., along with copies of the bills but the same are not available on record. As such, the said additions to the fixed assets have remained unverified and unexamined and also, the then AO failed to examine the



genuineness of the assessee's claim of depreciation during the period under consideration, amounting to Rs. 1,05,85,432/- and also did not examine the date of installation and date of putting to use such assets.

(ii) The Assessing Officer did not examine the addition to partner's capital accounts. It is noticed that there is addition of Rs. 53,36,482/- in the case of Shri Baldev Raj Makija and Rs. 59,92,955/- in the case of Praveen Makija. Thus the nature and source of this capital introduced by the partners has remained unverified and un-vouched"

(emphasis supplied)

3. The respondent assessee filed response to the said notice and submitted that at the time of original assessment proceedings, the Assessing Officer had verified addition to the fixed assets amounting to Rs. 5,36,73,181/- in the first half and Rs.69,31,924/- in the second half. Similarly with regard to addition to capital account, the assessee had filed details and proof in support.

4. The Commissioner of Income Tax held that the order passed by the Assessing Officer under Section 143(3) of the Act was erroneous and prejudicial to the interest of the Revenue as the two issues were not considered/examined/investigated by the Assessing Officer. However, in the body of the order, the Commissioner of Income Tax has referred to the



explanation of the assessee on increase in the capital account of the partners as well as details submitted by the assessee vide letter dated 26.05.2010 regarding additions to the fixed assets along with photocopy of the receipts etc. He accepted as a fact that these documents and details were not available on record. The Commissioner did not comment why and for what reasons, these documents and papers were not available on record. Noticeably no adverse finding to contradict the assertion that these documents and details were filed with the Assessing Officer, was made.

5. The respondent assessee thereafter filed an appeal and has succeeded by the impugned order dated 13.07.2012. Before the Income Tax Appellate Tribunal ('Tribunal' for short), the respondent assessee had filed a paper-book with documents to establish that full details and particulars had been furnished and enquiries were made by the Assessing Officer before passing the assessment order under Section 143(3) of the Act. Paragraph 3 of the order passed by the Tribunal in this regard is relevant and for the sake of completeness is reproduced below:-

“3. The assessee is now in appeal before us against the aforesaid findings of the ld. CIT. The ld. AR on behalf of the assessee while carrying us through page 8 to 14 of the paper book contended that during the course of assessment



proceedings, the AO issued a show cause notice, seeking, inter-alia, the details of fixed assets and sources of addition to capital account of the partners. The assessee vide letter dated 26th May, 2010 submitted details of additions to fixed assets along with photocopies of bills besides confirmations of the partners towards addition to their capital to the extent of Rs.53,36,428/- in the account of Shri Baldev Raj Makhija and Rs.59,92,955/- in the account of Shri Praveen Makhija along with computation of income, copies of their ITR acknowledgments and copies of their respective bank accounts. Thus, the AO had made the necessary inquiries and was satisfied. It was further pointed out that the assessee submitted all the relevant details again before the CIT. Without pointing out as to how the assessment order was erroneous, the ld. CIT concluded that the aforesaid assessment order dated 20th August, 2010 was prejudicial to the interest of the revenue, the ld. AR added. The ld. AR vehemently argued that the ld. CIT incorrectly assumed the jurisdiction under Section 263 of the Act and set aside the assessment. Inter-alia, the ld. AR relied upon decisions in CIT vs. Sunbeam Auto Ltd. 332 ITR 167(Del.) (Delhi); CIT vs. Leisure Exports Ltd., 341 ITR 166(Del.), CIT vs. Hindustan Marketing & Advertising Co. Ltd., 341 ITR 180 (Del.); and CIT vs. Vikas Polymers, 341 ITR 537 (Delhi).”



Accepting the said assertion, the order under Section 263 of the Act, stands struck down.

6. The issue raised is whether or not the Assessing Officer before passing the order under Section 143(3) of the Act had conducted enquiries which were “necessitated and required” considering the substantial increase in the capital account of the partners as well as investments made by the assessee firm in the form of capital assets. The finding recorded by the Tribunal on the basis of documents and papers filed before them, was that the said enquiry was duly made. The Tribunal has accepted that the assessee had filed letter dated 26.05.2010 and had also filed copies of income tax returns, computation of income, copy of statement of respective bank accounts of the partners to show that the said additions to the capital account were genuine. Similarly bills etc. for purchase of assets and relevant details were filed during the course of the assessment proceedings.

7. In view of the aforesaid controversy by order dated 13.11.2013, we had asked the Commissioner of Income Tax, Delhi-XIII to file an affidavit, placing on record, copy of the order sheet of the Assessing Officer, letters written by the Assessing Officer to the assessee during the course of assessment proceedings and the letters/response filed by the assessee. A



copy of the show cause notice issued by the Commissioner and reply given by the assessee was also directed to be filed. The Commissioner of Income Tax was also required to state, whether any enquiry was made from the Assessing Officer who had passed the order under Section 143(3) of the Act as to the details and particulars which were filed before him by the assessee during the course of the original assessment proceedings.

8. The Commissioner of Income Tax has filed affidavit dated 22.01.2014, in which she has stated as under:-

“4. From a perusal of the record, it could not be ascertained whether any such enquiry was made from the concerned Assessing Officer who had passed the assessment order. However, there is a letter on record dated 01-03-2011 written by the A.O. to the Commissioner of Income Tax, wherein he has stated that although the then AO had called for details in respect of addition to fixed assets during the year, amounting to Rs.5,36,73,181/- in the first half of the financial year and Rs.69,31,924/- in the second half of the financial year, alongwith copies of bills etc. vide notice u/s 142(1) dated 21-04-2010, but the same are not available on record. Further, the AO also stated that the then AO had also not examined the addition to partner's capital accounts although the said details were specifically called for vide notice u/s 142(1) dated 26-05-2010 and that the nature and



source of this capital introduced by the partners has remained unverified and unvouched and showed the malafide intention of the assessee in not furnishing the details although the same were specifically required to be furnished. A copy of the said letter dated 01.03.2011 is being filed as Annexure A.”

9. It is clear from the aforesaid affidavit that no attempt was made by the Commissioner of Income Tax to ascertain from the then Assessing Officer, who had passed original assessment order under Section 143(3) of the Act dated 20.08.2010 to assure the correct factual position. Reference to the letter of the subsequent Assessing Officer is of no consequence as it is noticeable from the show cause notice itself and the findings recorded by the Commissioner of Income Tax in the order under Section 263 of the Act that the assessment record was incomplete. Papers and documents had gone missing and probably had been removed. To assume and cast aspersion and slur against the assessee without ascertaining the full facts, cannot be accepted, specially when the surrounding and background facts, do not predicate and necessitated any such inference. Other causes for the said malicious act cannot be ruled out, in the absence of any material or justification implicating and incriminating the assessee. To be fair to the



appellant – revenue no such direct allegation and assertion is made in the order under Section 263 of the Act. The order sheet of the Assessing Officer filed on record shows issuance of notice under Section 143(2) of the Act on 21.04.2010 for 21.05.2010. Thereafter the case was taken up for hearing on 26.05.2010 when part details were filed. The case was then taken up on 07.06.2010. Thereafter hearings were fixed on 14.06.2010, 24.06.2010, 05.07.2010 and 12.07.2010, on which dates nobody attended. Thereupon another notice under Sections 143(2)/142(1) of the Act was issued on 20.07.2010 and hearings were held on 02.08.2010, 09.08.2010, when more details were filed, and then on 20.08.2010. Letter dated 26.05.2010 states that the respondent assessee had furnished several documents showing expenses as well as confirmation of the accounts from the sundry debtors, trade creditors etc. Monthwise details of the sales, purchases during the year were enclosed. Details of gross profit earned for earlier years, details of opening and closing stock, statement of bank account, additions to the fixed assets along with bills, and details of fringe benefits were furnished. The assessment order records that an initial statutory notice under Section 143(2) of the Act was issued on 07.09.2009. By letter dated 15.03.2010, several other details including copy of income tax return for the assessment year



2008-09, financial statements, tax audit report and the statement that the assessee had four partners, along with the names of the partners had also been filed. As recorded above, these documents etc. which were missing, were filed before the Commissioner in the proceedings under Section 263 of the Act.

10. Nothing prevented or obstructed the Commissioner from ascertaining the truth and verifying the correctness of the contents of the said documents. This would have helped in identifying the cause of the missing papers. Absence or failure to properly maintain records cannot per se and by itself, would be a ground to invoke Section 263 of the Act i.e. the assessment order was erroneous and prejudicial to the interest of the revenue. Other material and evidence to show and manifest complicity and maliciousness of the assessee in question would or may satisfy the requirements. But facts should be ascertained and finding implicating and exhibiting involvement of the assessee should be elucidated and shown.

11. It is the responsibility and duty of the revenue authorities to maintain sanctity and piety of the files and records and to ensure that there is no tampering, removal or effacing of the papers. When lapses of such nature take place, the authorities must and should rule out foul play and ascertain



full facts. Guilty should then be taken to task and dealt with in accordance with law and punished. However, de-novo proceedings pursuant to an order under Section 263 of the Act cannot be initiated without proper ascertainment of facts. The question whether the papers/documents were filed and whether and what enquiries were conducted by the then Assessing Officer, should be elucidated, investigated and answered. Custodian of the records have to take responsibility and blame for tampering and other lapses, for any such act is not possible without involvement of an insider whether acting on his own or at the behest of the third party, which may the assessee himself. Facts therefore should and must be ascertained and mystery unrevealed. Fair and just conclusion as to the involvement of the person or persons concerned and responsible should be formed.

12. The difference between absence of enquiry and inadequate enquiries, when power under Section 263 of the Act is exercised has been highlighted in several decisions. Even in case of inadequate enquiries, power under Section 263 of the Act can be exercised but not by way of remand. In case of inadequate enquiries, the Commissioner cannot pass a remand order, but he should himself conduct necessary enquiries and record findings why and



how the assessment order was erroneous and prejudicial to the interest of the revenue. The said conclusion must be recorded.

13. It is rather unfortunate that the department was not able to ensure the trustworthiness of their records and has, therefore, proceeded on the basis that no enquiry or investigation was conducted by the Assessing Officer. This would not be a correct inference unless proper and adequate enquiries were conducted or facts to indicate and infer the said conclusion of no enquiry or complicity are brought on record by the Commissioner. We had to ascertain and satisfy ourselves, given this opportunity by our order dated 13.11.2013. However, the Commissioner did not get in touch with the Assessing Officer, who had passed the assessment order under Section 143(3) of the Act dated 20.08.2010 to enquire and ascertain the details furnished and documents verified. No such letter was written and no response from the then Assessing Officer was called for. The Commissioner on the other hand, has stated that before issue or passing of order under Section 263 of the Act, it could not be ascertained whether necessary inquiries were made from the Assessing Officer. As noticed above, the Assessing Officer in his assessment order does mention that he had examined documents and details before completing the assessment. The



Tribunal has accepted the stand and stance of the assessee that confirmation, documents, details were filed and ascertained by the Assessing Officer.

14. In view of the aforesaid factual position, it is not possible for the High Court while exercising jurisdiction under Section 260A of the Act to interfere with the impugned order. The appeal is accordingly dismissed.

SANJIV KHANNA, J

V. KAMESWAR RAO, J

OCTOBER 01, 2014/km