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

% **Date of Decision** : 12th March, 2012.

\+ ITA 146/2012

CIT ..... Appellant
Through Mr. Sanjeev Sabharwal, sr. standing counsel

versus

HERO AUTO LTD ..... Respondent
Through

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA,J: (ORAL)

1. Ld. counsel for the Revenue at the outset states that Annexure 1 to this appeal is the assessment order passed pursuant to the order under Section 263 of the Income Tax Act, 1961 ('Act', for short). He prays for and is granted permission to place on record the original assessment order dated 26.12.2006. This order was made subject matter of an order under Section 263 of the Act dated 24th March,

2009 by the Commissioner of Income Tax ('CIT', for short). By the impugned order dated 8th July, 2011, the Income Tax Appellate Tribunal ('Tribunal', for short) has allowed the appeal of the respondent-assessee and has quashed the order dated 24.3.2009, under Section 263 of the Act, passed by the CIT on two aspects :

(1) Claim for warranty; and

(2) Deduction under Section 35 DDA.

With regard to the third aspect i.e. non-recurring items, the Tribunal has upheld the order passed by the CIT. In this appeal, we are therefore concerned only with the first two aspects.

2. On the question of warranty claim, it is noticeable that this issue was raised by the Assessing Officer during the course of original assessment proceedings and the assessee had written a letter dated 21.11.2006 giving complete details of the provision for warranty and had relied upon decision of Delhi High Court in the case of ***Commissioner of Income Tax v. Vinitec Corporation. Pvt. Ltd.***, (2005) 278 ITR 337. The CIT in the order dated 24.3.2009 has

not disputed the aforesaid factual position and has stated as under:

> "i) The assessee's claim that warranty issue is covered by Jurisdictional High Court decision in the case of CUT Vs Vinitec Corporation is not fully correct. The Hon'ble High Court had held that if the provisions is made on scientific basis then only it is an allowable expenditure."

3. Thereafter, he has referred to the second claim of the respondent-assessee and has observed that there was lack of enquiry and this vitiated the assessment order. Reference was made to the decision of this Court in ***Gee Vee Enterprises Vs. Addl. CIT & Ors.*** (1975) 99 ITR 375 (Del.). There is no discussion in the order of the CIT as to how and in what manner the enquiry was lacking and what was the fault and default committed by the Assessing Officer. The Assessing Officer had examined the said aspect in the original assessment proceedings and accepted the stand of the assessee. There is no finding of CIT that the order passed by the Assessing Officer was erroneous and prejudicial to the interest of the Revenue. The question of "lack of enquiry" and "inadequate enquiry" has been explained by this Court in ***Commissioner of Income Tax v.***

Sunbeam Auto Ltd., (2011) 332 ITR 167 (Del.) and it has been observed as under: -

> "We have considered the rival submissions of the counsel on the other side and have gone through the records. The first issue that arises for our consideration is about the exercise of power by the Commissioner of Income-tax under section 263 of the Income-tax Act. As noted above, the submission of learned counsel for the Revenue was that while passing the assessment order, the Assessing Officer did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This argument predicates on the assessment order, which apparently does not give any reasons while allowing the entire expenditure as revenue expenditure. However, that by itself would not be indicative of the fact that the Assessing Officer had not applied his mind on the issue. 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 a different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action

would be open. In Gabriel India Ltd. [1993] 203 ITR 108 (Bom), law on this aspect was discussed in the following manner (page 113) : " . . . From a rending of sub-section (1) of section 263, it is clear that the power of suo motu revision can be exercised by the Commissioner only if, on examination of the records of any proceedings under this Act, he considers that any order passed therein by the Income-tax Officer is ' erroneous in so far as it is prejudicial to the interests of the Revenue' . It is not an arbitrary or unchartered power, it can be exercised only on fulfilment of the requirements laid down in sub-section (1). 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. (See Parashuram Pottery Works Co. Ltd. v. ITO [1977] 106 ITR 1 (SC) at page 10) . . . 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 Com- missioner 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 a conclusion and such a conclusion cannot be formed 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 . . . We may now examine the facts of the present case in the light of the powers of the

Commissioner set out above. The Income-tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation in that regard by a letter in writing. All these are part of the record of the case. Evidently, the claim was allowed by the Income-tax Officer on being satisfied with the explanation of the assessee. Such decision of the Income-tax Officer cannot be held to be 'erroneous' simply because in his order he did not make an elaborate discussion in that regard."

After referring to the said, in the case of ***Income Tax Officer Vs. DG Housing Projects Ltd.*** decided on 1st March, 2012 we have recently observed and held as under :

"16. Thus, in cases of wrong opinion or finding on merits, the CIT has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and necessary, before the order under Section 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order passed is not sustainable in law and the said finding must be recorded. CIT cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous. In cases where there is inadequate enquiry but not lack of enquiry, again the CIT must give and record a finding that the order/inquiry made is erroneous. This can happen if an enquiry and verification is conducted by the CIT and he is able to establish and show the error or mistake made by the Assessing Officer, making the order unsustainable in Law. In some cases possibly though rarely, the CIT can also show and establish that the facts on record or inferences drawn from facts on record *per*

se justified and mandated further enquiry or investigation but the Assessing Officer had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further enquiries without a finding that the order is erroneous. Finding that the order is erroneous is a condition or requirement which must be satisfied for exercise of jurisdiction under Section 263 of the Act. In such matters, to remand the matter/issue to the Assessing Officer would imply and mean the CIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question.

17. This distinction must be kept in mind by the CIT while exercising jurisdiction under Section 263 of the Act and in the absence of the finding that the order is erroneous and prejudicial to the interest of Revenue, exercise of jurisdiction under the said section is not sustainable. In most cases of alleged "inadequate investigation", it will be difficult to hold that the order of the Assessing Officer, who had conducted enquiries and had acted as an investigator, is erroneous, without CIT conducting verification/inquiry. The order of the Assessing Officer may be or may not be wrong. CIT cannot direct reconsideration on this ground but only when the order is erroneous. An order of remit cannot be passed by the CIT to ask the Assessing Officer to decide whether the order was erroneous. This is not permissible. An order is not erroneous, unless the CIT hold and records reasons why it is erroneous. An order will not become erroneous because on remit, the Assessing Officer may decide that the order is erroneous. Therefore CIT must after recording reasons hold that the order is erroneous. The jurisdictional precondition stipulated is that the CIT must come to the conclusion that the order is erroneous and is unsustainable in law. We may

> notice that the material which the CIT can rely includes not only the record as it stands at the time when the order in question was passed by the Assessing Officer but also the record as it stands at the time of examination by the CIT [see ***CIT vs. Shree Manjunathesware Packing Products***, 231 ITR 53 (SC)]. Nothing bars/prohibits the CIT from collecting and relying upon new/additional material/evidence to show and state that the order of the Assessing Officer is erroneous."

4. We may also observe that the question of warranty claim was reopened in the assessment year 1999-2000 after an order u/s 263 of the Act. The order passed under Section 263 of the Act, in the assessment year 1999-2000, was struck down by the Tribunal and this decision has been upheld by this Court in ITA No.536/2007 decided on 21st November, 2007.

5. On the second aspect, it is noticed that the claim for deduction under Section 35DDA was made by the assessee for the first time in assessment year 2002-03. 1/5th of the amount payable under the voluntary retirement was allowed as a deduction. In this year, the Assessing Officer has followed the earlier assessment order. The CIT in the order dated 24th March, 2009 has observed as under: -

> "iii) In respect of issue of deduction u/s 35DDA, the Note 2 in audit report does create doubt as to whether expenditure to ESS was actually incurred or not. The point that still remains is that while in audit report the allowable amount u/s 35DDA mentioned in Annexure-III is Rs.17,79,196, in computation of income the deduction claimed u/s 35DDA is of Rs.1,097,42,824/-. There is therefore clearly a mismatch which was never looked into by A.O. similarly issue of ESS was not examined at all by the Assessing Officer. The lack of inquiry renders the assessment order erroneous and prejudicial to interest of revenue as discussed in point (ii) itself."

6. We may note that the assessee had stated before the CIT and explained the position that an amount of ₹5,37,14,119/- was incurred under Section 35DDA in the assessment year 2002-03 and 1/5th thereof being ₹1,07,42,824/- was amortised and claimed and allowed as a deduction. Thereafter, each year 1/5th of the said expenditure i.e. ₹1,07,42,824/- had been claimed for the next four assessment years. No part of it was precautionary and the note in the audit report has been erroneously read by the CIT. The note in question reads as under: -

> "The expenditure is ESS has been given on precautionary measure due to Introduction of new section 35DDA. However, this section has not been introduced in clause 15 of Form 3CD."

7. The assessee had clarified that the note was written by the auditor as a precautionary measure for reporting that the amount had been claimed under Section 35DDA. The CIT in the order did not appreciate and deal with the said aspect. He has wrongly interpreted and observed that the claim itself was made as a precautionary measure. The Tribunal was therefore right in setting aside this part of the order dated 24th March 2009 passed by CIT under Section 263 of the Act.

The appeal is dismissed. No costs.

SANJIV KHANNA, J.

R.V.EASWAR, J.

MARCH 12, 2012
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