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

% **Judgment reserved on: 15 February 2024**
Judgment pronounced on: 01 March 2024

\+ ITA 1428/2018

PR. COMMISSIONER OF INCOME TAX -2, DELHI
..... Appellant
Through: Mr. Prashant Meharchandani, Sr. Standing Counsel.

versus

M/S CLIX FINANCE INDIA PVT. LTD.
.... Respondent
Through: Mr. Sachit Jolly, Advocate.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

J U D G M E N T

PURUSHAINDRA KUMAR KAURAV, J.

1. The instant appeal at the instance of the Revenue is filed against the order dated 23.04.2018, passed by the Income Tax Appellate Tribunal [**"ITAT"**], setting aside the order of the Commissioner of Income Tax [**"CIT"**] passed under Section 263 of the Income Tax Act, 1961 [**"Act"**] for the Assessment Year [**"AY"**] 2002-03.

2. The facts of the case exhibit that the respondent-assessee is a Non-Banking Financial Company [**"NBFC"**] engaged in the business of providing finance to industry, trade etc. through hire purchase, lease

and loans. The respondent-assessee filed its income tax return [**"ITR"**] for the concerned AY on 31.10.2002, declaring its total income to the tune of Rs. 65,41,08,720/-. The ITR filed by the respondent-assessee was processed under Section 143(1) of the Act. Subsequently, a notice under Section 143(2) was issued on 28.03.2003, intimating that the case of the respondent-assessee has been selected for the scrutiny.

3. In pursuance of the proceedings under Section 143(3) of the Act, an assessment order was passed by the Revenue on 30.03.2005, wherein, the income of the respondent-assessee for the concerned AY was assessed at Rs. 87,01,68,210/-.

4. However, on 22.03.2007, the CIT while exercising power of revision of orders which are erroneous and prejudicial to the interest of the Revenue as per Section 263 of the Act, quashed the assessment order and remitted the matter back to the Assessing Officer [**"AO"**] for a *de novo* adjudication with respect to the following two claims:

i. The claim for deduction of Rs. 1114.68 lacs on account of provision for non-performing assets.

ii. The claim for deduction of Rs. 114.06 lacs on account of interest rate swap.

5. In compliance of the directions passed by the CIT, on 18.12.2007, the AO adjudicated the aforesaid two issues afresh and held that the expenditure of Rs. 2,28,35,593/- was capital in nature and the same was consequently, disallowed. Being aggrieved by the order of AO dated 18.12.2007, the respondent-assessee preferred an appeal before the Commissioner of Income Tax (Appeals) [**"CIT (A)"**], which came to be dismissed *vide* order dated 28.10.2011. The said appeal was

rejected on the grounds that (a) the claim of the respondent-assessee with respect to the loss of Rs. 2,28,35,593 being normal business loss during the concerned AY was unsustainable and (b) the expenditure was in relation to the protection of any higher payment of principal amount and not due to any interest payable on such loan raised in foreign exchange.

6. Thereafter, the respondent-assessee filed an appeal before the ITAT challenging the order dated 22.03.2007 passed by the CIT under Section 263 of the Act and subsequent order dated 28.10.2011 passed by the CIT (A). The ITAT *vide* impugned order dated 23.04.2018 invalidated the order of the CIT, mainly for the following reasons:

i. There was no error or prejudice to the interest of the Revenue as no deduction on account of provision for non-performing assets was allowed to the respondent-assessee.

ii. The interest rate swap was an actual loss and only the net loss of Rs. 114.05 lacs after setting of gain of interest rate swap was claimed as deduction.

iii. Both the abovementioned issues were duly examined by the AO *vide* questionnaire dated 02.11.2004 to which replies dated 09.12.2004, 20.12.2004 and 06.01.2005 were duly furnished by the respondent-assessee.

7. Learned counsel appearing on behalf of the Revenue submits that the ITAT erred in setting aside the revisional order under Section 263 of the Act, inasmuch as, the AO had failed to record any finding with respect to the above mentioned two issues in the assessment order. He submits that there is nothing on record which could signify due

application of mind on the part of the AO while allowing the claims of the respondent-assessee. He, therefore, submits that the revisional authority has rightly held that the AO has failed to make any enquiry and merely accepted the version of the respondent-assessee.

8. He further contends that any order passed by the AO without carrying out necessary verification, would be deemed to be erroneous as per Explanation 2 to Section 263 of the Act. While taking this Court through the original assessment order at *Annexure A-1,* he submits that the AO has merely sought details with respect to the claims in question, however, the same cannot be construed as an enquiry for the purpose of satisfying the conditions laid down in Section 263 of the Act. Learned counsel further submits that if the assessment order is read in juxtaposition with questionnaire dated 02.11.2004, the same would indicate that the AO has not decided anything in respect of allowability of the said claims.

9. Learned counsel for the Revenue has drawn our attention to Paragraph 4 of the order dated 22.03.2007, wherein, CIT has placed reliance on the decision of the Orissa High Court in the case of **Umashanker Rice Mill v. CIT** [1990 SCC OnLine Ori 368] to hold that the power under Section 263 of the Act is available to be exercised by the CIT, if on the basis of the material available on records, the CIT feels that there should be further enquiry.

10. Learned counsel has also placed reliance on the decision of the Hon'ble Supreme Court in the case of **Malabar Industrial Co. Ltd. v. CIT** [(2000) 2 SCC 718] to substantiate his arguments.

11. Learned counsel for the respondent-assessee, on the other hand, vehemently opposed the submissions canvassed by the Revenue. He submits that the instant case cannot be said to be a case of lack of enquiry as the Revenue has itself not denied that both the issues in question were specifically enquired by the AO *vide* notice dated 02.11.2004 and subsequently responded by the respondent-assessee *vide* replies dated 09.12.2004, 20.12.2004 and 06.01.2005. He also submits that at the time of scrutiny assessment, the AO *vide* notice dated 02.11.2004 had specifically put an enquiry about the provision for doubtful assets amounting to Rs. 8,34,22,265/-. According to him, since the AO was not completely satisfied with the replies submitted by the respondent-assessee with respect to the said notice, the AO made an addition of Rs. 73,46,160/- considering that the respondent-assessee had already disallowed Rs. 7,60,76,105/- in its computation of total income. He, therefore, contends that the AO has passed the assessment order after diligently carrying out the assessment and there is no reason to assail the same on the pretext of non-application of mind.

12. He submits that since the respondent-assessee does not exercise any control over the drafting of the assessment order, therefore, the record of the assessment must be seen in its entirety to determine whether any enquiry was made or not. According to him, the assessment order may not necessarily reflect everything that an AO asks for but that cannot lead to the conclusion that the issue has not been raised or examined. He further submits that the provisions of the Act do not envision recording of each and every finding in the assessment order, however, the same cannot lead to a far-fetched

conclusion that no enquiry has been conducted *qua* the issues not properly elucidated in the assessment order.

13. He further contends that once it appears that the AO has conducted the enquiry on the issues on which the concerned authority seeks to exercise jurisdiction under Section 263 of the Act, the said authority must record conclusive findings of error and prejudice and cannot remit back the issues for a fresh consideration.

14. Learned counsel has placed reliance on the decisions in the cases of **Hari Iron Trading Co. v. CIT** [(2003) 263 ITR 43 7 (P&H)], **CIT v. Eicher Ltd.** [(2007) 294 ITR 310 (Del.)], **CIT v. Gabriel India Ltd.** [(1993) 203 ITR 108], **CIT v. Nirma Chemicals Ltd.** [(2009) 309 ITR 67], **CIT v. Ashish Rajpal** [(2010) 320 ITR 674 (Delhi)].

15. We have heard the learned counsel appearing on behalf of the parties and perused the record.

16. *Vide* order dated 06.11.2019, this Court framed the following question of law:-

> "A. Whether, in the facts and circumstances of the case, the Hon'ble ITAT was justified in quashing the order under Section 263 of the Income Tax Act?"

17. The brief controversy involved in the present appeal pertains to the invocation of revisional jurisdiction under Section 263 of the Act by the CIT to set aside the original assessment order dated 30.03.2005.

18. Before adverting to the merits of the case, it is apposite to refer to the power of the revisional authority of the CIT envisaged as per Section 263 of the Act. For the sake of clarity, the relevant extract of Section 263 of the Act is reproduced as under:

"263. Revision of orders prejudicial to revenue—(1) The [Principal Chief Commissioner or Chief Commissioner or Principal Commissioner] or Commissioner] may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer [or the Transfer Pricing Officer, as the case may be,] is erroneous in so far as it is prejudicial to the interest of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, [including,—

(i) an order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment; or

(ii) an order modifying the order under Section 92-CA; or

(iii) an order cancelling the order under Section 92-CA and directing a fresh order under the said section.]

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[*Explanation 2*.— For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer [or the Transfer Pricing Officer, as the case may be,] shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal [Chief Commissioner or Chief Commissioner or Principal] Commissioner or Commissioner,—

(*a*) the order is passed without making inquiries or verification which should have been made;

(*b*) the order is passed allowing any relief without inquiring into the claim;

(*c*) the order has not been made in accordance with any order, direction or instruction issued by the Board under Section 119; or

(*d*) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.]

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19. A bare reading of sub-Section (1) of Section 263 of the Act makes it abundantly clear that the said provision lays down a two-pronged test to exercise the revisional authority i.e., *firstly*, the

assessment order must be erroneous and *secondly*, it must be prejudicial to the interests of the Revenue. Further, Explanation 2 to Section 263 of the Act delineates certain conditions and circumstances when the order passed by the AO can be said to be erroneous and prejudicial to the Revenue.

20. Clause (a) of Explanation 2 to Section 263 of the Act further stipulates that if an order is passed without making an enquiry or verification which should have been made, the same would bestow a revisional power upon the Commissioner. However, the said Clause or any other condition laid down in Explanation 2 does not warrant recording of the said enquiry or verification in its entirety in the assessment order.

21. Admittedly, in the instant case, the questionnaire dated 02.11.2004, which has been annexed and brought on record in the present appeal, would manifest that the AO had asked for the allowability of the claims with respect to the issues in question. Consequently, the respondent-assessee duly furnished explanations thereof *vide* replies dated 09.12.2004, 20.12.2004 and 06.01.2005. Thus, it is not a case where no enquiry whatsoever has been conducted by the AO with respect to the claims under consideration. However, this leads us to an ancillary question– whether the mandate of law for invoking the powers under Section 263 of the Act includes the cases where either an adequate enquiry has not been made and the same has not been recorded in the order of assessment or the said authority is circumscribed to only consider the cases where no enquiry has been conducted at all.

22. Reliance can be placed on the decision of this Court in the case of **CIT v. Sunbeam Auto Ltd.** [2009 SCC OnLine Del 4237], wherein, it was held that if the AO has not provided detailed reasons with respect to each and every item of deduction etc. in the assessment order, that by itself would not reflect a non-application of mind by the AO. It was further held that merely inadequacy of enquiry would not confer the power of revision under Section 263 of the Act on the Commissioner. The relevant paragraph of the said decision reads as under:-

> "17. 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)
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23. A similar view was taken by this Court in the case of **CIT v. Anil Kumar Sharma** [2010 SCC OnLine Del 838], wherein, it was held that

once it is inferred from the record of assessment that AO has applied its mind, the proceedings under Section 263 of the Act would fall in the category of Commissioner having a different opinion. Paragraph 8 of the said decision reads as under:-

> "8. In view of the above discussion, it is apparent that the Tribunal arrived at a conclusive finding that, though the assessment order does not patently indicate that the issue in question had been considered by the Assessing Officer, the record showed that the Assessing Officer had applied his mind. Once such application of mind is discernible from the record, the proceedings under section 263 would fall into the area of the Commissioner having a different opinion. We are of the view that the findings of facts arrived at by the Tribunal do not warrant interference of this court. That being the position, the present case would not be one of "lack of inquiry" and, even if the inquiry was termed inadequate, following the decision in Sunbeam Auto Ltd. (2011) 332 ITR 167 (Delhi) (page 180) : "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." No substantial question of law arises for our consideration."

24. In *Ashish Rajpal* as well, this Court was of the view that the fact that a query was raised during the course of scrutiny which was satisfactorily answered by the assessee but did not get reflected in the assessment order, would not by itself lead to a conclusion that there was no enquiry with respect to transactions carried out by the assessee.

25. Further, the decision of the Hon'ble Supreme Court in the case of *Malabar Industrial Co. Ltd.*, enunciates the meaning and intent of the phrase "prejudicial to the interests of the Revenue", in the following words:-

> "8. The phrase "prejudicial to the interests of the Revenue" is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not confined to loss of tax. The High Court of Calcutta in *Dawjee Dadabhoy & Co.* v. *S.P. Jain* [(1957) 31 ITR 872 (Cal)], the High Court of Karnataka in *CIT* v. *T. Narayana Pai* [(1975) 98 ITR 422 (Kant)], the High Court of Bombay in *CIT* v. *Gabriel India Ltd.* [(1993) 203 ITR

108(Bom)] and the High Court of Gujarat in *CIT* v. *Minalben S. Parikh* [(1995) 215 ITR 81 (Guj)] treated loss of tax as prejudicial to the interests of the Revenue.

9. Mr. Abraham relied on the judgment of the Division Bench of the High Court of Madras in *Venkatakrishna Rice Co.* v. *CIT* [(1987) 163 ITR 129 (Mad)] interpreting "prejudicial to the interests of the Revenue". The High Court held:

"In this context, (it must) be regarded as involving a conception of acts or orders which are subversive of the administration of revenue. There must be some grievous error in the order passed by the Income Tax Officer, which might set a bad trend or pattern for similar assessments, which on a broad reckoning, the Commissioner might think to be prejudicial to the interests of Revenue Administration."

In our view this interpretation is too narrow to merit acceptance. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. If due to an erroneous order of the Income Tax Officer, the Revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the Revenue.

10. The phrase "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. **Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue, for example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the Income Tax Officer is unsustainable in law.** It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the Revenue. (See *Rampyari Devi Saraogi* v. *CIT* [(1968) 67 ITR 84 (SC)] and in *Tara Devi Aggarwal* v. *CIT* [(1973) 3 SCC 482 : 1973 SCC (Tax) 318 : (1973) 88 ITR 323].)"

[Emphasis supplied]

26. Recently, the Hon'ble Supreme Court in the case of **CIT v. Paville Projects (P) Ltd.** [2023 SCC OnLine SC 371], while relying

upon *Malabar Industrial Co. Ltd.*, has discussed the sanctity of two-fold conditions for the purpose of invoking jurisdiction under Section 263 of the Act. The relevant paragraph of the said decision reads as under:-

> "27. Learned counsel appearing on behalf of the assessee has heavily relied upon the decision of this Court in the case of *Malabar Industrial Co. Ltd.* (supra). It is true that in the said decision and on interpretation of Section 263 of the Income Tax Act, it is observed and held that in order to exercise the jurisdiction under Section 263(1) of the Income tax Act, the Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. It is further observed that if one of them is absent, recourse cannot be had to Section 263(1) of the Act.
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> ***"

27. Considering the aforesaid judicial pronouncements, it can be safely concluded that inadequacy of enquiry by the AO with respect to certain claims would not in itself be a reason to invoke the powers enshrined in Section 263 of the Act. The Revenue in the instant case has not been able to make out a sufficient case that the CIT has exercised the power in accordance with law. Rather, in our considered opinion, the facts of the case do not indicate that the twin conditions contained in Section 263 of the Act are fulfilled in its letter and spirit.

28. Notably, the ITAT, while making a categorical finding that the CIT had failed to point out any definite or specific error in the assessment order, has satisfactorily explained both the claims in question in Paragraph 8.2 of its order, which reads as under:-

> "8.2 In the Impugned Order, the Ld. Commissioner of Income Tax-IV, Delhi held that the AO had not examined the aforesaid two issues properly and, therefore, set aside the issues for further inquiries to be conducted by the AO. As regards the first issue is concerned, we note that out of total provision of Rs. 1114.68 lacs, a sum of Rs.

7,60,76,105/- was suo moto added back in the computation of income and a further sum of Rs. 73,46,160- was disallowed by the AO in the original assessment order dated 30.3.2005. Therefore, out of Rs. 1114.68 lacs, Rs. 834.22 lacs already stood disallowed in the original assessment order. The balance amount represented actual write off which was palpably clear from page 2 of the impugned order itself. No deduction on account of any such provision was, therefore, allowed to the assessee. Hence, there is no error or prejudice to the interest of revenue. As regards second issue it was noted that interest rate swap was an actual loss and only the net loss of Rs. 114.05 lacs after setting of gain of interest rate swap was claimed as deduction. However, we find that both these issues were duly examined by the AO vide Questionnaire dated 2.11.2004 (Page 1-2 of the Paper Book) to which replies dated 9.12.2004, 20.12.2004 and 6.1.2005 (Page No. 3-39 of Paper Book-1) were furnished and, therefore, the finding of the Ld. CIT that the issues were not examined properly was not correct. Even the Ld. CIT has not pointed out the definite and specific error in the original assessment order and observed that the inquiry made by the AO was inadequate or improper without first pointing out the error in the original assessment order passed by the AO, particularly because both the aforesaid issues were duly examined at the stage of the original assessment proceedings, hence, the impugned order is beyond jurisdiction, bad in law and void-ab-initio."

29. It is discernible from the aforenoted findings of the ITAT that both the claims were duly examined during the original assessment proceedings itself and neither there was any error nor the same was prejudicial to the interests of the Revenue. Thus, the findings of fact arrived at by the ITAT do not warrant any interference of this Court.

30. So far as the reliance placed by the CIT on *Umashankar Rice Mill* is concerned, the same is misplaced, particularly in light of the insertion of Explanation 2 to Section 263 of the Act, brought in place by the Finance Act, 2015. The said amendment markedly specifies various conditions to exercise the authority vested in the Commissioner under Section 263 of the Act, leaving no ambiguity in the interpretation of the said provision.

31. In view of the aforesaid, the appeal preferred by the Revenue is dismissed alongwith the pending application(s), if any.

PURUSHAINDRA KUMAR KAURAV, J.

YASHWANT VARMA, J.

MARCH 01, 2024/p