

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 05.07.2010

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ITA 1376/2009

COMMISSIONER OF INCOME-TAX DELHI-IV

... Appellant

versus

HONDA SIEL POWER PRODUCTS LTD.

... Respondent

AND

+

ITA 1382/2009

COMMISSIONER OF INCOME-TAX DELHI-IV

... Appellant

versus

HONDA SIEL POWER PRODUCTS LTD.

... Respondent

Advocates who appeared in this case:-

For the Appellant : Mr N.P. Sahni and Ms Prem Lata Bansal with Mr P.C. Yadav

For the Respondent : Mr Ajay Vohra with Ms Kavita Jha and Mr Sriram Krishna

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE V.K. JAIN

1. Whether Reporters of local papers may be allowed to see the judgment ? YES
2. To be referred to the Reporter or not ? YES
3. Whether the judgment should be reported in Digest ? YES

BADAR DURREZ AHMED, J

1. These appeals were heard together and are being disposed of by this common judgment inasmuch as the question of law framed in both the appeals is identical and the circumstances are also virtually identical. The question of law that has been framed in these appeals is as under:-

“Whether the Income Tax Appellate Tribunal was correct in law in cancelling the order passed by the Commissioner of Income Tax under Section 263 and in restoring the order of the Assessing Officer by holding that the Assessing Officer had taken a possible view at the relevant point of time?”

2. ITA 1376/2009 relates to the assessment year 2001-02 and is directed against the Income-tax Appellate Tribunal’s order dated 12.09.2008 passed in ITA No.1675/Del/2006, which, in turn, arose from the order dated 07.03.2006 passed by the Commissioner of Income-tax under Section 263 of the Income-tax Act, 1961 (hereinafter referred to as ‘the said Act’).

3. ITA No1382/2009 is in respect of the assessment year 2002-03 and is directed against the Tribunal’s order dated 30.01.2009 in ITA No.715/Del/08. The appeal before the Tribunal was in respect of the order dated 22.03.2007 passed by the Commissioner of Income-tax under Section 263 of the said Act. The Tribunal’s order dated 30.01.2009 in respect of the assessment year 2002-03 merely follows the Tribunal’s earlier order dated 12.09.2008 in respect of the assessment year 2001-02. In both these decisions, the Tribunal has set aside the order passed by the Commissioner of Income-tax holding that the assessment orders passed by the Assessing Officer, in the facts and circumstances of the case, could not be the subject matter of an order under Section 263 inasmuch as the view taken by the Assessing Officer in respect of both the years was a possible view.

4. Since the circumstances in both the assessment years in question are virtually identical, for the sake of convenience, we shall only refer to the

factual position in respect of the assessment year 2001-02, which is the subject matter of ITA No.1376/2009. In this case, the assessment under Section 143(3) of the said Act was completed on 18.03.2004 on an income of Rs 18,74,31,920/-. The Assessing Officer had arrived at the said figure of total income after allowing deductions under Section 80HHC to the extent of Rs 2,70,48,517/- and under Section 80IB to the extent of Rs 3,04,15,236/-.

5. The Commissioner of Income-tax called for the records in respect of the assessment year 2001-02 and was, *prima facie*, of the view that the assessment was erroneous insofar as it was prejudicial to the interests of the revenue since the deduction under Section 80HHC was allowed on the whole profit of the business, including the profits derived from the Pondicherry unit and the deduction already allowed under Section 80IB to the extent of Rs 3,04,15,236/- was not reduced in terms of Section 80IB(13) read with Section 80IA(9) of the said Act. Consequently, the Commissioner of Income-tax issued a notice under Section 263 on 15.02.2006 and after receiving the written submissions from the respondent / assessee and hearing the representatives of the respondent / assessee, the Commissioner of Income-tax, by virtue of his order dated 07.03.2006, held that the assessment order passed by the Assessing Officer under Section 143(3) on 18.03.2004 was erroneous insofar as it was prejudicial to the interests of the revenue inasmuch as the Assessing Officer had not applied the provisions of Section 80IB(13) / 80IA(9) of the said Act and had wrongly calculated the deduction under Section 80HHC without reducing

from the profits and gains computed for allowing such deduction, the claim already allowed as deduction to the extent of such profits and gains under Section 80IB of the said Act. The Commissioner of Income-tax directed the Assessing Officer to re-calculate the allowable deduction under Section 80HHC after reducing from the profits and gains calculated for the purposes of allowance under Section 80HHC, such profits and gains to the extent of Rs 3,04,15,236/-, which had been claimed and allowed as deduction under Section 80IB of the said Act.

6. In the order dated 07.03.2006 passed by the Commissioner of Income-tax under Section 263 of the said Act, it was mentioned that there was no question of there being any two views since the Assessing Officer had not, at all, considered the embargo placed by Section 80IA(9) / 80IB(13). According to the Commissioner of Income-tax, it was not a case where two views of a situation were reflected, but a case where the Assessing Officer did not, at all, apply his mind to the applicability of Section 80IA(9)/80IB(13) of the said Act.

7. At this juncture, it ought to be pointed out that the Assessing Officer, in the assessment order dated 18.03.2004, had dealt with the claim of deduction under Section 80HHC as well as the claim of deduction under Section 80IB separately in great detail. The deduction under Section 80HHC claimed by the assessee was to the extent of Rs 3,41,60,544/-, whereas the deduction allowed by the Assessing Officer was only to the extent of Rs 2,70,48,517/-. Similarly, the assessee had claimed an amount

of Rs 3,19,74,289/- as deduction under Section 80IB. However, the Assessing Officer had allowed an amount of Rs 3,04,15,236/- as deduction under Section 80IB. It is true that while allowing the aforesaid deduction under Section 80HHC, the Assessing Officer did not compute the deduction under Section 80HHC after reducing the deduction claimed under Section 80IB of the said Act.

8. Being aggrieved by the order dated 07.03.2006 passed by the Commissioner of Income-tax under Section 263 of the said Act, the respondent / assessee preferred an appeal (ITA No.1675/Del/06) before the Income-tax Appellate Tribunal. The question which fell for consideration before the Tribunal was whether the order passed by the Assessing Officer was erroneous insofar as it was prejudicial to the interests of the revenue for the reason that the deduction under Section 80HHC had been allowed without reducing from the profit and gains, the deduction already allowed under Section 80IB of the said Act. It was contended before the Tribunal that since the issue of deduction under Section 80HHC, with or without reducing the profits and gains by the deduction already allowed under Section 80IB of the said Act, was debatable and more than one view was possible, the Commissioner of Income-tax could not have resorted to the corrective mechanism under Section 263 of the said Act. The Income-tax Appellate Tribunal referred to the Supreme Court decision in the case of **CIT v. Max India Ltd: (2007) 295 ITR 282(SC)** as also to the decision in the case of **CIT v. G.M. Mittal Stainless Steel Pvt. Ltd: 263 ITR 255**. The Tribunal held that on the question of allowability of deduction under

Section 80HHC on the profits without reducing it by the amount of deduction allowed under Section 80IB, there was a difference of opinion amongst the various benches of the Tribunal and the same continued till the decision of the Special Bench (Chennai) of the Income-tax Appellate Tribunal on 27.04.2007 in the case of ***ACIT v. Rogini Garments***: 108 ITD 49 (Chennai) (SB). In order to examine as to whether there were two different views on the aforesaid issue on 17.03.2006, when the Commissioner of Income-tax passed the order under Section 263 of the said Act, the Tribunal referred to various decisions of different benches of the Tribunal prior to 17.03.2006. The decisions were in respect of Section 80IA(9), which is applicable in view of Section 80IB(13). The following decisions, all prior to 17.03.2006, were in favour of the assessee:-

- 1) Decision of the Bangalore bench of the Tribunal in the case of ***Mittal Clothing Co.***: (2005) 4 SOT 626 decided on 20.06.2005;
- 2) Decision of the Jaipur bench of the Tribunal in the case of ***Toshica Creation v. ITO***: 96 TTJ 651 (ITA No.613/Jpr/2005, decided on 19.07.2005);
- 3) Decision of the Bangalore bench of the Tribunal in the case of ***Irfan Sheriff v. ACIT***: (2006) 7 SOT 57 (ITA No.115 Bang, decided on 18.11.2005);
- 4) Decision of the Delhi bench SMC of the Tribunal in the case of ***ITO v. RV Diamond Jewellers Pvt. Ltd.***: (ITA 2252/D/05, decided on 30.11.2005); and
- 5) Decision of the Delhi bench of the Tribunal in the case of ***Bharat Heavy Electricals Ltd v. DCIT***: 98 TTJ 565 (ITA No.6146/Del/1997, decided on 22.07.2005).

9. The tribunal also noted the decisions rendered after 17.03.2006, which were all (except one) in favour of the assessee. The decisions referred to by the Tribunal were:-

- 1) Decision of the Delhi bench of the Tribunal in the case of **DCIT v. Eltek SGS (P) Ltd**: (ITA Nos.3646 and 3669/Del/03, decided on 30.06.2006);
- 2) Decision of the Madras High Court in the case of **SCM Creations v. ACIT**: 218 CTR 126 (Mad) (ITA Nos.310 and 311 of 2008, decided on 06.03.2008);
- 3) Decision of the Chandigarh bench of the Tribunal in the case of **DCIT v. Glaxo Smithkline Consumer Healthcare Ltd**: (ITA No.145/Del/07, decided on 28.05.2008);
- 4) Decision of the Delhi bench of the Tribunal in the case of **ACIT v. Gold Star Industries**: [11 DTR 238 (Tribunal), decided on 06.06.2008]; and
- 5) Decision of the Delhi bench of the Tribunal in the case of **Nodi Exports v. ACIT**: (ITA Nos.1439 and 1440/Del/04, decided on 25.07.2008).

10. All the above decisions, except the decision in the case of ***Nodi Exports*** (*supra*) were in favour of the assessee. Consequently, the Tribunal came to the conclusion that the Assessing Officer had taken a view in consonance with the decisions of the Tribunal referred to above. The same position existed on the day when the Commissioner of Income-tax passed the order under Section 263 of the said Act. Consequently, the Tribunal was of the view that the Assessing Officer's action could not be said to be "erroneous inasmuch as it was prejudicial to the interests of the revenue". The Assessing Officer had taken one of the possible views prevailing at the relevant point of time. The Tribunal also placed reliance on its earlier decision in the case of **Anil Kumar Rastogi v. Commissioner of Income-**

tax: decided on 08.02.2008 in ITA Nos.2627 and 2628/Del/2005 pertaining to the assessment years 2001-02 and 2002-03 where the Tribunal had, *inter alia*, held that on the allowability in deduction under Section 80HHC on the profits without reducing it by the amount of deduction under Section 80IB, there was a cleavage of opinion and that this position continued till the decision in the case of **Rogini Garments** (*supra*) was delivered by the Special Bench of Chennai. Consequently, the Tribunal in **Anil Kumar Rastogi**'s case concluded that when the Commissioner passed the order dated 31.03.2005 under Section 263, there were two different possible views on the issue and, therefore, the provisions of Section 263 could not be invoked.

11. As a result, the Tribunal, without entering into the question of applicability of the provisions of sub-section (9) of Section 80IA and deciding as to which view was sustainable in law, cancelled the order passed by the Commissioner of Income-tax under Section 263 and restored the order of the Assessing Officer on the issue involved in the appeal for the reason that the view taken by the Assessing Officer was a possible view at the relevant point of time.

12. Being aggrieved by the said decision of the Tribunal, the revenue is in appeal before us in both these appeals. The learned counsel for the appellant / revenue submitted that the impugned decisions of the Tribunal were liable to be set aside in view of the fact that the Tribunal ignored a very important circumstance and that is that the Assessing Officer in making

the assessment order made no reference to two possible views. The learned counsel submitted that, in fact, the Assessing Officer made no mention of the provisions of Section 80IB(13) read with Section 80IB(9) of the said Act and the assessment order was passed in complete ignorance of the said provisions. According to the learned counsel, the situation in these appeals was not one where the Assessing Officer, faced with two different but plausible views, adopted one of them, but, the position was that the Assessing Officer did not at all refer to two different views or even to the relevant provisions and was thus a case of clear non-application of mind. Such a situation was clearly correctible by the Commissioner of Income-tax in exercise of his powers under Section 263 of the said Act. In aid of the aforesaid submission, the learned counsel for the appellant placed reliance on the following decisions:-

- 1) **Gee Vee Enterprises v. Additional Commissioner of Income-tax, Delhi**: 99 ITR 375(Del);
- 2) **Malabar Industrial Company Ltd v. Commissioner of Income-tax**: 243 ITR 83 (SC);
- 3) **Commissioner of Income-tax v. Deepak Kumar Garg**: [2008] 299 ITR 435 (MP);
- 4) **Deepak Kumar Garg v. Commissioner of Income-tax**: SLP(C) Nos.4814-16/2008 dismissed by the Supreme Court on 10.03.2008: 299 ITR 91 (Journal).

13. On the other hand, Mr Ajay Vohra, the learned counsel appearing on behalf of the respondent / assessee, supported the decision of the Tribunal in both the appeals and submitted that the Assessing Officer had taken a plausible view based on various decisions of the Tribunal. Even

on the dates on which the Commissioner of Income-tax passed the orders under Section 263 in the two respective appeals, the view taken by the Assessing Officer was a plausible one inasmuch as the issue was debatable. It was also submitted that it was not a case of non-application of mind on the part of the Assessing Officer inasmuch as the Assessing Officer had considered the claim of deduction of the respondent / assessee under both Sections 80HHC and 80IB in great detail. It was also submitted that the assessee has no control over the manner in which the Assessing Officer makes his order of assessment and that merely because the deduction allowed under Section 80IB was not reduced from the profits and gains while computing the deduction under Section 80HHC, it cannot be said that the Assessing Officer had not applied his mind to the provisions of Section 80IB(13) read with Section 80IA(9). The learned counsel for the respondent / assessee placed reliance on the following decisions:-

- 1) **Commissioner of Income-tax v. Max India Ltd: 268 ITR 128(P&H);**
- 2) **Commissioner of Income-tax v. Max India Ltd: 295 ITR 282(SC);**
- 3) **Hari Irion Trading Company v. Commissioner of Income-tax: 263 ITR 437 (P&H);**
- 4) **Commissioner of Income-tax v. Eicher Limited: 294 ITR 310 (Delhi);**
- 5) **Commissioner of Income-tax v. Kelvinator of India Limited: 256 ITR 1 (FB) (Del);**
- 6) **Godrej Agrovet Limited v. Assistant Commissioner of Income-tax and Others: 290 ITR 252 (Bom).**

14. Let us first examine the decisions cited by the learned counsel for the respondent / assessee. The Punjab & Haryana High Court in the case of ***Max India Limited*** (*supra*) took the position that if the view expressed by the Assessing Officer was a possible view, the Commissioner of Income-tax would have no jurisdiction to interfere with such a view by exercising his powers under Section 263 of the said Act. The decision of the Punjab & Haryana High Court in the case of ***Max India Ltd*** (*supra*) was carried to the Supreme Court and the view taken by the Punjab & Haryana High Court was confirmed in **CIT V. Max India Ltd: ITR 295 ITR 282 (SC)**. The Supreme Court also clarified its earlier decision in the case of ***Malabar Industrial Company Ltd*** (*supra*), which has been strongly relied upon by the learned counsel for the revenue, that the phrase “prejudicial to the interest of the revenue” in Section 263 had to be read in conjunction with the expression “erroneous”. The Supreme Court further clarified that every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interest of the revenue. As an example, the Supreme Court noted that when an Income-tax Officer adopts one of the courses permissible in law and it results in loss of revenue, then it cannot be treated as an erroneous order prejudicial to the interest of revenue. Furthermore, where two views are possible and the Income-tax Officer has taken one view with which the Commissioner of Income-tax does not agree, it cannot, once again, be treated as an erroneous, order prejudicial to the interest of the revenue unless, of course, the view taken by the Income-tax Officer is unsustainable in law. The Supreme Court in the case of ***Max***

India Ltd (supra) also noted, with reference to Section 80HHC that the said provision has been amended 11 times and that the mechanics of the Section have become too complicated over the years that “two views were inherently possible” and, therefore, the subsequent amendment in 2005, even though it was retrospective, would not attract the provisions of Section 263, particularly because it is the position of law as it stood on the date when the Commissioner passed the order under Section 263, which is to be taken into account in testing whether the Commissioner of Income-tax correctly exercised his powers under Section 263 of the said Act.

15. *Hari Irion Trading Company (supra)* was another case which was decided by the Punjab & Haryana High Court. In this decision, the Punjab & Haryana High Court took the view that the Commissioner of Income-tax, while exercising his powers under Section 263, has to look into not only the assessment order, but the entire record of the proceedings before arriving at a conclusion as to whether the Assessing Officer had examined any issue or not. This is so because the assessee has no control over the way the assessment order is drafted. It was further observed that during the course of assessment proceedings, the Assessing Officer examines numerous issues and, generally, the issues which are accepted, do not find mention in the assessment order and only such points are taken note of on which the assessee’s explanations are rejected and additions / disallowances are made. The said High Courts observations to this effect were as under:-

“A bare perusal of the aforesaid provisions shows that the CIT can exercise powers under sub-s. (1) of s. 263 of the Act only after examining "the record of any proceedings under the Act". The expression 'record' has also been defined in cl. (b) of the Explanation so as to include all records relating to any proceedings available at the time of examination by the CIT. Thus, it is not only the assessment order but the entire record which has to be examined before arriving at a conclusion as to whether the AO had examined any issue or not. The assessee has no control over the way an assessment order is drafted. The assessee on its part had produced enough material on record to show that the matter had been discussed in detail by the AO. The least that the Tribunal could have done was to refer to the assessment record to verify the contentions of the assessee. Instead of doing that, the Tribunal has merely been swayed by the fact that the AO has not mentioned anything in the assessment order. During the course of assessment proceedings, the AO examines numerous issues. Generally, the issues which are accepted do not find mention in the assessment order and only such points are taken note of on which the assessee's explanations are rejected and additions / disallowances are made.

(underlining added)

The view taken by the Punjab & Haryana High Court in ***Hari Iron Trading Company*** (*supra*) was accepted by this court in ***Eicher Limited*** (*supra*) in the following words:-

“15. In *Hari Iron Trading Co. v. CIT*: (2003) 263 ITR 437, a Division Bench of Punjab and Haryana High Court observed that an assessed has no control over the way an assessment order is drafted. It was observed that generally, the issues which are accepted by the Assessing Officer do not find mention in the assessment order and only such points are taken note of on which the assessee's Explanations are rejected and additions / disallowances are made. We agree.”

16. In ***Kelvinator of India*** (*supra*), a Full Bench of this court held that when a regular order of assessment is passed under Section 143(3), a presumption can be raised that such an order has been passed upon an

application of mind. It was further observed that a presumption could also be raised to the effect that in terms of clause (3) of Section 114 of the Indian Evidence Act, judicial and official acts have regularly been performed.

17. The last decision referred to by the learned counsel for the assessee was that of the Bombay High Court in the case of **Godrej Agrovet Limited** (*supra*). This decision had been referred to in the context of the controversy with regard to the scope of Section 80IB(13) read with Section 80IA(9), wherein the Bombay High Court observed as under:-

“20. The next contention of the Revenue is that in the regular assessment, the Assessing Officer has not discussed the provisions of section 80-IB(13) read with section 80-IA(9) of the Act and if those provisions were taken into consideration, there would be negative profit and consequently deduction under Section 80HHC could not be granted. This argument is also without any merit because, in the affidavit in reply filed on behalf of the Revenue it is admitted that the assessee had not made exports of the goods manufactured in the industrial units eligible for deduction under section 80-IB. If the goods manufactured in the units availing of deduction under section 80-IB were not exported, then obviously the goods manufactured in those units would not be taken into account for computation of deduction under section 80HHC. In that event, the question of applying the principles laid down in section 80-IA(9) while computing the deduction under section 80HHC does not arise at all.”

18. From the aforesaid discussion, it is apparent that the expression prejudicial to the interest of revenue appearing in Section 263 has to be read in conjunction with the expression “erroneous” and that every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interest of the revenue. In cases where the Assessing Officer adopts one of the courses permissible in law or where two views are possible and the Income-tax Officer has taken one view, the

Commissioner of Income-tax cannot exercise his powers under Section 263 to differ with the view of the Assessing Officer even if there has been a loss of revenue. Of course, if the Assessing Officer takes a view which is patently unsustainable in law, the Commissioner of Income-tax can exercise his powers under Section 263 where a loss of revenue results as a consequence of the view adopted by the Assessing Officer. It is also clear that while passing an order under Section 263, the Commissioner of Income-tax has to examine not only the assessment order, but the entire record of the profits. Since the assessee has no control over the way an assessment order is drafted and since, generally, the issues which are accepted by the Assessing Officer do not find mention in the assessment order and only those points are taken note of on which the assessee's explanations are rejected and additions / disallowances are made, the mere absence of the discussion of the provisions of Section 80IB(13) read with Section 80IA(9) would not mean that the Assessing Officer had not applied his mind to the said provisions. As pointed out in *Kelvinator of India (supra)*, when a regular assessment is made under Section 143(3), a presumption can be raised that the order has been passed upon an application of mind. No doubt, this presumption is rebuttable, but there must be some material to indicate that the Assessing Officer had not applied his mind.

19. We now examine the decisions upon which reliance was placed by the learned counsel for the revenue. The first is the case of *Gee Vee Enterprises (supra)*. The Delhi High Court in that case observed as under:-

“... The Income-tax Office is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. The meaning to be given to the word "erroneous" in section 263 emerges out of this context. 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 the 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 the facts stated therein are assumed to be correct.”

(underlining added)

20. The Supreme Court in *Malabar Industrial Company Ltd* (*supra*), with reference to the powers exercised under Section 263 of the said Act, observed as under:-

“A bare reading of this provision makes it clear that the prerequisite to exercise of jurisdiction by the CIT suo motu under it, is that the order of the ITO is erroneous insofar as it is prejudicial to the interests of the Revenue. The CIT has to be satisfied of twin conditions, namely, (i) the order of the AO sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent - if the order of the ITO is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue - recourse cannot be had to s. 263(1) of the Act.

There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the AO; it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. **In the same category fall orders passed without applying the principles of natural justice or without application of mind.**”

(emphasis supplied)

In the context of the factual matrix of the case before it, the Supreme Court, in *Malbar Industrial Company Ltd (supra)*, concluded as under:-

“In the instant case, the CIT noted that the ITO passed the order of nil assessment without application of mind. Indeed, the High Court recorded the finding that the ITO failed to apply his mind to the case in all perspective and the order passed by him was erroneous. It appears that the resolution passed by the board of the appellant-company was not placed before the AO. Thus, there was no material to support the claim of the appellant that the said amount represented compensation for loss of agricultural income. He accepted the entry in the statement of the account filed by the appellant in the absence of any supporting material and without making any inquiry. On these facts the conclusion that the order of the ITO was erroneous is irresistible. We are, therefore, of the opinion that the High Court has rightly held that the exercise of the jurisdiction by the CIT under s. 263(1) was justified.”
(emphasis supplied)

21. The High Court of Madhya Pradesh in the case of *Deepak Kumar Garg (supra)* held that from the order of the Assessing Officer, it was clear that for want of time, the Assessing Officer had done only a semblance of an inquiry and, that too, in a very slip shod manner. The Assessing Officer accepted the version of the assessee without a proper enquiry and as a result, a substantial amount of taxable income was not brought to tax. The court held that in such a case, the assessment order would be erroneous and prejudicial to the interest of the revenue because the law enjoins upon the Assessing Officer to make the assessment order bringing all taxable income to tax and that an enquiry held in a perfunctory manner could not be said to be a proper enquiry before passing the assessment order. It is also relevant to point out that the Madhya Pradesh High Court also noted that no thumb rule of universal application can be

evolved or laid down for the exercise of revisional power under Section 263 of the Act and that it would depend on the facts of each case. However, the Commissioner of Income-tax must be satisfied of the existence of the twin conditions, that is, that the order of the Assessing Officer is erroneous and that it is prejudicial to the interest of the revenue. The decision of the Madhya Pradesh High Court was challenged before the Supreme Court by way of a Special Leave Petition being SLP (C) 4814-16/08, but the same was dismissed by the Supreme Court by its order dated 10.03.2008.

22. From the decisions cited by the learned counsel for the revenue, it is apparent that failure to make an enquiry on the part of the Assessing Officer would be a ground for invoking the powers under Section 263. The Supreme Court in ***Malabar Industrial Company Ltd*** (*supra*) also noted that the cases which fell in the category of non-application of the principles of natural justice or non-application of mind would also satisfy the requirement of the order being erroneous and would, therefore, be amenable to correction under the revisional jurisdiction of Section 263 of the said Act. In the case of ***Gee Vee Enterprises*** (*supra*), the Assessing Officer's order was held to be erroneous because the relevant enquiry was not made. Again, in ***Malabar Industrial Company Ltd*** (*supra*), the Assessing Officer's order was held to be erroneous because it had been made without application of mind and the Assessing Officer had merely accepted the entries in the statement of accounts filed by the assessee in the absence of any supporting material and without making any enquiry. Similarly, in ***Deepak Kumar Garg*** (*supra*), the Assessing Officer accepted the version of

the assessee and for want of time did not conduct any proper enquiry. On these facts, it was found that the order passed by the Assessing Officer was erroneous and prejudicial to the interest of the revenue.

23. In the facts of the present case, we find that there is no material to indicate that the Assessing Officer had not applied his mind to the provisions of Section 80IB(13) read with Section 80IA(9). The presumption that the assessment orders passed under Section 143(3) passed by the Assessing Officer had been passed upon an application of mind, has not been rebutted by the revenue. No additional facts were necessary before the Assessing Officer for the purpose of construing the provisions of Section 80IB(13) read with Section 80IA(9). It was only a legal consideration as to whether the deduction under Section 80HHC was to be computed after reducing the amount of deduction under Section 80IB from the profits and gains. There is no doubt that the Assessing Officer had allowed the deduction under Section 80HHC without reducing the amount of deduction allowed under Section 80IB from the profits and gains. He did not say so in so many words, but that was the end result of his assessment order. Since he was holding in favour of the assessee, as has been observed in *Hari Iron Trading Company (supra)* and *Eicher Limited (supra)*, generally, the issues which are accepted by the Assessing Officer, do not find mention in the assessment order, it cannot be said that the Assessing Officer had not applied his mind. It cannot also be said that the Assessing Officer had failed to make any enquiry because no further enquiry was necessary and all the facts were before the Assessing Officer.

Consequently, we are of the view that the decisions cited by the learned counsel for the revenue, wherein assessment orders were found to be erroneous for want of an enquiry or proper enquiry, would have no application to the present appeals. It is also true that the validity of an order under Section 263 has to be tested with regard to the position of law as it exists on the date on which such an order is made by the Commissioner of Income-tax. From the narration of facts in the Tribunal's order, it is clear that on the date when the Commissioner of Income-tax passed his orders under Section 263, the view taken by the Assessing Officer was in consonance with the views taken by several benches of the Income-tax Appellate Tribunal. Therefore, the conclusion of the Tribunal that the Commissioner of Income-tax could not have invoked his jurisdiction under Section 263 of the said Act was correct. As a result, we answer the question against the revenue and in favour of the assessee by holding that the Income-tax Appellate Tribunal was correct in law in cancelling the order passed by the Commissioner of Income-tax under Section 263 and in restoring the order of the Assessing Officer by holding that the Assessing Officer had taken a possible view at the relevant point of time. The appeals are accordingly dismissed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

V.K. JAIN, J

JULY 05, 2010

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