

GURBAX SINGH
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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

ITA No.111 of 2015 (O&M)

Date of decision: 27.9.2018

The Principal Commissioner of Income Tax 3, Ludhiana

.....Appellant

Vs.

M/s Venus Woollen Mills, Ludhiana

.....Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE AVNEESH JHINGAN**

Present: Mr. Rajesh Katoch, Sr. Standing Counsel for the appellant.
Mr. Sachin Bhardwaj, Advocate for the respondent.

Ajay Kumar Mittal,J.

CM No.17890-II-2018

Allowed as prayed for.

At the joint request of learned counsel for the parties, both the appeals, i.e. ITA Nos. 111 and 141 of 2015 are taken up for hearing today itself.

ITA No.111 of 2015

1. This appeal has been preferred by the revenue under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 17.9.2014 (Annexure-3) passed by the Income Tax Appellate Tribunal, Chandigarh Bench 'B', Chandigarh (hereinafter referred to as "the Tribunal") in ITA No.407/CHD/2013, for the assessment year 2008-09. The appeal was admitted by this Court vide order dated 28.7.2016 for determination of the following substantial question of law:-

“Whether on the facts and in the circumstances of the case,
Hon'ble ITAT Chandigarh is justified in quashing the revisionary

order under Section 263 made by the CIT-3, Ludhiana without appreciating the fact that all the comparison of figures made by the assessee is very much based on the figure taken from books of account duly admitted defective by the assessee himself during survey operation?”

2. A few facts necessary for adjudication of the instant appeal as narrated therein may be noticed. The assessee is engaged in the business of manufacturing/trading of yarn and fiber waste etc. A survey under Section 133A of the Act was conducted at the business premises of the assessee on 28.2.2008 and during the survey, a sum of ₹ 2,15,00,000/- was surrendered as an additional income. The assessee filed its return of income for the assessment year 2008-09 on 27.9.2008 declaring an income of ₹ 1,35,36,300/-. The case was selected for scrutiny and notice was issued to the assessee. The assessment was completed under Section 143(3) of the Act by the Assessing Officer vide order dated 8.12.2010 (Annexure-I) by making an addition of ₹ 15,752/- under Section 40(a)(ia) of the Act. Subsequently, the Commissioner of Income Tax-3, Ludhiana (in short, “the CIT”) vide order dated 28.3.2013 passed under Section 263 of the Act held that the order of the Assessing Officer was erroneous in so far as it was prejudicial to the interests of the revenue. It was observed that the Assessing Officer had failed to make proper verification and the assessment order was passed without necessary verification. Accordingly, the CIT vide order dated 28.3.2013 (Annexure-2) enhanced the income of the assessee by ₹ 1,83,80,208/-. Feeling aggrieved by the order, Annexure-2, the assessee filed an appeal before the Tribunal. The Tribunal vide order dated 17.9.2014 (Anenxure-3) quashed the order dated 28.3.2013 (Annexure A-2) relying upon the decision of the Supreme Court in *Malabar Industrial Company Limited vs. Commissioner of Income Tax*, (2000) 243 ITR 83. Hence the present appeal by the revenue.

3. We have heard learned counsel for the parties and perused the record.

4. Examining the scope of Section 263(1) of the Act, it would be expedient to reproduce the said provision which is relevant for our purpose:-

“263(1) The 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 is erroneous in so far as it is prejudicial to the interests 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 an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

Explanation.- xxxxxxxxxx”

5. A bare perusal of Section 263 of the Act makes it clear that before the CIT passes any order, an opportunity of hearing is required to be provided to the assessee and thereafter, prima facie finding recorded that the order made by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue. Power under Section 263 of the Act can be exercised in relation to a proceeding in which the Assessing Officer has passed an erroneous order prejudicial to the interests of the Revenue. The law envisages fulfillment of following conditions for assumption of jurisdiction under Section 263 of the Act:-

(a) such order should be erroneous ;

(b) and it should be prejudicial to the interests of the revenue.

In other words, two circumstances must exist to enable the Commissioner to exercise power of revision under Section 263, viz., (a) the order is erroneous; (b) by virtue of the order being erroneous, prejudice has been caused to the interests of the revenue. Wherever one of them is absent - if the order of the assessing officer is erroneous but is not prejudicial to the interests of the revenue or if it is not erroneous but is prejudicial to the interests of the revenue - assumption of revisional jurisdiction under Section 263 of the Act would not be proper.

6. The object of the enactment of the aforesaid provision is to correct an order which is prejudicial to the interests of the revenue. The purpose behind incorporating this provision in the statute is to ensure that interests of the revenue is safeguarded by an erroneous order passed by the Assessing Officer as the Department has no right to file an appeal against the order of the Assessing Officer. It is not the power as a substitute for the power of the Assessing Officer to make assessment whereas the revisional power under Section 263 of the Act is certainly available where the order of the Assessing Officer is erroneous and prejudicial to the interests of the revenue. There is no strait jacket formula for categorizing an order to be erroneous and prejudicial to the interests of the revenue but depends upon the facts of each case.

7. Section 263 of the Act had been matter of legal interpretation in numerous decisions. The Apex Court in *Malabar Industrial Co. Limited's* case (supra) observed as under:-

"7. There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; 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 falls orders passed without applying the principles of natural justice or without application of mind."

8. Adverting to the factual matrix in the present case, a survey was conducted at the business premises of the assessee on 28.2.2008 and during survey, a surrender of ₹ 2,15,00,000/- was made by the assessee as additional income. The aforesaid surrender was on account of following undisclosed income:-

(a) ₹ 70,00,000/- on account of unexplained investment in stock;

(b) ₹ 4,00,000/- on account of excess cash found during survey;

(c) ₹ 1,31,00,000/- unaccounted investment made in construction of building at 424, I.A.Area, Ludhiana;

(d) ₹ 10,00,000/- additional income offered on account of discrepancy on account of any mistake/omission/discrepancy in the books of account.

9. The Assessing Officer vide assessment order dated 08.12.2010 passed under Section 143(3) of the Act after recording that surrender of ₹ 2,15,00,000/- was made during survey under Section 133A of the Act on 28.2.2008 assessed the taxable income at ₹ 1,35,52,050/- after making an addition of only ₹ 15,752/- under Section 40(a)(ia) of the Act to the returned income of ₹ 1,35,36,300/-. A perusal of the assessment order does not show that the Assessing Officer applied its mind to the correctness of the books of account produced before her except to note that the books of accounts were produced and test checked. The Assessing Officer was required to have carefully dealt with the present case especially where the assessee had surrendered ₹ 2,15,00,000/- during survey under Section 133A of the Act carried out on 28.2.2008 where huge amount of ₹ 1,31,00,000/- was surrendered on account of undisclosed investment in construction of building in 424 IA-Area, Ludhiana and ₹ 70,00,000/- on account of unexplained investment in stock. From the narration of facts noticed hereinabove, it is clear that the assessee has attempted to off set the surrender made by him by claiming loss figure in the business otherwise the taxable income could not have been ₹ 1,35,52,050/- against a surrender of ₹ 2,15,00,000/- made by it. The Tribunal has also made certain observations in that behalf but proceeded to cancel the revisional order passed by CIT under Section 263 of the Act. The relevant observations read thus:-

“26. Before parting, we would like to observe that Assessing Officer may have called for certain details which have been filed but no discussion at all has been made in the assessment order and in our opinion the Assessing Officer in general should be more cautious and

vigilant and discuss the various aspects of the case at least briefly in the body of the assessment order. xxxxxx”

10. The CIT vide order passed under Section 263 of the Act had computed the enhancement of ₹ 1,83,80,208/- as under:-

“14. The AO failed to take into account the decision of the Hon’ble Jurisdiction High Court as well as Jurisdiction Tribunal that in these circumstances no cognizance can be taken of the books of accounts produced by the assessee and also surrendered amount cannot be treated as business income in the absence of any evidence. The books of account of the assessee are rejected. Keeping in view the ratio of the decision of the Hon’ble Jurisdiction High Court as well as Hon’ble Jurisdiction Tribunal, the GP rate of assessment year 2007-08 is applied and the income is enhanced to that extent which is computed as under:-

i) Total turnover of the current year	₹ 32,01,01,795/-
ii) GP shown	₹ 3,67,73,331/-
iii) Rate of GP shown	11.48%
iv) Rate of GP in A.Y. 2007-08	17.23%
v) GP worked out adopting GP rate @ 17.23%.	₹ 5,51,53,539/-
vi) Difference in GP	₹ 1,83,80,208/-

Income to be enhanced by ₹ 1,83,80,208/-

Based on the above discussion, I am also satisfied that the assessee has concealed income or furnished inaccurate particulars of income.”

11. In such circumstances, it cannot be concluded that the assessment order dated 08.12.2010 passed under Section 143(3) of the Act was not erroneous and prejudicial to the interests of the revenue. Accordingly, it is held that the Tribunal erred in setting aside order dated 28.3.2013 passed by CIT under Section 263 of the Act.

12. At this stage, it was pointed out that in pursuance to the order passed by the CIT dated 28.3.2013, the assessment was completed under Section 143(3) read with Section 263 of the Act on 28.3.2013 recomputing the taxable income enhancing the returned income by ₹ 1,83,80,208/-. The onus was heavily on the assessee to discharge its obligation to satisfy that the books of account were genuine and properly maintained especially when a huge surrender of ₹ 2,15,00,000/- had been made during survey under Section 133A of the Act on 28.2.2008.

13. The powers of CIT under Section 263 of the Act are very wide. The only limitation on his power is that he must have some material which would enable him to form a prima facie opinion that the order passed by the officer was erroneous in so far as it is prejudicial to the interests of the revenue. Once he concludes on the basis of the material that the order of the Assessing Officer was erroneous and prejudicial to the interests of the revenue, the CIT is empowered to pass an order as the circumstances of the case may warrant. He may pass an order enhancing the assessment or he may modify the assessment. He is also empowered to cancel the assessment and direct a fresh assessment. The CIT is fully competent to adopt any one of the three causes indicated by the said provision.

14. The CIT while coming to the conclusion that declared income is to be enhanced by ₹ 1,83,80,208/- had dealt with the matter in detail before so concluding. It would be expedient to reproduce the findings of the CIT which are quoted below:-

“5. I have carefully considered the submission of the assessee. The Assessee was specifically asked as to why the books of account be not rejected as the books of account are not reliable in view of the surrender made by the assessee on various heads. The Assessee did

not give any specific reply and simply stated that the AO did not point out any specific defects in the books of account. What greater proof is required than the own admission of the assessee that there are discrepancies in the books of account and a huge sum of ₹ 2.15 crores had been offered. No accountancy principle justifies that such books of account are reliable. The AO failed to reject the books of account, rather without making any proper inquiry accepted the books of account as true.

6. It is also seen that the assessee adopted certain methods to reduce the income after making surrender of ₹ 2.15 crores. The assessee has taken a plea that there was volatility in the market. The assessee failed to give any evidence that there was volatility in the market. The purchase/sale bills cannot be believed in view of the fact that such books of account are reliable to be rejected.

7. A statement of Shri Sanjay Gupta partner of M/s Venus Woollen Mills was recorded on 28.2.2008. The statement is reproduced as under:-

Q.1 During the course of survey inventory of stock of the firm Venus Woollen Mills has been prepared. As per this inventory stock available physically comes to ₹ 6,40,65,390/-. As against this stock as per books have been shown at ₹ 5,74,42,727/-. Thus, there is difference of ₹ 66,22,665/- being excess stock found at your premises. How do you explain the same?

Ans. I cannot explain this difference at the moment. However, to buy peace of mind and settle the affair I offer an additional income of ₹ 80 lacs (Seventy lacs) in respect of unexplained investment in stock subject to no penalty under Section 271(1)(c).

Q.2. During the course of survey inventory of cash available at your business premises has been prepared as per this inventory cash physically available is ₹4,63,570/-. However, cash as per your books of account comes to ₹75,802/-. Please explain the source of excess cash found at ₹ 3,87,768/-.

Ans. I cannot explain this at moment. However, to buy peace I offer a sum of ₹4 lacs being additional income on this account subject to no penalty under Section 271(1)(c).

Q.3. During the course of survey a slip has been found. As per this slip a sum of ₹ 1,31,00,000/- has been invested by you in the construction of building at 424, I.A-A. Please go through the same and show where the amount so invested is accounted for in the books? If not what is the source thereof?

Ans. I have perused this slip. I have also put my signatures thereon as a book of having seen this slip. As per slip ₹ 1,31,00,000/- has been spent on construction of factory building of Venus Woollen Mills at 424, Industrial Area-A, Ludhiana during the financial year 2007-08 over and above the amount disclosed in the regular books of account. This amount has been spent out of the undisclosed income of the firm which I am offering for tax subject to no penalty under Section 271(1)(c).

Q.4. Do you wish to offer any additional income on anything other than the above?

Ans. I wish to declare a sum of ₹ 10 lacs over the above discrepancies to cover any possible mistake/omission/discrepancy in the books of account for the financial year 2007-08. Thus, in total a sum of ₹ 2,15,00,000/- (Rs.Two crores and fifteen lacs) is offered for tax over and above the normal income as per account for the financial year 2007-08.

8. The above statement itself shows that the assessee's books of account cannot be relied upon in view of the details of discrepancies found during the course of survey and the assessee has also admitted such discrepancies. If excess stock/excess cash is found, it is inconceivable that such books of account are reliable. The assessee is unnecessarily putting an emphasis that the AO has verified all the records. Infact, the AO failed to apply his mind that under such circumstances such books of account cannot be relied upon.

9. The AO conducted the proceedings by raising queries on various dates in the order sheet. A copy of order sheet is placed as Annexure I.

10. The AO also issued questionnaire vide letter dated 22.11.2010. A copy is placed as Annexure II. The assessee filed reply vide letter dated 29.11.2010. A copy is placed as Annexure III.

11. The assessee also filed further reply vide letter dated 3.12.2010. In para 11 of the reply dated 3.12.2010, the assessee submitted as under:-

“As regards, fall in the GP rate comparison to the last year is concerned, we have already filed detailed submissions vide our earlier letter. Further, in continuation of that we are filing herewith the trading account as on date of survey and in that trading account GP comes to 11.13% and its proof our bonafide at page 69. Another reason was that during the year under consideration, our purchase rate is increased as compared to the last year and while sale rates are decreased as compared to the last year, the comparison for the same i.e. purchase and sales are being filed therewith at page 70-98 alongwith bills of sales and purchase that is why our GP rate has gone down as compared to the last year.”

12. The AO failed to apply his mind and simply accepted the explanations of the assessee. Once there are discrepancies in the books of account and also surrender is made, the AO did not come to a logical conclusion that the very books of account which are unreliable have been relied upon while accepting the explanations of the assessee. In para of the reply dated 15.3.2013, the assessee has submitted that there is not much difference in the GP rates as returned by the assessee if the previous year's rate is taken out of the picture. The assessee has been earning profits and the assessee has failed to give any cogent evidence for the drastic fall in the GP rate as compared to earlier years. A general statement that there was fluctuation in the rates is not acceptable. Moreover, the books of account of the assessee are not reliable.

13. One more aspect on the particular facts of case is required to be seen. The assessee adopted some methods to offset the income surrendered. Otherwise the income should not have come below the income surrendered by the assessee plus a normal income declared in the last year. It was a conscious attempt on the part of the assessee to offset the income declared during course of survey. Even the net profit rate has been brought down from 9.32% to 4.32%. This further indicates that the assessee has adopted a method to offset the amount surrendered.”

15. No illegality or perversity could be pointed out in the order passed by the CIT which may warrant interference by this Court. Accordingly, the appeal is allowed and the order dated 17.9.2014 (Annexure-3) passed by the Tribunal is set aside. The substantial question of law is answered in favour of the revenue.

16. Before parting, it is considered appropriate to direct the Registry of this Court to forward a copy of this order to the Central Board of Direct Taxes (CBDT) to issue necessary instructions to all the Assessing Officers that in cases of search and seizure or where survey operations have been carried out by the Department and surrender made or concealed income detected, to ensure proper scrutiny of such cases and discuss reasons for rejecting or accepting the books of account of the assessee and not to merely record in slipshod or cursory manner that ‘the books of account produced and test checked’ as done by the Assessing Officer in the present case.

(Ajay Kumar Mittal)
Judge

September 27, 2018
‘gs’

(Avneesh Jhingan)
Judge

Whether speaking/reasoned
Whether reportable

Yes
Yes