

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

ITA No. 240 of 2016
Date of decision: 06.09.2018

Shri. Arun Trehan, Plot No.3, Timber Market, Sector 26, Chandigarh.

.....Appellant

Vs.

Principal Commissioner of Income Tax-II, Chandigarh.

.....Respondent

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

Present: Ms. Radhika Suri, Sr. Advocate with Mr. Manpreet Singh
Kanda, Advocate for the appellant.

Ms. Urvashi Dhugga, Sr. Standing Counsel for the
respondent.

Ajay Kumar Mittal,J.

1. This order shall dispose of ITA Nos. 240 of 2016 and 449 of 2015 as according to the learned counsel for the parties, the issue involved in both these appeals is identical. However, the facts are being extracted from ITA No.240 of 2016.

2. ITA No.240 of 2016 has been filed by the appellant-assessee under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 21.03.2016, Annexure A.3 passed by the Income Tax Appellate Tribunal, Chandigarh Bench (in short, "the Tribunal") in ITA No.9/Chd/2016, for the assessment year 2011-12.

3. The appeal was admitted on 15.09.2016 to consider the following substantial questions of law:-

- i) “Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal erred in law in upholding the proceedings under Section 263 of the Income Tax Act even though the original assessment order had been passed after due application of mind and after adequate inquiry?
- ii) Whether on the facts and in the circumstances of the case, the Tribunal erred in law in following its decision in the case of Hycron Electronics without adjudicating the issue relating to assumption of jurisdiction under Section 263 of the Income Tax Act?
- iii) Whether on the facts and in the circumstances of the case, the Tribunal erred in law in disallowing the benefit of substantial expansion under Section 80IC to the units that came into existence after 7.1.2003 by stating that initial assessment year can’t be re-fixed?
- iv) Whether the Id. Income Tax Appellate Tribunal is right in law and facts in holding that definition of initial assessment year does not allow the undertaking to claim deduction under Section 80IC at the rate of 100% upon their substantial expansion?
- v) Whether the order of the Id. Income Tax Appellate Tribunal is perverse as the same is contrary to the material on record?”

4. A few facts relevant for the decision of the controversy involved as narrated in ITA No. 240 of 2016 may be noticed. The appellant-assessee filed a return of income on 23.9.2011 for the assessment year 2011-12 declaring an income of ₹ 8,97,200/- after claiming deduction under Section 80IC of the Act to the tune of ₹ 51,76,063/- which was processed under Section 143(1) of the Act. Notice under Section 143(2) of

the Act was served on the assessee. The Assessing Officer after scrutinizing the accounts accepted the returned income of ₹ 8,97,200/-. The Assessing Officer passed the assessment order accepting the claim of deduction under Section 80IC of the Act by the assessee. Thereafter, the Principal Commissioner of Income Tax (CIT) issued a notice under Section 263 of the Act on 12.11.2015 to the assessee on the ground that the deduction claimed under Section 80IC of the Act was erroneous and prejudicial to the interests of the revenue and the proceedings under Section 263 of the Act were initiated against the assessee. The assessee filed reply on 01.12.2015 which was examined by the CIT. Relying on the Tribunal's decision in the case of *M/s Hycron Electronics Baddi*, the order passed by the Assessing Officer was revised in exercise of jurisdiction under Section 263 of the Act. The CIT cancelled the order dated 31.01.2014 Annexure A.1, passed by the Assessing Officer and directed him to pass a fresh order in accordance with law. The assessee filed an appeal before the Tribunal. Vide order dated 21.03.2016, Annexure A.3, the Tribunal concluded that the Assessing Officer had allowed the deduction under Section 80IC of the Act without any inquiry. The Tribunal by following its own decision in the case of *M/s Hycron Electronics* (supra) upheld the order passed by the CIT. Hence the instant appeals by the appellant-assessee.

5. We have heard learned counsel for the parties.

6. Questions No. (i) & (ii) as claimed by the assessee relate to assumption of jurisdiction under Section 263 of the Act by the CIT. Questions No. (iii) & (iv) are on the merits of the controversy relating to admissibility of deduction under Section 80IC of the Act in case of

substantial expansion undertaken by the assessee. Question No. (v) as claimed is general in nature and, therefore does not arise.

7. Adverting to questions No. (i) & (ii) first, which relate to the assumption of jurisdiction by the CIT under Section 263 of the Act, it would be expedient to reproduce Section 263 (1) of the Act 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”

8. 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.

9. 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.

10. Section 263 of the Act had been matter of legal interpretation in numerous decisions. The Apex Court in *Malabar Industrial Co. Limited vs. CIT*, (2000) 243 ITR 83 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.”

11. The primary contention of learned counsel for the assessee was that where two views are possible, then in that situation to exercise revisional power under Section 263 of the Act would be conferring an appellate power to be exercised by the revenue against the order of the Assessing Officer which is not permissible under the statute. Support was gathered from the following observations of the Apex court in ***CIT vs. Amitabh Bachhan***, (2016) 384 ITR 200:-

“21. There can be no doubt that so long as the view taken by the Assessing Officer is a possible view the same ought not to be interfered with by the Commissioner under Section 263 of the Act merely on the ground that there is another possible view of the matter. Permitting exercise of revisional power in a situation where two views are possible would really amount to conferring some kind of an appellate power in the revisional authority. This is a course of action that must be desisted from.”

Reliance was also placed on the decision in ***Malabar Industrial Co.’s case*** (supra) and ***CIT vs. Max India Limited***, (2007) 295 ITR 282.

12. The legal position expounded above is unexceptionable. However, the applicability of these principles would depend upon facts from case to case. A perusal of the assessment order passed by the Assessing Officer under Section 143(3) of the Act shows that the returned income of the assessee at ₹ 8,97,200/- was accepted. However, the CIT while exercising revisional jurisdiction under Section 263 of the Act

expressly noted regarding the claim of the assessee @ 100% deduction under Section 80IC of the Act as under:-

“3. From the perusal of the assessment record, it has been noticed that the initial year for claiming deduction under Section 80IC is assessment year 2006-07. Accordingly, you were eligible for claiming 100% deduction upto next five years i.e. till assessment year 2010-11 and thereafter deduction under Section 80IC was to be allowed @ 25% for next five assessment years. You have claimed 100% deduction in assessment year 2011-12 on the basis of substantial expansion undertaken in the firm M/s M&A Industries during financial year 2010-11. The commercial activities in the firm M/s M&A Industries were started in the financial year 2005-06 and 100% deduction under Section 80IC of the Act is to be allowed only to those concerns which were in existence before coming in force the provisions of Section 80IC i.e. before 1.4.2004. The issue has not been taken up by the Assessing Officer while framing the assessment under Section 143(3) of the IT Act. Hence the issue remains unexplained on your part and unexamined on the part of the Assessing Officer.

5. In view of the facts stated above, it is held that the assessment framed under Section 143(3) on 31.1.2014 is erroneous in so far as prejudicial to the interest of the revenue. You are, therefore, requested to show cause as to why assessment framed vide assessment order dated 31.1.20124 under Section 143(3) of the Income Tax Act, 1961 should not be cancelled by invoking the provisions of section 263 of the Income Tax Act, 1961.”

13. After hearing the response of the authorized representative of the assessee, the CIT noted that the only issue in the case was regarding percentage of profit and gains from eligible unit which was to be allowed as deduction under Section 80IC of the Act after five years where substantial expansion has been carried out during the period relating to the

assessment year 2011-12. The conclusion recorded in the revisional order is as under:-

“In view of the clear position of law the assessee was entitled for 25% and not 100% of the profit and gains of the unit for which initial year was assessment year 2006-07. This position of law has also been held by the Hon’ble ITAT, Chandigarh in its decision dated 27.5.2015 deciding twenty appeals through a composite order in the lead case of *M/s Hycron Electronics Baddi, Solan vs. ITO, Ward 2, Baddi* in ITA No.798/Chd/2012. However, in the instant case the AO did not apply the correct provision and allowed hundred percent of the profit and gains as deduction under Section 80IC making the order patently erroneous as well as prejudicial to the interest of revenue. This action of the Assessing Officer in allowing 100 per cent deduction after 5th year or any of the subsequent assessment year of the initial year might set a bad trend or pattern for similar assessments.”

14. In the present case, the claim of the assessee for 100% deduction under Section 80IC of the Act after the expiry of initial five years from assessment year 2006-07 when the commercial activities in the firm M/s M&A Industries were started, whereas substantial expansion was carried out during the period relating to assessment year 2011-12 was not admissible. The Assessing Officer had not expressed any view in that behalf as is discernible from the assessment order. Moreover, the Tribunal in the case of *M/s Hycron Electronics’s* case (supra) had also held similar issue against the assessee. No doubt, the Himachal Pradesh High Court did express contrary view in appeal against the said decision of the Tribunal which was reversed by the Apex court in *Commissioner of Income Tax Vs. M/s Classic Binding Industries*, Civil Appeal No(s) 7208 of 2018 decided on 20.08.2018.

Thus, contention of the assessee that where two views are possible, recourse to proceedings under Section 263 of the Act is unwarranted, does not come to his rescue in the present factual matrix as noticed hereinbefore.

15. Adverting to question Nos.(iii) and (iv) on the merits of the controversy regarding claim of 100% deduction under Section 80IC of the Act for the assessment year 2011-12 when the industrial unit had been set up in the financial year 2005-06 relating to assessment year 2006-07, it could not be disputed that the matter is no longer *res integra* and is concluded by the decision of the Apex court in ***Classic Binding Industries' case*** (supra) against the assessee and in favour of the revenue.

16. In view of the above, the substantial questions of law claimed by the assessee are answered accordingly. Consequently, both the appeals stand dismissed.

(Ajay Kumar Mittal)
Judge

September 06, 2018

(Avneesh Jhingan)

'gs'

Judge

Whether speaking/reasoned

Yes

Whether reportable

Yes

In the present case, undisputedly the appellant-assessee filed its income tax return on 23.09.2011 for the assessment year 2011-12 declaring an income of ₹ 8,97,200/- after claiming deduction under Section 80IC of the Act to the tune of ₹ 51,76,063/-. Accordingly, the return was processed under Section 143(1) of the Act. Notice was issued to the appellant-assessee under Section 143(2) of the Act. The Assessing Officer passed the assessment order dated 31.01.2014 accepting the returned income of ₹ 8,97,200/-. Thereafter, CIT on 12.11.2015 issued a notice to the assessee under Section 263 of the Act on the ground that the deduction claimed under Section 80IC of the Act was erroneous and, thus, proceedings under Section 263 of the Act were initiated against the assessee. The assessee filed reply which was examined by the CIT. The CIT replied upon the earlier decision taken by the Tribunal in the case of *M/s Hycron Electronics Baddi*, and revised the order passed by the Assessing Officer in exercise of jurisdiction under Section 263 of the Act. The Tribunal upheld the order passed by the CIT. Hence, the present appeals.