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

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Judgment reserved on: 08.12.2023
Judgment pronounced on: 08.01.2024

+ **ITA 730/2023**

PRINCIPAL COMMISSIONER OF INCOME TAX 4 Appellant
Through: Ms Dacchita Shahi, Standing
Counsel.

versus

M/S MOHAK REAL ESTATE PVT LTD Respondent
Through: None.

CORAM:**HON'BLE MR. JUSTICE RAJIV SHAKDHER****HON'BLE MR. JUSTICE GIRISH KATHPALIA****[Physical Hearing/Hybrid Hearing (as per request)]****GIRISH KATHPALIA, J.:**

1. By way of this appeal brought under Section 260A of the Income Tax Act ("the Act"), the revenue has assailed order dated 25.05.2023 of the Income Tax Appellate Tribunal, whereby the appeal bearing no. ITA 1068/Del/2021 pertaining to the Assessment Year 2016-17 filed by the present respondent/assessee was allowed. Having heard learned counsel for the appellant/revenue, we found it not to be a fit case for issuance of notice.

2. Briefly stated, circumstances relevant for present purposes are as follows. On 15.10.2016, the respondent/assessee filed its return of income for Assessment Year 2016-17, declaring its income as Rs.12,85,64,070/- and



the Assessment Order under Section 143(3) of the Act was passed on 07.12.2018.

2.1 However, on 17.03.2021, the Principal Commissioner Income Tax (“PCIT”) cancelled the said Assessment Order, invoking Section 263 of the Act and directed the Assessing Officer to pass fresh Assessment Order. Accordingly, on 27.03.2022, the Assessing Officer passed fresh order under Section 143(3) of the Act, recording disallowance under Section 37 of the Act to the tune of Rs.13,46,28,258/- and a further disallowance of deduction under Section 57 of the Act to the tune of Rs.50,86,297/-, thereby scaling up the total taxable income of the respondent/assessee to Rs.26,82,78,625/-.

2.2 Aggrieved by the order dated 17.03.2021 of the PCIT, the respondent/assessee preferred an appeal before the Income Tax Appellate Tribunal (“the Tribunal”). By way of order dated 25.05.2023, the Tribunal allowed the said appeal of the respondent/assessee, thereby setting aside order dated 27.03.2022, holding that since at the initial stage, the Assessing Officer had completed the assessment under Section 143(3) of the Act after making enquiries and applying mind, assumption of jurisdiction under Section 263 of the Act by the PCIT was not in accordance with law. Hence, the present appeal.

3. During preliminary hearing, the learned counsel for appellant/revenue contended that the impugned order of the Tribunal is contrary to law and facts, so liable to be set aside. For, the Assessing Officer had failed to obtain necessary records like income tax return, balance-sheet and bank statements



etc. of M/s DLF Commercial Projects Corporation with whom the respondent/assessee had entered into development agreement and had received Rs.14,06,00,000/- as advance, therefore, invoking the provisions under Section 263(1) of the Act was justifiable. However, learned counsel for appellant/revenue did not dispute that order under Section 263 of the Act did not at all deal with the submissions of the respondent/assessee in reply to the show-cause notice.

4. At this stage, it would be apposite to briefly refer to the legal position pertaining to Section 263 of the Act.

4.1 In the case of ***Commissioner of Income Tax (Central) Ludhiana vs Max India Ltd.***, (2007) 15 SCC 401, the Supreme Court referred to its earlier judgment in the case of ***Malabar Industrial Company Limited vs CIT***, (2002) 2 SCC 718 and reiterated that every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interest of revenue within the meaning of Section 263 of the Act; and that where the Income Tax Officer adopts one of the courses permissible in law and the same results 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 interest of the revenue, unless the view taken by the Income Tax Officer is not sustainable in law.

4.2 In the case of ***Commissioner of Income Tax, Gujarat II vs Kwaliti Steel Suppliers Complex***, (2017) 14 SCC 548, while dealing with Section



263 of the Act, the Supreme Court held thus:

*“7. This provision has come for interpretation time and again before this Court. Such a power given to the Commissioner to revise the order of the assessing officer is held to be constitutionally valid having regard to the fact that the Department has no right of appeal to the CIT (A) against any order passed by the assessing officer. It is for this reason, Section 263 is enacted to empower the Commissioner with the authority of revising the order of the assessing officer, where the order is erroneous and the error has resulted in prejudice to the interests of the Revenue. As is clear from the language of the provision, **there has to be a proper application of mind by the Commissioner to come to a firm conclusion that the order of the assessing officer is erroneous and prejudicial to the interests of the Revenue. Thus, two conditions need to be satisfied for invoking such a power by the Commissioner, which are:***

- (i) the order of the assessing officer sought to be revised is erroneous; and*
- (ii) it is prejudicial to the interests of the Revenue. (See Malabar Industrial Co. Ltd. v. CIT)*

*8. At the same time, this Court has also laid down that this provision cannot be invoked to correct each and every type of mistake or error committed by the assessing officer. While interpreting the expression “prejudicial to the interests of the Revenue”, it is also held that **order of the assessing officer cannot be termed as prejudicial simply because assessing 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 assessing officer has taken one view with which the Commissioner did not agree. (See CIT v. Arvind Jewellers.)***

*9. It is clear from the above that where two views are possible and the assessing officer has taken one view and the CIT again revised the said order on the ground that he does not agree with the view taken by the assessing officer, in such circumstances the assessment order cannot be treated as an order erroneous or prejudicial to the interest of the Revenue. Reason is simple. **While exercising the revisionary jurisdiction, the CIT is not sitting in appeal.**”*

[Emphasis is ours]

4.3 In the case of *PCIT vs Delhi Airport Metro Express Pvt. Ltd.*, 2017 SCC OnLine Del 12959, a coordinate bench of this court examined the scope of Section 263 of the Act and observed that the conclusion about the



order of the Assessing Officer being erroneous and prejudicial to the interest of revenue has to be arrived at by the Principal Commissioner of Income Tax only after carrying out at least a minimal enquiry and if the same is not done, the conclusion of the Principal Commissioner of Income Tax gets vitiated; that the Principal Commissioner of Income Tax has to record reasons in order to justify exercise of jurisdiction under Section 263 of the Act; and that where the aforesaid was not carried out, the order passed under Section 263 of the Act was not sustainable.

4.4 In the case of *CIT vs Sunbeam Auto Ltd.* (2010) 332 ITR 167, a coordinate bench of this court held that one has to keep in mind the distinction between lack of enquiry and inadequate enquiry; and that merely because the enquiry carried out was inadequate, that by itself would not justify invoking Section 263 of the Act.

4.5 In the case of *CIT vs New Delhi Television Ltd.*, (2014) 220 Taxman 43, a coordinate bench of this court examined the provision under consideration herein and observed thus:

“In paragraph 6 of the order dated 29th March, 2007, the Commissioner uses the expression “erroneous and prejudicial to the interest of revenue” but does not cite any reason or ground for the said conclusion. Use of the words without elucidation indicates, that the said observations are presumptive or a suspicion and mere repetition of words, but this does not satisfy the requirements under Section 263 of the Act. Order under Section 263 must be clear and must set out logical ground and reason as to why the assessment is erroneous and prejudicial to the interest of the revenue.”

[Emphasis is ours]

5. Falling back to the present case, a perusal of the Assessment Order dated 07.12.2018 would clearly show it not to be a case of complete absence



of enquiry. As reflected from para 2 of the said Assessment Order, in compliance with the statutory notices, the respondent/assessee had electronically submitted the details and replies and subsequently, at request of the respondent/assessee, manual scrutiny assessment on account of technical difficulties faced by the respondent/assessee was carried out with necessary approvals and hearings were held on various dates during which the documents and replies submitted by the respondent/assessee were duly considered. Further, as reflected from records produced before the Tribunal, the Assessing Officer had sent notice under Section 142(1) of the Act along with a detailed questionnaire comprising 38 questions to which replies were submitted by the respondent/assessee and the Assessing Officer duly applied mind to the same before passing the Assessment Order. That having been done, it could not be labelled as a case of lack of enquiry and consequently, invocation of Section 263 of the Act was not justified in the light of judicial precedents quoted above.

6. Further, according to records, prior to passing the order under Section 263 of the Act, the PCIT had issued show-cause notice dated 15.02.2021, which was duly served on the respondent/assessee. As mentioned in the order under Section 263 of the Act, on behalf of the respondent/assessee, not just written submissions in response to the show-cause notice were filed but even a chartered accountant and an advocate on behalf of the respondent/assessee attended hearings. But in the order under Section 263 of the Act, the PCIT did not even whisper about the contents of reply to show-cause notice, what to say of holding any enquiry. In the name of dealing with the reply to show-cause notice, the PCIT simply observed that on



behalf of the respondent/assessee, legal issue of assumption of jurisdiction under Section 263 of the Act was raised. But even on that aspect, the PCIT did not record any discussion in the order under Section 263 of the Act.

7. In the order under Section 263 of the Act, the PCIT also did not record the reasons for arriving at the conclusion that the Assessment Order was erroneous and prejudicial to the interest of revenue, what to say of basing the said discussion on some minimal enquiry.

8. Therefore, we have no hesitation to hold that the order under Section 263 of the Act was not sustainable in the eyes of law. Consequently, we find no infirmity in the impugned order of the Tribunal.

9. We are unable to find any substantial question of law in this appeal for our consideration. Therefore, the appeal is dismissed.

**GIRISH KATHPALIA
(JUDGE)**

**RAJIV SHAKDHER
(JUDGE)**

JANUARY 08, 2024/R.Y