

IN THE INCOME TAX APPELLATE TRIBUNAL  
HYDERABAD BENCH ' B ', HYDERABAD

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND  
SHRI CHANDRA POOJARI ACCOUNTANT MEMBER

**ITA No.673/Hyd/2010**  
**Assessment Year 2004-05**

**M/s Rain Commodities Ltd., Vs The Dy. CIT 3(1), Hyderabad**  
**Hyderabad.**  
**(PAN AABCP 2276 K)**  
(Appellant) (Respondent)

Appellant by: Shri Rajan Vora  
Respondent by: Smt. Vasundhara Sinha, DR

**ORDER**

**Per Chandra Poojari, Accountant Member:**

This appeal preferred by the assessee is directed against the order of passed u/s 263 of the IT Act dated 23.3.2009.

2. Brief facts of the case are that the assessee is a limited company incorporated on March 15, 1974 and engaged in the business of manufacturing and trading of cement. The assessee has filed its return of income on Oct. 31, 2004 and the assessment was completed u/s 143(3) vide order dated December, 8 2006. The CIT had issued a notice u/s 263 of the Act dated July 11, 2008 stating that the order of the assessing officer is erroneous in so far as it is prejudicial to the interest of the revenue on the contention that the assessment u/s 143(3) has been completed omitting to assess profit u/s 115JB resulting in short computation of tax to the extent of Rs.7,33,55,613/-. The assessee had filed written submissions dated August 20, 2008 explaining that the gain arising on transfer of assets to wholly owned subsidiary being exempt u/s 47(iv) is not taxable u/s 115JB of the Act based on various judicial precedents.

2.1. The assessee also submitted that the precedents u/s 263 is invalid and void ab initio. The CIT considered the submissions and passed an order u/s 263 of the Act directing the assessing officer to compute the book profit of the assessee after considering the gain arising on transfer of assets to RIL which is exempt u/s 47(iv) as part of book profit. The assessee has preferred an appeal before the Tribunal against the order of CIT u/s 263. The Hon'ble Tribunal was of the opinion that in view of the different decisions of the Tribunals/Courts the matter should be referred to Special Bench. Accordingly, the Special Bench vide order dated 2.7.2010 in ITA No.673/H/2009 had held that the section 47(iv) of the Act has no application in the computation of book profits u/s 115JB. It was also held that computation of income under normal provisions of the income tax and the book profit are two parallel computations. In the absence of exclusion of exempt capital gains in the computation of book profit under the provisions of section 115JB of the Act, the assessee is not entitled for the same. Against this order the assessee company had filed Miscellaneous Application u/s 254(2) of the Act on the following grounds:

i). Whether the assessing officer has the power to recompute the books profits u/s 115JB of the Act by considering the profit and loss account prepared as per schedule VI of the Companies Act 1956.

ii). Whether the commissioner was justified in invoking the provisions of section 263 of Act.

2.3. The Tribunal vide order dated 31.8.2010 in MA No.128/H/2010 held that there was no error in the order of the Special Bench of the Tribunal u/s 254(2) of the Act. As the Tribunal has directed the division bench to consider the issue of legality of exercise of jurisdiction u/s 263 of the Act in its order of the Special Bench, this issue was taken up for adjudication.

2.4. The assessee's counsel submitted that the CIT erred in invoking the provisions of revision u/s 263. The assessee further submitted that once the assessee has made full disclosure in the books of account and the assessing officer has taken one of the possible views, the CIT cannot revise the order of assessing officer based on the change of opinion.

2.5. Further, the assessee submitted that all the documents and the information based on which the revision was invoked had been available with the assessing officer and the assessing officer has applied his mind in determining the income of the assessee. It was contended that the assessee has relied the various decisions of Tribunal while calculating the book profits and arrived at the conclusion in absence of the jurisdictional HC decision which cannot be the reason for revision u/s 263.

2.6. The learned counsel for the assessee placed reliance on the following decisions to support his contention

- i) Malabar Industries Co. Ltd. Vs. CIT (2000) 243 ITR 83 (SC)
- ii) Khatiza S. Oomerbhoy Vs. ITO (2006) 100 ITD 173 (Mum)
- iii) Girdharilal B. Rohra Vs. CIT (2004) 86 TTJ 177 (Mum).

2.7. Further, he submitted that there was no judicial precedent against the assessee on the issue of taxability of capital gains exempt u/s 47(iv) of the Act while computing book profits u/s 115JB of the Act. In fact, all the judicial precedents cited during the course of submission were in favour of the assessee.

2.8. According to him, in the absence of any negative judicial precedents in relation of aforementioned issued against the assessee proceedings initiated u/s 263 of the Act are invalid and void.

3. The learned departmental representative submitted that a perusal of the assessment order shows that the assessing officer had not even computed the income u/s 115JB, leave along undertake any discussion on the treatment to be accorded to profit on sale of assets to its subsidiary. It is also a fact that the assessing officer had not raised any issue regarding the liability of the assessee u/s 115JB at all in the course of the assessment proceedings, whether by way of notices/letters to the assessee or otherwise. She submitted that failure of the assessing officer to examine the issue amounts to an error prejudicial to revenue for which the CIT is empowered to invoke section 263. She placed reliance on the following judgements:

- i) GEE Vee Enterprises Vs. Addl. CIT 99 ITR 375 (Del.)
- ii) CIT Vs. Emery Stone Manufacturing Co. 213 ITR 843 (Raj.)
- iii) Duggal & Co. Vs. CIT 220 ITR 456 (del.)
- iv) CIT Vs. Shri Bhagwan Das 272 ITR 367 (all)
- v) Thermal Systems (Hyd.) P Ltd. Vs. ACIT (ITA 270/H/2006) dt. 15.2.2008

4. The learned Departmental Representative submitted that the issue before the CIT is only w.r.t. whether the order passed by the assessing officer is erroneous orders prejudicial to the interest of revenue. She submitted on merit the Special Bench vide order dated 02/07/2010 decided the issue regarding the computation of book profit u/s 115JB against the assessee as such the order of the assessing officer is erroneous and there is loss of revenue as a consequence of erroneous order of the assessing officer. Hence, it is prejudicial to the interest of the revenue.

The assessing officer has the committed error in computing the book profit only. The assessing officer has also not applied his mind while computing book profit. She further relied on the following judgements:

1. GEE VEE Enterprises Vs. SCIT ((99 ITR 375) (Delhi HC)
2. CIT Vs. Emery Stone Mfg. Co. (213 ITR 843) (Raj. HC)
3. Duggal & Co. Vs. CIT (220 ITR 456) (Delhi HC)
4. CIT Vs. Shri Bhagwan Das (Allahabad HC) (272 ITR 367)
5. Thermal Systems (Hyd.) (P) Ltd. Vs. ACIT (122 ITD 376) (Hyd.).
6. Appollo Tyres Ltd. Vs. CIT (255 ITR 273) (SC)

5. We have heard both the parties and perused the materials available on record. Let us examine the decision relied by the learned authorised representative in the case of Malabar Industries Co. Ltd. Vs. CIT (243 ITR 83) (SC). In this case it was held that:

**“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 the ITO adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the ITO 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 ITO is unsustainable in law.”**

1. In the case of Mrs. Khatiza S. Oomerbhoy Vs. ITO (Mum) (100 ITD 173) where in it was held that:

- i) the commissioner must record satisfaction that the order of the assessing officer is erroneous and prejudicial to the interests of the revenue. Both the conditions must be fulfilled.
- ii) An incorrect assumption of facts or an incorrect application of law will suffice for the requirement of order being erroneous.
- iii) S.263 cannot be invoked to correct each and every type of mistake or error committed by the assessing officer and it is only when an order is erroneous, that the section will be attracted.

- iv) If the order is passed without application of mind, such order will fall under the category of erroneous order.
- v) Every loss of revenue cannot be treated as prejudicial to the interests of the revenue and if the assessing officer has adopted one of the courses permissible under law or where two views are possible and the assessing officer has taken one view with which the Commissioner not agree, it cannot be treated as an erroneous order, unless the view taken by the assessing officer is unsustainable under law.
- vi) If while making the assessment, the assessing officer examines the accounts, make enquiries, applies his mind to the facts and circumstances of the case and determines the income, the Commissioner, while exercising his power u/s 263, is not permitted to substitute his estimate of income in place of the income estimated by the assessing officer.
- vii) The assessing officer exercises quasi judicial power vested in him and if he exercises such power in accordance with law and arrives at a conclusion, such conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion.
- viii) The Commissioner, before exercising his jurisdiction u/s 263 must have material on record to arrive at a satisfaction.
- ix) If the assessing officer has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation by a letter in writing and the assessing officer allows the claim on being satisfied with the explanation of the assessee, the decision of the assessing officer cannot be held to be erroneous simply because in his order he does not make an elaborate discussion in that regard.

- x) The jurisdiction u/s 263 cannot be utilized as an instrument for reopening concluded proceedings on flimsy grounds or on assumption.

2. In the case of Girdharilal B. Rohra Vs. CIT (2004) 86 TTJ 177 (Mum) wherein it was held that :

**“It is now well settled position of law that in order to assume jurisdiction u/s 263 the CIT must satisfy himself prima facie that the order of the assessing officer is erroneous and prejudicial to the interests of Revenue. Such satisfaction must be based on the material on record. The assumption of jurisdiction u/s 263 cannot be made in a casual and arbitrary manner and if there is no material on record to satisfy prima facie that the aforesaid two conditions are present then the provision of S.263 cannot be invoked. While passing the order u/s 263 it is expected that the CIT should be prima facie satisfied about the erroneous nature of the assessment which has caused prejudice to the Revenue. Beyond stating that no further enquiries are made, there should be some material which must be pointed out to show how lack of an enquiry has caused prejudice to the Revenue. This has not been done by the CIT in the present case.”**

6. From the aforesaid discussions, it is apparent that prejudicial to the interest of revenue appearing section 263 is conjunction with the expression ‘erroneous’ and that every loss of revenue as a consequence of an order of the assessing officer cannot prejudice to the interest of Revenue. In case, where the assessing officer adopts one of the courses permissible in law where two views are plausible the CIT cannot exercise his power u/s 263 to defer with the assessing officer even if there has been a loss of revenue. On the other hand, when the assessing officer takes a view it is patently unsustainable, the CIT can exercise his powers where the loss of revenue results as a consequence of the view taken by the assessing officer. It is also clear that while passing the order u/s 263, the CIT has to be examined not only the assessment order but also the entire facts on the record. Further, when a regular assessment is made it has to be presumed that it has been passed upon proper application of mind. The ITO is not only the adjudicator but also an investigator. He cannot be remained passive in face of an order when it calls for further enquiry. He

has to ascertain the truth of the facts stated by the assessee. It is incumbent on the part of the assessing officer to make further investigation of the facts stated by the assessee when circumstances would make such an enquiry is prudent. The word 'erroneous' in section 263 includes failure to make such an enquiry by the assessing officer. The assessment order becomes erroneous because such an enquiry is not made and not because there is anything wrong with the facts stated therein or assumed to be correct. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of being erroneous. An order passed by the assessing officer without application of his mind is said to be an erroneous order. In the facts of the present case, we find that the assessing officer has not applied his mind to the provisions of section 115JB. No additional facts were necessary before the assessing officer to come to the conclusion that the book profit u/s 115JB is wrongly computed. The assessing officer not examined the facts before him. The order passed by the assessing officer is very cryptic. There is no discussion or methodology of computation of book profit. It seems that he has accepted the computation of book profit as furnished by the assessee. It cannot be said that the assessing officer is aware of any of the Tribunal orders on the issues involved. The order of the assessing officer is erroneous for want of proper enquiry. He has not recorded reasons for accepting the return of the assessee as submitted by it on the impugned issue. The assessing officer without making any enquiry accepted the claim of the assessee without recording any reasons at all. The assessment order is silent about the issue raised by the CIT. He has not examined the merit of the claim of the assessee. We cannot say that he has taken one of the permissible views in accordance with law. He has not taken any view, except blindly accepting the view of the assessee on the issue. In this case, the failure of the assessing officer to make an enquiry with regard to the claim of the assessee and to record such a reason, why



he is taking particular view, makes the assessment order erroneous and prejudicial to the interest of the revenue. As such, we are of the opinion that there is no merit in the arguments of the assessee's counsel.

7. In the result, the appeal of the assessee stands dismissed.

Order pronounced in the open Court 24. 12.2010

Sd/-

**N.R.S. GANESAN**  
**JUDICIAL MEMBER**

sd/-

**CHANDRA POOJARI**  
**ACCOUNTANT MEMBER**

Dated the 24<sup>th</sup> December, 2010

Copy forwarded to:

1. M/s Rain Commodities Ltd., Plot No.34, Rain Centre, Srinagar Colony, Hyderabad-500 073.
2. Dy. CIT 3 Circle (1), Hyderabad
3. CIT-III Hyderabad.
4. CIT, Hyderabad
5. The D.R., ITAT, Hyderabad.

**Np**