IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'B' BENCH, NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No. 5815/DEL/2011
[A.Y 2007-08]

Eicher Motors Ltd. [Erstwhile Eicher Goodearth Investment Ltd] Eicher House, 12, Commercial Complex	Vs.	The C.I.T Delhi IV New Delhi
PAN: AAACE 0052 D		
[Appellant]		[Respondent]

Assessee by : Shri Ajay Vohra, Sr. Adv
Shri Gaurav Jain, Adv
Shri Deepesh Jain, CA

Revenue by : Ms. Nidhi Srivastava, CIT-DR

Date of Hearing : 21.01.2021
Date of Pronouncement : 25.01.2021

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

With this appeal, the appellant has challenged the assumption of jurisdiction u/s 263 of the Income tax Act, 1961 [hereinafter referred to as 'The Act' for short] by the CIT, Delhi-IV.

2. The appellant contends that the order dated 31.10.2011 framed u/s 263 of the Act, setting aside the assessment order dated 05.11.2009 framed u/s 143(3) of the Act, is neither erroneous nor/and prejudicial to the interest of the Revenue.

3. The representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the ld. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules and have also perused the judicial decisions relied upon by both the sides.

4. Briefly stated, the facts of the case are that the appellant filed its return of income on 30.10.2007 declaring taxable income of Rs. 5,10,62,326/-. Return was selected for scrutiny assessment and an order dated 05.11.2009 was framed u/s 143(3) of the Act and total income of the assessee was computed as under:

Income from business [as per return of income]			4,00,62,319/-
Add : Disallowance on account of expenses	2,12,08,600/-		
Disallowance u/s 14A r.w.r. 8D	26,35,73,535/-		
Disallowance on account of repair and Maintenance		90,36,373/-	
Consultancy expenses		20,36,319/-	29,58,54,827
			33,59,17,153
			1,10,00,000
			34,69,17,153

5. During the year under consideration, the appellant had received ICD of Rs. 50 lakhs from Eicher Ltd, carrying interest @ 9% per annum on 14.06.2006. Since Eicher Ltd was subsidiary of the appellant company and the appellant company held more than 10% share holding in Eicher Ltd, the Assessing Officer raised a query asking the assessee to explain as to why provisions of section 2(22)(e) of the Act should not be applied and why the loan should not be treated as deemed dividend under that section.

6. Vide reply dated 05.11.2009, the assessee, inter alia, replied as under:

> "Note on ICD from Eicher Ltd
>
> Regarding your query as to why the ICD of Rs.50 lacs received by assessee from its subsidiary company M/s Eicher Limited (EL) during the previous year 2006-2007 should not be treated as deemed dividend in the hands of assessee company, we submit as under:
>
> It is submitted that the provisions of section 2(22)(e) are not applicable in the case of the assessee for the following reasons:
>
> During the previous year assessee company has received ICD of Rs.50 lacs from the EL on 14.06.2006 and the same has been repaid on 06.07.2006. This ICD was taken in the normal course of business on interest **@ 9%** per annum.
>
> It is submitted that EL was a listed company till 22.02.2007 in Bombay Stock Exchange and till 13.03.2007 in National Stock Exchange as is evident from Note No. 10 at page no. 19 of audited annual accounts of EL enclosed herewith. The ICD was given by EL to assessee company in the status of a listed company in which public is substantially interested.
>
> It is submitted that provisions of section 2(22)(e) are not applicable in case of a company in which the public are substantially interested.

Eicher Limited was a listed company, in which public are substantially interested. The relevant extract of section 2(22)(e) as under :

"2(22) dividend includes -
(a) to (d) xxxx xxxxx

(e) any payment by a company, not being a company in which the public are substantially interested, **of any sum xxxx xxxxx xxxxxx xxxxxx"**

Therefore, it may be appreciated that provision of section 2(22)(e) are not applicable in the case of the assessee company in the year in which ICD to assessee company was given by Eicher Limited was a listed company.

Further, it is submitted that during the previous year EL was doing the business of Non Banking Finance Company and is registered with RBI. EL was granted a certificate of registration by the Reserve Bank of India on 22.12.2005 to carry on the business of activities as a non banking financial institution as is evident from the Auditors report at page no.7 of audited annual accounts of EL.

The ICD received by assessee on 06.07.2006 has been given by EL in the ordinary course of business. As per clause (ii) of section 2(22)(e) the dividend does not include the loan given in the ordinary course of business of financing.

Therefore, for this reason also, the ICD received by assessee from EL cannot be treated as deemed dividend in the hands of assessee.

In view of the above, it may be appreciated that provisions of section 2(22)(e) of the Income Tax Act are not applicable in respect of ICD received by the assessee from EL."

7. The Assessing Officer was convinced with this reply of the assessee and completed the assessment after making additions mentioned elsewhere.

8. The ld. CIT assumed jurisdiction u/s 263 of the Act by serving notice as under:

OFFICE OF THE
COMMISSIONER OF INCOME TAX, DELHI-IV,
ROOM NO-397, 3RD FLOOR, CENTRAL REVENUE BUILDING,
I.P.ESTATE, NEW DELHI-2

F. No. CIT-IV/ /2010-11/ 1616 Dated: 25.08.2010

To,

The Principal Officer
M/s Eicher Goodearth Investments Ltd.
Eicher House, 12, Commercial Comples
Greater Kailash-II, (Masjid Moth)
New Delhi

Sub: Proceedings u/s 263 of **the** I.T. Act 1961- M/s **Eicher Goodearth Investments Ltd. A.Y. 2007-08 – reg-**

An examination of .ho income-tax assessment records of **M/s Eicher Goodearth Investments Ltd., AY 2007-08**, showed that the assessee filed its return declaring income of Rs. 5,10,62,326/- which was assessed u/s 143(3) on 05.11.2009 at income of Rs. 34,69,17,150/-.

During the course of the proceedings, it was found on examination that a sum of Rs. 50 lakhs was received by M/s Eicher Goodearth Ltd. during the year from M/s Eicher Ltd. attracted the provisions of Section 2(22) (e) in the hands of M/s Eicher Goodearth Ltd. It is seen that the Assessing Officer has not made consequential addition u/s 2(22(e) of the I. T. Act. Therefore, there is a consequential loss of revenue on account of non addition of the above amount. Thus it can be seen because of the above factual position there is an error in the assessment because of non application of statutory provision. The order of die AO is prejudicial to the interest of revenue on account of associated loss of

revenue. Therefore, the order of the AO is both erroneous as well as prejudicial to the interest of revenue.

It is seen from the examination of record that these aspect were never considered while the A.O. framed the assessment order nor there was any application of mind on the issue. As also, no inquiry/investigation seems to have been carried out with regards to this aspect. It is settled position of law that the aforesaid lack of inquiry/investigation apart from the under assessment of income pointed out in earlier paragraph has made the order of the AO both erroneous as well as prejudicial to the interest of revenue.

In view of the above facts, the assessment order u/s 143(3) of the I. T. Act, 1961 for the A.Y 2008-09 appears to be erroneous and prejudicial to the interests of revenue. Therefore, I propose to invoke the provisions of section 263 of the I. T. Act, 1961 and modify the assessment accordingly. In case you have any objections to the proposed remedial action, you may file such objections before me at **12:00 P.M. on 03.09.2010**. If no objections are received by the aforesaid date, it shall be presumed that you have nothing to say in this matter and suitable remedial orders u/s 263 will be passed on merits on the basis of material available on record.

(S. K. RAY)
COMMISSIONER OF INCOME TAX
DELHI-IV, NEW DELHI

9. After giving thoughtful consideration to the factual matrix in light of the reasons given by the ld. CIT in his notice dated 25.08.2010 [supra], we are of the considered opinion that the ld. CIT has proceeded on wrong assumption of facts.

10. The facts, in true perspective, are that the appellant had an opening outstanding balance of Rs. 610 lakhs payable to Eicher Ltd in

respect of ICDs received in earlier years. The ICD of Rs. 50 lakhs received during the year under consideration alongwith opening balance of ICD was fully repaid by the appellant to Eicher Ltd by 17.07.2006. We find that at the time of receipt of deposit and repayment thereof, i.e. 14.06.2006 and 17.07.2006, shares of Eicher Ltd. were listed on the recognised stock exchange i.e. Bombay Stock Exchange and National Stock Exchange till 22.02.2007 and 13.03.2007 respectively. Eicher Ltd was registered as NBFC with the Reserve Bank of India.

11. As mentioned elsewhere, during the assessment proceedings itself, the Assessing Officer specifically required the appellant to explain as to why the aforesaid ICD of Rs. 50 lakhs be not treated as deemed dividend in the hands of the appellant company. As mentioned elsewhere, the assessee had made a specific reply which was duly considered by the Assessing Officer.

12. The contention of the ld. DR that the reply dated 05.11.2009 was not properly considered by the Assessing Officer as the assessment order itself was framed on the same date, does not have much weightage.

13. We do not find any merit in this contention of the ld. DR because in the assessment order, at point No. 7, while making disallowance on account of repair and maintenance amounting to Rs. 90,36,373/-, the Assessing Officer has considered the reply of the assessee dated 05.11.2009.

13. Further, at point No. 8, the Assessing Officer, while making disallowance out of consultancy expenses amounting to Rs. 30,36,319/- has duly considered the reply dated 05.11.2009. Therefore, it cannot be said that the Assessing Officer has not considered the reply dated 05.11.2009 while framing the assessment order.

14. In our understanding of the law, provisions of section 2(22)(e) of the Act apply on the date of taking the loan and as mentioned elsewhere, on the date of acceptance of ICD of Rs. 50 lakhs from Eicher Ltd. Eicher Ltd was a listed company at BSE and NSE. Therefore, it can safely be concluded that on the date of the said loan, the lender company was a company in which public were substantially interested which make the transaction outside the purview of section 2(22)(e) of the Act.

15. The Hon'ble Supreme Court in Malabar Industrial Co. Ltd., 243 ITR 83, has laid down the following ratio:

> "A bare reading of section 263 of the Income-tax Act, 1961, makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer 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 Income-tax Officer 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 section 263(1) of the Act. 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 ".

16. The Hon'ble Bombay High Court in the case of Gabriel India Ltd 203 ITR 108 has held as under:

> "The power of suo motu revision under subsection (1) is in the nature of supervisory jurisdiction and the same can be exercised only if the circumstances specified therein exist. Two circumstances must exist to enable the Commissioner to exercise power of revision under this sub-

section, viz., (i) the order is erroneous; (ii) by virtue of the order being erroneous prejudice has been caused to the interests of the Revenue. It has, therefore, to be considered firstly as to when an order can be said to be erroneous. We find that the expressions "erroneous", "erroneous assessment" and "erroneous judgment" have been defined in Black's Law Dictionary. According to the definition, "erroneous" means "involving error; deviating from the law". "Erroneous assessment" refers to an assessment that deviates from the law and is, therefore, invalid, and is a defect that is jurisdictional in its nature, and does not refer to the judgment of the Assessing Officer in fixing the amount of valuation of the property. Similarly, "erroneous judgment" means "one rendered according to course and practice of court, but contrary to law, upon mistaken view of law; or upon erroneous application of legal principles".

12. From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is held to be erroneous. Cases may be visualised where the Income-tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner

he would have estimated the income at a figure higher than the one determined by the Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure. It is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. It may be said in such a case that in the opinion of the Commissioner the order in question is prejudicial to the interests of the Revenue. But that by itself will not be enough to vest the Commissioner with the power of suo motu revision because the first requirement, viz., that the order is erroneous, is absent. Similarly, if an order is erroneous but not prejudicial to the interests of the Revenue, then also the power of suo motu revision cannot be exercised. Any and every erroneous order cannot be the subject-matter of revision because the second requirement also must be fulfilled. There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed. We, therefore, hold that in order to exercise power under sub-section (1) of section 263 of the Act there must be material before the Commissioner to consider that the order passed by the Income-tax Officer was erroneous in so far as it is prejudicial to the interests of the Revenue. We have already held what is erroneous. It must be an order which is not in accordance with the law or which has been passed by the Income-tax Officer without making any enquiry in undue haste. We have also held as to what is prejudicial to the interests of the Revenue. An order can be said to be prejudicial to the interests of

the Revenue if it is not in accordance with the law in consequence whereof the lawful revenue due to the State has not been realised or cannot be realised. There must be material available on the record called for by the Commissioner to satisfy him prima facie that the aforesaid two requisites are present. If not, he has no authority to initiate proceedings for revision. Exercise of power of suo motu revision under such circumstances will amount to arbitrary exercise of power.

It is well-settled that when exercise of statutory power is dependent upon the existence of certain objective facts, the authority before exercising such power must have materials on record to satisfy it in that regard. If the action of the authority is challenged before the court it would be open to the courts to examine whether the relevant objective factors were available from the records called for and examined by such authority.

The Income-tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation in that regard by a letter in writing. All these are part of the record of the case. Evidently, the claim was allowed by the Income-tax Officer on being satisfied with the explanation of the assessee. Such decision of the Income-tax Officer cannot be held to be "erroneous" simply because in his order he did not make an elaborate discussion in that regard. Moreover, in the instant case, the Commissioner himself, even after initiating proceedings for revision and hearing the assessee, could not say that the allowance of the claim of the assessee was erroneous and that the expenditure was not revenue expenditure but an expenditure of capital nature. He simply asked the Income-tax Officer to re-examine the matter. That, in our opinion, is not permissible.

Hence the provisions of section 263 of the Act were not applicable to the instant case and, therefore, the commissioner was not justified in setting aside the assessment order."

17. The Assessing Officer, while framing assessment u/s 143(3) of the Act has taken a possible view. Therefore, the ld. CIT cannot impose his view upon the Assessing Officer on wrong appreciation of facts.

18. The Hon'ble Supreme Court in the case of Max India Ltd 295 ITR 282 has held as under:

"In our view at the relevant time two views were possible on the word "profits" in the proviso to Section 80HHC(3). It is true that vide the 2005 amendment the law has been clarified with retrospective effect by insertion of the word "loss" in the new proviso. We express no opinion on the scope of the said amendment of 2005. Suffice it to state that in this particular case when the order of the Commissioner was passed under Section 263 of the Income Tax Act, 1961, two views on the said word "profits" existed.

It is not in dispute that when the order of the Commissioner was passed there were two views on the word "profits" in that section. The problem with Section 80HHC is that it has been amended eleven times. Different views existed on the day when the Commissioner passed the above order. Moreover, the mechanics of the section have become so

complicated over the years that two views were inherently possible. Therefore, subsequent amendment in 2005 even though retrospective will not attract the provision of Section 263 particularly when as stated above we have to% take into account the position of law as it stood on the date when the Commissioner passed the order dated March 5,1997, in purported exercise of his powers under Section 263 of the Income Tax Act.

3. For the above reasons, civil appeals filed by the department stand dismissed."

19. We have given thoughtful consideration to the orders of the authorities below. It is a settled position of law that powers u/s 263 of the Act can be exercised by the Commissioner on satisfaction of twin conditions, i.e., the assessment order should be erroneous and prejudicial to the interest of the Revenue. By 'erroneous' is meant contrary to law. Thus, this power cannot be exercised unless the Commissioner is able to establish that the order of the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. Thus, where there are two possible views and the Assessing Officer has taken one of the possible views, no action to exercise powers of revision can arise, nor can revisional power be exercised for directing a fuller enquiry to find out if the view taken is erroneous. This power of

revision can be exercised only where no enquiry, as required under the law, is done. It is not open to enquire in case of inadequate inquiry. Our view is fortified by the decision of Hon'ble High Court of Bombay in the case of CIT vs. Nirav Modi, [2016] 71 taxmann.com 272 (Bombay).

20. This view is further supported by the decision of the Hon'ble Gujarat High Court in the case of Shri Prakash Bhagchand Khatri in Tax Appeal No. 177 with Tax Appeal No.178 of 2016, wherein the Hon'ble Gujarat High Court was seized with the following *substantial question of law:-*

> *"Whether the Tribunal is right in law and on facts in upholding the order passed by the CIT under section 263 of the Act on merits and still storing the issue of allowability of deduction under section 54 of the Act to the file of Assessing Officer even though the working of allowability of deduction under section 54F is available in the order under section 263 which is not disputed by the assessee before ITAT."*

21. And the Hon'ble High Court, after considering the facts, held as under:-

> "6. It can thus be seen that though final order of assessment was silent on this aspect, the Assessing Officer had carried out inquiries about the nature of sale of land and about the validity of the assessee's claim of deduction under section 54F of the Act. Learned counsel for the Revenue

however submitted that these inquiries were confined to the claim of deduction under section 54F of the Act in the context of fulfilling conditions contained therein and may possibly have no relevance to the question whether the sale of land gave rise to a long term capital gain. Looking to the tenor of queries by the Assessing Office and details . A.Y. 2009-10 supplied by the assessee, we are unable to accept such a condition. In that view of the matter, the observation of the Tribunal that the Assessing Officer having made inquiries and when two views are possible, revisional powers could not be exercised, called for no interference. Since with respect to computation and assertions of other aspects of deduction under section 54Fofthe Act, the Tribunal has remanded the proceedings, nothing stated in this order would affect either side in considerations of such claim.

7. No question of law arises. Tax Appeals are dismissed."

21. We find the Hon'ble Delhi High Court in the case of CIT Vs. Anil Kumar reported in 335 ITR 83 has held that where it was discernible from record that the A.O has applied his mind to the issue in question, the ld. CIT cannot invoke section 263 of the Act merely because he has different opinion. Relevant observation of the High Court reads as under:

"63. We find the Hon'ble Delhi High Court in the case of Vikas Polymer reported in 341 ITR 537 has held as under:

"We are thus of the opinion that the provisions of s. 263 of the Act, when read as a composite whole make it incumbent upon the CIT before exercising revisional powers to : (i) call for and examine the record, and (ii) give the assessee an opportunity of being heard and thereafter to make or cause to be made such enquiry as he deems necessary. It is only on fulfilment of these twin conditions that the CIT may pass an order exercising his power of revision. Minutely examined, the provisions of the section envisage that the CIT may call for the records and if he prima facie considers that any order passed therein by the AO is erroneous insofar as it is prejudicial to the interest of the Revenue, he may after giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary, pass such order thereon as the circumstances of the case justify. The twin requirements of the section are manifestly for a purpose. Merely because the CIT considers on examination of the record that the order has been erroneously passed so as to prejudice the interest of the Revenue will not suffice. The assessee must be called, his explanation sought for and examined by the CIT and thereafter if the CIT still feels that the order is erroneous and prejudicial to the interest of the Revenue, the CIT may pass revisional orders. If, on the other hand, the CIT is satisfied, after hearing the assessee, that the orders are not erroneous and prejudicial to the interest of the Revenue, he may choose not to exercise his power of revision. This is for the reason that if a query is raised during the course of scrutiny by the AO, which was answered to the satisfaction of

the AO, but neither the query nor the answer were reflected in the assessment order, this would not by itself lead to the conclusion that the order of the AO called for interference and revision. In the instant case, for example, the CIT has observed in the order passed by him that the assessee has not filed certain documents on the record at the time of assessment. Assuming it to be so, in our opinion, this does not justify the conclusion arrived at by the CIT that the AO had shirked his responsibility of examining and investigating the case. More so, in view of the fact that the assessee explained that the capital investment made by the partners, which had been called into question by the CIT was duly reflected in the respective assessments of the partners who were I.T. assessees and the unsecured loan taken from M/s Stutee Chit & Finance (P) Ltd. was duly reflected in the assessment order of the said chit fund which was also an assessee."

64. Since in the instant case the A.O after considering the various submissions made by the assessee from time to time and has taken a possible view, therefore, merely because the DIT does not agree with the opinion of the A.O, he cannot invoke the provisions of section 263 to substitute his own opinion. It has further been held in several decisions that when the A.O has made enquiry to his satisfaction and it is not a case of no enquiry and the DIT/CIT wants that the case could have been investigated/ probed in a particular manner, he cannot assume jurisdiction u/s 263 of the Act. In view of the above discussion, we hold that the assumption of jurisdiction by the DIT u/s 263 of the Act is not in accordance with law.

We, therefore, quash the same and grounds raised by the assessee are allowed."

22. Considering the facts of the case in totality, in light of judicial decisions discussed hereinabove, we set aside the order of the ld. CIT, Delhi-IV dated 31.10.2011 and restore that of the Assessing Officer dated 05.11.2009 framed u/s 143(3) of the Act.

23. In the result, appeal of the assessee in ITA No. 5815/DEL/2011 is allowed.

The order is pronounced in the open court on 25.01.2021.

Sd/-	**Sd/-**
[SUCHITRA KAMBLE**]**	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 25 January, 2021

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	