IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES 'G', MUMBAI

ITA No. 348/Mum/2008
Assessment Year : 2003-04

WNS GLOBAL SERVICES PVT LTD
(FORMERLY WORLD NETWORK SERVICES P LTD)
GATE 4, GODREJ & BOYCE COMPLEX,
PIROJSHANAGAR, VIKHROLI(W), MUMBAI-400079
PAN NO: AAACW2598L

Vs

THE ITO, RANGE-10(2), MUMBAI

Sushma Chowla, JM and B Ramakotaiah, AM

Dated : June 17, 2009

Appellant Rep by : Mr Dinesh Vyas & Ajit Shah
Respondent Rep by : Mr P S Chellappan, CIT DR

Income tax - Sec 10A(9) - Assessee is a subsidiary of UK-based company - provides IT-enabled BPO services - During the relevant FY, WNS (Mauritius) Ltd, a wholly owned subsidiary of WN Holdings, acquires the entire share capital of the assessee from the UK-based company - assessee owns four units - two each in Mumbai and Pune - files return - revises return and declares Nil income after setting off losses of certain units against profits and gains of other units - also claims Sec 10A benefits - In revised return, assessee provides information by way of a note about the change in ownership of the assessee company - AO makes inquiry about various deductions claimed but fails to apply provisions of Sec 10A(9) - CIT invokes powers u/s 263 and denies benefits under Sec 10A - held, since the AO fails to apply his mind to the application of Sec 10A(9), this is not a case of taking another view - it is a clear case of the AO's order being erroneous as well as prejudicial to the interest of Revenue as Sec 10A(9) was very much on the statute register during the relevant AY and the same was deleted in

the later years and the assessee cannot claim Sec 10A benefits prior to the amendment - however, the assessee had made an alternate claim before the CIT that if Sec 10A benefits are denied, it may be allowed benefits under Section 80HHE/80JJAA and the same may be examined a fresh on remand to the AO - Assessee's appeal partly allowed

ORDER

Per : Sushma Chowla:

This appeal filed by the assessee is against the order of CIT-10, Mumbai dated 20.11.2007 relating to the Assessment Year 2003-2004 against the order under section 263 of the I.T.Act 1961.

2. The assessee has raised the following grounds of appeal:-

"1. On the facts and in the circumstances of the case and in law, the order passed by the learned CIT, City-10, Mumbai under section 263 of the I.T. Act is bad in law, illegal, void and without jurisdiction.

2. On the facts and in the circumstances of the case and in law, the learned CIT has erred in holding that the provisions of section 10A(9) of the Act are applicable to the appellant's case for assessment year 2003-04.

3. Without prejudice to the above grounds in appeal, on the facts and circumstances of the case and in law, the learned CIT has legally erred in rejecting the plea of the appellant and not directing the Assessing Officer to grant deduction to the appellant under section 80HHE/80JJAA of the Act."

3. The brief facts of the case are that the assessee was wholly owned subsidiary of British Airways Ltd., a company incorporated in United Kingdom to provide Information Technology Enabled Business Process Outsourcing (ITE-BPO) services in India. In May, 2002 WNS (Mauritius) Ltd. a wholly owned subsidiary of WNS Holdings acquired the entire share capital of the assessee from M/s. British Airways. The assessee presently is providing ITE-BPO services by carrying on its business activities through four operating

units i.e. Mumbai Unit I, Mumbai Unit-II, Pune Unit-I and Pune Unit-II. The profits and gains of Mumbai Unit I and Pune Unit I were eligible for deduction under section 10A of the Act. The Mumbai Unit II and Pune Unit II were established as Software Technology Park (STP Units). In the original return of income filed, the assessee declared a total income of Rs.25.49 lakhs and thereafter, the assessee filed a revised return declaring total income at Nil. In the revised return of income the loss arising from Pune Unit II was adjusted against the income earned from Mumbai Unit I and Pune Unit I. The assessee had claimed deduction under section 10A of the Act in respect of the profits of Pune Unit I and Mumbai Unit I. The claim of deduction under section 10A of the Act was disclosed by way of notes in the original return of income. In the said note, the assessee had stated that the amendment carried out by Finance Act, 2003, wherein section 10A(9) was deleted was an amendment of clarificatory nature and such deletion should be considered to have been omitted retrospectively. Similar disclosure was also claimed to have been made in Form No.56F filed along with return of income to claim deduction under section 10A of the Act. The assessment was selected for scrutiny and during the course of assessment proceedings, the Assessing Officer had called for various details from the assessee to justify its claim of deduction under section 10A of the Act. The Assessing Officer had granted deduction under section 10A of the Act totalling Rs.30,75,43,167/- and the assessment was completed on total income of approximately Rs.3.68 crores after making adjustments on account of denial of deduction under section 10A of the Act on miscellaneous business income, denial of adjustment of loss of Pune Unit II against the profits of Mumbai Unit I and Pune Unit I on the ground that loss cannot be allowed, in view of the provisions of section 14A, denial of adjustment of losses of Mumbai Unit II against Mumbai Unit I and Pune Unit I and thereby restricted the claim of deduction under section 10A of the Act to Rs.30.75 crores as against the claim of approximately Rs.31.89 crores.

4. The CIT issued a show cause notice under section 263 of the Act on 18.1.2007. The CIT was of the view that the Assessing Officer had failed to apply his mind and had erroneously accepted the wrong claim of the assessee and thus the assessment was both erroneous and prejudicial to the interest of the Revenue, attracting the provisions of section 263 of the Act. The explanation of the assessee before the CIT was that in the notes appended to the return of income (including revised return) the fact of change in share holding of the company was clearly mentioned. Similar note was also appended to

the return in Form No. 56F in support of the claim of deduction under section 10A of the Act. The assessee further stressed that during the course of assessment proceedings several queries were raised by the Assessing Officer in respect of the claim under section 10A of the Act and a perusal of the assessment order would show that the Assessing Officer had considered the issue in detail and revised the claim of deduction under section 10A of the Act after taking cognizance of Form No.56F filed on record as well as notes to the return of income. The plea of the assessee was that the possible view taken by the Assessing Officer was for the deduction under section 10A was available on the premise that the restriction in section 10A(9) were unwarranted and respectfully following the decision of the Hon'ble Supreme Court in *Allied Motors (P) Ltd. Vs. CIT, 224 ITR 677 (SC)* = **(2002-TIOL-588-SC-IT)** the amendment made to rectify and to make a provision workable was curative in nature and hence applicable retrospectively. The Assessing Officer had followed one of the possible views and the same would not make an order erroneous and prejudicial to the interest of the Revenue and hence the proceedings under section 263 merited to be dropped.

5. The CIT rejecting the contention of the assessee admitted that the Assessing Officer had allowed the claim of deduction under section 10A of the Act while passing the order under section 143(3) of the Act. The CIT noted that it was a fact that in May, 2002 i.e. during the year under consideration WNS (Mauritius) Ltd. another company had acquired the entire share capital of the company from British Airways, U.K. The assessee was a wholly owned subsidiary of the British Airways and the provisions of section 10A(9) which were subsequently omitted by the Finance Act, 2003 with effect from 1.4.2004 were very much operative during the year. The CIT observed that for assessment year 2003-04 owing to the change in ownership within the meaning of section 10A(9), the assessee was not entitled to the deduction under section 10A of the Act and the Assessing Officer had failed to apply the said prohibition. The plea of two possible views raised by the assessee was rejected as according to the CIT, no Assessing Officer could have allowed deduction under section 10A(9) of the Act in respect of the disclosure of facts by the assessee. Reliance was placed on the decision of Rajasthan High Court in *CIT Vs. Emery Stone Manufacturing Co., 213 ITR 843 (Raj)* wherein the applicability of section 263 was upheld where the Assessing Officer had allowed depreciation without examining the provisions. An alternate contention was raised by the learned A.R. for the assessee before the CIT(A) that in the notes to the

return of income, the assessee had asked for allowability of deduction under section 80HHE/80JJAA of the Act, if no deduction under section 10A of the Act was allowed. The alternate plea of the assessee was also rejected by the CIT as no specific claim was made before the Assessing Officer and as the proceedings before the CIT were under 263, the contention was rejected. The matter was set aside to the file of the Assessing Officer for deciding the same afresh after allowing an opportunity of hearing to the assessee. The assessee is aggrieved by the order of the CIT passed under section 263 of the Act and hence, the present appeal.

6. The learned A.R. for the assessee pointed out that the assessee made the disclosure in the computation of income by way of note under the head eligible under section 10A of the Act. Our attention was drawn to the revised computation of income filed at pages 1 to 5 of the paper book. The learned A.R. further pointed out that in the report dated 28.11.2003 furnished in From No. 56F, the fact of change in shareholding was reported and the said report is annexed at pages 6 to 11 of the paper book. The learned A.R. also pointed out that clarification of change in share holding was also part of Annexure at page 9 of the paper book. The learned A.R. for the assessee pointed out that the assessee had also claimed alternate deduction under section 80HHE of the Act in respect of foreign exchange earnings which was not computed by the assessee in view of its claim under section 10A of the Act. However, the assessee reserved its right to such claim at the time of assessment as per Note no.9 annexed to the computation of total income. The learned A.R. pointed out that the Finance Bill, 2003 proposed to remove the provisions of section 10A(9) as the restriction on benefits upon the change in ownership or their holding were not logical. The plea of the learned A.R. for the assessee was that such amendments were retrospective in nature and the deduction was allowable to the assessee and the Assessing Officer had taken a plausible view on the issue. The Bangalore Bench of the Tribunal in *M/s. G.E. Thermometrics India Pvt. Ltd. Vs. DCIT., in ITA Nos. 257 & 258/Bang/2008* have taken a view that though section 10A(9) is omitted with effect from 1.4.2004, even for the assessment year 2003-04 the aforesaid section 10B has to be read without the impugned sub-section (9). The learned A.R. pointed out that after May, 2002 there is no change in the shareholding. Reliance was placed on the decision of Hon'ble Supreme Court in *Malabar Industrial Co. Ltd. Vs. CIT., 243 ITR 83 (SC)* = ***(2002-TIOL-491-SC-IT)*** for the proposition that where two views are possible and the Assessing Officer has taken one view, then in order to take second

view, the CIT cannot resort to section 263 of the Act. Further reliance was placed on the order of the Tribunal in *F.A.A. Jasdanwalla Vs. CIT, (2007) 18 SOT 1 (Mum)* for the proposition that merely because the order of the Assessing Officer was not elaborative on the point of allowability of the claim of the assessee, it does not give rise to a presumption that particular issue was not looked into by the Assessing Officer. Further reliance was placed on list of cases for the difference between repeal of the Act and omission of Act. The learned A.R. for the assessee further pointed out in case of omission it has to be taken that there was no operation of particular provision at all the amendment was curative. Reliance was further placed on the decision of Hon'ble Supreme Court in *Allied Motors Pvt. Ltd. Vs. CIT, 224 ITR 677 (SC)* = **(2002-TIOL-588-SC-IT)** and also in *CIT Vs. Gold Coin Health Food P. Ltd, 304 ITR 308 (SC)* **= (*2008-TIOL-152-SC-IT*).** The learned A.R. for the assessee pointed out that in view of the ratios laid down by the Hon'ble Supreme Court, the only view possible in the matter is that amendment was brought into to cure the defects and also CIT has not whispered on the parallel line of arguments raised before him. The learned A.R. further submitted that such view taken by the Assessing Officer has subsequently been endorsed by the Tribunal, the CIT is not empowered to exercise the power under section 263 of the Act. The learned A.R. for the assessee further pointed out that ground no. 1 raised by the assesses is to be allowed as the Assessing Officer had taken the only view possible in the matter and the CIT in any case, has no power to endorse his view. In respect of ground no.2 raised by the assessee, the learned A.R. pointed out that even if two views are possible, then the Assessing Officer had taken one view and the CIT had no power to revision u/s.263 of the Act. The learned A.R. pointed out that an alternate plea was being raised by the assessee that in case no deduction is allowable under section 10A of the Act, then the assessee should be allowed deduction under section 80HHE / 80JJAA of the Ad. The learned A.R. submitted that under section 263 of the Act, the powers enshrined in the Commissioner was not absolute power but the same was coupled with duty and it was the duty of the Commissioner to make fair assessment and pass such an order as on the facts and circumstances of the case.

7. The learned D.R. pointed out while passing the order under section 143(3) of the Act, the Assessing Officer had not noticed the apparent fact of change in shareholding. The learned D.R. submitted that the Assessing Officer by allowing relief under section 10A of the Act has made a wrong application of law and such incorrect application of law makes

the order of the Assessing Officer as erroneous. The ratio laid down by the Hon'ble Supreme Court in *Malabar Industrial Co. Ltd. Vs. CIT., 243 ITR 83 (SC)* **= (2002-TIOL-491-SC-IT)** is applicable. The learned DR. further pointed out that the Assessing Officer while passing the order has failed to consider the provisions of section 10A(9) of the Act in the assessment order and there was an apparent omission of not taking the same into consideration. Merely because the assessee has disclosed the facts and the Assessing Officer had not considered the same, it was pointed out by the learned D.R, the CIT in such circumstances had the power under section 263 of the Act. Reliance was placed on the decisions reported in *194 ITR 144 and 234 ITR 832.* Regarding the merits of the case, the learned D.R. pointed out that the amendment was not retrospective and the legislation has not intended so and the case laws quoted by the learned A.R. for the assessee do not consider the provisions of section 10A of the Act and thus are not applicable. Reliance was placed on the decision of Hon'ble Allahabad High Court in *CIT Vs. Zam Zam Tanners, 279 ITR 197 (All)* **= (2006-TIOL-03-HC-ALL-IT)** for the proposition that rule of retrospectivity cannot be applied. In any case, in the case of assessee there was a takeover of company and not demerger of domestic companies.

8. In rejoinder, the learned A.R. pointed out that the provisions of section 29BB were introduced with effect from certain date and being procedural provisions were to be applied from the said date and the substantive law as inserted in the omission section 10A(9) is to be applied retrospectively.

9. We have heard the rival submissions and perused the record. The assessee company was a wholly owned subsidiary of British Airways, United Kingdom and during the year under consideration in May, 2002 M/s. WNS(Mauritius) Ltd. acquired the entire share capital of the assessee company from British Airways Ltd. The assessee was carrying on the business of (ITE-BPO) and had claimed deduction under section 10A of the Act in respect of its Mumbai Unit I and Pune Unit I. The original return of income filed by the assessee was revised by the assessee. In both the original as well as revised return of income, the assessee had appended a note with regard to eligibility under section 10A of the Act, which is as under:-

"The assessee company was a wholly owned subsidiary of British Airways Plc. United Kingdom (British Airways.). The assessee company has been providing data processing and management services through its 3 units viz. Mumbai I. Pune I & II and has been

claiming deduction under section 10A of the Act. During the financial year 2002-03 (i.e. in May, 2002) WNS (Mauritius) Ltd. acquired the entire share capital of the assessee company from British Airways. As a result, the ownership in the aforesaid undertakings of the assessee company underwent change. Section 10A(9) provides that where during any previous year the ownership of beneficial interest in the undertaking is transferred by any means, the deduction under section 10A shall not be allowed. Explanation 1 says that in case of a company, the change in the ownership arises in case where more than 50% of the shares carrying voting power gets transferred.

The Finance Act, 2003 has deleted the provisions of Section 10A(9) with effect from assessment year 2004-05. The Memorandum of Finance Bill, 2003 explain that by virtue of insertion of section 10A(7A), the amendment to section 10A(9) and Explanation 1 (explained above) have become redundant and are proposed to be omitted so that tax benefits are not lost on change of ownership. Further, the Finance Minister in his speech on introducing the Finance Bill, 2003 has termed the provisions of sub-section (9) as illogical. This suggests that the deletion is retrospective in nature i.e. illogicality is sought to be removed from inception and not only from the assessment year 2004-05. In the light of the above, assessee company is of the view that it is entitled to deduction under section 10A in respect of its income from STP units in Mumbai and Pune in spite of change in the shareholding exceeding 50%"

10. The assessee by way of Note No.9 had made an alternative claim of deduction under section 80HHE of the Act which was not being claimed in the return of income, in lieu of deduction claimed under section 10A of the Act. The revised computation of income along with the notes are annexed at pages 1 to 5 of the paper book. The assessee company had furnished the report in Form No.56F of the Act in respect of its claim of deduction under section 10A of the Act. As per clause 3, it was reported that the company was of the view that in spite of change in shareholding of more than 50% of the company during the year, the company was eligible to claim deduction under section 10A of the Act. The report is dated 28th November, 2003. In the annexure at column 18 under the heading 'Qualification' the assessee had reported the same note as in clause 6 annexed to the computation of income. The said report is annexed at pages 6 to 11 of the paper book. The Assessing Officer while completing the assessment under section 143(3) of the Act had considered the claim of deduction under section 10A of the Act. The Assessing Officer had elaborately discussed the claim of deduction against the

miscellaneous business income earned by the assessee, the losses incurred at Pune Unit II and Mumbai Unit II and also set off of losses. The Assessing Officer had recomputed the deduction under section 10A of the Act and as against the Nil revised return filed by the assessee had computed the total income at Rs.3.68 crores after allowing deduction under section 10A of the Act at Rs.30.75 crores.

11. The CIT exercising the power under section 263 of the Act had issued show cause notice to the assessee for the following reasons:-

"2. In accordance with the provision contained in sub-section 9 of section 10A where during any previous year the ownership or the beneficial interest in the undertaking is transferred by any means, the deduction under this section shall not be allowed to the assessee for the assessment year relevant to such previous year and referred years. You are a wholly owned subsidiary of British Airways Pvt. Ltd., United Kingdom. The assessee company has been providing data processing and management service through its units and claiming deduction of resultant profits u/s. 10A of the I.T. Act, 1961. During the financial year 2002-03 (i.e. May, 2002 - WNS (Mauritius) Ltd. acquired the entire share capital of the assessee company from British Airways and still claimed deduction u/s. 10A of the I.T. Act, 1961."

12. The provision of section 10A(9) of the Act were on statute during the year. Only by the Finance Act, 2003, there was an amendment by which the provisions of sub-section (9) to section 10A of the Act were sought to be omitted. Under section 10A(9) of the Act in case the assessee enjoys the benefit of deduction, it would lose the benefit once there is change in their ownership or shareholding. However, the said section 10A(9) was omitted by the Finance Act, 2003 and while proposing a change it was commented as under:-

"It is India's showpiece success story. We have to not just maintain its momentum of growth, but continuously encourage it. Therefore, it is proposed that the concessions extended to IT under sections 10A and 10B of the I.T. Act will continue as originally envisaged. As per law, such companies as are currently covered by these tax exemptions lose the benefits upon change in their ownership or shareholding. This is not logical, I am therefore, removing these restrictions, the benefit of such tax exemptions will remain even in the case of amalgamation or demerger."

13. Similar deductions were available under section 10B of the I.T. Act and 10B(9) was sought to be omitted by Finance Act, 2003. The Bangalore Bench of the Tribunal in *M/s. G E Thermometrics India Pvt. Ltd. (supra) vide order dated 30.05.2008,* after an elaborate consideration of the issue of omission of section 10B(9) of the Act, and taking into consideration of the provisions of section 6 of General Clauses Act and ratio down by the Hon'ble Supreme Court in *Kolhapur Cane Sugar Works Ltd. Vs. UOI, (2000) 2 SCC 536* = ***(2002-TIOL-188-SC-CX)*** and also *Rayala Corporation Pvt. Ltd. Vs. Director of Enforcement, (1969) 2 SCC 412* **= *(2002-TIOL-295-SC-FERA-LB)*** *and General Finance Co. & Anr. Vs. CIT., 257 ITR 338 (SC)* has held that "section 10B should be read as though it never had sub-section (9) in it in all the proceedings under the Act. "The said decision of the Tribunal was rendered on 30.5.2008.

14. In the facts of the present case before us, the assessee had filed original return of income on 1.12.2003 and the revised of income on 23.3.2004 and in both the returns of income Note no.6 was filed, wherein it had claimed that the Finance Minister in his speech on introducing the Finance Bill, 2003 had termed the provisions of sub-section (9) to section 10A as illogical which implies that deletion is retrospective in nature. The assessee company was of the view that it was entitled to deduction under section 10A of the Act in respect of its income from STP units in Mumbai and Pune in spite of change in share holding exceeding 50%.

15. The legal position regarding powers of Commissioner under Section 263 of the I.T. Act was considered by Apex Court in *Malabar Industries Co. Ltd., Vs. CIT., 243 ITR 83 (SC)* = **(2002-TIOL-491-SC-IT)** which held as under:

" A bare reading of this provision makes it clear that the prerequisite to 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 interest of the Revenue. The Commissioner has to be satisfied with 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.

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 fall orders passed without applying the principles of natural justice or without application of mind.

The phrase "prejudicial to the interests of the Revenue" is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not confined to loss of tax. The High Court of Calcutta in *Dawjee Dadabhoy and Co. vs. S.P. Jain [1957] 31 ITR 872,* the High Court of *Karnataka in CIT Vs. T. Narayana Pai [1975] 98 ITR 422,* the High Court of Bombay in *CIT Vs. Gabriel India Ltd. [1993] 203 ITR 108* and the High Court of Gujarat in *CIT Vs. Smt. Minalben S. Parikh [1995] 215 ITR 81* treated loss of tax as prejudicial to the interests of the Revenue.

Mr. Abraham relied on the judgment of the Division Bench of the High Court of Madras in *Venkatakrishna Rice Company Vs. CIT [1987] 163 ITR 129* interpreting "prejudicial to the interest of the Revenue." The High Court held (page 138): "In this context, it must be regarded as involving a conception of acts or orders which are subversive of the administration of revenue. There must be some grievous error in the order passed by the Income-tax Officer, which might set a bad trend or pattern for similar assessments, which on broad reckoning, the Commissioner might think to be prejudicial to the interests of Revenue administration." In our view, this interpretation is too narrow to merit acceptance. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. If due to an erroneous order of the Income-tax Officer, the Revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the Revenue.

The phrase "prejudice to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. 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 an Income-tax 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 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 interests of the Revenue, unless the view taken by the Income-tax Officer is unsustainable in law."

16. In *CIT Vs. Gabrial India Ltd. [1993] 203 ITR 108 (Bom)* the Hon'ble Bombay High Court held as under:

"An order cannot be termed as erroneous unless it is not in accordance with law".

17. The Mumbai Bench of Tribunal in *Mrs. Khatiza S. Oomerbhoy Vs. ITO (100 ITD 173)* = **(2006-TIOL-192-ITAT-MUM)** after taking into consideration various judicial pronouncements on the issue of exercise of power by CIT under Section 263 of the Act laid down the following principles emerging from the various decisions on the issue as under:

"i) The Commissioner must record satisfaction that the order of the Assessing Officer is erroneous and prejudicial to the interest of the revenue. Both the conditions must be fulfilled.

ii) Section 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.

iii) An incorrect assumption for facts or an incorrect application of law will suffice for the requirement of order being erroneous.

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 does 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, makes enquiries, applies his mind to the facts and circumstances of the case and determines

the income, the Commissioner, while exercising his power under Section 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 under Section 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 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."

18. The Mumbai Bench of the Tribunal in *F.A.A. Jasdanwalla Vs. CIT, (2007) 18 SOT 1 (Mum)* has held as under:-

"The power of revision under section 263 being a supervisory jurisdiction conferred on the Commissioner is to be exercised with due care. In order to exercise the power under section 263, two conditions are prescribed i.e. the order of the Assessing Officer should be erroneous and also prejudicial to the interest of the Revenue. Both the conditions have to be simultaneously fulfilled before invoking the jurisdiction under section 263."

19. The CIT under section 263 of the Act is vested with the power to revise the order passed by the Assessing Officer in case the order so passed is erroneous and prejudicial to the interest of the Revenue. Both the conditions of the order being erroneous and prejudicial to the interest of the Revenue are to be simultaneously fulfilled. The Mumbai Bench of the Tribunal F.A.A. Jasdanwalla Vs. CIT (supra) had held that "there must be some *prima facie* material on record to the 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. 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." The question of plausible view in the matter or change in view by CIT in the case does not rise in the absence of the Assessing Officer not taking any view on the issue. Mere allowance of deduction under section 10A of the Act without considering the provisions of Section 10A(9) of the Act, which were available on the statue at the relevant point of time, makes the order passed by the Assessing Officer under section 143(3) of the Act erroneous and in allowing the said claim under section 10A of the Act, the order is prejudicial to the interest of the justice. Thus, both the conditions for invoking the provisions of section 263 of the act are satisfied and the Commissioner has the power to revise such order.

20. In the facts of the present case before us, the Assessing Officer had made enquiries in respect of the claim to be allowed under section 10A of the Act vis-a-vis miscellaneous income earned by the assessee and the set off of losses of one unit against the other while computing the deduction under section 10A of the Act. The second aspect of the allowability of section 10A of the Act because of the acquisition of the assessee company by another company, though reported by the assessee by way of notes filed along with the return of income and also by way of explanation incorporated in Form No.56F of the Act has not been looked into by the Assessing Officer, as the assessee has failed to bring on record any evidence to show or any explanation being filed during the course of assessment proceedings. The omission of sub-section (9) to section 10A of the Act by Finance Act, 2003 and the ratio laid down by the Bangalore Bench of the Tribunal in *M/s. G.E. Thermometrics India Pvt. Ltd. in ITA Nos. 257 & 258/Bang/2008 vide order dated 30th May, 2008* was not available at the time of passing of the order under section 143(3) of the Act. Neither the said ratio was available at the time of filing of the original or revised return of income. The said omission was effected prior to the filing of the return of income. But the Assessing Officer has failed to address the issue of the applicability or non-applicability of provisions of section 10A(9) of the Act which were available on statute in the year under assessment, though the same was omitted by the Finance Act, 2003 with effect from 1.4.2004. The order of the Assessing Officer where he failed to address the issue of applicability of section 10A(9) of the Act has been passed without application mind and under such circumstances the said order is erroneous and also prejudicial to the interest of justice by allowing the relief which the

assessee may or may not be entitled. However, we find substance in the alternate claim of the assessee wherein by way of Note annexed to the computation of income, it had claimed that because of its claim of deduction under section 10A of the Act, no relief was being claimed under section 80HHE/80JJAA of the Act. In case, the deduction under section 10A of the Act is withdrawn because of the provisions of section 10A(9) of the Act, the alternate claim of the assessee for deduction under section 80HHE/80JJAA of the Act is to be looked into and the same is to be allowed in accordance with law. We uphold the order of the CIT in exercising the power under section 263 of the Act. The Assessing Officer shall consider the settled legal principles on the issue of omission of section 10A(9) by the Finance Act, 2003 and examine the issue of allowability of claim under section 10A of the Act. We also modify the order of CIT to the extent that while reassessing the income, the Assessing Officer shall look into the alternate claim of the assessee in respect of deduction under section 80HHE/80JJAA of the Act, in accordance with law and settled legal principles. Upholding the order of the CIT passed under section 263 of the Act, we set aside the matter to the Assessing Officer to decide the same in line with the paras herein above after allowing a reasonable opportunity of hearing to the assessee. Thus, the grounds of appeal are partly allowed.

21. In the result, the appeal of the assessee is partly allowed.

Order pronounced on the 17.6.2009.