

**IN THE INCOME TAX APPELLATE TRIBUNAL  
BENCH 'A' HYDERABAD**

**ITA No.793/Hyd/2010  
Assessment Year: 2005-2006**

**M/s PYRAMID INFRASTRUCTURE PVT LTD  
PLOT NO 1267, ROAD NO 36  
JUBILEE HILLS, HYDERABAD**

**Vs**

**DEPUTY COMMISSIONER OF INCOME TAX  
CIRCLE-16(3), HYDERABAD**

**G C Gupta, VP and Akber Basha, AM**

**Dated: February 18, 2011**

**ORDER**

**Per: Akber Basha:**

This appeal filed by the assessee is directed against the order of the Commissioner of Income tax-IV, Hyderabad, passed under section 263 of the Act on 26/03/2010 for the assessment year 2005-06.

2. The assessee has raised 5 grounds of appeal, the sum and substance of which is against the order passed by the CIT under section 263 of the Act.

3. Briefly the facts of the case are that the assessee had filed return of income for the year under consideration on 01/11/2005 declaring total income of Rs.11,22,150/- after set off of brought forward losses of Rs.13,70,695/-. It entered into a sub-contract with Navayuga Engineering Company for execution of the some work. The work-in-progress and closing stock as on 31/03/2004 was transferred to the sub-contractor at book value. It transferred the machinery also at book value. The assessing officer called for several details in the course of assessment proceedings and after examining the sub-contract agreement, closing stock, etc. held that the expenditure on account of interest included in finance overheads was disallowable on the ground that the debit balances in the account of Navayuga Engineering Co. were interest-free. Finally, the assessing officer completed the assessment under section 143(3) of the Act on 28-12-2007 determining the total income of the assessee at Rs.59,37,736/- after disallowing and adding back interest of Rs.34,44,486/- paid to banks.

4. The learned CIT, however, subjected the assessment to revision proceedings under section 263 of the Act on the ground that the assessment order to be both erroneous and prejudicial to the interests of the revenue and to this effect the CIT stated in the revision order that 'in transferring the closing stock of work-in-progress as on 31-03-2004 worth Rs.2.75 crores had certainly transferred its right without any apparent consideration'. The CIT, therefore, directed the assessing officer to

subject this matter to a thorough examination and bring to tax the amount of income relating to the transferred asset after determining the amount of such income. The grounds for revision under section 263 of the Act mentioned by the CIT at page 1 & 2 of his order. Thereafter, the CIT issued notice under section 263 asking the assessee to show cause as to why the assessment should not be revised or set aside. In reply, the assessee submitted that closing-work-in-progress as on 31/03/2005 is Rs.27,04,624/- which is not out of opening work-in-progress and to this effect submitted vide order sheet entry dated 23/03/2010 that the assessee did not have any corresponding physical asset and the amount was offered as income for assessment year 2005-06 but actually relates to assessment year 2004-05. The bill submitted to the department in financial year 2003-04 was rejected and the same was accepted during the financial year 2004-05. It was submitted that the closing work-in-progress as on 31/03/2004 of Rs.2,45,68,454/- along with closing stock of Rs.30,11,650/- was transferred on sub contract basis to M/ Navayuga Engineering Co. Ltd. at a cost on 01/04/2004. The work-in-progress and material are integral and can be used only by the company which is executing the work. The amount was debited to the account of M/s Navayuga Engineering Co. and hence there was no understatement of opening stock/asset in the hands of the assessee. The assessee submitted that the expenditure of Rs.1.94 crores debited to profit and loss account represents bills as submitted by the sub-contractor as the assessee had not executed any work during the previous year 2004-05 and credit for TDS of Rs.2,05,212/- pertaining to assessment year 2006-07 was claimed in assessment year 2005-06.

5. After considering the submissions of the assessee, the CIT discussed the issue at length at pages 4 to 8 of his order and concluded that the assessee had not carried out any contract during the assessment year under consideration, it has contrived to debit substantial expenditure in the Profit and loss account by way of financial over heads which is essentially interest on cash credits, personnel over heads and administrative over heads. These debits have substantially reduced the income offered of around Rs.40,00,000/- to the extent of showing the net income of just Rs.2.82 lakhs. The assessing officer had allowed all such claims without any worth while examination and without any application of mind. He has omitted to apply the test of section 37 of the Act to the assessee's claim of expenditure as well as the test of other provisions as are applicable to the computation of business income. The CIT, therefore, directed the assessing officer to subject the assessee's claims of various expenditures to a thorough and a detailed analysis and examination and thereafter to disallow claims of expenditure if he finds not admissible and the CIT held that the assessment not only erroneous but also prejudicial to the interests of the revenue.

6. Aggrieved by the order of CIT, the assessee is in appeal before us.

7. Before us, the learned counsel for the assessee contended as regards work-in-progress and closing stock, the CIT failed to appreciate that the assessee had given away the work on sub-contract only because it could not work it profitably. The learned counsel for the assessee submitted that in the course of assessment proceedings, the assessing officer called for the sub-contract agreement the work-in-progress particulars and he considered both while making disallowances, therefore, the order cannot be called erroneous. It is submitted that the reasoning of the learned CIT is not correct as his inference that there was substantial loss in the business in the earlier year but for the closing stock is not correct because for arriving at the profit the closing stock has to be necessarily valued and taken in to account. It is further submitted that the profit rate of 2004-05 cannot be a

consideration to insist that the assessee should have made up the lower rate of profit in the earlier year by charging to the sub-contractor some profit at the time of transfer as there is no provision under the income tax act to tax the income that should have been made by the assessee but not actually made. It is pointed out that the stand of the CIT would mean that a hypothetical income should be postulated and brought to tax and, therefore, the assessment order cannot be held to be erroneous because such hypothetical income was not brought to tax. The learned counsel for the assessee submitted that the learned CIT has fallen into an error in holding that there was an apparent contradiction in showing the opening stock as nil, as the assessee transferred the closing stock at the book value to the sub-contractor at the start of the current year there was no opening stock. It is submitted that the sub contractor would have taken it as opening stock but, if the sub contractor did not show this as opening stock, it would result in a higher income for itself. Therefore, this could not have been the case. The learned counsel for the assessee submitted that the assessee has furnished the expenditure on all overheads to the assessing officer in the statements accompanying the return, and after considering the same, the assessing officer disallowed a substantial amount of financial overheads, but, the CIT directed the assessing officer to reconsider and make more disallowances, is not at all warranted. Finally, the learned counsel for the assessee submitted that the CIT was only substituting his views as to how the assessment should have been done in place of the assessment made by the assessing officer as there is no error pointed out in the revision order which is prejudicial to the interests of the revenue. It is submitted that the reasoning of the learned CIT to arrive at the conclusions is based on incorrect appreciation of the accounts and statements. Therefore, it is contended that the order of CIT is not correct either on the matter of jurisdiction or on merits. In support of his arguments, the learned counsel has relied upon the following precedents: -

1. *CIT Vs. Development Credit Bank Ltd.*, 320 ITR 206 (Bom)

2. *CIT Vs. B.K. Construction Co.*, 313 ITR 65 (Guj.)

3. *CIT Vs. Gabriel India Ltd.*, 203 ITR 108, 114 (Bom.)

8. The Departmental representative, on the other hand, has strongly relied on the order of CIT in support of revenue' case.

9. We have heard the learned representatives of the parties and perused the record as well as gone through the decisions cited. The issue under consideration is pertaining to section 263 of IT Act. The said section reads as under: -

*"263. (1) The 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.-For the removal of doubts, it is hereby declared that, for the purposes of this sub-section, -*

*(a) an order passed [on or before or after the 1st day of June, 1988] by the Assessing Officer shall include-*

*(i) an order of assessment made by the Assistant Commissioner [or Deputy Commissioner] or the Income-tax Officer on the basis of the directions issued by the [Joint] Commissioner under section 144A ;*

*(ii) an order made by the [Joint] Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorised by the Board in this behalf under section 120 ;*

*(b) "record" [shall include and shall be deemed always to have included] all records relating to any proceeding under this Act available at the time of examination by the Commissioner;*

*(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal [filed on or before or after the 1st day of June, 1988], the powers of the Commissioner under this sub-section shall extend [and shall be deemed always to have extended] to such matters as had not been considered and decided in such appeal.]*

*[(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.]*

*(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, [National Tax Tribunal,] the High Court or the Supreme Court.*

*Explanation.-In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded."*

10. From plain reading of sub-section (1) of section 263, it is clear that the power of suo motu revision can be exercised by the Commissioner only if, on examination of the records of any proceedings under this Act, he considers that any order passed therein by the Income-tax Officer is " erroneous in so far as it is prejudicial to the interests of the Revenue". It is not an arbitrary or un-chartered power. It can be exercised only on fulfillment of the requirements laid down in sub-section (1). The consideration of the Commissioner as to whether an order is erroneous in so far as it is prejudicial to the interests of the Revenue, must be based on materials on record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. The power of suo motu revision under sub-section (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 subsection, viz.(1) the order

is erroneous ; (2) 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 defect that is jurisdictional in its nature, 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.

11. In the case under consideration, we find that the issues taken up by the CIT for revision of assessment under section 263 of the Act, namely, work-in-progress & closing stock, opening stock, and disallowance of expenditure on account of various heads, have already been considered by the assessing officer in the assessment proceedings under section 143(3) of the Act. Therefore, in our considered opinion, the CIT is not justified in making these issues as a subject matter of revision. We find that the assessee has furnished all the details in respect of the expenditure claimed by the assessee against various over heads and the assessing officer after considering the same and after considering the explanations with regard to the issues in dispute, allowed the claim of the assessee. We are of the view that the CIT has wrongly directed the assessing officer to reconsider the disallowances made by the assessing officer. We find that the CIT was only substituting his views as to how the assessment should have been done in place of the assessment has already made by the assessing officer. There is no error point out in the revision order, which is prejudicial to the interests of the revenue. The reasoning of the CIT is on incorrect appreciation of the accounts and statement, therefore, the order of the CIT is not correct either on the matter of jurisdiction or on merits. Accordingly, we hereby cancel the order of CIT passed under section 263 of the Act and that of the order of the assessing officer is restored.

12. In the result, the appeal of the assessee is allowed.

(Pronounced in the court on 18.2.2011.)