

Order couldn't be said to be prejudicial if AO had taken one of two possible views, HC quashed sec. 263 revision

Summary – The High Court of Bombay in a recent case of Ballarpur Industries Ltd., (the Assessee) held that where AO, following decision of jurisdictional High Court, took into consideration unabsorbed depreciation of amalgamated company to determine WDV of assets, revision could not be initiated holding that said decision applied for provisions as existing in earlier year

Facts

- For the assessment year 1989-90, the Assessing Officer completed the assessment of the assessee-company under section 143(3) on 30-3-1992 determining a certain loss. He following the decision of the Bombay High Court rendered in the case of *CIT v. Hindustan Petroleum Corpn. Ltd.* [1990] 53 Taxman 512/[1991] 187 ITR 1 took into consideration unabsorbed depreciation of company 'J', which was amalgamating with assessee-company, to determine written down value of the assets of the company 'J'.
- The Commissioner issued on the assessee a notice under section 263 stating that the unabsorbed depreciation of the amalgamating company 'J' could not be included while computing the written down value of the assets of the amalgamating company. This in view of *Explanations 2 and 3* to section 43(6) was erroneous and prejudicial to the interest of the revenue.
- The assessee pointed out that the decision taken by the Assessing Officer allowing the taking of unabsorbed depreciation to determine written down value of assets of amalgamating company stood covered in its favour by the decision of the Bombay High Court in the case of *Hindustan Petroleum Corpn. Ltd. (supra)*. Thus, a possible view being taken, the notice under section 263 was without jurisdiction.
- The Commissioner held that the decision of the Bombay High Court in the case of *Hindustan Petroleum Corpn. Ltd. (supra)* dealt with the provisions as existing prior to the subject assessment year. The Hindustan Petroleum Corporation Ltd. dealt with *Explanations 2A and 3* to section 43(6) while amended provisions effective from 1-4-1988 were concerned with the new *Explanation 2* which applied for the subject assessment year 1989-90. He accordingly restored the above issue to the Assessing Officer to pass a fresh order after following the principles of natural justice keeping in view the existing *Explanations 2 and 3* to section 43(6).
- The Tribunal allowed the assessee's appeal by holding that the view taken by the Assessing Officer was a possible view based upon the decision of Bombay High Court in the case of *Hindustan Petroleum Corpn. Ltd. (supra)*. It further placing reliance upon the decision of Bombay High Court in the case of *CIT v. Gabriel India Ltd.* [1993] 203 ITR 108/71 Taxman 585 held that the powers of revision under section 263 could not be exercised merely because the Assessing Officer had a different view on the facts.
- On reference:

Held

- It is settled position in law that where two views are possible and the Assessing Officer has taken one of the two possible views, then it is not open to treat such a view as an order which is erroneous or prejudicial to the interest of the revenue. Merely because the Commissioner takes a different view to that of the Assessing Officer will not certainly justify exercise of his powers under section 263. In the instant case, the view taken by the Assessing Officer was in effect following the decision of the Bombay High Court in *Hindustan Petroleum Corpn. Ltd. (supra)*. The fact that it dealt with the unamended provisions of law would not in the present facts make the order of the Assessing Officer erroneous. In fact, the Madras High Court in the case of *EID Parry (India) Ltd. v. Dy. CIT* [\[2012\] 209 Taxman 214/23 taxmann.com 348](#) has, while dealing with amended provision viz. *Explanation 2* to section 43(6), observed that as far as the present case is concerned, it is no doubt true that *Explanation 2* is not similarly worded as *Explanation 2A*, which was considered by the Bombay High Court. The provisions contained in *Explanation 2*, applicable to the present case, in fact, brings out the intention better and is crisp in its language is evident from reading of *Explanation 2*.
- Therefore, reliance upon the decision of the Bombay High Court in the case of *Hindustan Petroleum Corpn. Ltd. (supra)* cannot be said to be perverse and/or erroneous. Therefore, the exercise of jurisdiction under section 263 was not called for.
- Therefore, the Commissioner could not have exercised his powers under section 263 of the Act.