(2012) 11 RAJ CK 0044

In the Rajasthan High Court

Case No : IT Appeal No. 60 of 2012

Commissioner of Income Tax APPELLANT

Vs

Jain Construction Co. RESPONDENT

Date of Decision : 24-11-2012

Acts Referred:
Income Tax Act, 1961 — Section 120, 129, 142(1), 143(1), 143(2)

Citation : (2013) 257 CTR 336

Hon'ble Judges : Vineet Kothari, J;Dinesh Maheshwari, J

Bench : Division Bench

Advocate : Arun Bhansali, for the Appellant;

Final Decision : Dismissed

Judgement

Vineet Kothari, J.—The present appeal filed by the Revenue for asst. yr. 2006-07 seek to raise substantial question of law under s. 260A of the IT Act, 1961 (for brevity, hereinafter referred to as ''Act'') from the order of Tribunal, Jodhpur Bench, Jodhpur in ITA No. 106/Jd/2010 vide its order dt. 19th Jan., 2012. The assessee filed the said appeal before the Tribunal, aggrieved by the order of CIT, Jodhpur passed under s. 263 of the Act on 12th Jan., 2006 for the asst. yr. 2006-07, which was passed by the CIT in exercise of its revisional jurisdiction under s. 263 of the Act against the assessment order of assessing authority passed under s. 143(3) of the Act, holding the same as an order erroneous and prejudicial to the interest of the Revenue.

2. The assessee M/s Jain Construction Co., Banner, undertakes the construction work of construction of roads. For asst. yr. 2006-07, return of income was filed by the assessee on 31st Oct., 2006 declaring total income of Rs. 67,83,280 and revised return was filed on 2nd Nov., 2006, only two days thereafter, declaring the total income at marginally higher figure of Rs. 70,20,830. Initially, the return was processed under s. 143(1) of the Act on 25th May, 2007, however, a notice under s. 143(2) of the Act was issued by the assessing authority on 18th Oct., 2007 for holding enquiry and scrutiny in the assessment records for passing the

assessment order under the provisions of s. 143(3) of the Act, which order was passed by the assessing authority in the present case on 28th March, 2008 after due enquiry and assessing the total income of assessee at Rs. 80,18,813 making some addition in the returned income of the assessee and thus raising demand of additional tax and interest.

3. The assessee appears to have preferred an appeal against the said assessment order before the CIT(A), who passed the appellate order on 6th Aug., 2009, however, the said appellate order has not been placed on record by the Revenue in the present appeal before this Court.

4. The CIT-II, Jodhpur, however, issued a notice under s. 263 of the Act, which provides for revision of orders erroneous and prejudicial to Revenue on 6th March, 2009 and after providing an opportunity of hearing to the assessee, passed the impugned revisional order on 12th Jan., 2010 setting aside the assessment order under s. 143(3) of the Act dt. 28th March, 2008.

5. Aggrieved by the said order of CIT under s. 263 of the Act, the assessee took up the matter further before the Tribunal, Jodhpur Bench, Jodhpur vide ITA No. 106/Jd/2010, which came to be allowed by the learned Tribunal by the impugned order dt. 19th Jan., 2012, holding that the learned CIT was not justified in invoking revisional jurisdiction under s. 263 of the Act in the given facts and circumstances and thus restored the assessment order dt. 28th March. 2008 for asst. yr. 2006-07.

6. Against the said order of the Tribunal, the Revenue has come up before this Court under s. 260A of the Act, purportedly seeking to raise certain substantial questions of law, allegedly, arising out of the order of the Tribunal as aforesaid.

7. Mr. Arun Bhansali, learned standing counsel for Revenue urged that the Tribunal had fallen into error in setting aside the order of CIT under s. 263 of the Act who had rightly found the order of assessment passed by the assessing authority as erroneous and prejudicial to the interest of the Revenue; and that enquiry made by the assessing authority in pursuance of the notice under s. 143(2) of the Act was not at all sufficient; and therefore, the CIT was justified in holding that the assessment order passed by the assessing authority was erroneous one as well as prejudicial to the interest of Revenue. He, therefore, prayed the order of learned Tribunal gives rise to substantial questions of law, which deserve to be determined by this Court.

8. We are unable to agree with the submissions made at the bar by the learned counsel for the Revenue.

9. The settled legal position for limitation on the revisional powers of CIT under s. 263 of the Act is that, firstly, they are limited in nature, and secondly, such revisional powers are not to be invoked merely for reviewing the order passed by the assessing authority on a mere change of opinion. The safeguard provided to the assessee in the said provision is that mere erroneous orders are not revisable

but the revisional authority has to further establish with the material on record that such erroneous order is also prejudicial to the interest of Revenue. The twin conditions of assessment order being erroneous and it also being prejudicial to the interest of Revenue, keeps the initial burden on the Revenue itself, namely, the CIT, who invokes such jurisdiction. From the following legal precedents, it would be clear that such powers are not allowed likely to be invoked for the fall of hat as it were, and merely because the revisional authority is of different opinion on the given set of facts or on the ground that assessing authority did not hold a sufficient enquiry during the course of assessment proceedings unless the aforesaid twin conditions for invoking the said jurisdiction under s. 263 are satisfied.

10. The following legal precedents throw ample light for aforesaid legal position.

11. In the case of Commissioner of Income Tax Vs. Max India Ltd., , the Hon''ble apex Court has held as under :

3. According to the learned Addl. Solicitor General on interpretation of the provisions of s. 80HHC(3) as it then stood the view taken by the AO was unsustainable in law and therefore the CIT was right in invoking s. 263 of the IT Act. In this connection he has further submitted that in fact 2005 amendment which is clarificatory and retrospective in nature itself indicates that the view taken by the AO at the relevant time was unsustainable in law.

4. We find no merit in the said contentions. Firstly, it is not in dispute when the order of the CIT was passed there were two views on the word ''profit'' in that section. The problem with s. 80HHCC is that it has been amended eleven times.

Different views existed on the day when the CIT 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 s. 263 particularly when as stated above we have to take into account the position of law as it stood on the date when the CIT passed the order dt. 5th March, 1997 in purported exercise of his powers under s. 263 of the IT Act.

12. In the case of MALABAR INDUSTRIAL CO. LTD. Vs. COMMISSIONER OF INCOME TAX, , the Hon''ble apex Court has held as under :

... A bare reading of s. 263 of the IT Act, 1961, makes it clear that the prerequisite for the exercise of jurisdiction by the CIT suo motu under it, is that the order of the ITO is erroneous insofar as it is prejudicial to the interests of the Revenue. The CIT has to be satisfied of twin conditions, namely, (i) the order of the AO 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 ITO 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 s. 263(1) of the Act.

13. In the case of The Commissioner of Income Tax Vs. Design and Automation

Engineers (Bombay) Pvt. Ltd., , the Bombay High Court, while dismissing the Revenue''s appeal relied upon Commissioner of Income Tax Vs. Gabriel India Ltd., and has held as under:

Held, dismissing the appeal, that it could not be said that the AO had not applied his mind while granting deduction under s. 80HHC of the Act as regards the net profit earned by the assessee pertaining to its export business. The Tribunal was right in holding that the view taken by the AO was a possible view and that the condition precedent for invoking jurisdiction under s. 263 by the CIT did not exist. The Tribunal was justified in upsetting the order passed by the CIT under s. 263 of the Act.

14. In the case of CIT vs. Gabrial India Ltd. (supra), the Bombay High Court has held as under:

The power of suo motu revision under sub-s. (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 CIT to exercise power of revision under this sub-section, viz., (i) 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 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 AO 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... '' 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 ITO acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the CIT simply because, according to him, the order should have been written more elaborately. This section does not visualize a case of substitution of the judgment of the CIT for that of the ITO, who passed the order, unless the decision is held to be erroneous. Cases may be visualized where the ITO 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 CIT, 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 CIT he would have estimated the income at a figure higher than the one determined by the ITO. That would not vest the CIT with power to re-examine the accounts and determine the income himself at a higher figure. It is because the ITO has exercised the quasi-judicial power vested in him in accordance with law and arrived at a conclusion and such a conclusion cannot be termed to be erroneous simply because the CIT does not feel satisfied with the conclusion. It may be said in such a case that in the opinion of the CIT the order in question is prejudicial to the interests of the Revenue. But that by itself will not be enough to vest the CIT 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 the 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.

As observed in DAWJEE DADABHOY and CO. Vs. S. P. JAIN AND ANOTHER., , ''the words ''prejudicial to the interests of the Revenue'' have not been defined, but it must mean that the orders of assessment challenged are such as are not in accordance with law, in consequence whereof the lawful revenue due to the State has not been realised or cannot be realized. It can mean nothing else''. The aforesaid observations were also applied by the Gujarat High Court in Additional Commissioner of Income Tax, Gujarat Vs. Mukur Corporation, . We are of the opinion that the aforesaid interpretation given by the Calcutta High Court to the expression ''prejudicial to the interests of the Revenue'' is the correct interpretation.

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. Our aforesaid conclusion gets full support from a decision of Sabyasachi Mukharji J. (as his Lordship then was) in Russell Properties Pvt. Ltd. Vs. A. Chowdhury, Addl. Commissioner of Income Tax and Others, . In our opinion, any other view in the matter will amount to giving unbridled and arbitrary power to the revising authority to initiate proceedings for revision in every case and start re-examination and fresh enquiries in matters which have already been concluded under the law. As already stated it is a quasi-judicial power hedged in with limitation and has to be exercised subject to the same and within its scope and ambit. So far as calling for the records and examining the same is concerned, undoubtedly, it is an administrative act, but on examination "to consider" or in other words, to form an opinion that the particular order is erroneous insofar as it is prejudicial to the interests of the Revenue, is a quasi-judicial act because of this consideration or opinion the whole machinery or re-examination and reconsideration of an order of assessment, which has already been concluded and controversy which has been set at rest, is set again in motion. It is an important decision and the same cannot be based on the whims or caprice of the revising authority. There must be materials available from the records called for by the CIT.

15. In the case of Commissioner of Income Tax Vs. Arvind Jewellers, , the Gujarat High Court has held as under:

''The provisions of s. 263 of the IT Act, 1961, cannot be invoked to correct each and every type of mistake or error committed by the AO. 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. The phrase ''prejudicial to the interests of the Revenue'' has to be read in conjunction with an erroneous order passed by the AO and every loss of revenue as a consequence of an order of the AO cannot be treated as prejudicial to the interests of the Revenue. When an AO adopts 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 CIT 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.

Held, that the finding of fact by the Tribunal was that the assessee had produced relevant material and offered explanations in pursuance of the notices issued under s. 142(1) as well as s. 143(2) of the Act and after considering the material and exemptions, the ITO had come to a definite conclusion. Since the material was there on record and the said material was considered by the ITO and a particular view was taken, the mere fact that different view can be taken should not be the basis for an action under s. 263. The order of revision was not justified.

16. In the case of Commissioner of Income Tax Vs. Ganpat Ram Bishnoi, . this Court has held as under:

From the record of the proceedings, in the present case, no presumption that can be drawn is that the AO had not applied its mind to the various aspects of the matter. In such circumstances, without even prima facie laying foundation for holding that assessment order is erroneous and prejudicial to interest in any matter merely on spacious ground that the AO was required to make an enquiry, cannot be held to be satisfied the test of existing necessary condition for invoking jurisdiction under s. 263 of the IT Act.

Undoubtedly, the jurisdiction under s. 263 is wide and had meant to ensue that due revenue ought to reach the public treasury and if does not reach on account of some mistake of law or fact committed by the AO, the CIT can cancel that order and require the concerned AO to pass a fresh order in accordance with law after holding a detailed enquiry. But when enquiry in fact has been conducted and the AO has reached a particular conclusion, though reference to such enquiries has not been made in the order of the assessment, but the same is apparent from the record of the proceedings, in the present case, without anything to say how and why the enquiry conducted by the AO was not in accordance with law, the invocation of jurisdiction by the CIT was unsustainable.

As the exercise of jurisdiction by the CIT is founded on no material, it was liable to be set aside. Jurisdiction under s. 263 cannot be invoked for making short enquiries or to go into the process of assessment again and again merely on the basis that more enquiry ought to have been conducted to find something.

The finding of the Tribunal that the ITO had passed assessment order after relevant enquiries and considering the aspects of the matter required by the CIT to be considered by him is a finding of fact and on basis of which, the jurisdiction was assumed by the CIT being nonexistent must be held to be not sustainable.

17. In the case of Commissioner of Income Tax Vs. Mehsana District Co-operative Milk Producers Union Ltd., . it has been held as under:

The provisions of s. 263(1) of the IT Act, 1961, cannot be invoked to correct each and every type of mistake or error committed by the AO, and it is only when the order is erroneous that the section will be attracted. The phrase ''prejudicial to the interests of the Revenue'' has to be read in conjunction with an erroneous order passed by the AO. When two views are possible and the ITO has taken one view with which the CIT does not agree, it cannot be treated an erroneous order prejudicial to the interests of the Revenue unless the view taken by the ITO is unsustainable in law...

Moreover, the CIT could not exercise his power under s. 263 against the order of the ITO granting deduction under s. 80J of the Act, which order was appealed against and had merged in the order of the CIT(A), which was made on 31st Jan., 1984, prior to the making of the revisional order. The order was not valid and was liable to be quashed.

18. Turning to the facts of the present case, it appears that the learned CIT invoked the revisional jurisdiction under s. 263 of the Act on grounds like that the assessee did not disclose any closing stock or work-in-progress in the trading account, that AO has failed to verify the monthly expenditure on different items so as to arrive at correct quantum of closing stock or work-in-progress; the assessee has failed to declare any closing stock, raw material and/or work-in-progress, no verification was made by the assessing authority with reference to the materials and labour charges vis-?-vis completion part of different contracts.

19. It is found appropriate to reproduce the relevant extract of the order of learned CIT, as reproduced by the learned Tribunal in its impugned order, for the purposes of ready reference:

8. In respect of issue stated at para P-5 of this office show-cause notice under s. 263, dt. 6th March, 2009, it is submitted by the assessee before me that the AO rejected the books of accounts and applied provisions of s. 145(3). The said rejection under s. 145(3) was upheld by the learned CIT(A). Thus, the assessment order has merged into the appellate order and no disallowance / addition on account of closing stock or work-in-progress could be made now.

I have given a careful consideration to the entire material facts and it is found that during the course of assessment proceedings, the assessee stated that there is no closing stock or closing work-in-progress for the reason that all the works were completed. The AO accepted the statement without any verification. No verifications were made with the contractees in this regard. The AO also failed to look into the expenditures on different items date wise and correlate the same with the date of contract receipts amounts to arrive at a correct conclusion regarding closing stock of materials and closing work-in-progress. The AO further failed to verify the TDS certificates annexed with the return of asst. yr. 2007-08. If in the return for asst. yr. 2007-08, any TDS certificate showed receipt of amounts in the month of April or May, 2006, it would mean that bills for the same were submitted by the assessee in March, 2006 and under such circumstances the same should have been shown as closing work-in-progress. Normally, there is a time lag of one to two months between presentation of bill to the PWD and receipt of amount by the contractor. The AO also failed to verify as to whether any of the contracts continued in the next year. The TDS certificate of Rs. 2,19,96,512 issued by PWD, Jaisalmer reveals payments of VI running bill on 28th March, 2006 for Rs. 21,75,418. This admittedly shows that it was a running contract and therefore, should have some closing stock of materials /closing work-in-progress. Had the AO verified the purchases date wise, he would have quantified the closing stock of materials/closing work-in-progress. Similar is the case with M/s NG Projects Ltd. who made substantial payments (Rs. 27,09,199 + Rs. 6,35,200 + Rs. 8,14,046 + Rs. 2,31,889) on 31st March, 2006 to the assessee. Here again it was a running contract. Similarly, M/s B. Ratan & Co. paid a sum of Rs. 4,34,244 and Rs. 12,65,435 on 29th March, 2006 to the assessee. The AO failed to make any verification as to whether the contract with M/s B. Ratan & Co. was a running contract which spread over to the next year. Likewise, it is also observed from the TDS certificates placed on records that M/s Cairns Energy India (P) Ltd., PWD, Banner and PWD, Jalore paid a sum of Rs. 7,41,896, Rs. 2,10,559 and Rs. 21,36,082 on 29th March, 2006 and 31st March, 2006, respectively. As mentioned above, no verifications were made with reference to closing stock of materials/closing work-in-progress. In any event, these facts suggest that the contracts continued and therefore, the assessee had certain quantum of closing stock of materials/closing work-in-progress. The AO also failed to verify the purchases made and wages incurred in the month of March, 2006 to ascertain the closing stock of materials as also work-in-progress. All the above facts goes to prove that the assessment was made in undue hurry and without making any enquiries. The point to be noted here is that there is apparent and substantial suppression of closing stock and had the AO substituted the correct figure of closing stock/work-in-progress, he would have ended up with a much more addition than the addition made by him after rejecting the books of accounts and applying a particular net profit rate. I have already discussed earlier that closing stock is an integral part of accounts and any deviation therein changes the profit. In other words, if an addition is made by rejecting the books, yet the AO is required to and legally bound to substitute the figure of closing stock etc. as disclosed by the assessee with the correct figure.

The above discussion amply shows that the assessment order so passed by the AO is erroneous as also prejudicial to the interest of Revenue and therefore, the same is set aside to the extent as above. The AO shall thoroughly verify and investigate the issue of closing stock of raw material and work-in-progress and take action as per law.

20. The above premise for invoking the revisional jurisdiction on the ground that the assessing authority made insufficient enquiry or improper enquiry and failed to verify closing stocks in the record of the assessee, before passing the assessment order, falls flat by a bare perusal of the assessment order dt. 28th March, 2008 itself. The assessing authority finding the same deficiencies in the maintenance of regular day-to-day record including the stock register and in the absence of verification of expenditure incurred in execution of various contract works himself had rejected the books of accounts even though audited by the auditor in accordance with provisions of the Act; and invoking the provisions of s. 145(3) of the Act had proceeded to assess the total income applying the GP rate of 12.5 per cent, which was upheld in the case of same assessee upto this Court. Even though the chart of GP rate produced for last 5 years in the assessment order showed that even for the asst. yr. 2006-07, under consideration, the assessee had declared the higher GP rate of 12.21 per cent, the assessing authority further raised it to 12.5 per cent making an addition of Rs. 4,06,540 on this account, and then making three more additions in the declared total income, enhanced the declared income by approximately Rs. 10 lacs converting the declared total income as per return of Rs. 70,20,830 into assessed income at Rs. 80,18,813 resulting in additional demand along with interest and also issuing penalty notice while passing the assessment order. The relevant extract of the assessment order dt. 28th March, 2008 is reproduced herein below for ready reference:

2. The assessee is engaged in the business of contract work of roads. The accounts of the assessee are audited and the report in Form Nos. 3CB and 3CD are enclosed with the return. The assessee has furnished the comparative gross profit/net profit chart for last four years as following:

From the perusal of the above chart, it reveals that the GP rate disclosed in the year under consideration is 12.21 per cent out of the total receipts of Rs. 14,01,79,045 which is better in comparison to just immediate preceding year i.e. 2005-06 but it is lower in comparison to asst. yr. 2004-05. Where gross profit percentage of 12.22 per cent was declared in asst. yr. 2004-05 at the gross receipts of Rs. 4,50,07,549.

21. The assessing authority had duly noted the auditor''s comments in his audit report and had noted these very objections or deficiencies in the record maintained by the assessee, viz. non-maintenance of day-to-day stock register, which the learned CIT found sufficient to issue notice and initiate revisional jurisdiction under s. 263 of the Act in the following terms in his assessment order dt. 28th March, 2008:

The assessee failed to give head-wise break-up of expenses. In the audit report also, the auditor made a note that there might be some personal expenses pertaining to partners in the form of travelling expenses, food expenses and entertainment expenses. The Authorised Representative also agreed that the assessee did not maintain any register to verify part of work completed, expenditure incurred on various items, materials used at different sites of contract works. It was also admitted that the assessee did not maintain log book, wages register, attendance register and complete expenses vouchers in respect of labour, Rasoda, machinery, repairing, loading and unloading, diesel, petrol, oil, kerosene, tyre tube, travelling etc. Therefore, these expenses are not subject to verification. Moreover, the assessee has not disclosed work-in-progress at the year ending. No value of closing stock has been disclosed. It is quite improbable that the contract work specially of road construction would have been completed before the end of the financial year. Looking to the above mentioned defects, the results declared by the assessee cannot be accepted as fully correct and provisions of s. 145(3) of the IT Act are clearly applicable in this case.

Once, the assessing authority rejected the books of account of the assessee on these very defects and passed the best judgment assessment on the basis of GP rate of 12.5 per cent and made additions in the declared total income, there was no occasion of revising the said order on the ground that the assessing authority did not verify the closing stocks of assessee, a fact which the assessee himself admitted and the assessing authority noticing the same and rejecting the books of accounts, passed the best judgment assessment.

22. Thus, it is clear that the learned CIT had merely on a change of opinion and to substitute his own opinion about the deficiencies in the maintenance of the record by the assessee invoked the revisional jurisdiction and set aside the assessment order. This is not permissible under s. 263 of the Act. Sec. 263 of the Act is quoted hereinbelow:

Sec. 263. Revision of orders prejudicial to Revenue.-

(1) The CIT may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the AO is erroneous insofar 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 AO shall include-

(i) an order of assessment made by the Asstt. CIT or Dy. CIT or the ITO on the basis of directions issued by the Jt. CIT under s. 144A.

(ii) an order made by the Jt. CIT in exercise of the powers or in the performance of the functions of an AO conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief CIT or Director General or CIT authorised by the Board in this behalf under s. 120;

(b) ''record'' shall include and shall be deemed always to have included all record relating to any proceeding under this Act available at the time of examination by the CIT.

(c) where any order referred to in this sub-section and passed by the AO had been the subject-matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the CIT 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-s. (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-s. (2), an order in revision under this section may be passed at any time in the case of any 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-s. (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to s. 129 and any period during which any proceeding under this section is stayed by an order of injunction of any Court shall be excluded.

23. It is also worth noting that the assessee himself felt aggrieved by the addition made in the total income declared by him in his revised return to the tune of Rs. 10 lacs or so and, therefore, had filed an appeal before the appellate authority i.e., CIT(A), who had also passed order on 6th Aug., 2009, which has not been produced with the memo of appeal as aforesaid but this fact is duly noted by Tribunal in its order impugned and the fact remains that the assessment order stood merged with the order passed by the appellate authority, namely, CIT(A), in appeal filed under the provisions of s. 246 of the Act. Once the order of the assessing authority stood merged with higher appellate authority, the parallel authority on the administrative side, namely, CIT, even cannot revise later on the order passed by the assessing authority, which stood merged with the order of appellate authority.

24. In the case of the present assessee itself, this Court on previous occasion in Commissioner of Income Tax Vs. Jain Construction Co. and Others, , quashed the revisional order under s. 263 of the Act by holding as under:

3. The assessee, a registered partnership firm, filed return for the asst. yr.

1993-94 in respect of accounting period of 1992-93 declaring income of Rs. 17,980. On account of certain discrepancies noticed in the books of accounts, the assessing authority viz., the ITO, Banner, invoking the provisions of s. 145 of the Act of 1961, applied a net profit rate of 12.5 per cent on receipts of Rs. 76,12,688. He further allowed deduction by way of depreciation, interest and salary to partners to the extent of Rs. 8,67,691. As a result of this deduction, the assessable income was calculated as Rs. 83,895. The CIT, Jodhpur, on perusal of the assessment record, found that the order of the assessing authority is erroneous as it is prejudicial to the interest of the Revenue in as much as a result of deduction by way of depreciation, interest and salary to the partners, the net profit in assessee''s case came down to the rate of 1.10 per cent In his opinion, the said net rate was extremely low. He, therefore, invoked the provisions of s. 263 of the Act of 1961 and issued a notice to the assessee. The CIT held that while taking the net profit rate of 12.5 per cent, the assessing authority had already allowed expenses to the extent of 87.5 per cent in the case of the assessee against the net receipts. In his opinion, the provisions of s. 40(b) of the Act of 1961 were only enabling provisions and they did not provide for separate deductions of such expenses even when the income was being computed after adopting the net profit rate by rejecting the books of accounts. He also held that looking to the normal net profit rate, which is applicable in the case of contractors, the income determined by the assessing authority by applying effective rate of 1.1 per cent is very much low as compared to the income properly assessable in the case.

10. It will also be relevant to consider s. 44AD, which is a special provision for computing profits and gains of business of civil construction, etc. This provision has been inserted by the Finance Act of 1994 w.e.f. 1st April, 1994. The provision does not have a direct bearing on the controversy involved in the instant case as it pertains to asst. yr. 1993-94 but it required to be dealt with as it has been referred by the learned counsel for the Revenue. Now in case of assessee engaged in business of civil construction or supply of labour for civil construction fixed rate of net profit of 8 per cent has been provided. Proviso to sub-s. (2) permits salary and interest paid to the partners deducted from the fixed net profit of 8 per cent subject to the conditions and limits specified in cl. (b) of s. 40. Thus, there is further simplification and certainty in computation of income. Instructions contained in para 2 of the circular of the year 1965 have been brought in the statute, thereby the doubts, if any, with respect to subject circular have been settled.

11. The Division Bench of this Court in Commissioner of Income Tax Vs. S.M. Bhatiya Associates, has held that finding recorded by the Tribunal on appreciation of evidence available on record, is a finding of fact and does not give rise to the question of law for reference under s. 256(2) of the Act, and thereby rejected the applications seeking reference of similar questions.

In the instant cases, the Tribunal while allowing the appeal has directed the assessing authority to recompute the total income as estimated by him and allow relief on account of payment of interest and claim of depreciation. The finding recorded by the Tribunal is purely a finding of fact, based on proper appreciation of material on record and the evidence produced by the assessee. As no question of law arises out of the order passed by the Tribunal, we find no fault with the order of the Tribunal declining to refer the question for our opinion.

25. Thus having heard the learned counsel for Revenue at length and in view of aforesaid legal position and factual matrix, we are satisfied that the Tribunal was justified in holding that in these facts and upon the stated objections, the CIT was in error in invoking the revisional jurisdiction under s. 263 of the Act, and thus the findings arrived at by the Tribunal essentially remain findings of fact, which do not give rise to any substantial question of law, requiring consideration by this Court. Mere alleged insufficiency of the enquiry in the opinion of the CIT by the assessing authority, could not permit him to invoke the revisional jurisdiction under s. 263 of the Act and, therefore, the essential twin conditions for invoking the revisional jurisdiction, namely, the impugned assessment being erroneous as well as prejudicial to the interest of Revenue, were not at all satisfied in the present case and, therefore, the Tribunal was perfectly justified in allowing the assessee''s appeal and setting aside the order of learned CIT under s. 263 of the Act. We do not find any substantial question of law arising in the present appeal filed at the instance of the Revenue and the same is liable to be dismissed. The same is, accordingly, dismissed.

