IN THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai

Before Shri Jason P. Boaz, Accountant Member
and Shri Sandeep Gosain, Judicial Member

ITA No. 2828/Mum/2014
(Assessment Year: 2009-10)

M/s. Vinati Organics Ltd. 1102, 11th Floor, Parinee Cresenzo, Plot No. C-38 G-Block, Behind MCA, BKC Bandra (E), Mumbai 400051	Vs.	Commissioner of Income Tax-8 Room No. 259, Àayakar Bhavan M.K. Road, Mumbai 400020

PAN - AAACV6538K

Appellant **Respondent**

Appellant by: Shri Sunil Hirawat
Respondent by: Shri G.M. Doss

Date of Hearing: 23.05.2016
Date of Pronouncement: 31.05.2016

O R D E R

Per Jason P. Boaz, A.M.

This appeal by the assessee is directed against the order of the CIT-8, Mumbai dated 31.03.2014 passed under section 263 of the Income Tax Act, 1961 (in short 'the Act') for A.Y. 2009-10.

2. The facts of the case, briefly, are as under: -

2.1 The assessee, a company engaged in the business of manufacturing of chemicals, filed its return of income for A.Y. 2009-10 on 26.09.2009 declaring total income of ₹17,63,62,718/- and 'Book Profits' under section 115JB of the Act at ₹31,80,76,341/-. The return was processed under section 143(1) of the Act and the case was subsequently taken up for scrutiny. The assessment was completed under section 143(3) of the Act vide order dated 26.12.2011; wherein the income of the assessee was determined at ₹17,66,43,510/- in view of the assessee's claim for deduction under section 10B of the Act for the first time being restricted to ₹12,62,23,702/-. Book Profits under section 115JB of the Act were accepted as declared at ₹31,80,76,341/-.

2.2 The CIT-8, Mumbai on an analysis of the records of assessment observed that the administrative expenses of ₹6,76,23,924/- and employee cost of ₹4,00,79,292/- have not been allocated in the two periods in the assessee's Lote Manufacturing Unit between the two periods, i.e. 01.04.2008 to 31.07.2008 when it was a DTA Unit and for the period 01.08.2008 to 31.03.2009 when the Lote unit was an EOU Unit; thereby the assessee claimed and was allowed higher deduction under section 10B of the Act. According to the learned CIT the Assessing Officer (AO) did not examine these aspects with respect to the genuineness of the assessee's claim for deduction under section 10B of the Act thereby rendering the order of assessment for A.Y. 2009-10 erroneous and prejudicial to the interest of Revenue. In this view of the matter, the learned CIT issued a show cause notice under section 263 of the Act dated 10.01.2014 calling for the assessee's explanation in the matter. The assessee in reply thereto dated 05.02.2014 submitted that the expenses for the Lote Unit had been allocated for the two periods on actual and not on any percentage terms. It was submitted that since the details of allocation of expenses was before the AO when he examined the assessee's claim for deduction under section 10B of the Act, he had accepted the allocation after due consideration and therefore there being no cause for revisiting the issue under section 263 of the Act it was requested that the proceedings under section 263 of the Act initiated for A.Y. 2009-10 be dropped.

2.3 The learned CIT issued a fresh show cause noticed dated 21.03.2014 to the assessee observing that the notice dated 10.01.2014 is to read as, since the administrative expenses of ₹6,76,23,924/- and employee cost of ₹4,00,79,292/- of Lote unit have not been correctly allocated between the two periods, i.e. 01.04.2008 to 31.07.2008 (as DTA Unit) and 01.08.2008 to 31.03.2009 (as EOU Unit) and this aspect of the assessee's claim for deduction under section 10B of the Act having not been examined by the AO, the order of assessment for A.Y. 2009-10 was rendered erroneous and prejudicial to the interest of Revenue. The learned CIT, after considering the submissions of the assessee, observed that prima facie there were defects in the trial balance vis-a-vis the

Balance Sheet in the allocation of administrative expenses and employee cost in respect of salary and wages, interest expenditure, administrative expenses and other expenses such as conveyance, motor car, postage, advertisement, guest charges, etc. The learned CIT was of the view that the assessee has not satisfactorily explained why the expenditure in the eight month period of the EOU was proportionately less than the DTA period. According to the learned CIT, the AO failed to examine the aforesaid aspects, i.e. of allocation of administrative expenses and employee cost between the two periods of the Lote unit, while examining the assessee's claim for deduction under section 10B of the Act. Therefore, the order of assessment is erroneous and prejudicial to the interests of Revenue. The AO was accordingly directed to recompute the deduction under section 10B after examining and making adjustments in relation to the allocation of administrative and employee costs.

3. Aggrieved by the order of the CIT-8, Mumbai under section 263 of the Act dated 31.03.2015, the assessee has preferred this appeal raising the following grounds: -

> *"1. On facts and in law, the learned Commissioner of Income-tax (hereinafter referred to us "Ld. CIT") had erred in setting aside the assessment order u/s. 143(3) of the Income-tax Act, 1961 even though the order u/s. 143(3) passed by the learned Assessing Officer who was neither erroneous nor prejudicial to the interest of the revenue. Under the facts and circumstances of the matter, he ought not to have set aside the assessment order u/s. 143(3) of the Act.*
>
> *2. On facts and in law, the Ld. CIT had erred in setting aside the issue regarding allocation of expenses to the 10-B Unit which issue has been duly dealt with by the learned Assessing Officer after due application of mind.*
>
> *3. On facts and in law, in any case the order passed by the Ld. CIT u/s. 263 is against the law and facts of the case and deserves to be quashed.*
>
> *4. The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing of the appeal, so as to enable the Hon. ITAT to decide this appeal according to law."*

4.1 According to the learned A.R. for the assessee, the impugned order of the learned CIT passed under section 263 of the Act ought to be quashed

since the issue regarding allocation of expenses to the 10B unit has been dealt with by the AO after due application of mind and therefore the order of assessment passed under section 143(3) of the Act for A.Y. 2009-10 is neither erroneous nor prejudicial to the interests of Revenue.

4.1.2 In this regard, it is submitted that in the course of assessment proceedings the assessee had submitted details vide letters dated 30.10.2011, 14.11.2011, 25.11.2011 and 03.12.2011 (placed at pages 1 to 19 of assessee's paper book); which included financial statements which, inter alia, reflected the details of allocation of expenses in the Lote Unit and also contained in the replies to AO's queries, especially with regard to the allocation of remuneration to Auditors, Audit Fees and also with respect to 'other income' when the AO examined the assessee's claim of deduction under section 10B of the Act. According to the learned A.R. for the assessee since the details of allocation of expenses of the Lote Unit of the assessee for both periods were before the AO and he accepted the same, there was no requirement or cause for assumption or jurisdiction by the learned CIT under section 263 of the Act since the order of assessment was neither erroneous nor prejudicial to the interest of Revenue. In support of this proposition, the learned A.R. for the assessee, inter alia, placed reliance on the following judicial decisions: -

i. CIT vs. Forest Development Corporation of Maharashtra Ltd. (2015) 374 ITR 538 (Bom.); and
ii. CIT vs. Fine Jewellery (India) Ltd. (2015) 372 ITR 303 (Bom)

4.1.4 The learned A.R. for the assessee contended that since the issue of allocation of expenses in the Lote Unit in the two periods (01.04.2008 to 31.07.2008 and 01.08.2008 to 31.03.2009) was examined by the AO, the view taken by the AO was one possible view, with which the learned CIT did not agree, it is only a change of opinion and therefore the order of assessment cannot be treated as an order prejudicial to Revenue. The learned A.R. contended that in view of the above submission it is evident that the impugned order under section 263 of the Act is not sustainable and prayed that the same may be quashed.

4.2.1 Per contra, the learned D.R. for Revenue emphatically supported the impugned order of the learned CIT under section 263 of the Act. According to the learned D.R., from a perusal of the order of assessment dated 26.12.2011 for A.Y. 2009-10 it is amply clear that while examining the assessee's claim for deduction under section 10B of the Act, the AO did not call for or examine the details in respect of allocation of administrative expenses of ₹6,16,23,924/- and employee cost of ₹4,00,79,292/- as to whether they were properly allocated at the Lote unit in the two periods 01.04.2008 to 31.07.2008 when it was DTA unit and 01.08.2008 to 31.03.2009 when it as a EOU unit. It is submitted that all that appears to have been examined by the AO was the allocation of miscellaneous income and Audit fees. Drawing the attention of the Bench to the assessee's paper book, the learned D.R. contended that a perusal of the letters purportedly filed by the assessee before the AO on 31.10.2011, 14.11.2011, 25.11.2011, 03.12.2011 (placed at pages 8 to 19 of the paper book) show that no query was raised by the AO in respect of the allocation of administrative expenses and employee costs in the Lote unit in the said two periods. In fact no material has been brought on record to show that the AO even raised any query in respect of the allocation of the aforesaid administrative expenses and employee costs. In these circumstances, the assumption of jurisdiction by the learned CIT under section 263 of the Act was in order as the order of assessment was erroneous and prejudicial to the interests of Revenue.

4.2.3 The learned D.R. further referred to the judicial decisions cited by the assessee in this regard and submitted that both of them would not be applicable to the case on hand. The learned D.R. pointed out that in the case of Fine Jewellery (India) Ltd. (supra), a query was raised on the issue by the AO during assessment proceedings and was responded to by the assessee; whereas in the case on hand no query, whatsoever was raised by the AO on the issue of proper allocation of administrative expenses and employee costs in the course of assessment proceedings. Since the factual situation of the cited case is different from the case on hand, the cited case was not applicable. The learned D.R. submitted that the decision in the

case of Forest Development Corporation of Maharashtra (supra) for A.Y. 2004-05 was not applicable as it was factually different. In the cited case the apportionment of expenses between agricultural and non-agricultural segments had a previous undisputed history that since 1996-97 the same method was adopted and accepted, whereas in the case on hand this was the first year of the assessee's claim for deduction under section 10B of the Act for the Lote EOU unit and therefore it was incumbent on AO to examine whether, inter alia, the allocation of administrative expenses and employee cost was properly done; which had not been done.

4.2.3 In view of the above, the learned D.R. submitted that the assumption of jurisdiction under section 263 of the Act by the learned CIT was in order as the issue in question (supra) having never been examined by the AO while granting the assessee deduction under section 10B of the Act for the first time rendered the order of assessment erroneous and prejudicial to the interests of Revenue and therefore the same ought to be upheld and the assessee's appeal dismissed.

4.3.1 We have heard both parties and perused and carefully considered the material on record, including the judicial decisions cited. At the outset, before embarking upon an inquiry about the facts available on record and how to construe them, we deem it pertinent to take note of the fundamental principles for judging the action of the learned CIT taken up under section *263* of the Act. In the case of Smt. Khatiza S. Oommerbhoy (100 lTD *173),* the ITAT analyzed in details the various authoritative pronouncements including the decision f the Honbie Apex Court in the case of Malabar Industries Co. vs. CIT (243 *ITR 83)* and propounded the following broader tests: -

i. *The CIT 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 was only when an order is erroneous that the section will be attracted.*

iii. *An incorrect assumption of facts or an incorrect application of law will suffice 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 course permissible under law or where two views are possible and the Assessing Officer has taken one view with which the CIT 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 determine the income, the CIT, 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 his 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 CIT does not feel satisfied with the conclusion.

viii. The CIT, 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 the 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.

4.3.2 The Hon'ble Delhi High Court in the case of Gee Vee Enterprises vs. Addl. CIT & Ors. (1975) 99 ITR 375 (Del.) has propounded the role required to be played by the Assessing Officer.

> *"The reason is obvious. The position and function of the Income Tax Officer is very different from that of a civil court. The statements A made in a pleading proved by the minimum amount of evidence* may *he accepted by a civil court in the absence of* any *rebuttal. The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which comes before it. The Income Tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. The meaning to be given to the word "erroneous" in section 263 emerges out of this contract. It is because it is incumbent on the Income Tax Officer to further investigate the facts stated in the return when lien circumstances would make such an inquiry prudent that the*

word "erroneous" in section 263 includes the failure to make such an inquiry. The order becomes erroneous because such art inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct."

4.3.3 In the light of the above proposition and on an appreciation of the material on record and submissions made in the case on hand, it is seen that, as contended by the learned D.R., a perusal of the order of assessment for A.Y. 2009-10 dated 26.12.2011 reveals that while examining the assessee's first year of claim for deduction under section 10B of the Act, the AO did not call for and examine whether there was a proper allocation of administrative expenses of ₹6,76,23,924/- and employee cost of ₹4,00,79,292/- in the Lote Unit between the periods 01.04.2008 to 31.07.2008 when it was a DTA unit and 01.08.2008 to 31.03.2009 when it was EOU unit. It is also seen, from a perusal of the correspondence, purportedly made by the assessee with the AO in assessment proceedings, vide letters dated 31.10.2011, 14.11.2011, 25.11.2011 and 31.12.2011 (paper book pages 8 to 19), that no query was raised or inquiry made by the AO with respect to whether or not the allocation of administrative expenses and employee costs were properly made. No material has been placed before us to show that the AO even raised a query, issued show cause notice or made inquiries in respect of whether the aforesaid expenses were properly allocated in the Lote unit in the two said periods and that the assessee had filed its reply thereto. While it is the prerogative of the AO to pass the order of assessment, but if a discussion is not discernable from the order of assessment on a particular issue, then in order to ascertain whether the AO has applied his mind, the appellate authorities can go through the show cause notice issued, if any, and the reply given by the assessee would indicate that even if the assessment order is silent, the issue must have been discussed in assessment proceedings. In our view no such material is available on record. The Hon'ble Apex Court in the case of Malabar Industries (supra) has observed that acceptance of accounting entries as it is without causing any enquiry would render the assessment order erroneous and prejudicial to the interest of Revenue. The learned CIT has rightly considered all these

aspects before taking action under section 263 of the Act. We, therefore, find no merit in this appeal.

4.3.3 Before parting, we would like to humbly state that we have carefully perused the judicial pronouncements cited by the assessee (supra) and, with due respect, agree with the averments of the learned D.R. for Revenue that those cited cases are distinguishable and not applicable to the facts of the case on hand for the reasons brought out succinctly in para 4.2.2 of this order.

5. In the result, the assessee's appeal for A.Y. 2009-10 is dismissed.

Order pronounced in the open court on 31st May, 2016.

Sd/-	Sd/-
(Sandeep Gosain)	**(Jason P. Boaz)**
Judicial Member	**Accountant Member**

Mumbai, Dated: 31st May, 2016

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT -8, Mumbai*
4. *The DR, "F" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.