IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

BEFORE SHRI P. K. BANSAL, VICE PRESIDENT AND
SHRI GEORGE GEORGE K., JUDICIAL MEMBER

ITA No.277/COCH/2016
Assessment Year:2011- 12

M/s Aspinwall and Company Ltd. 50-926/A1-A5, Total Towers, Devankulangra, Edappally P.O., Ernakulam. PAN:AACCA 2655 G	Vs	D.C.I.T., Circle-1(1), Kochi.
(Appellant)		(Respondent)

Appellant by	Shri Raja Kannal
Respondent by	Shri Shanthom Bose, CIT, D.R.
Date of hearing	04/10/2017
Date of pronouncement	05/10/2017

ORDER

PER P. K. BANSAL, V.P.

This appeal has been filed by the assessee against the order of the CIT dated 18/01/2016 passed under section 263 of the Act by taking the following grounds of appeal:

"*1. The order passed by the learned Principal Commissioner of Income-tax. Kochi - I ("the learned CIT") is bad in law and not in conformity of the powers granted under the provisions of section 263 of the Income-tax Act, 1961 ('the Act').*

2. The learned CIT has erred in holding that the assessment order passed by the learned AO is erroneous in so far as it is prejudicial to the interests of

the revenue and setting aside the Assessment Order passed by the learned Assessing Officer.

3. The learned CIT ought to have appreciated that the Appellant had voluntarily disallowed a sum of Rs.1,00,000/- under section 14A which was duly examined and accepted by the Assessing Officer. Accordingly, the revisionary proceedings in the present case are outside the jurisdiction of section 263 of the Act.

4. The learned CIT has erred in concluding that the provision of section 14A read with Rule 8D have to mandatorily be applied in the case of the Appellant.

5. The learned CIT ought to have appreciated that Rule 8D can be applied only after recording an objective satisfaction that the claim of the assessee is not correct in respect of expenditure incurred in relation to income which does not form part of total income.

6. The learned CIT has erred in not considering the fact that the Appellant's own funds were in far excess of the amount of investments made by the Appellant Company."

2. There is 84 days delay in filing the appeal. The assessee has filed application for condonation of delay along with the affidavit.

3. After hearing rival submissions and going through the affidavit filed by the assessee, we noted that the assessee was prevented by sufficient cause to file the appeal before the Tribunal within the permissible time therefore, we condone the delay.

4. Ground Nos. 4 to 6 taken by the assessee relate to the merit of the issue in respect of which the CIT has invoked the jurisdiction under section 263 of the Act. We noted that the CIT in this case has not decided the issue on merit but has simply set aside the order of the Assessing Officer on the limited issue of disallowance of expenditure

under section 14A read with Rule 8D. Therefore, these grounds do not arise out of the order of the CIT. We, therefore, dismiss the same.

5. Now coming to ground Nos. 1 to 3. The only issue involved before us is whether the order passed by the CIT under section 263 is valid and is erroneous in so far as prejudicial to the interest of the Revenue or not. The facts in this regard are that in this case the assessment under section 143(3) was completed on 31/03/2014 on a total income of Rs.10,55,81,850/-. Subsequently, the CIT, on verification of the case record, noted that the assessee has earned a sum of Rs.79,25,486/- as dividend during the previous year relevant to assessment year 2011-12. The dividend is earned from the related entities and from the investment carried out by the assessee. The said dividend was exempt under section 10(34) of the Act. The assessee disallowed lump sum on ad hoc basis a sum of Rs.1,00,000/- out of the expenditure relating to the earning of this exempt income. The CIT therefore, issued the show cause notice to the assessee on 16/12/2015 as to why the disallowance of the expenditure has not been computed under section 14A(1) read with Rule 8D. The CIT, after examining the submissions of the assessee, set aside the assessment order passed under section 143(3) dated 31/03/2014 on the limited issue of computing the disallowance under section 14A read with Rule 8D by observing as under:

> *"6. I, therefore, set aside the said order on this limited issue with a direction to the Assessing Officer to recalculate the expenditure disallowable under Rule 14(A) after applying provisions of Rule 8D of the Income-tax Act. Needless to say that the Assessing Officer will provide ample opportunity to the assessee to present its case before passing an order as per the provisions of the Income-tax Act, 1961."*

6. The assessee came in appeal before us and relied on his letter dated 20/01/2014 written to the ACIT in which at Serial number 4 the

assessee has mentioned "the transaction in mutual fund along with the copies of the relevant bank statements are given (Annexure-4)." The assessee did not submit before us copy of any notice issued under section 142(1) by which the Assessing Officer has made any inquiry in respect of claim of the disallowance of expenditure under section 14A and the applicability of Rule 8D. The learned A.R. also relied on the following decisions of Hon'ble Delhi High Court; (i) CIT vs. Sunbeam Auto Ltd. [2011] 332 ITR 167 (Del) and (ii) CIT vs. Anil Kumar Sharma [2011] 335 ITR 83 (Del) for the proposition of law that if there was any inquiry, even inadequate, that would not by itself give an occasion to the CIT to pass the order under section 263 of the Act merely because he has a different opinion in the matter. On a question from the Bench, whether any specific query was asked by the Assessing Officer with reference to the computation of disallowance of expenditure under section 14A(1), learned A.R. insisted on the letter dated 20/01/2014 and submitted that the Assessing Officer has duly asked for the transaction in mutual funds and that will tantamount that the inquiry, even inadequate, has been made in respect of the disallowance to be made under section 14A of the Act.

7. Learned D. R., on the other hand, vehemently contended that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. The CIT has rightly exercised the jurisdiction under section 263. It is a case where the Assessing Officer has not at all examined the claim of the assessee with reference to the expenditure to be disallowed under section 14A of the Act. Even no notice has ever been issued to the assessee asking explanation on the disallowance being estimated by the assessee at Rs.1,00,000/-. In this regard learned D.R. drawn our attention towards the assessment order and we also noted the assessment order nowhere whisper about the disallowance of the expenditure under section 14A of the Act.

8. We have heard the rival submissions, carefully considered the same along with the orders of the tax authorities below and the case laws as relied on. We have also gone through the provisions of section 263 of the Act. From the perusal of the said section, it is apparent that there are four main features of the power of revision to be exercised u/s 263 by the Commissioner of Income-tax. Firstly, the Commissioner may call for and examine the records of any proceedings under the Act and for this purpose he need not to show any reason or record any reason to believe. It is a part of his administrative power to call for the record and examine them relating to any assessee. Secondly, he may consider any order passed by the Assessing Officer as erroneous as well as prejudicial to the interest of the Revenue. This is exercised by calling for and examining the record available at this stage. There is no question of the assessee to appear and make submission at this stage. Thirdly, if after calling for and examining the records the Commissioner considers that the order of the Assessing Officer is erroneous in so far it is prejudicial to the interest of the Revenue, he is bound to give an opportunity to the assessee of being heard and after making or causing to be made such enquiry as he may deem fit, pass such order thereon as the circumstances of the case may justify including an order enhancing or modifying the assessment or canceling assessment and directing a fresh assessment. This empowers the CIT to cause or make such enquiries as he deems necessary. Fourthly, the CIT u/s 263 can enhance or modify the assessment as a result of enquiry conducted and hearing of the assessee.

8.1 For invoking the provisions of Sec. 263, the twin condition that the order passed by the AO is erroneous and also that it is prejudicial to the interest of the Revenue must be satisfied. If one of them is absent, the provisions of Sec. 263 cannot be invoked. The term 'erroneous' has not

been defined under the Income Tax Act but it is well settled that each and every type of mistake or error committed by the AO cannot be said to be an error. An order can be set to be erroneous if there is incorrect assumption of facts or incorrect application of law in the order of the AO. If the AO after making the inquiry and examining the record has taken one of the possible views, it cannot be said that the order passed by the AO was erroneous. The assessment record and the evidence produced before us during the course of the hearing reflect apparently that the AO, in this case, during the impugned assessment year has not carried out any inquiry with regard to the quantum of disallowance made by the assessee in computation of income with regard to the applicability of section 14A read with Rule 8D. It is a fact that in this case, the AO has not issued any notice or raised any query to the Assessee in respect of quantum of disallowance to be made as per the provisions of section 14A read with Rule 8D. No doubt, the AO issued notice u/s 142(1) on but no query in respect of the disallowance to be made as per the provisions of section 14A read with Rule 8D was ever made. The Assessee even though claimed vide letter dt. 20.1.2014, a copy of which is submitted to us during the course of hearing, that the Assessee filed the details of transaction in mutual funds, except for the details of these transactions, we do not find any letter being written by the AO asking from the Assessee about the disallowance to be made u/s 14A. From the facts on record, we noted that in this case the Assessing Officer has not issued any notice or raised any query to the assessee in respect of the disallowance to be made under section 14A(1) and applicability of Rule 8D. Even no submissions were made by the assessee except with reference to the transaction in mutual funds. No doubt the assessee has disallowed on ad hoc a sum of Rs.1,00,000/- under section 14A. The Assessing Officer accepted the said disallowance without making any

inquiry in this regard. This does not mean that the Assessing Officer has applied his mind to the disallowance made under section 14A. Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. vs. CIT [2000] 243 ITR 83, at page 88 has categorically held as under:

> *"In the instant case, the Commissioner noted that the Income Tax Officer passed the order of nil assessment without application of mind. Indeed, the High Court recorded the finding that the Income Tax Officer failed to apply his mind to the case in all perspective and the order passed by him was erroneous. It appears that the resolution passed by the board of the appellant company was not placed before the Assessing Officer. Thus, there was no material to support the claim of the appellant that the said amount represented compensation for loss of agricultural income. He accepted the entry in the statement of the account filed by the appellant in the absence of any supporting material and* ***without making any inquiry****. On these facts the conclusion that the order of the Income Tax Officer was erroneous is irresistible. We, are, therefore of the opinion that the High Court has rightly held that the exercise of the jurisdiction by the Commissioner u/s 263(1) was justified."*

This itself proves non application of mind on the part of the Assessing Officer and allowing the deduction to the assessee without making an enquiry will tantamount that the order is erroneous and prejudicial to the interest of the Revenue. Hon'ble Supreme Court in the case of Malabar Industrial Co. (Supra) while holding so has relied on the decision of Hon'ble Supreme Court in the case of Rampyari Devi Saraogi vs. Commissioner of Income-tax 67 ITR 84(SC). In this case the Income Tax Officer accepted the return of the assessee in respect of the initial capital, gift received and sale of jewellery, the income from business etc. without any enquiry or evidence whatsoever. For that reason the CIT held the order to be erroneous. In revision, he cancelled the order and ordered the Income Tax Officer to make fresh assessment.

8.2 Thus, the law as may be stated after going through both the decisions of Supreme Court is very clear that if the assessment has been made without making the proper enquiry and application of mind, the order is erroneous and prejudicial to the interest of Revenue. Unlike the Civil Court which is neutral to give a decision on the basis of evidence produced before it, an Assessing Officer is not only an adjudicator but is also an investigator. The Assessing Officer cannot remain passive on the face of a return which is apparently in order but calls for further enquiry. It is the duty of the Assessing Officer to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke enquiry. If there is failure to make such enquiry, in our opinion, the order is erroneous and prejudicial to the interest of Revenue. The Revenue has not to prove that its order is erroneous and CIT can revise it u/s 263. Even the Hon'ble Allahabad High Court in the case of Swarup Vegetable Products Industries Ltd. (No. 1) vs. CIT [1991] 187 ITR 412 has also taken the similar view by observing as under:

> *"It is beyond dispute that, under section 263 of the I.T. Act, the Commissioner has power to set aside the assessment order and send the matter for fresh assessment if he is satisfied that further enquiry is necessary and that the order of Income Tax Officer is prejudicial to the interest of the Revenue."*

Hon'ble Delhi High Court also in the case of Gee Vee Enterprises vs. Addl. CIT [1975] 99 ITR 375 (Del) has also taken the similar view that lack of proper enquiry tantamount that the order is erroneous and prejudicial to the interest of Revenue.

8.3 Similar issue has arisen before the Special Bench of I.T.A.T. Chennai "B" Bench in the case of Rajalaksmi Mills Ltd. vs. Income Tax Officer [2009] 121 ITD 343 (Chennai) (SB). The facts of this case were

that the assessee enclosed the balance sheet along with the return and in the balance sheet the assessee made a provision for gratuity amounting to Rs.7,85,600/-. The assessee claimed it as deduction in the return of income. The Assessing Officer allowed the same without making any discussion in the order of assessment. The CIT by invoking the provision of section 263 took the view that the order was erroneous and prejudicial to the interest of Revenue. The Special Bench of I.T.A.T. under these facts has held as under:

> *"It is not necessary for the Commissioner to make further enquiries before cancelling the assessment order of the Assessing Officer. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Assessing Officer should have made further inquiries before accepting the statements made by the assessee in the return. The reason is obvious. Unlike the civil court which is neutral to give a decision on the basis of evidence produced before it, an Assessing Officer is not only an adjudicator but is also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further enquiry. 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 context. The word 'erroneous' in that section includes cases where there has been failure to make the necessary inquiries. It is incumbent on the Assessing Officer to investigate the facts stated in the return when circumstances make such an inquiry prudent and the word 'erroneous' in section 263 includes the failure to make such an enquiry. The order becomes erroneous because such an enquiry 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.*
>
> *In the instant case, the Assessing Officer failed to make any enquiry in regard to the allowability of the provision for gratuity. As such, the order was erroneous and prejudicial to the interests of the revenue. Therefore, the conditions precedent for assuming jurisdiction under section 263 did exist in the facts of the instant case."*

This clearly proves that the Special Bench of the Tribunal has also taken the view that the lack of inquiry will tantamount that the order is erroneous and prejudicial to the interest of the Revenue. We also noted that the CIT has not given direction to the Assessing Officer on merit but has simply restored the issue to the file of the Assessing Officer with the direction that the Assessing Officer shall redecide the issue on merit after giving proper opportunity to the assessee. The assessee can place on merit all the decisions before the Assessing Officer.

8.4 Now coming to the case laws as relied on by learned A.R. We noted that Hon'ble Delhi High Court in the case of CIT vs. Sunbeam Auto Ltd. [2011] 332 ITR 167 (Del) held that if there is some inquiry by the Assessing Officer in the original proceedings, even if inadequate, that cannot given occasion to CIT with the jurisdiction under section 263 merely because he can form another opinion. In this case on the basis of the decision of Hon'ble High Court took the view that if there was any inquiry, even inadequate, that would not by itself give occasion to the CIT to pass order under section 263 of the Act merely because he had a different opinion in the matter. In the case of the assessee, we noted that the Assessing Officer has not made any inquiry with reference to the disallowance to be made under section 14A read with Rule 8D. We may clarify that inquiring the disallowance under section 14A is different from giving detail of the transaction in mutual funds. We have also gone through the decision of CIT vs. Anil Kumar Sharma (supra). There also we noted the Hon'ble High Court took the view that there is distinction between lack of inquiry and inadequacy of the inquiry. It was held that if there was an inquiry, even inadequate, that would not by itself give occasion to the CIT to pass order under section 263 of the Act merely because he has a different opinion in the matter. This decision also, in

our opinion, will not assist the assessee as we have already held in the preceding paragraph that the case of the assessee does not relate to the inadequacy of inquiry but it is a case where the Assessing Officer while accepting the disallowance made by the assessee on ad hoc basis amounting to Rs.1,00,000/- under section 14A did not bother to make any inquiry in this regard. Even no iota of evidence was brought to our knowledge by learned A.R. that the Assessing Officer made the inquiry in this regard. We, therefore, do not find any inquiry in the order of the CIT invoking the jurisdiction under section 263 of the Act as in our opinion the order passed by the Assessing Officer was erroneous as well as prejudicial to the interest of the Revenue. We accordingly uphold the order passed under section 263 of the Act. Thus, the appeal filed by the assessee stands dismissed.

9. In the result, the appeal of the assessee stands dismissed.

(Order pronounced in the open court on 05/10/2017)

Sd/.	Sd/.
(GEORGE GEORGE K.)	(P. K. BANSAL)
Judicial Member	Vice President

Dated:05/10/2017
***Singh**

<u>Copy of the order forwarded to</u> :

1.The Appellant
2.The Respondent.
3.Concerned CIT
4.The CIT(A)
5. D.R., I.T.A.T., Cochin

Asstt. Registrar