

आयकर अपीलीय अधीकरण, न्यायपीठ – “A” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA
 (समक्ष)Before श्री ए. टी. वर्की, न्यायीक सदस्य एवं/and श्री एम .बालागणेश, लेखा सदस्य)
 [Before Shri A. T. Varkey, JM & Shri M.Balaganesh, AM]

I.T.A. No. 1226/Kol/2017
Assessment Year: 2012-13

Encord Refricool Private Limited (PAN: AABCE6922D)	Vs.	Income-tax Officer, Wd-8(2), Kolkata
Appellant		Respondent

Date of Hearing	15.02.2018
Date of Pronouncement	26.04.2018
For the Appellant	Shri P. R. Kothari, AR
For the Respondent	Shri G. Hangshing, CIT

ORDER

Per Shri A.T.Varkey, JM

The appeal filed by the assessee is against the revision order of Ld. Pr. CIT-3, Kolkata dated 24.01.2017 for AY 2012-13 passed u/s. 263 of the Income-tax Act, 1961 (hereinafter referred to as the “Act”).

2. Brief facts of the case are that during the course of assessment proceedings the AO noted that the assessee company had invested in shares but did not earn any dividend income from this investment. The AO took note of the fact that assessee had paid interest to the tune of Rs.1,09,229/- on secured and unsecured borrowing which has entirely been capitalized. However, in view of the Circular no. 5/2014 dated 11.02.2014 issued by the CBDT the amount of disallowance u/s. 14A of the Act read with Rule 8D of the I. T. Rules, 1962 (in short Rules) was calculated as under:

“Total Investment as on 31.03.2011	Rs. 3,66,00,000
Total investment as on 31.03.2012	Rs. 5,98,86,000
Average investment	Rs. 4,82,83,000
0.5% of Average investment	Rs. 2,41,215
<u>A. Rule 8D(2)(i)</u>	
The amount directly related to exempt income	Rs. Nil
<u>B. Rule 8D(2)(ii)</u>	

Interest paid x average investment/Average Assets	Rs.	89,484
<u>C. Rule 8D(2)(iii)</u>		
0.5% of Average investment	<u>Rs.</u>	<u>2,41,215</u>
Total of (A), (B) and (C) disallowed u/s. 14A	Rs.	3,30,699

3. However, the AO restricted the amount of disallowance only to Rs.1,09,229/- and passed an assessment order on 11.03.2015. The Ld. Pr. CIT exercised his revisional jurisdiction u/s. 263 of the Act and found fault with the aforesaid action of the AO. According to him, there was sufficient expenses claimed by the assessee in its P&L Account out of which balance of the computed disallowance of Rs.3,30,699/- u/s. 14A of the Act could have been made and the AO should not have restricted the disallowance to Rs.1,09,229/-. Therefore, he vide the impugned order passed u/s. 263 of the Act dated 24.01.2017 set aside the assessment order dated 11.03.2015 with a direction to AO to pass a fresh assessment on the limited issue of disallowance u/s. 14A of the Act read with Rule 8D of the Rules after considering the expenses debited in the P&L Account, books of account and as per law. Aggrieved by the aforesaid action of the Ld. Pr. CIT the assessee is before us.

4. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the AO has passed the 143(3) order dated 11.03.2015 which order of the AO has been interfered by the Ld. Pr. CIT exercising his jurisdiction u/s. 263 of the Act, which action of the Ld. Pr. CIT is under challenge before us. The assessee company has challenged in the first place the very usurpation of jurisdiction by Ld. Pr. CIT to invoke his revisional powers enjoyed u/s. 263 of the Act. Therefore, first we have to see whether the requisite jurisdiction necessary to assume revisional jurisdiction is there existing before the Pr. CIT to exercise his power. For that, we have to examine as to whether in the first place the order of the Assessing Officer found fault by the Principal CIT is erroneous as well as prejudicial to the interest of the Revenue. For that, let us take the guidance of judicial precedence laid down by the Hon'ble Apex Court in Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83(SC) wherein their Lordship have held that *twin* conditions needs to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer must be erroneous and so far as prejudicial to the interest of the Revenue. In the following circumstances, the order of the

AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed on incorrect assumption of fact; or (ii) incorrect application of law; or (iii) Assessing Officer's order is in violation of the principle of natural justice; or (iv) if the order is passed by the Assessing Officer without application of mind; (v) if the AO has not investigated the issue before him; then the order passed by the Assessing Officer can be termed as erroneous order. Coming next to the second limb, which is required to be examined as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue. When this aspect is examined one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industries (supra) held that this phrase i.e. "*prejudicial to the interest of the revenue*" has to be read in conjunction with an *erroneous order* passed by the Assessing Officer. Their Lordship held that it has to be remembered that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, 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 prejudicial to the interest of the revenue "**unless the view taken by the Assessing Officer is unsustainable in law**".

5. Taking note of the aforesaid dictum of law laid down by the Hon'ble Apex Court, let us examine whether the Assessing Officer passed order u/s 143(3) dated 11.03.2015 is erroneous as well as prejudicial to the interest of the revenue. We note that the AO has categorically observed that assessee company did not earn any dividend income from the investment made in shares. In such a scenario as per the order of the Hon'ble Delhi High Court in Chem Investment Ltd. Vs. CIT (2015) 61 taxman.com 118 (Del) wherein their lordships held that sec. 14A will not apply if no exempt income is received or receivable during the relevant previous year and set aside the Special Bench order of the Tribunal reported in Chem Investment Ltd. 121 ITD 318 (Del) which has been referred to by the Ld. Pr. CIT to find fault with the order of AO for not invoking Rule 8D. We note that the AO has restricted the disallowance to Rs.1,09,229/- which was the interest expenses of the assessee (that too which has been capitalized). In any event, the AO has adopted one of the courses permissible in law and even if it has resulted in loss to the revenue, the said decision

of the AO cannot be treated as erroneous and prejudicial to the interest of revenue as held by the Hon'ble Supreme Court in Malabar Industries Ltd. (supra), since the order of the AO cannot be held to be erroneous as well as prejudicial to the interest of the revenue. Therefore, the facts and circumstances narrated above, usurpation of jurisdiction by Ld. Pr. CIT exercising his revisional jurisdiction is 'null' in the eyes of law and, therefore, we are inclined to quash the assumption of jurisdiction to invoke revisional jurisdiction u/s. 263 of the Act by the Pr. CIT. Therefore, we quash the order of the Principal CIT passed u/s. 263 of the Act. Appeal of the assessee is allowed.

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

Order is pronounced in the open court on 26.04.2018

Sd/-
(M. Balaganesh)
Accountant Member

Sd/-
(Aby. T. Varkey)
Judicial Member

Dated : 26th April, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – Encord Refricool Private Limited, Baid & Kothari, Chartered Accountants, 7/1B, Grant Lane 1st floor, Kolkata-700 012.
2. Respondent – ITO, Ward-2(2), Kolkata.
3. The CIT(A) Kolkata.
4. CIT Kolkata
5. DR, ITAT, Kolkata.

/True Copy,

By order,

Sr. Pvt. Secretary