

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'F' NEW DELHI**

**BEFORE SHRI G. D. AGRAWAL, VICE PRESIDENT
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

ITA No. 3046/DEL/2016 (A.Y 2009-10)

| | | |
|---|----|--|
| Perfetti Van Melle India Pvt. Ltd. Global Business Park, Tower-A, 1 st Floor, Mehrauli Gurgaon Road Gurgaon AAACP2626A (APPELLANT) | Vs | Pr. CIT(A) Gurgaon (RESPONDENT) |
|---|----|--|

| | |
|----------------------|--|
| Appellant by | Sh. Nageshwar Rao & Sh. Parth, Advs |
| Respondent by | Smt. Sulekha Verma, CIT (DR) |

| | |
|------------------------------|-------------------|
| Date of Hearing | 27.12.2018 |
| Date of Pronouncement | 11.01.2019 |

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against the order dated 29/03/2016 passed by Pr. CIT(A) , Gurgaon u/s 263 of the Act, for Assessment Year 2009-10.

2. The grounds of appeal are as under:-

1. *“That on facts and circumstances of the case and in law, order dated 29.3.2016 passed by the Ld. Principal Commissioner of Income Tax [“PCIT”] u/s 263 is grossly without jurisdiction, bad in law, unlawful and invalid as necessary statutory preconditions for invocation of jurisdiction are not satisfied.*

2. *Without prejudice to other contentions, PCIT completely failed to appreciate*

that section 144 C (13) mandates Assessing Officer to pass order in conformity with directions of Dispute Resolution Panel, accordingly order dated 07.01.2014 cannot be said to 'erroneous' much less prejudicial and therefore, is not amenable to revisionary Jurisdiction under section 263.

3. Without prejudice to our contention that allowance of deduction under section 80 IC allowed by ld. AO in the draft assessment order cannot be said to erroneous in any manner whatsoever and therefore, is not prejudicial to interest of revenue making even such order amenable to Revision under section 263 of the Act. Assuming without admitting that some errors as alleged in order dated 29.03.2016 under section 263 have crept into such draft order, time limit prescribed for exercise of Revision power under the Act has expired, as admittedly draft assessment order was passed on 06.03.2013. PCIT failed to appreciate that what cannot be done directly cannot be sought to be done indirectly by revising lawful Assessment order passed in conformity with directions of DRP under section 144C (13).

4. Without prejudice to above, PCIT grossly erred on facts and in law in not appreciating that Ld. AO passed draft assessment order 06.03.2013 after making due enquiries, thus initiation of proceedings under section 263 of the Act to revise Assessment order under section 144 C r.w.s. 143(3) by order dated 29.03.2016 is without jurisdiction and impermissible in law.

5. Without prejudice to above, PCIT erred in asserting jurisdiction under section 263 by relying on case-law which is not applicable to facts and law applicable in present case.

6. Without prejudice to above, PCIT grossly erred in routinely assuming that facts relevant for AY 2011-12 and for AY 2009-10 are same and that conclusions reached in assessment order for AY 2011-12 would be valid for AY 2009-10.

The above grounds of appeal are without prejudice to each other.

3. The assessee filed its return of Income on 29.09.2009 showing total income at Rs. 13,19,79,440/- wherein claimed deduction u/s 80IC of the Income Tax Act, 1961 to the extent of Rs. 53,48,23,878/-. Draft assessment order was passed u/s 144C of the Income Tax Act, 1961 on 06.03.2013

working out the total income at Rs. 176,23,92,422/-. In the order so proposed to be passed, addition to the extent of Rs. 163,04,12,982/- was made on account of TP adjustment. The draft order was sent to the assessee. The assessee approached the Dispute Resolution Panel (DRP). The DRP issued direction u/s 144C (5) of the Income Tax Act, 1961 on 18.12.2013 confirming the additions suggested in draft order. The assessment was completed u/s 144C (13) of the Income Tax Act on 07.01.2014 determining the total income at Rs. 176,23,92,422/-.

4. The Pr. CIT, Gurgaon observed that the company has three units at Rudrapur, Manesar and Chennai. The company claimed deduction u/s 80IC only on one unit situated in Rudrapur (Uttarakhand). The other units at Manesar (Gurgaon) and Chennai are bigger and older than the Rudrapur (Uttarakhand) unit. Income of Rudrapur unit is shown to the extent of Rs. 53,48,23,878/-. Net profit as per P&L account is Rs. 49,78,05,000/- which includes other income of Rs. 11,11,10,000/- which means the assessee incurred loss in the other two units. The assessee claimed deduction u/s 80IC of the Income Tax Act to the extent of Rs. 53,48,23,878/- on total turnover of Rs. 304,48,51,644/- i.e. the assessee has shown net profit @17.56% in the unit on which deduction is claimed. On the other hand, the net profit as per P&L account of the assessee is Rs. 49,78,05,000/- on the total turnover of Rs. 824,65,76,000/- i.e. profit @6%. Form No. 10CCB i.e. report of the auditor u/s 80IC of the Act was submitted by the Assessee. In the said report, details of the assessee are mentioned from column 1 to 13 and for eligible business u/s 80IC of the I.T. Act, were mentioned in column no. 25 & 26 of the report. In column no. 25, it was mentioned that the unit is situated in notified area with description of area. The date of commencement of production is mentioned as 15th May, 2007. In column no. 25(f) the auditor mentioned whether the enterprise is involved in manufacture of any article or thing specified in Schedule-XTV. In this column, the auditor ticked 'yes' column and mentioned the item manufactured as Pharma products/chloromint candy. The item

Pharma product is covered by Serial no.12 of part-C of Schedule-XIV. However, it is noticed that the assessee company is not involved in manufacturing of Pharma products as mentioned in schedule XIV, as was found during assessment proceedings for A.Y. 2011-12.

6. The Pr. CIT, Gurgaon further observed that the issue of claim of deduction u/s 80IC was examined in A.Y. 2011-12 wherein the facts are same. The claim of deduction was disallowed in the draft assessment order for A.Y. 2011-12 with the final findings as below:-

“In view of the facts narrated above it is apparent that the claim of the assessee is not allowable because the claim was made u/s 80IC(2)(b) of the IT Act whereas the assessee is not involved in manufacture of any item covered by Schedule XIV. Hence, the claim of deduction u/s 80IC to the extent of Rs.149,89,32,563/- is disallowed. ”

The disallowance of deduction u/s 80IC of the IT Act to the extent of Rs.149,89,32,563/-proposed in the draft assessment order for A.Y. 2011 -12 was approved by DRP in its order dated 30.12.2015.

7. The Pr. CIT Gurgaon observed that the facts of the case are similar in A.Y. 2009-10 as well and further observed that in A.Y. 2009-10, the Assessing Officer did not examine the issue in respect of claim of deduction u/s 80IC of the Income Tax Act made by the assessee company. The Pr. CIT also observed that the Assessment Order was passed without making any enquires or verification regarding the claim of deduction u/s 80IC of the I.T. Act, which should have been made although it is apparent from the records particularly the report of Auditor that the claim is not allowable as per provisions of the Act. Further, the Pr. CIT mentioned that the Assessing Officer did not examined/verified the allocation of expenses between three units run by the

assessee to ascertain the correct income derived by the unit at Rudarpur. In the order so passed the claim of deduction u/s BOTC was allowed resulting in under assessment to the extent of Rs. 53,48,23,878/-. The assessee company was provided an opportunity to show cause as to why the assessment order passed by the DCIT, Circle-2, Gurgaon u/s 144C(13) r.w.s. 143(3) dated 07.01.2014 for A.Y. 2009-10 in its case should not be revised u/s 263 of the Income Tax act, 1961 by the Pr. CIT. The CA of the assessee company attended the hearing and furnished the submissions. After giving proper opportunity to the assessee company, the Pr. CIT vide order dated 29.03.2016 u/s 263 of the Act held that the assessment order u/s 144C(13) dated 7/1/2014 for the A.Y. 2009-10 passed by the Assessing Officer is prima-facie erroneous and prejudicial to the interest of the revenue and hence, because of the fact that the order is passed without making inquiries or verification which should have been made, liable to be revised u/s 263 of the Act.

8. Being aggrieved by the order dated 29.03.2016 u/s 263 passed by the Pr. CIT, the assessee company has filed the present appeal before us.

9. The Ld. AR submitted that the claim of deduction under Section 80IC of the Act made by the assessee was widely examined by the Assessing Officer during the course of the assessment proceedings and the deduction was allowed after considering all the documents and submissions filed by the assessee before the Assessing Officer. The Ld. AR submitted that the facts of the present assessment year are different from that of A.Y. 2011-12. The Ld. AR further submitted that in A.Y. 2011-12, the assessee did not manufacture the said Pharma products, though the assessee fulfilled all the conditions to claim deduction under Section 80IC of the Act, due to technical error in Form 10CCB, the claim of deduction under Section 80IC of the Act was rejected by the Assessing Officer against which the assessee filed appeal and the Tribunal remanded back the issue to the file of the Assessing Officer. The Ld. AR

submitted that the Pr. CIT has taken a different view than the Assessing Officer and hence does not attract invocation of Section 263 of the Act.

10. The Ld. DR submitted that Pr. CIT rightly passed order u/s 263 of the Act as the assessee company had claimed deduction u/s 80IC of the Act at Rs. 53,48,23,878/- in its return of income furnished for A.Y. 2009-10 and the Assessing Officer allowed the same without any justification. It is noticed by the Pr. CIT that the Assessing Officer had issued a questionnaire to the assessee to furnish a note on activity carried out by the unit claiming deduction u/s 80IC and explanation as to how the unit is eligible for deduction u/s 80IC of the Act and also asked to furnish separate profit and loss account of the Rudrapur Unit alongwith basis for allocation for expenses to the Rudrapur Unit. In response, the assessee furnished written submissions. The Ld. DR submitted that the Pr. CIT after perusal of the quarterly statement furnished by the assessee company with the Commissioner, Central Excise, Meerut for F.Y. 2008-09, noticed that the assessee company had also manufactured other products such as 'chewing gum', 'toffee' and 'bubble gum' in addition to manufacturing of Pharma Products for which the assessee company is not entitled for deduction u/s 80IC of the Act as these article or things are not specified in the Fourteenth Schedule. But the Assessing Officer has not made any enquiries or verification which should have been made before allowing any relief u/s 80IC of the Act to the assessee company in the assessment order passed. Thus, the Assessment Order passed by the Assessing Officer u/s 143(3) r.w.s. 144C(13) of the Act dated 07.11.2014 for A.Y. 2009-10 is erroneous and prejudicial to the interest of the Revenue. The Ld. DR submitted that the present case is covered by the decision of the Hon'ble Apex Court in case of Deniel Merchants Private Limited & Anr. Vs. Income Tax Officer (Appeal No. 2396/2017 order dated 29.11.2017). The Ld. DR also relied upon following decision of the various Hon'ble High Courts and Tribunal:

- (a) Malabar Industrial Co. Ltd. Vs. CIT (2000) 243 ITR 83 (SC)
- (b) Rajmandir Estates (P) Ltd. vs. PCIT (2016) 386 ITR 162 (Cal.)
- (c) Rajmandir Estates (P.) Ltd. vs. PCIT (2017) 245 Taxman 127 (SC)
- (d) Shree Manjunathesware Packing Products & Camphor Works vs. CIT (1998) 231 ITR 53 (SC)
- (e) CIT vs. Amitabh Bachchan 384 ITR 200 (SC)
- (f) PTC Impex (India) Pvt. Ltd. vs. CIT ITA No. 2860/DEL/2010 order dated 03.04.2018.

11. We have heard both the parties and perused all the records. It is pertinent to note that the assessee is engaged in manufacturing of a variety of confectionary productions which includes Big Babool, Alpenlibe, Centre Fresh, Center Fruit, Center Shok, Chater Pater, Chlor-mint, Choco-tella, Cofitos, Happydent White, Protex Happydent, Marbels, Mentos etc. From these products it can be seen that all products are not that of pharma, chlor-mint, ayurved based products. There are confectionary products as well. The Pr. CIT after perusal of the quarterly statement furnished by the assessee company with the Commissioner, Central Excise, Meerut for F.Y. 2008-09, noticed that the assessee company had also manufactured other products such as 'chewing gum', 'toffee' and 'bubble gum' in addition to manufacturing of Pharma Products for which the assessee company is not entitled for deduction u/s 80IC of the Act as these article or things are not specified in the Fourteenth Schedule. But the Assessing Officer has not made any enquiries or verification which should have been made before allowing any relief u/s 80IC of the Act to the assessee company. The decision of the Hon'ble Supreme Court in Malabar Industrial Company Ltd. vs. CIT (243 ITR 83)(SC) held that the Commissioner has to satisfy himself of both the conditions, firstly order being erroneous and

secondly order being prejudicial to the interest of revenue. Both these test have been seen by the Principal Commissioner of Income Tax in the present case and aptly applied in the present case. It is also held by the Hon'ble Apex Court that the provisions cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. Thus, the Pri. CIT has looked into the aspect of the Assessment Order in the present case to the extent of erroneous and thus, Section 263 of the Act is attracted in the present case. Section 263 of the Act is not invoked simply for correcting mistake or error committed by the Assessing Officer in the present case. It can be observed that the Pr. CIT has considered all the contentions of the assessee and thereafter rightly come to the conclusion that the Assessing Officer failed to consider the fact that whether the assessee is entitled for claim under Section 80IC or not in respect of the products which do not come under the ambit of Fourteenth Schedule. It can be seen that the Pr. CIT has properly invoked the provisions of Section 263 and there is no procedural lapse on the part of the Pr. CIT. In fact, the Assessing Officer did not made any inquiry and there is no mention of the same in the Assessment Order itself which proves that the order is passed without making inquiries or verification which should have been done by the Assessing Officer before allowing the claim u/s 80IC of the Act. Thus, it is prejudicial to the interest of the Revenue and there is loss of revenue. The Pr. CIT after issuing the Show Cause Notice u/s 263 of the Act given ample opportunity to the Assessee for explanation and dealt with the reply/details filed by the assessee in proper manner. Thus, proper opportunity was given by the Pr. CIT to the assessee during the proceedings u/s 263 of the Act. The present case is covered by the decision of the Hon'ble Apex Court in case of Deniel Merchants Private Limited & Anr. Vs. Income Tax Officer (Appeal No. 2396/2017 order dated 29.11.2017). The Hon'ble Supreme Court held as under:

“In all these cases, we find that the Commissioner of Income Tax had passed

an order under Section 263 of the Income Tax Act, 1961 with the observations that the Assessing Officer did not make any proper inquiry while making the assessment and accepting the explanation of the assessee(s) insofar as receipt of share application money is concerned. On that basis the Commissioner of Income Tax had, after setting aside the order of the Assessing Officer, simply directed the Assessing Officer to carry thorough and detailed inquiry. It is this order which is upheld by the High Court. We see no reason to interfere with the order of the High Court.

The Special Leave Petitions are dismissed.”

Thus, in the present case the Assessing Officer has not properly adjudicated the issue of claim u/s 80IC before allowing the same to the assessee company, therefore, the Pr. CIT has rightly invoked Section 263 of the Act and passed the order. Therefore, the Order under Section 263 of the Income Tax Act, 1961 passed by the Principal Commissioner of Income Tax is just and proper. There is no need to interfere with the same. The appeal of the assessee is dismissed.

12. In result, appeal of the assessee is dismissed.

Order pronounced in the Open Court on 11th January, 2019.

Sd/-

**(G. D. AGRAWAL)
VICE PRESIDENT**

Sd/-

**(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

Dated: 11/01/2019
R. Naheed

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

| | |
|---|------------|
| Date of dictation | 28.12.2018 |
| Date on which the typed draft is placed before the dictating Member | 28.12.2018 |
| Date on which the typed draft is placed before the Other Member | |
| Date on which the approved draft comes to the Sr. PS/PS | |
| Date on which the fair order is placed before the Dictating Member for pronouncement | |
| Date on which the fair order comes back to the Sr. PS/PS | 14.01.2019 |
| Date on which the final order is uploaded on the website of ITAT | 14.01.2019 |
| Date on which the file goes to the Bench Clerk | 14.01.2019 |
| Date on which the file goes to the Head Clerk | |
| The date on which the file goes to the Assistant Registrar for signature on the order | |
| Date of dispatch of the Order | |