IN THE INCOME-TAX APPELLATE TRIBUNAL "A" BENCH MUMBAI

BEFORE SHRI G.S. PANNU, VICE-PRESIDENT AND

SHRI PAWAN SINGH JUDICIAL MEMBER

ITA No. 3214/Mum/2015 (Assessment Year 2010-11)

Aditya Birla Retail Ltd., 86/92 Skyline Icon, 5th & 6th Floor, Near Mittal Industrial Estate, Andheri (East), Mumbai 400 059 **PAN – AAACP2678Q**	Vs.	Principle CIT-9 Room No. 214, 2nd Floor, Aayakar Bhavan, M.K. Road, Mumbai 400 020
Appellant		Respondent

Appellant by : Shri Yogesh Thar/Ms. Niyanta Mehta and Manish Shah (AR's)

Respondent by : Shri R.P. Meena (CIT-DR)

Date of Hearing : 05.09.2019

Date of Pronouncement : 18.09.2019

ORDER UNDER SECTION 254(1)OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. The appeal by assessee is directed against the order of ld. Principle Commissioner of Income Tax-9 [ld. PCIT), Mumbai dated 27.03.2015 passed under section 263 of the Income-Tax Act (the Act) for Assessment Year 2010-11. The assessee has raised the following grounds of appeal:

GROUND I

1. On the facts and circumstances of the case and in law, the Learned Principal Commissioner of Income Tax- 9 ("the CIT") erred in invoking the provisions of section 263 of the Income Tax Act 1961 ("the Act") and revising the order passed by the Deputy Commissioner of Income Tax Range -8(1) (Now Deputy Commissioner of Income Tax Range - 9(1)(1)), Mumbai, ("the AO")

u/s 143 (3) on the alleged ground that the order was erroneous and prejudicial to the interest of the revenue.

2. He failed to appreciate and ought to have held that:

(a) Both the pre-requisites i.e. assessment order being erroneous and prejudicial to the interest of the revenue are necessary to invoke the provisions of section 263. If any one condition is not satisfied, section 263 cannot be invoked.

(b) The Appellant had furnished the requisite information and the AO has completed the assessment after considering all the facts and therefore the assessment order is not erroneous.

3. The appellant prays that it be held that the assessment order passed by the AO is not erroneous and accordingly the action of the Pr. CIT in invoking provisions of section 263 and revising assessment order be held ab-initio and / or otherwise void and bad-in-law.

WITHOUT PREJUDICE TO GROUND I

GROUND II

1. On the fact and circumstances of the case and in law, the Pr. CIT erred in directing the AO to modify the assessment order passed u/s. 143(3) of the Act dated 08 March 2013, after considering the investments worth Rs. 560.85 crores which were directly out of borrowed funds for computing the average investments under rule 8D(2)(ii) of the Income Tax Rules, 1962, ('the Rules').

2. He failed to appreciate and ought to have held that:

(a) Out of the Total investment of about Rs. 644.85 crores, investments worth Rs. 560.85 crores were directly out of borrowed funds for which the Appellant had made disallowance of direct interest expenditure under rule 8D(2)(i), suo motto.

(b) Considering the investment worth Rs. 560.85 crores for computing the average investments under rule 8D(2)(ii) of the Rules would amount to the double disallowance of the proportionate interest attributable to the said investments i.e. Rs 560.85 crores.

3. The Appellant therefore prays that the direction of the Pr. CIT in this regards should be quashed.

GROUND III

1. On the facts and circumstances of the case and in law, the Pr. CIT erred in directing the AO to modify the assessment order passed u/s. 143(3) of the Act dated 08 March 2013, to make proportionate disallowance on account interest expenditure on the borrowed funds utilised for making investments in the mutual funds, which ultimately resulted in the capital gain.

2. He failed to appreciate that Appellant had made investments in the mutual funds from the funds from the day to day operation and not from the borrowed funds.

2. Facts in brief are that the assessee is a company engaged in the business of running departmental stores and retailing household articles, filed its return of income for Assessment Year 2010-11 on 27.09.2009 declaring loss of Rs. 480 crore (approx.). The case was selected for scrutiny and after service of statutory notice under section 142(1) and 143(2) completed the assessment under section 143(3) on 08.03.2013. In the assessment order, the Assessing Officer made the various disallowances under section 40(a)(ia), disallowance of expenditure on computer software, mismatching of AIR data and prior period expenses.

3. The assessment was revised by ld. PCIT vide order dated 27.03.2015 passed under section 263 of the Act. The ld PCIT issued show-cause notice under section 263 dated 11.02.2015 and 25.03.2015. In the show-cause notice dated 11.02.2015, the ld. PCIT written that the assessee made a suo-moto disallowance under section 14A r.w. Rule 8D of Rs. 23,40,01,809/- being expenses attributable to earning of exempt income after applying the Rule 8D. However, in the Profit & Loss Account, debit balance a contrary entry used to balance the figure of liability

shown in the balance-sheet, which is in the nature of fictitious entry without any substance or in other words, the same does not have tangible or intangible asset in its support. Accordingly, due to this error in working/computation of figure of average asset by the assessee has resultantly into lesser working of disallowance under section 14A r.w. Rule 8D by a sum of Rs. 66 crore (approx.), thereby the order passed by Assessing Officer is erroneous and prejudicial to the interest of revenue.

4. In the second show-cause notice dated 25.03.2015, the ld. PCIT observed that the disallowance under section 14A was made considering the average investment made for the purpose of units of mutual funds which is separately assessed under the head "Capital Gain" and not under the head "Business Income", which should have been taken separately not forming part of a computation under Rule 8D(2)(ii). However, the proportionate disallowance of this account in respect of interest paid should have been made separately as the entire investment for the purpose of units of mutual funds are found to be directly attributable to the borrowed funds.

5. The assessee filed reply to the show-cause notice dated 11.02.2015 vide reply dated 04.03.2015. In the reply, the assessee stated that they themselves have made suo-moto disallowance of Rs. 23,40,01,809/- under section 14A r.w. Rule 8D being expenditure incurred for earning exempt income. It was further stated that computation was made in

accordance with the mechanism provided in Rule 8D, which was accepted by Assessing Officer. The assessee also furnished the copy of working filed before the Assessing Officer. For calculating the average value of asset under Rule 8D(2)(ii), the assessee stated that total asset as appearing in the balance-sheet (including P&L A/c and debit balance amounting to Rs.890,32,72,961/-) after excluding current liability and investment on which interest expenses has already been considered separately for disallowance under Rule 8D(2)(i). Accordingly, the assessee stated that the proposed disallowance in this regard would result into double disallowance on the same investment under clause (i) as well as clause (ii) of Rule 8D which is not logical. The assessee further stated that investment made for the purpose of purchase of units of mutual fund considered as a part of its average investment and the same should be considered as a part of average investment for working of disallowance under section 14A. With regard to excess deduction allegedly allowed by Assessing Officer on such investment made in the purchase of mutual fund forming part of total income but to be assessed as a Capital Gain. The assessee again vide its reply dated 26.03.2015 stated that even if the funds for purchasing of units of mutual funds are out of borrowed funds, the interest paid thereon is to be allowed under section 36(1)(iii) as the funds were borrowed for business purpose. The assessee besides the other contention also contended that the Assessing

Officer while passing the assessment order considered the material and adopted particular view. Merely a different view could be taken; this should not have been basis for action under section 263 of the Act. The assessee also stated that the order is not erroneous or prejudicial to the interest of revenue as the Assessing Officer passed the order after considering the material and took a possible view which is not erroneous and prejudicial to the interest of revenue.

6. The contention of assessee was not accepted by ld. PCIT. The ld. PCIT took his view that the exclusion of the debit balance of Profit & Loss A/c firming part of total asset as per Rule 8D(2)(iii) appears to be logical which may be looked into and detailed by Assessing Officer during the set-aside assessment proceeding as directed hereunder based on the details to be furnished by assessee. It was further concluded that (total investment) for the working of (average investment) are exclude the direct investment on which it has already made disallowance of interest under Rule 8D(2)(i) because no specific provision exist either in Rule 8D(2)(i). The ld. PCIT accepted that arguments seems to be logical but being a deeming provision, the said interpretation of assessee considering his own aforesaid argument is not acceptable. The ld. PCIT further held that the assessee while computing the average investment under Rule 8D(2)(ii) as included the amount of investment made in the purchase of units of mutual funds which has resulted into calculation of

lesser disallowance which is neither verified by the Assessing Officer nor enquired into before mechanically allowing the disallowance. The income attributable to the purchase of units of the mutual fund as Short Term Capital Gain is admitted by assessee and therefore, not covered by section 14A. Secondly, on the issue of direct and indirect expenses pertaining to investment made in purchase of the units of mutual fund being assessed under "Capital Gain" is not acceptable as the earning of income by assessee under the head "Capital Gain" and not under the "Business Income". There is no provision in the Act that any expenses attributable to earning of income from Capital Gain are to be allowed except provided under section 48 and 49 of the Act. The deduction claimed by assessee under section 36(1)(iii) cannot be considered. The said deduction is to be allowed against the working of Business Income and not for earning Capital Gain. For the contention of assessee that Assessing Officer raised queries about the issue during the assessment, the ld. PCIT concluded that although the issue was raised relevant reply in the form of computation of disallowance was filed but the Assessing Officer mechanically accepted the same without applying his mind and thereby made less disallowance. No issue regarding disallowance of direct and indirect expenses attributable to its earning of Capital Gain was neither raised nor discussed. The ld. PCIT finally concluded that Assessing Officer failed to exclude the amount of investment of Rs. 561

crore (approx.) and the amount of investment made in the purchase of mutual fund from the average value of investment while calculating disallowance under Rule 8D. Similarly, the Assessing Officer failed to disallow the direct interest expenditure incurred by assessee for making investment for the purchase of units of mutual fund, the Short Term Capital Gain income earned thereon is assessed under the Capital Gain, therefore, no deduction either on account of direct expenses or indirect expenses attributable thereto should have been allowed in the computation of total income. The ld. PCIT concluded that it is a clear case of non-application of mind and there cannot be two opinions on this issue. The Assessing Officer has not discussed anything in this regard in the assessment order and that assessment order is silent. The ld. PCIT finally held that the issue of proportionate disallowance of interest and other direct expenses against its short term investment made in the purchase of units of the mutual fund on which the assessee earned Short Term Capital Gain is completely overlooked by Assessing Officer. Thus, the assessment order is erroneous and prejudicial to the interest of revenue. Therefore, the assessment order passed under section 143(3) dated 08.03.2011 was set-aside with the direction to pass the fresh order as per law after giving opportunity to the assessee. Aggrieved by the order of ld. PCIT, the assessee has filed the present appeal before us.

7. We have heard the submission of ld. AR of the assessee and ld. DR for the revenue and perused the material available on record. The ld. AR of the assessee submits that during the assessment proceeding, the Assessing Officer raised questionnaire/queries regarding disallowance under section 14A. The assessee vide its reply dated 11.02.2013 furnished the detailed reply and stated that they have not received any tax free/exempt income and therefore, no disallowance under section 14A ought to be made. The assessee relied upon the decision of Tribunal in Avshesh Mercantile vs. DCIT in ITA No. 577/Mum/2006 and ITA No. 208/Mum/2009. The assessee further stated that they made disallowance under section 14A for abundant caution, though no disallowance under section 14A r.w. Rule 8D should be made.

8. The Assessing Officer after passing satisfaction made no disallowance under section 14A. The ld. AR of the assessee further submits that provision of section 14A r.w. Rule 8D can be invoked whether no exempt income was earned by the direct relevant Assessment Year. Thus, when suo-moto disallowance is made in absence of exempt income, there is no question of order being erroneous or prejudicial to the interest of revenue. In support of his submission, the ld. AR of the assessee relied upon the decision of Hon'ble Delhi High Court in Cheminvest Ltd. Vs. CIT [378 ITR 33 (Del.)], CIT vs. Delite Enterprises (ITA No. 110/2009 (Bom), CIT vs. Holcim India (P.) Ltd.

(57 taxmann.com 28) (Del.), Redington (India) Ltd. Vs. ACIT [392 ITR 633 (Madras)], CIT vs. Chettinad Logistics (P.) Ltd. [80 taxmann.com 221 (Madras)], DCIT vs. M/s. Apex Realty Pvt. Ltd. (ITA No. 2855/M/2013 & ACIT vs. M. Baskaran [152 ITD 844 (Chennai Trib.)].

9. In alternative submission, the ld. AR of the assessee submits that if investment has already considered in Rule 8D(2)(i) are once again considered under Rule 8D(2)(ii), it would neither be in-compliance with the law nor in consonance with the affidavit filed by revenue before the Hon'ble Bombay High Court in case of Godrej & Boyce's case reported vide [328 ITR 81]. The ld. AR of the assessee further submits that for invoking the provision of section 263, the twin condition as enumerated under section 263 must co-exist i.e. order is erroneous and prejudicial to the interest of revenue.

10. In support of his submission, the ld. AR of the assessee relied upon the decision of Hon'ble Supreme Court in Malabar Industrial Co. Ltd. vs. CIT [243 ITR 83(SC)] and CIT vs. Greenworld Corporation [181 Taxman 111 (SC)].

11. In other alternative submission, the ld. AR of the assessee submits that where disallowance of expenditure of exempt income was debatable and order of Assessing Officer could not be held as unsustainable, revision power cannot be exercised. In support of his submission, the ld. AR of the assessee relied upon the decision of Hon'ble Delhi High Court in

CIT vs. DLF Ltd. [350 ITR 555 (Del HC)] and the decision of Amritsar Tribunal in Dabwali Transport Co. Ltd. Vs. DCIT [163 ITD 579].

12. On the other hand, the ld. DR for the revenue submits that the Assessing Officer has raised a routine query. The Assessing Officer has not verified the disallowances made by assessee. The Assessing Officer has not made any review of return income. The return income cannot be reduced unless the income is revised. The Assessing Officer has mechanically accepted the reply of assessee without applying his mind and thereby made a less disallowance under section 14A. Therefore, the order is erroneous as well as prejudicial to the interest of revenue.

13. We have considered the rival submission of the parties and have gone through the orders of authorities below. We have seen that in the assessment order, there is no reference about the disallowance under section 14A. The ld. AR of the assessee vehemently argued that during the assessment, the Assessing Officer examined the issue of section 14A. The assessee vide its reply dated 11.02.2013 furnished the detailed reply including raising the contention that assessee has not earned any exempt income, though there should not be any disallowance under section 14A. Though the assessee out of abundant caution made a suo-moto disallowance. We have further noted that in reply to the show-cause notice under section 263, the assessee vide its reply dated 04.03.2015 stated that the assessee has made suo-moto disallowance of

Rs. 23.40 crore under section 14A and that computation of suo-moto disallowance was made in accordance with the mechanism prescribed under Rule 8D. The assessee further vide its reply dated 17.03.2015 has again reiterated before ld. PCIT that the assessee has not received any exempt income during the year under consideration and that no disallowance under section 14A is warranted. We have noted that the ld. PCIT despite the firm stand of the assessee that no exempt income, the income was earned and that no disallowances under section 14A is warranted, has not examined the fact about the non-receipt of exempt income. Moreover, we have noted that during the assessment, the Assessing Officer examined the issue if disallowance under section 14A and after receipt of reply, no disallowance was made.

14. The Hon'ble Delhi High Court Cheminvest Ltd. Vs. CIT (supra) held that the provision of section 14A will not apply if no exempt income is received or receivable during relevant previous year. The Hon'ble Delhi High Court in CIT vs. DLF Ltd. (supra) held that disallowance of expenditure of exempt income is debatable and the order of Assessing Officer could not be held as unsustainable and revisionary of power could not be exercised. Similarly, the Amritsar Tribunal Dabwali Transport Ltd. vs. DCIT (supra) also held that when no exempt income during the relevant period revision power under section 263 cannot be invoked for making disallowance under section 14A. The Kolkata

Tribunal in ACIT vs. Champion Commercial Co. Ltd. [26 taxmann.com 342 (Kol)] held that when assessee himself offers a disallowance under section 14A, the Assessing Officer need not record its satisfaction.

15.The Hon'ble Supreme Court in Malabar Industrial Company Ltd. (supra) held that a bare reading of section 263(1) makes it clear that the pre-requisite to exercise of jurisdiction by the Commissioner 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 Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer 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 section 263(1). It was further held that there can be no doubt that the provision 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. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind.

16. The Hon'ble Supreme Court in CIT vs. Greenworld Corporation (supra) held that assessment order passed by Assessing Officer (ITO) cannot be interfered with only because another view is possible.

17. Now turning to the facts of the present case as the stand of assessee during the assessment as well as in revision proceeding that no exempt income is earned by the assessee. We have perused the Balance-sheet and Profit & Loss Account of the assessee wherein in Schedule-14 (other income) forming part of Balance-sheet shows Nil income. In Schedule-6 (investments), in Column-B assessee has shown investment in units of mutual fund (growth scheme) and the income of such investment is not exempted. Thus, as per the decision of Hon'ble Delhi High Court in Cheminvest Investment Ltd. (supra), Hon'ble Madras High Court Redington (India) Ltd. (supra) that when there is no exempt income in the relevant period, there cannot be disallowance of expenditure under section 14A. Accordingly, the assessment order under section 143(3) is not erroneous. The Assessing Officer has adopted a possible view for not making any disallowance under section 14A. Though, there is no discussion about the acceptance of contention of the assessee in its reply dated 11.02.2013, filed during the assessment proceeding.

18. In view of the aforesaid discussion, we are of the considered view that the order passed by Assessing Officer was not erroneous and thus the

twin condition as laid down by Hon'ble Apex Court in Malabar Industrial Co. Ltd. (supra), the recourse of section 263 cannot be invoked against the assessment order. Therefore, the assessee succeeds on legal ground. Since, the assessee succeeded on legal ground, therefore, adjudication on other contentions and issues raised by assessee have become academic.

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

Order pronounced in the open court on 18/09/2019.

Sd/-	**Sd/-**
G.S. PANNU	**PAWAN SINGH**
VICE-PRESIDENT	**JUDICIAL MEMBER**

Mumbai, Date: 18.09.2019
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Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4.The concerned CIT
5. DR "A" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai