

आयकर अपील अाधिकरण, अहमदाबाद ढयायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
"A" BENCH, AHMEDABAD

BEFORE, SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And

Ms MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./ITA No.1271/AHD/2016

अाधरण वर्ष/Asstt. Year: 2011-2012

Gujarat Urja Vikas Nigam Ltd., Sardar Patel Vidyut Bhavan, Race Course Circle, Baroda-382405. PAN: AACCG2861L	Vs.	Pr. Commissioner of Income Tax-1 Vadodara.
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(Applicant)		(Respondent)
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Assessee by :	Shri M. J. Shah, A.R
Revenue by :	Ms Rita Dokania, CIT.DR

सुनवाई का ताराख/Date of Hearing : 24/07/2019

घोषणा का ताराख /Date of Pronouncement: 16/10/2019

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Principal Commissioner of Income Tax, Vadodara-1, [Ld.CIT in short], dated 25/03/2016 arising in the matter of assessment order passed under s. 263 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") dated 30/01/2014 relevant to Assessment Year (AY) 2011-12.

The assessee has raised the following grounds of appeal:

- 1.0 *The learned Commissioner of Income Tax-1, Baroda has erred in law and on facts in holding that the assessment order dated 30-01-2014 passed under section 143(3)*

of the Income Tax Act, 1961 is erroneous and prejudicial to the interest of revenue and thereby erred in invoking the provisions of section 263 of the IT Act.

2.0 *The learned Commissioner of Income Tax-1, Baroda erred in law and on facts has held that the set of brought business losses and unabsorbed depreciation of earlier years has already been given in the Asst. Years 2008-09, 2009-10 and 2010-11 and that the appellant has wrongly claimed the set off. The learned Commissioner of Income Tax-1, Baroda has erred in directing the Assessing Officer to verify the same and re-compute the claim of set off of unabsorbed business losses and depreciation.*

2.1 *The appellant submit that the unabsorbed brought forward losses and depreciation were apportioned to the appellant on the demerger of erstwhile GEB. Such unabsorbed brought forward losses and depreciation have been enhanced substantially as a result of decision of appeals in case of erstwhile GEB for the years the brought forward losses and depreciation pertain to.*

The Assessing Officer, however, has not passed the appeal effect orders in case of erstwhile GEB. On passing of such appeal effect orders for earlier years, the claim of brought forward losses and depreciation will increase' substantially.

3.0 *The learned Commissioner of Income Tax-1, Baroda has erred in law and on facts in directing the Assessing Officer to enhance the disallowance made under section 14A r.w Rule 8D of the IT Act to Rs.148,83,18,280/- on account of dividend income of dividend income of Rs.11,60,62,000/- being reduced from the disallowance made under that section.*

4.0 *The learned Commissioner of Income Tax-1, Baroda has erred in law and on facts in directing the Assessing Officer to verify the issue relating to disallowance of prior period expenses amounting to Rs.2,15,28,000/- without Appreciating the fact that the Assessing Officer had already made such' disallowance both under normal provisions as well as section 115JB of the I f Act, 1961 while completing assessment.*

The appellant had brought the fact to the learned Commissioner's notice vide its letter dated 28-01-2016 which has also been reproduced in the impugned order.

5.0 *The learned Commissioner of Income Tax-1, Baroda erred in law and on facts has set aside the assessment order passed on 30-01-2014 under section 143(3)of the IT Act.*

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

7.0 *The appellant craves leave to add to, alter, delete or modify any of the grounds of appeal either before or at the time of hearing of this appeal.*

The assessee has challenged the order passed by the Ld. CIT under section 263 of the Act holding the assessment framed by the AO under section 143(3) of the Act as erroneous insofar prejudicial to the interest of Revenue.

2. Briefly stated facts are that the assessee in the present case is a limited company and engaged in the business of purchase and sale of electricity. The assessee in the year under consideration filed its return of income declaring total income under normal computation at NIL and the profit under section 115 JB of the Act at Rs. 125,69,73,539/-only. Subsequently, the case was selected under scrutiny under section 143(3) of the Act and accordingly the assessment was framed vide order dated 30th January 2014 after making the disallowance/additions to the total income of the assessee under normal computation at Rs. NIL after setting of the brought forward losses and the unabsorbed depreciation and the profit under section 115 JB of the Act at Rs. 303,11,39,819/-only.

3. Subsequently, the Ld. CIT under section 263 of the Act opined that the assessment order passed under section 143(3) of the Act is erroneous insofar prejudicial to the interest of Revenue for the following reasons:

- i. The assessee has set off the brought forward losses and the unabsorbed depreciation of Rs. 371,58,34,739.00 and 3,35,82,000.00 against the taxable Income in the year under consideration. However, the assessee has already claimed the set off of such brought forward losses and unabsorbed depreciation against the income for the assessment years 2008-09, 2009-10 and 2010-11.

- ii. The amount of dividend income of Rs. 11,60,62,000/- was reduced from the amount of the disallowances made under section 14A read with rule 8D of Income Tax Rule amounting to Rs. 148,83,18,280/-. Thus the effective disallowance was made for Rs. 137,22,56,280/- against the actual disallowance of Rs. 148,83,18,280/-
- iii. The amount of prior period Expenses was claimed amounting to Rs. 2,15,28,000/- against the prior period income. However the AO under the normal computation of income added the prior period expenses to the total income of the assessee. But the AO under MAT computation of income omitted to add such prior period expenses.

In view of the above, the notice was served upon the assessee under section 263 of the Act proposing the order passed by the AO as erroneous insofar prejudicial to the Revenue.

4. The assessee before the Ld. CIT submitted that it has claimed the set off of the brought forward losses and the unabsorbed depreciation as declared in the income tax return. Moreover, the issue regarding the brought forward losses and the unabsorbed depreciation is pending before the Honøble ITAT for the assessment years 2007-08 and onwards and some of them have been decided in favour of the assessee which are pending for giving the appeal effects.

4.1 The assessee regarding the dividend income of Rs. 11,60,62,000/- submitted that it has not claim the exemption of such dividend income. Therefore, the same is liable to be reduced from the amount of disallowance made by the AO under section 14A read with rule 8D of income tax rule.

4.2 The assessee regarding the prior period expenses submitted that it has already been added in the book profit computed under section 115JB of the Act.

In view of the above, the assessee claimed that the order passed by the AO is neither erroneous nor prejudicial to the interest of Revenue.

4.3 However, the Ld. CIT disregarded the contentions of the assessee and held the order of the AO as erroneous insofar prejudicial to the interest of Revenue for the reasons as discussed below:

3.3.2 Assessee's submissions are considered, however, the same needs to be verified in the light of addition of Rs.2,15,28,000/- made while computing the total income under normal provisions, at para 5.0(b) of the assessment finalized u/s 143(3) of the IT Act.

4. Considering the totality of facts as narrated in the preceding paras, I am of the view that the A.O. has failed to examine the records and appreciate the facts and the law while completing the assessment. Further, the issue of excessive allowance of unabsorbed business loss & unabsorbed depreciation needs to be ascertained by giving appeal effect in all the relevant assessment years. Assessee's contentions that the alleged dividend income has not been claimed as exempt income, also needs proper verification. Further, as mentioned in para 3.3.2, the issue of addition of Rs.2,15,28,000/- needs to be verified.

5. In the case of *K.A. Ramaswamy Chettiar (220JTR_6§7)* the Hon'ble Madras High Court has held that when the ITO is expected to make an enquiry of a particular item of income and if he does not make an enquiry as expected, that would be a ground for the Commissioner of Income Tax to interfere U/s.263 with the order passed of the ITO, since such an order passed by the ITO is erroneous and prejudicial to the interest of the revenue.

5.1 In the case of ***Swarup Vegetable Products vs. Commissioner of Income Tax (1990) 187 ITR 412 (All)***, it was **held by Hon'ble Allahabad High Court as under:-**

°It is beyond dispute that, U/s. 263 of the IT Act, the CIT does have the power to set aside the assessment order send the matter for a fresh assessment if he is satisfied that further enquiry is necessary, and that the order of the ITO is prejudicial to the interest of the Revenue."

6. ***Failure on the part of the A.O. with regard to examination/verification of the vital issue discussed in Para 3.1, 3.2 & 3.3 (including sub-paras) herein above has rendered the assessment erroneous, in so far as, it is prejudicial to the interest of revenue. Therefore in exercise of the powers conferred by the Section 263 of the Income-tax Act, 1961, the assessment is set-aside with the direction that the assessment should be framed afresh by the A.O. after proper enquiries / verification on the aforementioned issues, examining the accounts and records of the assessee and after allowing reasonable opportunity of being heard to the assessee.***

Being aggrieved by the order of the Ld. CIT, the assessee is in appeal before us.

5. The Ld. AR before us, regarding the set-off of the brought forward losses and unabsorbed depreciation, fairly agreed that the order passed by the AO is erroneous insofar prejudicial to the interest of Revenue which certainly requires verification.

5.1 The Ld. AR before us regarding the disallowance under section 14A read with rule 8D submitted that the amount of dividend income was not claimed as exempted and therefore the same was reduced against the disallowances made under section 14A read with Rule 8D of Income Tax Rule. The AO reduced the amount of dividend income against the

disallowances made under section 14A read with rule 8D after due verification.

5.2 The Ld. AR regarding the prior period expenses submitted that the AO has already made the addition of such expenses to the book profit computed under section 115JB of the Act.

6. On the other hand the Ld. DR vehemently supported the order of the authorities below.

7. We have heard the rival contentions of both the parties and perused the materials available on record. In this case the order of the AO was held as erroneous insofar prejudicial to the interest of revenue on account of the reasons which have been discussed in the preceding paragraph elaborately. Therefore, we do not want to repeat the same for the sake of brevity and convenience. Now, we proceed to adjudicate to each issue one by one as discussed above.

Regarding the brought forward losses and the unabsorbed appreciation

7.1 At the outset we note that, the Ld. AR at the time of hearing did not dispute the finding of the Ld. CIT under section 263 of the Act. Therefore, we do not find any reason to interfere in the order of the Ld. CIT to the extent of brought forward losses and the unabsorbed depreciation.

Regarding the dividend income of Rs. 11,60,62,000/-.

7.2 It is settled law that the order of the AO can be held as erroneous insofar prejudicial to the interest of Revenue on the satisfaction of the twin conditions. *Firstly*, it has to be erroneous and *secondly* such error should cause prejudice to the interest of Revenue. In the instant case, there is no loss to the Revenue on account of reducing the dividend incomes against the disallowance of the expense under section 14A read with rule 8D of Income Tax Rule. In the instant case the assessee has offered the exempted income to tax which needs to be reduced from the taxable income. As such the Revenue has to allow the rightful claims to the assessee despite the same were not claimed by the assessee. In such situation and circumstances, the **CBDT circular Circular no 14(XL-35) dated 11-04-1955** provides as under:

(3) Officers of the Department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the Officers should take the initiative in guiding a taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the department for it would inspire confidence in him that he may be sure of getting a square deal from the department. Although, therefore, the responsibility for claiming refunds and reliefs rests with assessee on whom it is imposed by law, officers should—

(a) draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other ;

(b) freely advise them when approached by them as to their rights and liabilities and as to the procedure to be adopted for claiming refunds and reliefs.

In view of the above, if the amount of dividend income is not reduced against the disallowance of the expenses, then such income has to be treated as exempted income under section 10(34) of the Act. Finally, the amount of dividend will be reduced and disallowance of the expenses will increase. Thus in effect the entire exercise will be tax neutral. Therefore, in our considered view the order passed by the AO at the most can be held as erroneous but it does not cause any prejudice to the interest of Revenue.

Thus in our considered view, on this count, the order of the AO cannot be held as erroneous insofar prejudicial to the interest of Revenue.

Regarding the prior period expenses of Rs. 2,15,28,000/-.

7.3 At the outset we note that, the amount of the prior period expenses has already been added by the AO to the book profit computed under section 115JB of the Act. This fact can be verified from the order of the AO. Thus in our considered view there is no error in the order of the AO as alleged by the Ld. CIT. Hence in our considered view the order of the AO cannot be held erroneous insofar prejudicial to the interest of Revenue on this reasoning.

In view of the above, we hold that the order of the AO is erroneous in so far prejudicial to the interest of revenue to the extent of the benefit granted by the AO on account of brought forward losses and unabsorbed depreciation. The assessee on this count fails. However, the assessee on other 2 items as discussed above succeeds for the reasons elaborated hereinabove. Hence the appeal of the assessee is partly allowed.

8. In the result the appeal of the assessee is partly allowed.

Order pronounced in the Court on 16/10/2019 at Ahmedabad.

**-Sd-
(Ms MADHUMITA ROY)
JUDICIAL MEMBER**

**-Sd-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

(True Copy)
Ahmedabad; Dated 16/10/2019
Manish