

आयकर अपीलीय अधीकरण, न्यायपीठ –“B” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA
[Before Shri J. Sudhakar Reddy, AM and Shri A. T. Varkey, JM]

I.T.A. No. 362/Kol/2020
Assessment Year: 2015-16

M/s Kusum Industrial Gases Ltd. (PAN: AABCK 4407 B)	Vs.	ITO, Ward-4(4), Kolkata
Appellant		Respondent

Date of Hearing (Virtual)	13.05.2021
Date of Pronouncement	23.06.2021
For the Appellant	Shri A.K. Tulsiyan, A.R
For the Respondent	Shri Tushar Dhwal Singh, CIT D.R

ORDER

Per Shri A. T. Varkey, JM:

This is an appeal filed by the Assessee against the order of Ld. PCIT-2, Kolkata dated 23.03.2020 passed u/s 263 of Income Tax Act, 1961 (hereinafter referred to as the ‘Act’) for Assessment year 2015-16.

2. The Ld. A.R. for the assessee Shri A.K. Tulsiyan drew our attention to the legal challenge made by the assessee against the action of Ld. PCIT to invoke the revisional jurisdiction u/s 263 of the Act without satisfying the condition precedent as prescribed u/s 263 of the Act i.e. without validly finding that the AO’s order is erroneous as well as prejudicial to the revenue.

3. Brief facts of the case is that the Ld. PCIT noted that the assessee company had filed its return of income on 30.09.2015 declaring total return income of Rs. 44,61,840/-. The return was processed u/s 143(1) of the Act. However, later it was selected for scrutiny through CASS and the assessment order u/s 143(3) of the Act was passed on 19.07.2017 wherein the AO accepted the return of income as it was returned by the assessee. According to Ld. PCIT, he received a proposal for review of the assessment order dated 09.07.2017 since an error was detected in the assessment order and thereupon he perused the said

proposal and found that the AO has failed to take logical action on the information available with him. According to Ld. PCIT, he issued show cause notice (SCN) to the assessee u/s. 263 of the Act, the relevant portion of the SCN is reproduced as under:

“The main reason for scrutiny was in regard to huge investment made (Rs. 8.35 crores) in unlisted securities. The officer has not inquired about the source of such huge investment, it appears from the record that the assessee sold inventory (MF units) and diverted the fund into investment in unlisted equity; but no detail was obtained by the officer. The assessee earned dividend income of Rs. 2.32 crores out of MFs but disallowance u/s 14A had not been considered by the officer.

In the course of assessment proceedings, the AO had passed the order without proper verification/examination of the issues mentioned above and accordingly making disallowance / addition in this regard.”

4. In response to the aforesaid show cause notice the Ld. PCIT notes that no one appeared nor any adjournment petition was filed despite the matter was fixed thrice (12.03.2020, 18.03.2020 and 20.03.2021). Thereafter the Ld. PCIT notes that from the assessment records it is seen that the main reason for scrutiny was with regard to huge investment of Rs. 18.94 crores in unlisted securities. According to him, the AO has not enquired the source of such huge investment. However, the Ld. PCIT notes that it appears from the record that the assessee had sold inventory Mutual Fund units (MF units) and diverted the fund into investment in unlisted equity. According to Ld. PCIT no such details was obtained by the AO. The other fault found by the Ld. PCIT was that the assessee has earned dividend income of Rs. 2.32 crores out of Mutual Funds but disallowance u/s 14A has not been considered by the AO. Therefore, according to Ld. PCIT, the AO has not done in-depth enquiry in respect of huge investment made by the assessee and subsequent income earned out of such investment. Therefore, he was pleased to restore the issues back to the file of AO for de novo assessment after giving opportunity to the assessee.

5. Aggrieved the assessee is before us.

6. We have heard both the parties and perused the records. At the outset, the Ld. A.R submitted that the assessee pursuant to the show cause notice of Ld. PCIT dated 06.03.2020 had filed detailed written submission on 20.03.2020 and as mark of proof that the same was filed before Ld. PCIT, he drew our attention to page 5 of paper book, which is the first page of the assessee's written submission before the Ld. PCIT pursuant to his show cause notice dated 06.03.2020. From a perusal of the same it is seen that a seal of the department is

affixed dated 20.03.2020 (*though not legible*). Therefore he submitted that the Ld. PCIT's observation that the assessee did not file any submission to his SCN is wrong. On this factual assertion of Ld. AR, the Ld. D.R. representing the Revenue could not controvert this fact of the assessee filing the written submission before the Ld. PCIT before he passed impugned order on the same date (20.03.2020).

7. We have heard both the parties and perused the records. Before we advert to the facts and law involved in this lis before us, let us revise the law governing the issue before us. The assessee has challenged in the first place, the very usurpation of jurisdiction by Ld. Principal 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; [*because AO has to discharge dual role of an investigator as well as that of an adjudicator*] then in aforesaid any event 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”**. Keeping the aforesaid legal principle in our mind let us examine the impugned order of the Ld. PCIT as to whether the condition precedent as laid down by the Hon’ble Supreme Court in *Malabar Industrial Co. Ltd. vs. CIT* reported in [2000] 243 ITR 83 (SC) is satisfied or not.

8. Keeping the aforesaid legal principle in our mind let us examine the impugned order of the Ld. PCIT as to whether the condition precedent as laid down by the Hon’ble Supreme Court in *Malabar Industrial Co. Ltd. vs. CIT* reported in [2000] 243 ITR 83 (SC) is satisfied or not. We note that the assessee had returned an income of Rs. 44,61,840/- which has been accepted by the AO after scrutiny assessment u/s 143(3) of the Act. The Ld. PCIT has noted that the reason for scrutiny was in regard to the huge investment made of Rs.8.95 crores in unlisted equity and the main fault attributed by him was that the source of such huge investment has not been enquired into by the AO. However it is interesting to note that in the same breath the Ld. PCIT notes that *“ it appears from the record that the assessee sold inventory (MF unit) and diverted the fund into the investment in unlisted equity.”* From the aforesaid observation/finding made by the Ld. PCIT in the show cause notice issued on 06.03.2020 which has been reproduced (supra) we note that the Ld. PCIT himself has recorded a finding that the source of huge investment in unlisted equity was from the sale consideration of the mutual fund units /inventory (MFunits). Therefore, the main fault alleged by the Ld. PCIT that the source of huge investment made by the assessee to the tune of Rs. 8.95 crores in unlisted equity has not been enquired into by the AO falls down by the Ld PCIT’s admission that from the assessment records it appears that the source from the investment was from the sale consideration of the mutual fund units/inventory. And the remaining fault is that no details of the investment made by assessee in unlisted equities were obtained by the AO. For that the Ld. A.R. drew our attention to reply filed by the

assessee during the assessment proceedings before the AO dated 22.06.2017 and 27.06.2016 which are placed from pages 22 to 24 and 25 of the paper book respectively. From a perusal of page 23 of paper book it is noted that the assessee has replied to the AO pursuant to the notice issued u/s 142(1) of the Act dated 14.06.2017 wherein the assessee has given a reason for increase in investment in unlisted equities (Group Companies) as under:

“During the year, the increase in investment in unlisted equities is amounting to Rs. 8,95,11,968/-. Investment in unlisted equities as on 31.03.2014 was Rs. 6,47,56,500/- which had increased to Rs. 15,42,68,468/- as on 31.03.2015. this is evident from Note-7 of the Balance Sheet. All such investment were made in the group companies. The details of companies in which said investment were made is as under:

SL. No.	Name of Company	Amount (Rs.) of investment made during the year
1.	Horizon Vintrade pvt. Ltd.	2,30,00,000/-
2.	Majestic Commotrade Pvt. Ltd.	70,00,000/-
3.	Pinnacle Commodeal Pvt. Ltd.	2,15,00,000/-
4.	Techno Leasing & Finance Co. Pvt. Ltd.	1,05,00,000/-
5.	Techno International Ltd.	1,40,00,000/-
6.	Varanasi Commercial Ltd.	1,35,11,968/-
	<i>Total</i>	<i>8,95,11,958/-</i>

The above investments made in the shares of group companies are strategic investments to hold control over the said company.

9. Thereafter the Ld. A.R drew our attention to page 17 of PB which is detailed reply filed assessee before the Ld. PCIT wherein the assessee has explained that AO had in fact enquired about the investment in unlisted equities and pursuant to which the assessee had replied and brought to the notice of the AO that the investment were made in the group companies of the assessee (unlisted equities) to acquire *strategic control* over them. And the *source* of investment was out of the funds from *redemption of mutual fund*. According to Ld. A.R this fact is evident from the perusal of the balance sheet of the assessee (page 26-40 PB) wherein it can be noted that the value of mutual fund as on 31.03.2015 has got

reduced to Rs. 1,18,60,301/- from the value of Rs. 6,22,86,969/- as on 31.03.2014. and the details of the investment made by the assessee can be seen from the chart below:

Name of the company in which the investment has been made	Amount of Investment Made	Source of Investment made
Horizon Vintrade Pvt. Ltd.	2,30,00,000	Redemption of Reliance Mutual Fund
Majestic Commotrade Pvt. Ltd.	70,00,000	Redemption of Reliance Mutual Fund
Pinnacle Commoddeal Pvt. Ltd.	2,15,00,000	Redemption of Reliance Mutual Fund
Techno Leasing & Finance Co. Pvt. Ltd.	1,05,00,000	Redemption of Reliance Mutual Fund
Techno International Ltd.	1,40,00,000	Redemption of Reliance Mutual Fund
Varanasi Commercial Ltd.	1,35,11,968	Transferred from quoted investments
Total	8,95,11,968	

10. In order to buttress this fact the assessee has filed the bank statement as well as mutual funds statements which reflects that the amount has been received from the redemption of mutual funds, he drew our attention to page 41 and 46 of PB wherein the copy of statement showing source of investment made in unlisted equities along with relevant bank statement and mutual funds statement are found enclosed. He thereafter drew our attention to page 37 of PB wherein the details of other investment under non-current investment is given wherein the name of investment in equity instruments are given and from a perusal of the same, we note that the details of investment in quoted shares are given. We note from page 37 of PB the details viz. name of unquoted and quoted shares along with the number of shares held by the assessee as on 31.03.2015. The entire details of investment made by the assessee is seen to have been filed by the assessee before the AO. So, therefore, the Ld. PCIT's allegation that no details was called for by the AO during the enquiry conducted in respect of huge investment made to the tune of Rs. 8.95 crores in unlisted equity is on wrong assumption of facts and therefore the Ld. PCIT erred on this issue.

11. Coming to the next issue i.e. the assessee having earned dividend income of Rs. 2.32 crores out of mutual funds and no disallowance u/s 14A of the Act had been considered by the AO. It is noted that the assessee had made suo moto disallowance of Rs. 8,65,105/- u/s 14A read with Rule 8D which fact is evident from the perusal of page 23 of the PB wherein Para 4 the computation of disallowance u/s 14A read with Rule 8D was enclosed for the perusal of AO pursuant to the notice of AO u/s 142(1) dated 14.06.2016. The computation of

suo moto disallowance u/s 14A as per Rule 8D is seen placed at page 19 and 20 of PB wherein the computation at page 19 made in tabular format is as under:

		<u>Amount (Rs.)</u>															
i) Expenditure directly related to earning of Exempted Income :Demat Charges		1,000.00															
ii) Apportionment of Interest expenses not directly related to any particular Income		-															
iii)Disallowance @ 0.50% on the average value of Investments(Opening + Closing) income from which is exempt.																	
	<table border="1"> <thead> <tr> <th></th> <th style="text-align: center;">Opening</th> <th style="text-align: center;">Closing</th> </tr> </thead> <tbody> <tr> <td>Unquoted Shares</td> <td style="text-align: right;">64,756,500</td> <td style="text-align: right;">154,268,468</td> </tr> <tr> <td>Mutual Funds</td> <td style="text-align: center;">-</td> <td style="text-align: center;">-</td> </tr> <tr> <td>Quoted Shares</td> <td style="text-align: right;">71,270,701</td> <td style="text-align: right;">55,346,351</td> </tr> <tr> <td></td> <td style="text-align: right;"><u>136,027,201</u></td> <td style="text-align: right;"><u>209,614,819</u></td> </tr> </tbody> </table>		Opening	Closing	Unquoted Shares	64,756,500	154,268,468	Mutual Funds	-	-	Quoted Shares	71,270,701	55,346,351		<u>136,027,201</u>	<u>209,614,819</u>	
	Opening	Closing															
Unquoted Shares	64,756,500	154,268,468															
Mutual Funds	-	-															
Quoted Shares	71,270,701	55,346,351															
	<u>136,027,201</u>	<u>209,614,819</u>															
Average Value of Investments [(13,60,27,201/- + 20,96,14,819/-) / 2]		<u>172,821,010</u>															
Amount @ 0.50% of Average Value of Investments		864,105															
Total Disallowance u/s 14A as per Rule 8D (i + ii + iii)		<u><u>865,105</u></u>															

12. Based on the aforesaid computation, the assessee has suo moto disallowed the amount of Rs.8,65,105/- which fact is revealed from a perusal of page 20 PB. Therefore, this issue has been enquired into by the AO and the assessee has replied to it as aforesaid and since the disallowance has been made by the assessee suo moto u/s 14A read with Rule 8D the fault alleged by the Ld. PCIT is again on wrong assumption of facts. Therefore, the action of the AO cannot be termed as erroneous as well as prejudicial to the revenue for no enquiry on the part of AO. Therefore, we note that the impugned order of Ld. PCIT was without satisfying the condition precedent as stipulated u/s. 263 of the Act that the AO's order dated 19.07.2017 as erroneous as well as prejudicial to the revenue. In the absence of this jurisdictional fact and law, Ld. PCIT ought not to have usurped the jurisdiction u/s 263 of the Act to interfere with the assessment order passed by the AO on 19.07.2017. Since the jurisdictional condition precedent has not been satisfied in this case by Ld. PCIT before passing the impugned order, we are inclined to quash the impugned order of Ld PCIT dated 23.03.2020.

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

Order is pronounced in the open court on 23rd June, 2021

Sd/-
(J.S. Reddy)
Accountant Member

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

Dated: 23.06.2021

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- M/s Kusum Industrial Gases Ltd., 32, Radha Bazar Lane, Room No. P-46A, Lal Bazar, Kolkata, West Bengal-700001
2. Respondent – ITO, Ward-4(4), Kolkata
3. The PCIT- 2, Kolkata
4. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata
