

आयकर अपीलीय अधिकरण] पुणे न्यायपीठ “बी” पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL PUNE BENCH “B”, PUNE
(Through Virtual Court)

BEFORE SHRI INTURI RAMA RAO, AM
AND SHRI PARTHA SARATHI CHAUDHURY, JM

आयकर अपील सं. / ITA No.1406/PUN/2017
निर्धारण वर्ष / Assessment Year : 2012-13

Biz Secure Labs Private Limited,
1206, Sadashiv Peth,
Pune – 411 030.

..... अपीलार्थी /
Appellant

PAN : AADCB6188L.

बनाम v/s

The Pr.Commissioner of Income Tax – 1,
Pune.

..... प्रत्यर्थी /
Respondent

Assessee by : Shri Vardhaman Jain.
Revenue by : Shri Deepak Garg, CIT.

सुनवाई की तारीख / Date of Hearing : 13.07.2021
घोषणा की तारीख / Date of Pronouncement : 15.07.2021

आदेश / ORDER

PER INTURI RAMA RAO, AM:

This is an appeal filed by the assessee directed against the order of learned Principal Commissioner of Income Tax – 1, Pune (hereinafter referred as “Id.PCIT”) dated 30.03.2017 passed u/s 263 of the Income Tax Act (hereinafter referred as “the Act”) for the assessment year 2012-13.

2. The brief facts of the case are as under :

The appellant is a company incorporated under the provisions of the Companies Act, 1956. It is engaged in the business of manufacturing and

sale of anti-virus software namely "Net Protector". The return of income for the assessment year 2012-13 was filed on 30.09.2012 declaring a total income of Rs.19,14,48,969/- after claiming a deduction of Rs.21,09,60,407/- u/s 80IC of the I.T. Act. Against the said return of income, the assessment was completed by the DCIT, Circle - 1, Pune (hereinafter referred as "the Assessing Officer") vide order dated 31.03.2015 passed u/s 143(3) of the Act at a total income of Rs.30,17,18,540/- after making the following disallowances :

- 1) Disallowance of claim of deduction of Rs.10,90,23,322/- u/s 80IC of the Act.
- 2) Disallowance of Rs.12,14,250/- u/s 14A of the Act.

3. While matter stood thus, the ld. PCIT - 1, Pune on verification of the assessment records, found that out of the total claim for deduction of Rs.21,09,60,407/- u/s 80IC claimed in respect of income from Parwanoo Unit at Haryana, the profits attributed to inter unit sales of Rs.14.97 crores was alone disallowed, in respect of profits on the sales of Rs.13.47 crores made to vendors directly from Parwanoo Unit was allowed by the Assessing Officer. According to the ld.PCIT, the action of the Assessing Officer allowing the profits on the sales of Rs.13.47 crores without causing any necessary enquiries is erroneous as the Assessing Officer himself gave a finding that only 10% of the profit can be attributed to the C.D. writing and packing activities which are done at Parwanoo Unit. Thus, the ld.PCIT formed the opinion that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of revenue. Accordingly, issued a show cause notice u/s 263 of the Act on 16.09.2016 calling the appellant

to show cause as to why the assessment order should not be declared as erroneous and prejudicial to the interest of revenue.

4. In response to the show cause notice, the appellant had filed detailed explanation inter-alia stating that the Assessing Officer had examined the eligibility of the company for claiming deduction u/s 80IC and took a plausible view that the assessee is eligible for deduction u/s 80IC of the Act in respect of the profits earned on the sales made to vendors directly from Parwanoo Unit. It is further contended before Id.PCIT that the very fact that the Assessing Officer had disallowed the claim for deduction u/s 80IC partly would go to show that the issue was examined by the Assessing Officer. However, the Id.PCIT rejected the explanation of the appellant company and held that the Parwanoo Unit was only involved in the CD writing services and packing activities, the actual development of anti-virus software was developed in Pune Unit and therefore significant portion of the profits in relation to the sales from Parwanoo Unit of Rs.13.47 crores is attributable to Pune Unit and therefore since the Pune unit was not eligible for deduction, the profits were diverted to Parwanoo Unit and the Assessing Officer had allowed the claim without examining and causing necessary enquiries into the claim made by the assessee. Therefore, the Id.PCIT set aside the assessment order dated 31.03.2015 passed u/s 143(3) of the Act with a direction to the Assessing Officer to examine the claim for deduction u/s 80IC in respect of sales of Rs.13.47 crores made to vendors directly from Parwanoo Unit vide order dated 31.03.2017 passed u/s 263 of the Act.

5. Being aggrieved by the order of ld.PCIT, the appellant is before us in the present appeal.

6. Firstly, it was contested before us that ld.PCIT ought not have exercised the revisional jurisdiction in the facts of the case as the Assessing Officer had considered the issue and took a plausible view as the Assessing Officer himself had disallowed the claim for deduction u/s 80IC of the Act in respect of inter unit sales made to Pune unit. Thus, it was contested that the assessment order cannot be termed as erroneous and prejudicial to the interest of Revenue and reliance was placed on the following decisions :

- 1) Malbar Industrial Co. Ltd. Vs. CIT 243 ITR 83 (SC)
- 2) Bodhisattva Chattopadhyay Vs. CIT ITA No.1304/KOL/2019 (KOL Trib)
- 3) Magic Landcon LLP Vs. CIT ITA No.4551/Del/2019 (DELHI Trib)
- 4) CIT Vs. Fine Jewellery (India) Ltd ITA No.296 of 2013.

Secondly, it was contested that the explanation 2 of Sec.263 of the Act has no application to the facts of the present case as in the present case, the Assessing Officer had examined the claim during the course of assessment proceedings and took a view that only a part of the claim u/s 80IC is disallowable.

Thirdly, it was contested that the original assessment order is appealed against before the ld.CIT(A) and the subject matter of the appeal before ld.PCIT is eligibility of the assessee for claiming deduction u/s 80IC. Therefore, the assessment order got merged with the order of ld.CIT(A) as

the power of revision u/s 263 is not available to the ld.PCIT and in this connection, he relied on the following judgments :

- 1) Sonal Garments (Mum) 95 ITD 363.
- 2) CIT Vs. Shashi Theatre (Guj) 248 ITR 126.
- 3) Oil India Ltd Vs. CIT (Cal) 138 ITR 836.
- 4) CIT Vs. Fortleza Developer (Mum) 141 ITD 133
(confirmed by High Court in 374 ITR 510).

7. On the other hand, the ld.CIT D.R. vehemently opposed the submissions of the Ld.A.R. that the claim was examined by the Assessing Officer during the course of assessment proceedings. He submitted that the claim of deduction u/s 80IC comprises of two things (1) claim for deduction u/s 80IC in respect of inter unit sales (2) claim in respect of sales made to vendors directly from Parwanoo unit. As the Assessing Officer had only examined the claim in relation to the profits earned on inter-unit sales, then it cannot be said that the Assessing Officer had examined the claim which is the subject matter of revision and took a plausible view. The ld.CIT D.R. submitted that since no enquiry is caused by the Assessing Officer during the course of assessment proceedings on the issue which is the subject matter of revision, the explanation (2) of Sec.263 of the Act is squarely applicable to the facts of the present case. The ld. CIT D.R. also placed reliance on the decision of Hon'ble jurisdiction High Court in the case of CIT Vs. Ballarpur Industries Ltd. reported in (2017) 85 taxamnn.com (Bom) and the order of Co-ordinate Bench of the Tribunal in the case of the Jalgaon People's Co-op Bank Ltd., Vs. PCIT (ITA No.698/PUN/2019 dt.22.02.2021). On the issue of merger of assessment order of

ld.CIT(Appeals), he submitted that the ld.CIT(Appeals) had not considered the issue of eligibility of profits on the sales made to vendors directly from Parwanoo Unit neither considered and decided by the ld.CIT(Appeals) as it does not form part of the appeal before ld.CIT(Appeals). Therefore, in the light of the clear provisions of clause (c) of Explanation 1 to sub-section (1) of Section 263 of the Act, it cannot be said that the doctrine of merger have no application to issue which is the subject matter of revision.

8. We have heard the rival contentions and perused the material on record. The only issue that arises for our consideration in the present appeal relates to whether the ld.PCIT was justified in the facts of the present case in exercising the revisional authority vested with him or not. It is settled position of law as held by the Hon'ble Supreme Court in the case of Malbar Industrial Co., Ltd. Vs. CIT reported in 243 ITR 83 (SC) that the power of revision under the provisions of Sec.263 of the Act can be exercised only on satisfaction of twin conditions namely, (i) the order of the Assessing Officer must be erroneous and (ii) it is prejudicial to the interest of revenue. The Hon'ble Supreme Court further held that when a claim made by the assessee is allowed by the Assessing Officer without making any enquiry, then the order of the Assessing Officer to the extent it allowed such claim is erroneous and consequently prejudicial to the interest of Revenue. Therefore, the question that requires to be determined in the present case is whether the AO had examined the claim i.e., eligibility of the profits earned on the sales made to vendors directly from Parwanoo Unit, while allowing deduction u/s 80IC of the Act.

9. In the present case, the amount of profits that were claimed as deduction u/s 80IC of Act comprises of two components, namely, (i) the profit on inter-unit sales of Rs.14.97 crores (ii) the profits on sales of Rs.13.47 crores made to vendors directly from Parwanoo Unit. From the perusal of the assessment order as well as the material on record, it is clear that the Assessing Officer had examined the claim in relation to the profits earned on the inter unit sales of Rs.14,97,23,544/- and disallowed the deduction of Rs.10,90,23,322/- u/s 80IC of the Act. There is nothing on record to suggest that the Assessing Officer had examined the claim of deduction u/s 80IC of the Act in relation to the profits earned from sales made to the vendors directly from Parwanoo Unit. The facts of the claim undoubtedly demands an enquiry into the claim as to eligibility as well as quantification as the purchases were made from Pune Unit and the only activity done at Pune Unit is only CD writing and packing activities, which no doubt, not of a much value addition and therefore, the claim is required to be examined with reference to the provisions contained in sub-section (5) and sub-sections (7) to (12) of Sec.80IA of the Act in view of the admitted fact that the software developed was transferred from Pune Unit to Parwanoo Unit,

10. The issue whether Assessing Officer did the examination of the claim and took a plausible view is a question of fact. The onus lies upon the assessee to prove this fact by leading the necessary evidence on record. In the present case, the Ld.A.R. neither pointed out any material on record suggesting that the issue which is the subject matter of revision was examined by the Assessing Officer during the course of assessment

proceedings nor could he reply to the pointed query on this aspect from the Bench. The only submission of the Ld.A.R. is that the claim was examined by the Assessing Officer during the course of assessment proceedings is on the premise that out of the total claim of Rs.21,09,60,407/- u/s 80IC, the Assessing Officer had disallowed a sum of Rs.10,90,23,322/-. In our considered opinion, the submission of the Ld.A.R. is far-fetched and cannot be accepted for the reason that the Assessing Officer had examined only one component of the total claim and had failed to examine the other component of the claim for whatsoever reasons nor can it be inferred that the Assessing Officer had examined total claim u/s 80IC of the Act, in the absence of any material on record justifying such inference. As held by the Hon'ble jurisdictional High Court in the case of CIT Vs. Ballarpur Industries Ltd. reported in (2017) taxmann.com 10 (Bom), the word "due verification" would include within its ambit not only inadequate inquiry / verification but also no enquiry / verification. As held by the Hon'ble Supreme Court in the case of Malbar Industrial Co., Ltd. Vs. CIT reported in 243 ITR 83 (SC), non-enquiry before allowing the claim would make the Assessing Officer amenable to jurisdiction u/s 263 of the Act. There is nothing on the record to say that this component for the claim u/s 80IC which is the subject matter of revision is examined or enquired into by the Assessing Officer and took a plausible view, even if one infers that the Assessing Officer took a view, it can be said that mere taking of view of by the Assessing Officer without having subjected the claim to examination would not make a view of the Assessing Officer. A view has necessarily been preceded by the examination and opting to choose one of the possible views.

The same view has been taken in the case of K.A. Ramaswamy Chettiar Vs. CIT reported in 220 ITR 657 (Mad) wherein it was held as under :

“25. When an officer is expected to make inquiry of a particular item of income and if he does not make any inquiry as expected, that would be a ground to interfere with the order passed by the officer, since such an order passed by the Officer is erroneous and prejudicial to the interests of the Revenue.”

Also in the case of Rampyari Devi Sarogi Vs. CIT reported in (1968) 67 ITR 84 (SC) wherein it was held as under :

“26. the Commissioner can regard the AO's order as erroneous on the ground, that in the circumstances of the case, the AO should have made further inquiries before accepting the statement made by the Assessee in his return. Besides, the Hon'ble Supreme Court, in the facts of the said case, held that the Assessee had not suffered in any way from the failure of the Commissioner to indicate results of inquiries since, the Assessee would have full opportunity of showing the AO whether he has jurisdiction or not, and whether the income assessed in the assessment orders which were originally passed was correct or not.

11. The Hon'ble jurisdictional High Court in the case of PCIT Vs. Zuari Maroc Phosphates Ltd., reported in 432 ITR 316 held as under :

“27. In several decisions, it has been held that it is incumbent on the AO to investigate the facts stated in the return when the circumstance would make such an inquiry prudent and when the word 'erroneous' in Section 263 includes failure to make an inquiry, the order becomes erroneous when such an inquiry had been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct. Duggal and Co. vs. Commissioner of Income Tax – 220 ITR 456 (Delhi); CIT vs. Pushpa Devi – 164 ITR 639 (Pat.) and CIT vs. Pushpa Devi – 173 ITR 445 (Pat.).”

Further, the Hon'ble Bombay High Court in the case of CIT, Nagpur Vs. Ballarpur Industries Ltd., reported in (2017) 85 taxmann.com 10 (Bom) held as follows :

“13. The above issue which comes for our consideration is, did the Assessing Officer consider and examine the claim of the respondent before allowing a claim for deduction under Section 80 HHC of the Act. The respondent-assessee seeks to draw inference from the statement of case that there was

an inquiry made before allowing the claim of deduction under Section 80 HHC of the Act at Rs.92.81 lakhs. This inference is not justified. Mere using the word "allowed" does not mean examination and enquiry before allowing the claim of deduction under Section 90 Hon'ble High Court of the Act. The words "due verification" would include within its ambit not only inadequate inquiry / verification but also no enquiry / verification. However, in case the respondent – assessee was of the view that the claim has been examined by the Assessing Officer before allowing it, then respondent-assessee ought to have the statement of case modified/amended so as to bring the aforesaid facts on record, as held by the Apex Court in the case of Calcutta Agency Ltd. (supra). This not being done and now to draw far fetched inference cannot be accepted. It is now settled in view of Malabar Industries (supra) that non-enquiry before allowing the claim would make the order of the Assessing Officer amenable to jurisdiction under Sec.263 of the Act. The non-enquiry by the Assessing Officer gives jurisdiction under Section 263 of the Act. Merely because the issue is debatable, it does not absolve the Assessing Officer from examining the issue and taking a view on the claim after examination. Similarly because the two views are possible and or that there are contrary view of higher forums, does not permit permit non-examination of the claim and taking one of the possible view by giving reasons. In this case no examination of the claim under Section 80 HHC of the Act has been done by the Assessing Officer. Therefore, the exercise of jurisdiction by the Commissioner of Income Tax under Section 263 of the Act was valid.

14. *The decision of the Apex Court in Max India Ltd. (supra) relied upon by the respondent-assessee to our mind would not come to its rescue for the reason that in the present facts the statement of the case does not indicate that the view taken to allow the claim under Section 80 HHC of the Act was after examination/inquiry. Mere taking of a view by the Assessing Officer without having subjected the claim to examination would not make it a view of the Assessing Officer. A view has necessarily to be preceded by examination of the claim and opting to choose one of the possible results. In the absence of view being taken, merely because the issue itself is debatable, would not absolve the Assessing Officer of applying his mind to the claim made by the assessee and allowing the claim only on satisfaction after verification/enquiry on his part. A view in the absence of examination is no view but only a chance result. Therefore, even the decision of the Andhra Pradesh High Court in Gogineni Tobacco Ltd. (supra) will also have no application.*

15. *It appears from the decision of the Apex Court in Max India Ltd. (supra) that the Assessing Officer had taken one of the two views of the word "profit" as occurring in Section 80 BBC of the Act. Therefore, it was in that context that the Apex Court held that Section 263 of the Act would not be attracted particularly when view of the Assessing Officer was found to be a view taken by various authorities under the Act. In passing we may point out that as recorded in the statement of case, the Tribunal held the exercise of powers under Section 263 of the Act by the Commissioner of Income Tax to be bad in law as the view of the Assessing Officer was in line with the decision of the Tribunal in Mysore Exports Ltd. (supra). It is relevant to note that on the date when the Commissioner of Income Tax exercised his powers under Section 263 of the Act on 31.03.1995, the decision of the Tribunal in Mysore Exports Ltd. (supra) was not available before him as it was rendered on 19.05.1995.*

16. *Therefore, we are of the view that the Assessing Officer cannot abdicate his responsibility of examining the claim for deduction before allowing it.*

Absence of examination of the claim made by the assessee while passing an assessment order and allowing the claim made, would render the order of the Assessing Officer erroneous and coupled with the fact that in this case it is admitting prejudicial to the interest of the revenue, exercise of the revisional jurisdiction under Section 263 of the Act by the Commissioner of Income Tax proper and valid.”

12. The ratio of the decisions of Hon'ble jurisdiction High Court in the case PCIT Vs. Zuari Maroc Phosphates Ltd (supra) and also in the case of CIT, Nagpur Vs. Ballarpur Industries Ltd. (supra) are squarely applicable to the facts of the present case. The decisions cited upon by the Ld.A.R. are not applicable to the facts of the present case as those decisions were rendered based on the fact that the enquiries were made on the claim which is subject matter of the revision.

13. As regards to the argument of the Ld.A.R. that the ld.PCIT ought not have involved the jurisdiction u/s 263 of the Act on the ground that the subject matter of the revision is also subject matter of appeal before the ld.CIT(A). Admittedly, in the present case, the subject matter of the appeal before ld.CIT(A) is only in relation to claim for deduction u/s 80IC in respect of profits earned on inter-unit sales and not in respect of profits earned on the sales made to vendors directly from Parwanoo unit. Therefore, this issue was neither considered and decided by the ld.CIT(A) nor subject matter of appeal before ld.CIT(Appeals). Thus, the doctrine of merger have no application to the facts of the present case in view of the plain provisions of Clause (c) of Explanation 2 of sub-section (1) of 263 of the I.T. Act. In the light of the above legal position discussed on the facts of the present case, we are of the considered opinion that the ld.PCIT was justified in

exercising the jurisdiction u/s 263 of the I.T. Act and we do not find any merit in the grounds of the appeal filed by the assessee.

14. In the result, the appeal filed by the assessee is dismissed.

Order pronounced on 15th day of July, 2021.

Sd/-

(PARTHA SARATHI CHAUDHURY)
न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-

(INTURI RAMA RAO)
लेखा सदस्य/ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 15th July, 2021.
Yamini

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. CIT(Appeals), Pune – 5, Pune.
4. Pr.CIT, Pune – 1, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, “बी” /
DR, ITAT, “B” Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार / BY ORDER,

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.