

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D" BENCH: NEW DELHI

BEFORE SHRI RAMA KANTA PANDA, ACCOUNTANT MEMBER
AND
SHRI NARENDER KUMAR CHOUDHRY, JUDICIAL MEMBER

ITA Nos. 3846/Del/2018
[Assessment Year: 2011-12]

Linde Engineering India Pvt. Ltd.,
'Linde House', Opp. Vuda Office,
VIP Road, Karelibaug, Vadodara,
Gujarat-390018
PAN- AAACL0084E

Vs Principal CIT, Delhi-5,
New Delhi.

APPELLANT

RESPONDENT

Appellant by
Respondent by

Sh. Ajit Jain, Ld. CA
Sh. P.C. Maurya, Ld. CIT DR

Date of hearing

05.01.2022

Date of pronouncement

30.03.2022

ORDER

PER N. K. CHOUDHRY, JM:

This appeal has been preferred by the Assessee against the order dated 21.03.2018, impugned herein, passed by the Ld. Principal Commissioner of Income-tax-5, New Delhi (in short 'Ld. PCIT') u/s 263 of the Income-tax Act, 1961 (in short "the Act"), for the assessment year 2011-12, whereby the Ld. PCIT set aside the assessment orders dated 15.05.2015 and 31.12.2015 passed u/s 143(3) and 154/143(3) of the Act respectively.

2. Brief facts of the case are that the Assessee company had filed its return of income by declaring "Nil" income on 30.11.2011 and paid the taxes u/s 115JB of the Act. The said return was processed u/s 143(1) of the Act and subsequently selected for scrutiny and the Assessing Officer completed the assessment of the Assessee by making addition of Rs. 15,94,27,269/- on account of upward adjustment in the arm's length price and disallowance of Rs. 1,15,11,583/- on account of market to market losses.

2.1 Thereafter an order u/s 154 of the Act was also passed on 31.12.2015 by which the claim u/s 10A of the Act amounting to Rs. 31,74,80,850/- for the assessment year under consideration was restricted to Rs. 16,21,37,440/- as total taxable profit of the Assessee company and the computation was revised by the Assessing Officer by giving the benefit of deduction claimed u/s 10A of the Act and assessing the taxable income of the Assessee to the tune of Rs. 1,55,95,440/- .

2.2 Subsequently, the case of the Assessee was opened by the Ld. PCIT u/s 263 of the Act by issuing show cause notice on following grounds:

"(i) The assessment in the above mentioned case was completed in 15.05.2015 determining an income of Rs 17,09,38,850/- under normal provisions against Nil returned income and at Rs. 18,21,24,104/- under special provisions of the Income Tax Act, 1961 (hereinafter referred to as "the Act").

(ii) On perusal of the assessment records, it is noticed that the income in the subject case was assessed at Rs. 17,09,38,850 after making additions of Rs. 15,94,27,269/- on account of transfer pricing and Rs. 1,15,11,583/- on account of marked to market losses under section 143(3) of the Act. It is also noticed that you had claimed deduction u/s 10A amounting to Rs. 31,74,80,850/- in computation of income but restricted to Rs. 16,21,37,440 to the extent of total taxable profit of the company. Thereafter the balance claim u/s 10A amounting to Rs. 15,53,43,410/- was allowed under section 154 of the Act on 31.12.2015 assessing the taxable income at Rs. 1,55,95,440/-.

(iii) However, as per proviso to section 92C(4) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), no deduction under section 10A or 10AA or under chapter VI-A is to be allowed in respect of amount of income by which the total income of the assessee is enhanced as a result of computation of arm's length price. The error of allowing deduction of Rs. 15,94,27,269 on addition of Transfer Pricing adjustment resulted in underassessment of income of Rs. 14,38,31,829 as computed below:

Profit before deduction u/s 10A:		Rs. 16,21,37,440/-
Addition on account of market to market loss:		Rs. 1,15,11,583/-
		Rs. 17,36,49,023/-
Addition on account of transfer pricing:		Rs. 15,94,27,269/-
		Rs. 33,30,76,259/-
Less- Deduction u/s 10A	(-)	Rs. 17,36,49,023/-
Income should have been assessed:		Rs. 15,94,27,269/-
Less- Income assessed u/s 154 on 31.12.2015:	(-)	Rs. 1,55,95,440/-
Under assessment		Rs. 14,38,31,829/-

Such underassessment resulted in short-levy of tax of Rs. 2,49,89,263/- under normal provisions including interest u/s 234B.

(iv) *Section 263 of the Act reads as under:*

“The Principal Commissioner or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the instances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.”

(v) *Whereas the undersigned is of the consideration that the aforementioned orders under section 143(3) and 154 passed by the Assessing Officer are erroneous in so far as they are prejudicial to the interest of the revenue, you are hereby requested to show cause why an order should not be passed enhancing or modifying the assessment as per the provisions of section 263 of the Act.”*

3. The Assessee replied the said notice. Though the Ld. PCIT considered the reply of the Assessee, however, formed a view that various issues remained unverified, including the issues mentioned in the show cause notice and thus no proper inquiry was conducted by the Assessing Officer in the instant year on the above issues and, therefore, the impugned order held to be

erroneous and prejudicial to the interests of the Revenue and consequently set aside the same.

4. The Assessee being aggrieved preferred the instant appeal.

5. Heard the parties and perused the material available on record. In this case return of income filed by the Assessee on dated 30.11.2011 by declaring 'nil' income, which was processed u/s 143(1) of the Act and later on came into scrutiny and resulted into passing of assessment order dated 15.05.2015 u/s 143(3) of the Act by assessing the total income of Rs. 17,09,38,850/- under normal provisions and book profit of Rs. 18,21,24,104/- u/s 115JB of the Act, which was subsequently rectified and recomputed u/s 154/143(3) of the Act on 31.12.2015 by the Assessing Officer by determining the total income of Rs. 1,55,95,440/- of the Assessee.

6. Subsequently, the Ld. PCIT opened the case of the Assessee u/s 263 of the Act mainly on the basis that on perusal of assessment records it is noticed that the income in the subject case was assessed at Rs. 17,09,38,850/- after making addition of Rs. 15,94,27,269/- on account of transfer pricing and Rs. 1,15,11,583/- on account of market to market losses u/s 143(3) of the Act. It is also noticed that the Assessee had claimed deduction u/s 10A amounting to Rs. 31,74,80,850/- in computation of income but restricted to Rs. 16,21,37,440/- to the extent of total taxable profit of the company. Thereafter, the

balance claim u/s 10A amounting to Rs. 15,53,43,410/- was allowed u/s 154 of the Act on 31.12.2015 assessing the taxable income at Rs. 1,55,95,440/-. It was further observed by the Ld. PCIT that as per proviso to Section 92C(4) of the Act no deduction u/s 10A or 10AA or under Chapter VI-A is to be allowed in respect of amount of income by which the total income of the Assessee is enhanced as a result of computation of arm's length price. The error of allowing deduction of Rs. 15,94,27,269/- on addition of transfer pricing adjustment resulted into under assessment of income of Rs. 14,38,31,829/- and such under assessment resulted into short levy of tax of Rs. 2,49,89,263/- under normal provisions including interest u/s 234B.

7. Heard the parties and perused the material available on record. It is the claim of the Assessee that the orders under Section 143(3) and 154 of the Act have been passed after holding appropriate verification and necessary enquiry and perusing the documents/details submitted before the AO during the assessment proceedings and therefore the case is not covered under Explanation 2(a) to Section 263 of the Act. As the orders passed by the AO are neither erroneous nor prejudicial to the interest of the revenue, hence the impugned order u/s 263 of the Act is bad in law and is liable to be quashed.

7.1 We observe that more or less the Id. PCIT set aside the orders passed by the Assessing Officer on allowing of deduction of Rs. 15,94,27,269/- claimed u/s 10A of the Act by the Assessee and therefore we have to see as to whether the Assessing Officer examined the issue under consideration by making inquiries and/or verifying the factual position.

7.2 From the soft paper book page 18 column no. 35 and Annexure 'A' (page no. 33 of the paper book) it clearly reflects that the Assessee had claimed the amount of Rs. 31,74,80,850/- as deduction u/s 10A of the Act and also given details of the same . The said deduction was inquired by the Assessing Officer by issuing a questionnaire/notice U/s 142(1) of the Act on 24.10.2014 (pg. 142 PB), whereby in para no. 6 of the said notice, the Assessee was asked to submit the documents in respect of the deduction and exemptions claimed and also to give a brief note as to why deduction/exemption claimed be accepted by the Department.

7.3 The Assessee in response to the said notice/ questionnaire replied vide letter dated 30.12.2014 (refer page 138 of the PB) and filed the details of exemption claimed u/s 10A. The Assessee also filed a letter of permission dated 29.09.2006 issued by Software Technologies Parks of India, whereby the Assessee's unit was declared as hundred percent export oriented unit and permission was granted under the STP scheme for the

development of computer software and IT enabled service (refer page 147 of the PB). The Assessee vide letter dated 13.02.2015 also filed 'note' on justification of deduction claimed u/s 10A of the Act (refer page 152 of the PB). Therefore, on the basis of documents as referred above, the Assessee claimed that the Assessing Officer thoroughly considered the claim of the Assessee by perusing the details and documents submitted and 'note' on justification of the deductions claimed u/s 10A of the Act and hence the order passed u/s 163 is liable to be set aside.

8. On the contrary, the Id. DR claimed that basic condition of section 92C(4) has not been followed by the Assessing Officer. As per Section 92C(4) of the Act, no deduction is allowable in respect of the amount of income by which the total income of the Assessee is enhanced after computation of income under this sub-section. It was further submitted by the Id. DR that the Assessing Officer while allowing the said deduction claimed by Assessee, did not apply his mind and, therefore, the order u/s 263 of the Act passed by the Ld.PCIT is totally justified, legal and appropriate and, therefore, do not warrant any interference .

9. We have given thoughtful consideration to the submissions of the parties. The factual position to the effect that the Assessing Officer thoroughly made the inquiries in respect of deduction claimed u/s 10A of the Act by the Assessee by issuing appropriate notices and questionnaire u/s 142(1) of the Act, is

not in dispute. It is also undisputed fact that the Assessee responded to the said questionnaire and submitted appropriate reply and documents and thereafter only the Assessing Officer allowed the claim of deduction u/s 10A of the Act against the profits of eligible undertaking as it reflect from Form 56F submitted by the Assessee in its paper Book. The Hon'ble Apex Court in the case of CIT vs M/S. Vegetables Products Ltd. (Supreme Court) 88 ITR 192 held that if two reasonable constructions of a taxing provision are possible that construction which favours the Assessee must be adopted. The assessing Officer while allowing the deduction claimed u/s 10A of the Act had taken a plausible view by using its own wisdom and the said view is not contrary to the provisions of law and therefore the orders passed by the AO cannot be attributable as erroneous and prejudicial to the interests of Revenue as per the provisions of Section 263 of the Act.

9.1 Even otherwise, it is not the case of the Revenue Department that the Assessing Officer has not done any inquiry and failed to verify the deduction as claimed by the Assessee, and therefore observation of the Ld. PCIT in para no. 6 of the impugned order, to the effects *“Thus it is clear that no proper inquiry was conducted by the assessing officer in the instant year on the above issues. Therefore, the impugned assessment order was erroneous and prejudicial to the interests of revenue as per the provisions of Section 263 of the IT Act, 1961”*, is un-sustainable.

10. Coming to the claim of the Ld. DR that no deduction is allowable u/s 92C(4) of the Act, we have perused the proviso again, wherefrom it is clear that no deduction 10A of the Act shall be allowed in respect of the amount of income by which the total income of the Assessee enhances after computation of income under this sub-section. The Assessee had claimed that it has not recomputed the claim of deduction u/s 10A, however just claimed the deduction of INR 317,480,850 which is same as that computed at the time of filing return of income as clearly reflects from Form 56F. The claim under Section 10A is not enhanced on account of transfer pricing addition and since the Assessee is not claimed deduction u/s 10A on enhanced assessed income and therefore the proviso to Section 92C(4) shall not apply. We have given out thoughtful consideration to the rival claims of the parties and came to the considered view that here the case is not of the enhancement of income as the deduction was not allowed against the enhanced assessed income and therefore the proviso to Section 92C(4) as specifically referred by the Ld. DR, at all is not applicable to the instant case.

11. On the aforesaid analyzations and observations, we are inclined to set aside the impugned order passed by the Ld. Principal Commissioner u/s 263 of the Act.

12. In the result, Assessee's appeal stands allowed.

Order pronounced in the open court on 30.03.2022.

-Sd/-
(R. K. PANDA)
ACCOUNTANT MEMBER

-Sd/-
(N. K. CHOUDHRY)
JUDICIAL MEMBER

MP

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI