

आयकर अपीलिय अधिकरण, 'डी' न्यायपीठ, चेन्नई
**IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH, CHENNAI**

श्री वी दुर्गा राव, न्यायिक सदस्य एवं श्री जी. मंजुनाथ, लेखा सदस्य के समक्ष
**BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER AND
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA No.: **1719/Chny/2018**
निर्धारण वर्ष / Assessment Year: 2013-14

Pochiraju Industries Limited
C/o. M M Reddy & Co.,
Chartered Accountant,
MMR Lion Corp., HSR Eden
Beside Cream Stone,
Road No.2, Banjara Hills,
Hyderabad – 500 034.
[PAN: AAACP-3640-A]

Assistant Commissioner of
Income Tax,
Circle-1,
Hosur.

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri. T.S. Lakshmi Venkataraman, CA
प्रत्यर्थी की ओर से/Respondent by : Shri. S. Palani Kumar, CIT

सुनवाई की तारीख/Date of Hearing : 22.09.2022

घोषणा की तारीख/Date of Pronouncement : 14.10.2022

आदेश / O R D E R

PER G. MANJUNATHA, ACCOUNTANT MEMBER:

This appeal filed by the assessee is directed against the order passed by the learned Principal Commissioner of Income Tax [PCIT], Salem, dated 08.03.2018 u/s. 263 of the Income-tax Act, 1961 (hereinafter referred to as "the Act") and pertains to assessment year 2013-14.

2. The assessee has raised the following concise grounds of appeal:

"1. On the facts and circumstances of the case the learned PCIT is not justified in invoking the provisions of section 263 of the Act to set aside the order of the Assessing officer dated 31/03/201-6 passed u/s143(3) of the Income tax act.

2. On the facts and circumstances of the case the learned PCIT is not justified in invoking the provisions of section 263 of the Act when the AO in her Assessment Order dated 31/03/2016 passed u/s 143(3) of the Act has already disallowed a sum of Rs 2,11,15,074/- in the total deduction claimed u/s 35(1)(i) of the Act to an extent of Rs 4,22,30,147/- and has further added a sum of Rs 1,70,01,985/- under the other sources treating the same as non agricultural income and whereby the returned loss of Rs 9,73,28,331/- has been reduced to a loss figure of Rs 5,92,11,272/-. The above action of the AO demonstrates that complete facts have been examined and order has been passed after due application of mind which gives no scope for the PCIT to invoke his powers u/s 263 of the Act.

3. On the facts and circumstances of the case the learned PCIT is not justified in giving a direction to the AO to disallow the entire expenses relating to Bio Pharma division claimed by the appellant u/s 35(2AB) of the Act to an extent of Rs 2,11,15,074/-.

4. On the facts and circumstances of the case the learned PCIT is not justified in giving a direction to the AO to disallow the expenditure of Rs 10,70,08,883/- claimed by the appellant which has been incurred in Bio- Pharma division, on the ground that no commercial activit is shown by the division in the FY 2012-13 and the expenditure is in the nature of Pre- operative expenses.

5. On the facts and circumstances of the case the learned PCIT is not justified in applying the decision of the Madras High Court in the case of M/s E.I.D Parry (India) Ltd .Vs .CIF in 257 ITR 253 in which the facts are entirely different as compared to the case of the appellant."

3. The brief facts of the case are that the assessee is engaged in manufacturing/production of pharmaceuticals has filed its return of income for the assessment year 2013-14 on 17.03.2013 declaring total loss of Rs. 12,29,41,011/-. The case has been selected for

scrutiny and the assessment has been completed u/s. 143(3) of the Income-tax Act, 1961 (herein after referred to as "the Act") on 31.03.2016 and determined total loss of Rs. 5,92,11,272/- by making addition towards disallowance of expenditure incurred for scientific research and addition towards agricultural income.

4. The case has been subsequently taken up for revision proceedings by the PCIT, Salem u/s. 263 of the Act, and thus, a show cause notice dated 22.02.2018 was issued and served on the assessee and called upon to explain as to why the assessment order passed by the AO u/s. 143(3) of the Act dated 31.03.2016 shall not be revised. In the said show cause notice, the PCIT observed that the assessee claimed deduction u/s. 35(1) of the Act for Rs. 10,70,08,883/- towards expenditure for R&D for Bio-pharma division. However, said expenditure has been allowed as deduction u/s. 35(1) of the Act, even though the assessee has not commenced commercial activity which is evident from the fact that there is no revenue from operations from Bio-pharma division. The AO without verifying necessary facts simply allowed the claim of the assessee which rendered the assessment order to be erroneous and prejudicial to the interest of the revenue.

5. In response to the show cause notice, the assessee submitted that the assessment order passed by the AO is neither erroneous nor prejudicial to the interest of the revenue. The AO has considered the view of deduction towards R&D expenditure u/s. 35(1) of the Act, after considering the explanation of the assessee for weighted deduction u/s. 35(2AB) of the Act and opined that the assessee is not entitled for weighted deduction and expenditure incurred for scientific and research can be allowed u/s. 35(1) of the Act. Therefore, it cannot be said that the assessment order passed by the AO is erroneous in so far as it is prejudicial to the interest of the revenue.

6. The PCIT, after considering the submissions of the assessee and also taken note of various facts opined that the assessment order passed by the AO without carrying out required inquiries, he ought to have been carried out became erroneous and prejudicial to the interest of the revenue, because even though the assessee has not commenced its business activity in respect to Bio-pharma division, but the AO allowed total expenditure incurred for R&D u/s. 35(1) of the Act which rendered the assessment order passed by the AO erroneous and prejudicial to the interest of the revenue. Therefore, set aside the assessment order passed by the AO and

directed the Assessing Officer to redo the assessment afresh in accordance with law, considering the point discussed in the 263 proceedings. The relevant findings of the PCIT are as under:

2.3 *The contentions of the Managing Director of the company were considered. It is seen that the assessee has claimed the expenses relating to bio-pharma division as deduction u/ s 35(2AB) of the I.T. Act. As per section 35(2AB), the deduction is allowable to those companies incurring expenditure on scientific research on in-house research and development facility, who are carrying on business of manufacture or production of any articles or thing. However, the assessee has not started manufacturing of any article or thing in bio-pharma division in this case, but was only carrying on research and development activities and hence, assessee is not entitled for deduction u/s 35(2AB). Further, the Hon'ble Madras High Court in the case of E.I.D. Parry (India) Ltd. vs. CIT in 257 ITR 253 has held that though the assessee continued to carry on its old business but on that score revenue expenditure incurred for setting up a new project for manufacture of a new product is not allowable as the same is capital in nature. In the present case, the assessee has incurred expenditure on setting up bio-pharma unit, which is totally new project. The company was engaged only in floriculture business earlier. In the circumstance, the expenditure incurred of Rs.10,70,08,883/- in bio-pharma **Sudhakar**, Managing Director of the Company appeared on 23.02.2018 and the **case** was discussed with him.*

2.1 *On perusal of the records, it is seen that the expenditure of Rs. 10,70,08,883/- claimed by the Bio-Pharma division of the company is not allowable since no commercial- activity is shown by that division and the expenditure is in the nature of pre-operative expenses. The expenditure is allowable only if the assessee started commercial activities and shown- results from such commercial activities.*

2.2 *The Managing Director of the assessee company filed written submissions dated 23.02.2018, wherein it is stated that:-*

".....The company's agro division is in operation since 1998 and its biotech division was started in the year 2005 intended to manufacture and trade latest pharmaceutical and bio similar molecules : .

. The company has applied for exemption of its R&D expenditure under section 35(2AB) and got the approval by Form #CM initially up to March 2012 and then renewed up to 31.03.2015. (Copies of the same are herewith submitted for your information and record.)

...The project was capitalized as on 31.03.2012 and all the expenses incurred till then were either capitalized or carried forward to the balance sheet as deferred pre-operative expenditure including interest on term loan which was capitalized till 31.03.2012 which is evident from P&L account and balance sheet as on 31.03.2012

..... According to section 37(1) any expenditure (not being expenditure of the nature described in section 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purpose of the business or profession shall be allowed in computing the income chargeable under the head "Profits and Gains of business or profession...

division which is set off by the assessee against income earned from floriculture business is not allowable.

3. *As per the recent amendment by the Finance Act, 2015 w.e.f. 01.06.2015 "An order passed by the assessing officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner*

(a) the order is passes without making inquiries or verification which should have been made.

(b) the order is passed allowing any relief without inquiring into the claim".

4. *It is seen that the issues discussed above were not considered by the Assessing Officer during the course of assessment proceedings. Therefore, the assessment order passed by the Assessing Officer on 31.03.2016 is set aside u/s 263 of the IT Act, 1961 and the Assessing Officer is directed to complete the assessment afresh in accordance with law considering the points discussed above and after giving the assessee reasonable opportunity of being heard."*

7. The Ld. AR for the assessee submitted that the Ld. PCIT erred in setting aside the assessment order passed by the AO u/s. 143(3) of the Act dated 31.03.2016 in terms of section 263 of the Act without appreciating that the assessee has rightly claimed R&D expenditure incurred for Bio-pharma division. The Ld. AR for the assessee referring to annual report for the financial year 2012-13 relevant to assessment year 2013-14 submitted that the assessee

has started commercial production and generated revenue from R&D. However, while submitting details before the AO during the assessment proceedings by inadvertent error the revenue from Bio-pharma division was not disclosed. The AO after considering relevant submissions has rightly allowed the claim of the assessee and thus, the PCIT cannot assume jurisdiction u/s. 263 of the Act.

8. The Ld. CIT(DR) appearing for the revenue referring to various documents including audited financial statement of the assessee for the assessment year 2013-14 submitted that from the audited financial statement and information submitted by the assessee before the AO during the assessment proceedings, it is very clear that from Bio-pharma division there is no income from operations. Further, the assessee had only claimed expenditure of Rs. 10,70,08,883/-, even though there is no commercial activity in the impugned assessment year. The AO has allowed total expenditure claimed for Bio-pharma division which rendered the assessment order passed by the AO erroneous and prejudicial to the interest of the revenue and thus, the PCIT has rightly invoked jurisdiction and set aside the assessment order and their order should be upheld.

9. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. The provisions of section 263 empowers the PCIT to invoke his jurisdiction and set aside the assessment order passed by the AO if the PCIT satisfies that the assessment order passed by the AO is erroneous and prejudicial to the interest of the revenue. In order to invoke jurisdiction u/s. 263 of the Act, twin conditions embedded therein must be satisfied i.e., (i) the order passed by the AO must be erroneous and (ii) and further it should be prejudicial to the interest of the revenue. Unless these two conditions embedded therein satisfied, the PCIT cannot invoke his jurisdiction and revise the assessment order and this legal principle is supported by plethora of jurisdictional precedence including the Hon'ble Supreme Court in the case of Malabar Industrial Co. vs CIT, 243 ITR 83 (SC). In the light of above legal position, if you examine the facts of the case, one has to understand whether the AO has carried out required inquires which he ought to have been carried out, in the given facts and circumstances of this case, more particularly after insertion of explanation (2) to section 263 of the Act by the Finance Act, 2015 w.e.f 01.06.2015, where it has been clarified that the order passed by the AO shall be deemed to be erroneous in so far as it is prejudicial to the interest of the revenue, if, in the opinion of

the PCIT the order is passed without making inquiries and verification which should have been made and further the order is passed allowing any relief without inquiring into the claim. In this case, the AO has allowed the claim of R&D expenditure for Bio-pharma division even though the assessee has not commenced its business for Bio-pharma division for the impugned assessment year which is evident from the fact that the assessee has not generated any income from the operation of Bio-pharma division. Although, Id. Counsel for the assessee referring to annual report for the financial year 2012-13 argued that the assessee has generated revenue from Bio-pharma division, but there are certain doubts about the evidence filed by the assessee including annual report copy, because the assessee itself has filed a chart showing division wise revenue from operations as per which the assessee itself admitted that there is no revenue from operations from Bio-pharma division. The AO without considering relevant facts simply allowed the claim of the assessee. Therefore, in our considered view, the assessment order passed by the AO is erroneous and also prejudicial to the interest of the revenue, because the AO failed to carry out required inquiries or verifications which should have been made in the given facts and circumstances of the case. Thus, we are of the considered view that the PCIT has rightly invoked his

jurisdiction and set aside the assessment order passed by the AO, on the issue of deduction claimed towards R&D expenditure incurred for Bio-pharma division. Hence, we are inclined to uphold the order passed by the PCIT u/s. 263 of the Act and dismiss the appeal filed by the assessee.

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

Order pronounced in the court on 14th October, 2022 at Chennai.

Sd/-

(वी दुर्गा राव)

(V. DURGA RAO)

न्यायिकसदस्य/Judicial Member

Sd/-

(जी. मंजुनाथ)

(G. MANJUNATHA)

लेखासदस्य/Accountant Member

चेन्नई/Chennai,

दिनांक/Dated: 14th October, 2022

JPV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|------------------------|--------------------------|------------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त/CIT | 5. विभागीय प्रतिनिधि/DR | 6. गार्ड फाईल/GF |