IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH KOLKATA
आयकर अपीलीय अधीकरण, न्यायपीठ – "**B**" कोलकाता,

BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA No.261/Kol/2022
Assessment Year: 2017-18

M/s. Patton International Ltd., C/o Jain Vinod K & Associates, 41A, A. J. C. Bose Road, Diamond Prestige Nirman, 6th Floor, Suite No.613, Kolkata-700017 (PAN: AABCP7901M)	Vs.	Principal Commissioner of Income-tax, Kolkata-1.
(Appellant)		**(Respondent)**

Present for:
Appellant by : Shri Vinod Kumar Jain, AR
Respondent by : Shri Amitava Bhattacharyya, CIT, DR

Date of Hearing : 01.09.2022
Date of Pronouncement : 22.11.2022

O R D E R

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the revision order of Ld. Pr. CIT, Kolkata-1 passed u/s. 263 of the Income-tax Act, 1961 (hereinafter referred to as the "Act") vide order No. ITBA/REV/F/REV5/2021-22/1041449216(1) dated 24.03.2022 against the assessment order by the ACIT, Circle-8(2), Kolkata u/s. 143(3) of the Act, dated 30.11.2019.

2. Instant appeal relates to assumption of jurisdiction by the Ld. Pr. CIT by invoking the provisions of section 263 of the Act and passing the impugned order under the said section. There are three issues raised by the Ld. Pr. CIT for invoking the revisionary proceeding u/s. 263 of the Act

by which the order of assessment passed u/s. 143(3) of the Act has been set aside with the direction to the Ld. AO to pass a fresh assessment order by considering the three issues which are as under:

(i) Relating to donation made by the assessee and its claim of deduction u/s. 80G of the Act for which AO had not obtained the proof of receipts of donation and certificate of the nine donees;

(ii) Disallowance u/s. 40(a)(ia) of the Act in respect commission paid to the Managing Director/Directors of the assessee company for non-deduction of tax at source as well as non-compliance of section 197 of the Companies Act, 2013;

(iii) In respect of double claim of depreciation on fixed assets of SEZ unit at Falta.

2.1. Brief facts of the case are that assessee filed its return of income on 25.10.2017 reporting total income of Rs.74,31,92,720/-. The case was selected for scrutiny assessment u/s. CASS. Statutory notices were issued and served through the Departmental ITBA portal. Assessee complied with these notices by making submissions through departmental ITBA portal on various dates along with relevant documentary evidence. After considering the submissions of the assessee filed through the e-filing portal, assessment was completed by accepting the returned income as assessed income. Subsequently, Ld. Pr. CIT called for and examined the assessment records and observed on the three above issues as under:

> *"(i) Test check of the assessment revealed that the assessee claimed deduction u/s 80G to the tune of Rs. 3,81,72,500/- (50% of Rs. 7,63,45,000/- donated to 09 private Charitable Trusts during the F.Y 2016-17). From the online verification it is noticed that 06 out of total 09 trusts are genuine and 03 trusts to whom donation of RS.95 lakh claimed to have made found untrue. Even 80G Certificates and proof of payment of the donation are not found in the assessment record. To claim the deduction u/s 80G, Certificate from the donee and payment evidence must be obtained by the AO while allowing the same. The AO, without getting the aforesaid documents and without verification of the genuineness of the donation, allowed the deduction u/s 80G. Furthermore, it is found that contribution of Rs.6.57 Crore to*

04 Charitable Trust namely Swarnim Foundation, Vishnu Trust, Jashidi and HP Bhudia Charitable Trust was made and no Certificate u/s 80G and payment proof was found in the assessment record. Hence, claim of deduction of Rs.3.76 crore {50% of (Rs.6.57 crore plus Rs.0.95 crore)} was required to be added back to total income which will result in tax effect of Rs.1,30,12,608/-.

(ii) Examination of assessment record revealed that the assessee company paid commission of Rs.4,84,00,000/-each to Hari Prasad Budhia and Sanjay Budhia (both director of the assessee company) during the F. Yr. 2016-17. However, no TDS was made thereon on or before due date of filing of the return of income for the AY 2017-18. It is also observed that TDS of Rs.1.36 lakh was made only on commission on sale of scrap of Rs.77.17 lakh. Omission to do so resulted in underassessment of income by Rs. 290.40 lakh (30% Rs.9.68 crore) having tax effect of Rs.1,33,66,717/-.

(iii) Examination of assessment record for the AY 2017-18 revealed that the assessee claimed deduction of Rs.7.50 crore for 11th year of SEZ unit for future investment in Capex was estimated to this amount. An amount of Rs.6.65 crore after spent of Rs.0.85 crore on Machinery was appropriated for creation of SEZ Reinvestment Reserve Account. The assessee charged a depreciation of Rs.1.25 crore (Rs.1.44 crore as per Companies Act) on computation of total income of FALTA SEZ Unit and the same (Rs.1.44 crore) was again charged in the main Industry account under the head Other Expenses (It was not adjusted while computing the business income under Schedule BP). Thus, the depreciation of SEZ unit was double charged (One at SEZ Unit and again at main Industry) which resulted in underassessment of income by Rs.1.44 crore involving a tax effect of Rs.66.29 lakh."

2.2. On the above three issues observed by the Ld. Pr. CIT, a show cause notice was issued u/s. 263 of the Act dated 21.02.2022 for which a detailed reply was submitted by the assessee along with relevant documentary evidence. The written submission furnished by the assessee before the Ld. Pr. CIT, on each of the three issues is reproduced in the impugned order u/s. 263 from pages 2 to 6. After considering the submissions made by the assessee on the three above listed issues, Ld. Pr. CIT concluded that the papers submitted before him were not submitted in the course of assessment proceedings and, therefore, were not verified by the AO in the assessment completed by him. He also noted that whether the approval given u/s. 80G(5) by the appropriate authorities were withdrawn or not is not known. On the second issue relating to commission paid to the directors of the assessee company, Ld. Pr. CIT noted that remuneration given to the Directors should have been in accordance with the provisions of section 197 of the Companies Act,

2013 which appears to have been violated. On the third issue, Ld. Pr. CIT noted that the claim of double depreciation is to be verified from the income tax return. Accordingly, he held the assessment order dated 30.11.2019 passed by the AO as erroneous in so far as prejudicial to the interest of the revenue. He thus, set aside the said assessment order and directed the AO to frame the assessment afresh after considering his observations and by giving reasonable opportunity of being heard to the assessee. Aggrieved, the assessee is in appeal before the Tribunal.

2.3 Before us, Shri Vinod Kumar Jain, AR represented the assessee and Shri Amitava Bhattacharyya, CIT, DR represented the revenue.

3. Before us, Ld. Counsel for the assessee has placed on record a paper book containing 306 pages. At the outset, Ld. Counsel strongly submitted that all the three issues raised by the Ld. Pr. CIT in the revisionary order have been verified and examined by the ld. AO in detail in the course of assessment proceedings. After having satisfied with the submissions made by the assessee, the claims of the assessee were allowed in respect of the three said issues. To substantiate his submission, he referred to the two notices issued by the Ld. AO u/s. 142(1) of the Act dated 10.02.2019 and 16.10.2019 placed in the paper book at pages 128 to 130 and 225 to 233 respectively. He also referred to the replies filed by the assessee in response to these two notices along with supporting and corroborative evidence which are also placed at pages 131 to 224 and 234 to 238 respectively in the paper book. He further submitted that all these documents along with relevant evidence were filed before the Ld. Pr. CIT also in the revisionary proceedings who has failed to consider the same in proper perspective before passing the impugned order.

3.1. On the first issue relating to claim of deduction u/s. 80G of the Act for the donations made by the assessee to nine different charitable trusts, Ld. Counsel submitted that in the show cause notice it is stated that three

trusts to whom donation of Rs.95 lakh has been made are found to be untrue. However, no detail has been provided in respect of, which all three trusts have been found to be untrue. On the allegation of Ld. Pr. CIT that proof of payment of donation and certificate from the donees for the donation made are not found in the assessment records, Ld. Counsel referred to the abovementioned pages in the paper book wherein it has been categorically noted that money receipts as well as 80G certificates were filed on 01.03.2019 before the Ld. AO and the same were resubmitted before the Ld. Pr. CIT on 07.03.2022. Ld. Counsel also referred to "Schedule 80G" of the income tax return form wherein details of donations entitled for deduction u/s. 80G are to be furnished. In the said schedule, name and address of the donation, PAN of donee, amount of donation and eligible amount of donation entitled for 50% deduction, without qualifying limit, has been duly furnished. This is placed at page 40 of the paper book. In respect of observation made by the Ld. Pr. CIT relating to four charitable trusts namely, Swarnim Foundation, Vishnu Charitable Trust, Jashidi and HP Bhudia Charitable Trust for which it was alleged that no certificate u/s. 80G and payment proof is found in the assessment record, Ld. Counsel referred to the relevant documents placed in the paper book.

3.2. In respect of Swarnim Foundation, certificate issued by the Commissioner of Income Tax (exemption), Kolkata u/s. 80G(5)(vi) of the Act has given an approval which is valid in perpetuity i.e. w.e.f. 30.03.2015 unless specifically withdrawn. This certificate is placed at page 134 of the paper book. Similarly, for the other three donees, ld. Counsel referred to their respective certificates issued u/s. 80G(5)(vi) and the money receipts. For these three Trusts, the certificates stated their validity which expired prior to the relevant year under consideration. To this effect, ld. Counsel referred to the Circular No.7/2010 dated 27.10.2010 issued by CBDT giving clarification regarding period of validity and approval issued u/s. 10(23C) and section 80G(5) of the Act. In the

last para of the said circular, it is stated that any approval u/s. 80G(5) on or after 01.10.2009 would be a one time approval which would be valid till it is withdrawn. The relevant extract from the said circular is reproduced as under:

> *"It appears that some doubts still prevail about the period of validity of approval under section 80G subsequent to 1.10.2019 especially in view of the fact that no corresponding change has been made in Rule 11A(4). To remove any doubts in this regard, it is reiterated that any approval under section 80G(5) on or after 1.10.2009 would be a one time approval which would be valid till it is withdrawn."*

3.3. On the second issue relating to payment of commission to the Managing/Whole time Directors namely Shri H. P. Budhia and Shri Sanjay Budhia whereon tax deduction at source was not done as noted by Ld. Pr. CIT, it is submitted by the Ld. Counsel that the impugned amount of Rs.4,84,00,000/- paid as commission is part and parcel of the total remuneration of Rs.5,68,28,000/- paid to the two directors individually. Ld. Counsel further submitted that total tax applicable on this remuneration was Rs.1,98,98,094/- against which Rs.1,99,90,000/- was deducted and paid to the central government within the prescribed due dates in respect of both the directors. He further pointed out that details of deduction of tax at source u/s. 192 and payment to the central government are available on the "TRACES" portal of the Income Tax Department. Also, all the documents relating to the payment of commission which forms part of the salary of the two directors, Form-16, tax challans, working for both the directors and TDS quarterly returns for all are placed on record both before the Ld. AO and the Ld. Pr. CIT. Ld. Counsel further submitted that Ld. AO had called for and examined the issue of TDS on all the applicable amount of payments including this one relating to payment of commission to the two directors which form part for their salary subjected to TDS u/s. 192 of the Act. According to the Ld. Counsel, the conclusion drawn by Ld. Pr. CIT that no tax has been deducted on the payment of commission and the same is to be disallowed u/s. 40(a)(ia) of the Act is without examination of the records and without

considering the applicable provisions of the Act. He also submitted that issue relating to violation of the provisions of section 197 of the Companies Act, 2013 was never raised in the show cause notice issued u/s. 263 of the Act by the Ld. Pr. CIT though he has drawn his conclusion to set aside the assessment order on this aspect also. For section 197 of the Companies Act, 2013, Ld. Counsel submitted that this section puts a ceiling on the remuneration payable to directors at 11% of the profit and it is 10% in case of payment to Managing directors/whole time directors. He pointed out that net profit of the assessee is Rs.115.05 Cr. and the remuneration including commission paid is of Rs.11.42 Cr. which is 9.93%. He further submitted that section 17(1)(iv) of the Act includes commission as part and parcel of salary for the purpose of section 15 and 16 of the Act.

3.4. On the third issue relating to claim of depreciation twice u/s. 32 of the Act of Rs.1.44 Cr. on fixed assets of SEZ unit, Ld. Counsel submitted that SEZ unit of the assessee at Falta maintains separate set of books of account and its profits are worked out from its export activities separately. The said SEZ unit is entitled to claim deduction u/s. 10A of the Act to the extent of Rs.23.57 Cr. being 50% of the eligible profit of the unit against which it has claimed a deduction of Rs.7.50 Cr. only. He further submitted that eligible profit has taken into account, the amount of depreciation as per books and as per sec. 32 of the Act. He referred to the computation of income in respect of adjustment made for depreciation on assets which is noted as under:

> *"(a) On perusal of the computation of income of the company, it can be observed that the depreciation on assets as per books is taken at Rs. 2,28,47,810/-*
>
> *(i)Depreciation as per books for whole company Rs.3,72,48,991*
>
> *(ii) Depreciation on the assets at Falta SEZ Rs.1,44,01,181*
>
> *(iii) Depreciation added back in computation to profit Rs.2,28,47,810*

(b) In claiming the deduction u/s -32, again the depreciation as allowable on assets other than that of Falta SEZ are deducted

(i) Total depreciation allowable u/s 32 to the company Rs.3,82,65,400

(ii) Less: Depreciation on assets of Falta SEZ u/s 32 Rs.1,24,98,020

(iii) Depreciation claimed in the computation Rs.2,57,67,380

(c) In calculating the eligible profit for deduction of SEZ, we made the following calculation:

(i) Depreciation as per books for Falta SEZ Rs.1,44,01,181

(ii) Depreciation on the assets u/s 32 for Falta SEZ Rs.1,24,98,020

(iii)Depreciation added back for computation to eligible profit Rs.19,03,161"

3.5. Based on the above computation and calculation of eligible profits for deduction of SEZ, Ld. Counsel thus submitted that the allegation of double claim of depreciation of Rs.1,44,01,181/- is ill founded. He also submitted that all the details relating to the claim of depreciation in respect of the assessee as a whole and also in respect of Falta SEZ unit were submitted before the AO who had examined the claim in detail. He also pointed out that Ld. Pr. CIT has merely directed the AO to verify this issue through the income tax return without pointing out how it is erroneous and prejudicial to the interest of revenue.

4. Per contra, Ld. CIT, DR emphasized that AO has not undertaken the requisite examination and has simply taken the records submitted by the assessee to allow the claim made by it and completed the assessment. Ld. Pr. CIT has rightfully raised these three issues and has set aside the assessment for the purpose of re-examination by the Ld. AO which does not lead to any prejudice to the assessee. He placed reliance on the order of the Ld. Pr. CIT.

5. We have heard the rival contentions and perused the material available on record and given our thoughtful consideration to the submissions made. In respect of first issue relating to donation made by the assessee to nine charitable trusts, we note that the requisite

documents desired by the Ld. Pr. CIT in the revisionary proceeding for justifying the claim of deduction made by the assessee u/s. 80G of the Act in the form of donation receipts and approvals issued by the department to the donees u/s. 80G(5)(vi) of the Act are on record. We also note that the validity of approval granted to the three trusts out of four as noted by the Ld. Pr. CIT in his show cause notice is covered by the circular issued by CBDT vide circular no. 7/2010 referred above. In respect of one other trust, certificate of approval has been issued for perpetuity, unless otherwise withdrawn. We also note that all these details in respect of donations made by the assessee are duly reported in the return form and the Ld. AO has called for necessary details and has examined the veracity of claim of deduction made by the assessee.

5.1. On the second issue relating to deduction of tax at source on the commission paid by the assessee to two of its managing/whole time directors which is directed to be disallowed u/s. 40(a)(ia) of the Act, ld. Counsel has evidently demonstrated that the said payment forms part of the salary of the two directors which has been subjected to TDS u/s. 192 of the Act. We also note that issue relating to compliance of section 197 of the Companies Act, 2013 though not formed part of the show cause notice issued by the Ld. Pr. CIT, has been evidently demonstrated to be complied with, by the assessee as noted above. We also note that all the evidence in respect of TDS done on the amount of commission paid to the two directors and as reported in Form 16 as well as in quarterly TDS statement filed by the assessee, are on record which factually demonstrates that commission paid has been subjected to required TDS which is contrary to the observations made by the Ld. Pr. CIT.

5.2. On the third issue of double claim of depreciation by the assessee on the fixed assets of its SEZ unit at Falta, assessee has factually demonstrated that no such double claim much less the original claim of depreciation has been made by the assessee in computing the eligible

profits of the SEZ unit for making a claim of deduction u/s. 10A of the Act. Details of this computation have already been noted above. It is also important to note that the monetary eligible limit for the assessee for claiming deduction u/s. 10A was of Rs.23.57 Cr. but against this, it had restricted the deduction of Rs.7.50 Cr. only, owing to its planned capital expenditure in future. We note that all these working details were furnished in the course of assessment proceedings filed with e-portal and were also placed before the Ld. Pr. CIT in the revisionary proceeding.

5.3. From the above factual matrix of the three issues raised by the ld. PCIT, we find that he has not applied his mind to arrive at a consideration which is erroneous in so far as prejudicial to the interest of the revenue, for passing the impugned order u/s 263 of the Act. We observe that in the course of proceedings u/s 263 of the Act before the Ld. PCIT, assessee had furnished the relevant details and explained the issues raised through the show cause notice by the Ld. PCIT, supporting its contentions by corroborative documentary evidences. It is well settled law that for invoking the provisions of section 263 of the Act, both the conditions that the order must be erroneous and prejudicial to the interest of revenue needs to be satisfied. This ratio stands laid down by various Hon'ble Courts.

6. For this, let us take the guidance of judicial precedence laid down by the Hon'ble Apex Court in the case of Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83(SC) wherein their Lordships 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 of the events, the order passed by the AO can be termed as erroneous order. Looking at the second limb as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue, 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 AO. Their Lordships held 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.

7. We find that the three issues in the present case are purely on facts which are verifiable from the records of the assessee. Examination and verification of the same as placed in the paper book also reveals the correct state of its affairs in respect of the issues raised in the impugned revisionary proceedings for which both, ld. PCIT and the ld. CIT, DR could not bring any material on record to controvert the verifiable factual position.

8. Accordingly, on the three issues raised by the Ld. PCIT in the revisionary proceedings, no action u/s 263 of the Act is justifiable which in our considered view cannot be sustained under the facts and circumstances of the present case and judicial precedents dealt herein

above. We, therefore, quash the impugned order u/s 263 of the Act and allow the grounds raised by the assessee.

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

Order is pronounced in the open court on 22nd November, 2022.

Sd/- Sd/-

(SANJAY GARG) **(GIRISH AGRAWAL)**
JUDICIAL MEMBER **ACCOUNTANT MEMBER**

Dated: 22.11.2022

JD, Sr. P.S.

Copy to:

1. The Appellant:
2. The Respondent.
3. ACIT, Circle-8(2), Kolkata.
4. The DR, ITAT, Kolkata Bench, Kolkata

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata