

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

BEFORE SHRI PRAMOD KUMAR, VP AND SHRI ABY T. VARKEY, JM

आयकर अपील सं/ I.T.A. No.587/Mum/2022

(निर्धारण वर्ष / Assessment Years: 2017-18)

Benzo Chem Industries Pvt. Ltd. 26-28A, Cawasji Patel Street, Fort-400001.	बनाम/ Vs.	PCIT/NFAC PCIT Circle-6/AO-NFAC Maharashtra/New Delhi
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACB3369G		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Mahesh Saboo
Revenue by:	Ms. Samruddhi Hande (Sr. DR)

सुनवाई की तारीख / Date of Hearing: 14/10/2022

घोषणा की तारीख /Date of Pronouncement: 10/11/2022

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of the Ld. Principal Commissioner of Income Tax-06, Mumbai dated 22.03.2022 for assessment year 2017-18 passed under section 263 of the Income Tax Act, 1961 (hereinafter referred to as "the Act").

2. The assessee has raised the legal issue challenging the invocation of revisional jurisdiction u/s 263 of the Act without validly holding that the AO's order was erroneous as well as prejudicial to the revenue. According to the Ld. AR, the AO while passing the assessment order had inquired about the fault (issue) on which the Ld. PCIT has found fault with to justify invocation of revisional jurisdiction u/s 263 of the Act. The Ld. AR took us through the impugned PCIT order wherein he has found fault with the AO for



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not taking into consideration the entire investment made by the assessee for computation of Rule 8D of the Income Tax Rule, 1962 (hereinafter “the Rules”). According to Ld. AR, the assessee has earned exempt income to the tune of Rs.66,48,343/- and suo-motto disallowed Rs.10,73,398/- u/s 14A of the Act, by taking into consideration the average investment made by assessee in the investments which yielded exempt income. It was also pointed out that assessee has in its disposal own funds to the tune of Rs.17.68 crores and for earning the exempt income, no borrowings were made by the assessee. According to the Ld. AR, the AO had inquired about this issue of disallowance of expenditure incurred for earning the exempt income during the assessment proceedings and on facts have taken a plausible view, so it cannot be held to be erroneous action of AO. According to him, the AO had issued notice u/s 142(1) of the Act regarding the issue of disallowance of expenditure for earning the exempt income and vide notice dated 22.08.2019 (refer page no. 36-43 of PB especially page 37 PB) wherein the AO had asked about this issue by asking the query “*Please submit working of disallowance made u/s 14A of the Act at Rs.10,73,398/-. Please show cause as to why disallowance should not be made as per Rule 8D considering your investments in Mutual Funds at Rs.59,70,49,123/- (Previous Year Rs.54,14,61,489/-);* and the assessee pursuant to the notice u/s 142(1) of the Act replied by reply dated 30.09.2019 at page no. 44 to 53 of PB especially at para 7, page 45 of PB wherein assessee replied to the aforesaid query of AO by stating “*Para 7. The working of disallowance u/s 14A r.w. Rule 8D at Rs.10,73,398/-. We would*



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further like to state that the disallowance has been made as per the rule 8D only taking into consideration the investment which had generated the exempt income on monthly average basis of the investment made in the mutual funds. The calculation of the same enclosed herewith''. Thus according to the Ld. AR, this issue regarding disallowance u/s 14A r.w. Rule 8D was inquired by the AO thus discharging the duty of investigating officer on this issue during the assessment proceedings and after perusal of the assessee's reply (supra) the AO had adjudicated the issue which is in line and with the view of this Tribunal in several cases that while computing the disallowance under Rule 8D(2)(iii) of the Rules, the investment which yielded the exempt income (dividend) only need to be considered. We note this view of AO was based on the Special Bench decision of the Tribunal in the case of **ACIT Vs. Vireet Investment P. Ltd. (2017) 82 taxmann.com 415 (Del)**. Therefore, the AO has discharged the duty casted upon him as an adjudicator as well as investigator; and we note that the view taken by the AO on this issue is a plausible view (in consonance with the Special Bench decision in the case of Vireet Investment Pvt. Ltd.). Therefore, according to the Ld. AR, since the AO has taken a plausible view, the Ld. PCIT while exercising his revisional jurisdiction cannot interfere unless he is able to hold that the view adopted by the AO to be unsustainable in law as held by the Hon'ble Supreme Court in the case of Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83(SC), therefore, according to the Ld. AR, the impugned action of the Ld. PCIT is without jurisdiction. And therefore, it may be quashed.



3. Per contra, the Ld. CIT-DR, supporting the action of the Ld. PCIT submitted that the AO failed to take into account the investment made by the assessee for computation of Rule 8D(2)(iii) of the Rules as correctly observed by the Ld. PCIT; and since the AO has not done so, the order of the AO was erroneous as well as prejudicial to the revenue. Therefore, he does not want us to interfere with the impugned action of the Ld. PCIT.

4. We have heard both the parties and perused the records. Since the assessee has challenged the jurisdiction of the Ld. PCIT to pass the impugned order, let us first examine the scope of revisional jurisdiction u/s. 263 of the Act. 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 should be satisfied before jurisdiction u/s 263 of the Act is exercised by the Ld. PCIT/Ld. CIT. The twin conditions which need to be satisfied are that (i) the order of the Assessing Officer must be erroneous and (ii) as a consequence of passing an erroneous order, prejudice is caused to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous i.e. (i) if the Assessing Officer's order was passed on assumption of incorrect facts; or assumption of incorrect law; (ii) Assessing Officer's order is in violation of the principles of natural justice; (iii) if the AO's order is passed without application of mind; or (iv) if the AO has not investigated the issue before him. In the



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circumstances enumerated above the order passed by the Assessing Officer can be termed as erroneous for the purpose of section 263 of the Act. It has to be borne in mind that even if the Ld. PCIT/CIT finds that the assessment order is erroneous, he cannot invoke the revisional jurisdiction u/s 263 of the Act without satisfying the requirement of second limb [*i.e. the Ld. PCIT/CIT has to show that due to the erroneous assessment order, prejudice has been caused to the interest of revenue*]. This essential requirement of law also needs to be satisfied before the Ld PCIT/CIT invokes revisional jurisdiction. This proposition of law has been laid down by the Hon'ble Supreme Court in the case of Malabar Industries (supra) wherein their Lordship's 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. Further the Hon'ble Supreme Court held '*that for invoking powers conferred by section 263 of the Act, the CIT should not only show that the AO's order is erroneous as a result of any of the situations enumerated above but CIT must also further show that as a result of an erroneous order, some loss is caused to the interest of the revenue*'. At this juncture, one has to understand what is prejudicial to the interest of revenue. Their Lordship explaining about this in the said judgment (Malabar supra) 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*. It was further held that when the Assessing Officer adopts one of the course 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 Ld. CIT



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does not agree, it cannot be treated as an order prejudicial to the interest of the revenue unless the view taken by the Assessing Officer is unsustainable in law.

5. Bearing in mind the aforesaid principles of law, let us examine as to whether the AO has discharged his role as an investigator as well as adjudicator. And if the AO has discharged the dual role of an investigator and that of an adjudicator, then next question is whether the AO's view on the issue (on which the Ld. PCIT has found fault with) is a plausible view or not. And if it is found that the AO has discharged the duty of an investigator and as adjudicator i.e, if AO's view was a plausible view [on facts & law] then, the Ld. PCIT cannot again rake up the issue for substituting his own views on the same issue, unless he is able to show that the view of the AO was unsustainable in law.

6. Keeping the position of law in mind, when we look into the facts of the case in hand, we note that the Ld. PCIT has found fault with the AO's action of restricting the disallowance under Rule 8D of the Rules by only taking into consideration, the investment made by the assessee in which the exempt income was only yielded. According to the Ld. PCIT, the AO while computing the disallowance under Rule 8D(2)(iii) of the Rules, ought to have adopted the entire investment made by the assessee for computing the same. According to the Ld. PCIT, this omission of the AO not to consider the entire investment [i.e, even the investment which did not yield any exempt income] while



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computing disallowance under Rule 8D(2)(iii) of the Rules, renders the assessment order of the AO dated 17.12.2019 [on this issue] erroneous as well as prejudicial to the revenue and he observed as under: -

“5.1 The dispute arises on the issue that as per Rule 8D, 1% of average investment needs to be disallowed (which in the case of assessee comes to Rs.56,92,553/-). However, the assessee company has disallowed an amount of Rs.10,73,398/-. Thus, there is a short disallowance of Rs.46,19,155/- However, as per para 2 of letter dated 11.02.2022, the assessee has submitted that firstly, the average of investment are to be calculated on monthly average basis from this assessment year onwards and not simple yearly average of eligible Investments. Further, only the investment which had yielded exempt income ought to have been considered instead of entire investment.

5.2 There is no dispute regarding the method of calculation of investment on which 1% of disallowance needs to be calculated. On plain reading of rule 8D it is clear that the average of investment are to be calculated on monthly average basis. However, the assessee's claim that "only the investment which had yielded exempt income ought to have been considered and not entire investment is not acceptable on the following grounds:

5.2.1 There is nowhere mention in rule 8D of the Income Tax rule that the only the investment which had yielded exempt income should have been considered, instead it is clearly written that income which does not of shall not form part of total income should be considered. In simple words all the investments which have been made with the intention of earning exempt income should be considered for calculation of annual average of investment irrespective of the facts whether assessee's has earned exempt income or not. However, In the present case assessee has bifurcated its investment into investment, earning exempt income during the year and other investment not earning exempt income during the year and assessee has disallowed 1% of annual average of the monthly average of the opening and closing balances of the investment on which assessee has erroneously allowed by the AO.

6. Thus, the claim of the assessee company regarding disallowance u/s 14A of the Act, was allowed by the AO without taking into account the provisions of section 14A of the



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Act r.w.r 8D, and the instructions issued by the CBDT which are binding on the Revenue. While going through the submission of the assessee company made regarding disallowance u/s 14A, the AO has not applied his own mind and blindly accepted the method employed by the assessee company for calculating disallowance u/s 14A of the Act. The method adopted by the assessee company, for computing disallowance under Rule 8D(2)(ii), is not in accordance with the provisions of section 14A of the Act r.w.r 8D and thereby rendering the assessment order liable for revision under section 263 of the Act.”

7. So we note that the only issue, Ld PCIT found fault with the assessment order is regarding the action of AO accepting the assessee’s claim to have disallowed Rs.10,73,398/- under Rule 8D(2)(iii) wherein assessee has taken into consideration the investment made by it which yielded the exempt income whereas according to Ld. PCIT the AO ought to have taken the entire investment made by the assessee during the relevant assessment year and for that he has exercised the jurisdiction u/s 263 of the Act. Now when we examine the jurisdiction of Ld PCIT, we find that AO has discharged the duty of investigator as well as that of adjudicator. In such a scenario, the only issue which we need to examine as per the binding precedent of Hon’ble Apex Court in Malabar Industries (supra) whether the AO’s view on the issue of Rule 8D(2)(iii) (i.e. adopting only the investment which yielded exemption) is a plausible view or not. In this regard, we find that AO’s view is in consonance with the Special Bench ratio of this Tribunal in Vireet Investment (supra). So the view of AO on this issue is a plausible view and cannot be termed as “unsustainable in law”. So applying the judicial precedent in Malabar Industries (supra)



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we hold that Ld. PCIT could not have substituted his view, when AO's view was plausible view.

7. In such a scenario, the Ld. PCIT action to substitute his own view on this issue without holding the same to be unsustainable in law cannot confer jurisdiction u/s 263 of the Act. Therefore, we find force in the legal issue raised by the assessee. And therefore, we are inclined to quash the impugned action of the Ld. PCIT.

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

Order pronounced in the open court on this 10/11/2022.

Sd/-

(PRAMOD KUMAR)
VICE PRESIDENT

Sd/-

(ABY T. VARKEY)
JUDICIAL MEMBER

Mumbai; Dated 10/11/2022.
Vijay Pal Singh, (Sr. PS)

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
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