IN THE INCOME TAX APPELLATE TRIBUNAL
JODHPUR BENCH, JODHPUR

VIRTUAL HEARING

BEFORE: DR. S. SEETHALAKSHMI, JM
&
SHRI RATHOD KAMLESH JAYANTBHAI, AM

ITA No. 140/Jodh/2023
(ASSESSMENT YEAR- 2018-19)

Nahar Colours and Coatings Private Ltd., G-1, 90-93, Udyog Vihar, Suker, Udaipur	Vs	Principal Commissioner of Income Tax, Udaipur
(Appellant)		**(Respondent)**
PAN NO. AAACN 6942 K		

Assessee By	Sh. Gautam Chand Baid, CA
Revenue By	Sh. Lovish Kumar, CIT-DR
Date of hearing	14/07/2023
Date of Pronouncement	09/08/2023

O R D E R

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal is filed by assessee and is arising out of the order of the Principal Commissioner of Income Tax, Udaipur dated 17.03.2023 [here in after (PCIT)] passed u/s. 263 of the Income Tax Act [here in after “Act”] for assessment year 2018-19 which in turn arise from the order dated 01.02.2021 passed under section 143(3) read with

sections 143(3A) & 143(3B) of the Act, by the ACIT, National e-Assessment Centre, Delhi.

2. The assessee has marched this appeal on the following grounds:-

> *"1. The ld. PCIT, has erred in passing the order u/s 263 holding Nil that the assessment made u/s 143(3) was erroneous and prejudicial to the interest of revenue. The said order u/s 263 is bad in law and bad on facts. The original assessment cannot be said to be erroneous or prejudicial to the interest of revenue and was made after due verification.*
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> *2. The ld. PCIT has erred in observing that common expenses of 8,74,100 Rs. 29,13,664/- deserves to be allocated to business eligible for deduction u/s 801A. The income was computed on the basis of separate books of accounts and such allocation so made is bad in law and bad on facts.*
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> *3. The ld. PCIT has erred in observing that assessment order was erroneous as certain interest disallowance of Rs. 51,58,174/- is required to be made on account of capital contribution made to partnership firm form where exempted income is being received. The observation so made is bad in law and bad on facts.*
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> *4. The ld. PCIT has erred in observing that the order was 4,57,200/ erroneous on account of not making disallowance of Rs. 15,24,003/- for delayed payment of PF amount. The said observation is bad in law and bad on facts.*
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> *5. The appellant crave liberty to add, amend, alter, or modify, or Nil delete any of the ground of appeal on or before its hearing before your honours."*

3. The fact as culled out from the records is that the return of income in this case for the assessment year 2018-19 declaring income of Rs. 19,95,61,510/- was e-filed on 08.10.2018. This return was processed u/s 143(1) of the Income Tax Act, 1961. The assessee

company is engaged in business of manufacturing of Glaze Frit at its unit situated at Jolwa and running wind power units. Subsequently, this case was selected for Scrutiny based on CASS and first notice u/s 143(2) of the Act dated 22.09.2019 was issued and duly served upon the assessee within the stipulated time. The observation of the assessing officer as regards the reasons and completion of the assessment are as under:

> "3. The case was selected for Scrutiny under CASS on the following issues:
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> 1. Verification of duty drawback received as shown in the Export Import Data.
> 2. Large deduction claimed under section 80I/80IA/80IB/80IC as compared to turnover.
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> 3.1 As regards to the above stated reasons for selection of scrutiny, notice u/s 142(1) of the Income Tax Act, 1961 was issued on 14.12.2020 alongwith questionnaire, asking about the details of duty drawback claimed and sanctioned alongwith documentary evidences and details of deduction claimed u/s 80I/80IA/80IB/80IC. In response to the statutory notice issued, the assessee company filed details and information electronically, which have been examined.
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> 4. After examination of the details/documents submitted on ITBA portal, the returned income declared by the assessee company of Rs. 19,95,61,510/- has been accepted."

4. On culmination of the assessment order the ld. PCIT called for the assessment records and observed that the assessment was completed under FAS on 01.12.2021 u/s. 143(3) of the Act and on

further examination of the records the PCIT observed that (i) One of the major issues of selection of the case under scrutiny was huge claim of deduction u/s 80IA and the rationale given for this reason was "assessee claiming deduction u/s 80IA which is significantly high vis a vis turnover of undertaking". The assessee claimed net income of three units of wind/solar plants at Rs. 1,04,61,003/- on total sales of Rs 2,35,17,410/-. As such the net profit disclosed on eligible business u/s 801A was 44.25% whereas the NP rate of non-eligible business was only 9.75%. The intention was basically to ascertain and examine as to whether the claim u/s 80IA was legally correct and as to whether the common expenses related to both segment of business had been correctly allocated or there was any diversion of expenses of eligible business to non-eligible business so as to enhance profit of eligible business. In the instant case it is noticed that no such allocation has been made by the assessee company on its own or by the FAO at the time of finalizing the assessment. While completing assessment u/s 143(3) of the Act, the FAO has not allocated the common expenses to the eligible business and non eligible business in the ratio of business income earned by two segments. The FAO finalized the assessment by accepting the reply of the assessee. It was categorically observed

by the undersigned that during the assessment proceedings the FAO has not proceeded in this manner and thus there is an under computation/assessment of current year's profit by this amount of Rs. 29,13,664/-. The FAO passed the assessment order u/s 143(3) on 01.02.2021 (supra). without making any addition on this issue which is erroneous and prejudicial to the interest of Revenue. Further, a perusal of final accounts as available on record revealed that as per note 1.10 to Balance Sheet, the assessee company had made huge investments as capital contribution in partnership firms M/s Cuarzo Rs. 18,09,70,103/- and in M/s Angel Granite Rs. 2,09,15,000/- totaling to Rs. 20,18,85,103/-. Total of such capital contribution to partnership firms as on 31.3.2017 was of Rs. 16,83,21,523/- Since the income earned on these capital contributions in the form of share profit was not liable to be included in total income of the assessee, provisions of section 14A read with rule 8D were applicable for such capital contribution. It was categorically observed by the undersigned that during the assessment proceedings the FAO has not proceeded in this manner and thus there is an under computation/assessment of current year’s profit by this amount of Rs. 51,58,174/-. The FAO passed the assessment order u/s 143(3) on 01.02.2021 (supra),

without disallowing the sum of Rs. 51,58,174/- on this issue which is erroneous and prejudicial to the interest of Revenue. Further, on examination of records, it was found that the Auditor in his Audit report in Form 3CD has reported that the assessee had not deposited amount of contribution of Provident Funds by the employees within the prescribed time under relevant PF Act and thus the same was required to be disallowed u/s 36(1)(va) read with section 2(24)(x) of the IT. Act, 1961. It was categorically observed by the undersigned that during the assessment proceedings the FAO neither made any query in this regard nor examined the case of disallowance of Rs. 15,24,003/- in terms of section 36(1)(va) r.w.s 2(24)(x) of the Act. The FAO passed the assessment order u/s 143(3) on 01.02.2021 (supra), without making any addition on this issue which is erroneous and prejudicial to the interest of Revenue.

4.1 In view of these set of facts ld. PCIT noted that the FAO has failed to examine the issues of under computation / assessment of current year's profit by the amount of Rs. 29,13,664/- in view of provision of section 80IA of the Act, disallowance of Rs. 51,58,174/- u/s. 14A of the act and disallowance of Rs. 15,24,003/- in terms of

section 36(1)(va) r.w.s. 2(24)(x) of the Act. Therefore, due to lack of enquiry and due to incorrect and incomplete appreciation of facts, the assessment order is erroneous in so far as it is prejudicial to the interest of revenue. Therefore, the ld. PCIT based on these facts issued a show cause notice to the assessee on 30.01.2023 to furnish the submission on the said issues fixing the date of compliance on 14.02.2023. As there was no response to that notice another and final opportunity notice issued fixing the date of hearing on 23.02.2023 none appeared but a reply was filed in the dak on all the issues explaining all the issues which is also incorporated in the order of the PCIT.

4.2 The ld. PCIT considered the reply of the assessee but did not find convincing and therefore, ld. PCIT hold that the order passed by the FAO u/s. 143(3) dated 01.02.2021 is suffering from specific defects, hence the order so passed by the AO is erroneous and also prejudicial to the interest of the revenue. The order of the assessing officer therefore, considered liable to revision under clause (a) & (b) of the Explanation (2) of section 263 of the Act.

5. Aggrieved from the order of the PCIT, assessee preferred an appeal before this tribunal on the grounds as reiterated here in above in para 2. A propose to the grounds so raised the assessee has filed a paper book containing the following evidences in support of the contentions so raised :

S. No.	Particulars	Pages
1	Copy of Note u/s 263 issued by ld. PCIT, Udaipur vide letter dated 20.1.2023	1-5
2	Copy of written submissions filed before ld. PCIT in proceedings u/s 263	6-13
3	Acknowledgement of return and Computation of total income for AY 2018-19	14-20
4	Copy of Audited Financial statements for AY 2018-19	21-40
5	Notice u/s 142(1) issued during the assessment proceedings.	41-44
6	Submissions made before the ld. AO	45
7	Power Purchase agreement with JVVNL	46-60
8	Audit report in 10CCB for all the units	61-72

5.1 In addition the ld. AR of the assessee has also filed a detailed written submission filed before the ld. PCIT and has emphasized to consider even for considering the grounds of appeal so raised.

5.2 The ld. AR of the assessee in addition to the written submission so filed before PCIT argued that so far, the first issue pointed out by the PCIT there is no common expenses that is to be considered for the

eligible business for which deduction is claimed u/s. 80IA. To support this contention, he drawn our attention to the detailed written submission made before the ld PCIT on this issue and submitted that for this undertaking as there is specific contract of maintenance of the wind / solar plants. He also submitted that separate books of accounts for this undertaking is maintained and in support of this contention he relied upon the audit report submitted in support of the claim in Form no. 10CCB. Considering these specific facts available on record no expenses as alleged is required to be allocated and thus, the observations made by the PCIT is in wrong appreciation of the facts and there is no specific rebuttal of the PCIT on the submission made by the assessee.

5.2.1 First of ld. PCIT should appreciate that the issue raised by him was not subject matter of the assessment, so the issue raised were never subject of verification and therefore, invoking the provision on that aspect is bad in law as well as on facts. As regards the merit for disallowance u/s. 14A to be computed that the assessee company has invested the amount out of the own fund and as per the scheme of taxation the remuneration and interest is already chargeable to tax and

even the profit which is received by the assessee after payment of taxes only as per the scheme of taxation. The assessee has already submitted in detailed submission which the ld. PCIT has not appreciated. The ld. AR of the assessee from the copy of the balance sheet placed on record demonstrated that the assessee company has out of owned fund investment money in the partnership firm as capital contribution and the same is also done in the period year also. The details of the investment and the details of share capital and free reserve is as under :

Investment in Cuarzo Firm For Capital Contribution		1809,70,103.31	1488,50,523.31
Investment in Angel Granite For Capital Contribution		209,15,000.00	194,55,000.00
	Total	20,18,85,103.31	168305523.31
Share Capital		558,06,500	558,06,500
Reserves and Surplus		9075,80,125	7930,64,656
	Total	963386625	848871156
	Investment in terms of%	20.96%	19.82

Thus, even on merits based on this information the PCIT has not commented that whether the order is prejudicial to the interest of the revenue or not. Thus, the order of the FAO is not prejudicial or erroneous.

5.2.2 As regards the disallowance of Rs. 15,24,003/- in terms of section 36(1)(va) r.w.s. 2(24)(x) of the Act the issue was covered based on the jurisdictional high court decision and therefore, the issue was debatable and law does not permit the review of each every order after the same is considered and decided based on the law and judicial wisdom prevalent at the time of passing the order. Not only that the case of the assessee was limited scrutiny and this was not subject matter of verification before the assessing officer and therefore, the issue raised is not coming from the subject of provision of section 263 of the Act.

Based on this submission the Id. AR of the assessee relying on the judicial decision supported the order of the FAO and submitted that there is whisper in the order of the PCIT that how the order of the FAO is erroneous or prejudicial so as to interest of the revenue.

6. The Id DR is heard who has relied on the findings recorded in the order of the PCIT and also filed a detailed written submission to support the order of the PCIT and the same is reproduced here in below:

“The following written submissions (law points) are submitted for kind consideration in support of the order u/s 263 of the Act.

1. "OPINION" OF THE COMMISSIONER-PRIMA-FACIE FINDING REASONS TO INTERFERE WITH THE ORDER OF THE COMMISSIONER (PCIT/CIT)

WHETHER THE COMMISSIONER (PCIT/CIT) IN ORDER UNDER SECTION 263 IS CORRECT OR NOT SHALL HAVE TO BE FOUND OUT AFTER ENQUIRY BY THE A.O.

1.1. The commissioner was perfectly competent to exercise his powers under Section 263 whenever he found, prima facie, that there was need to enquire if the interest of the Revenue had suffered by an order of assessment. He has given certain reasons. The basis for the order of the Commissioner is a question of fact and whether it is correct or not shall have to be found out after enquiry by the Income-tax Officer. The Commissioner has found that the Income-tax Officer has omitted to enquire into this question found by the Commissioner implicit in the manner in which the amounts were borrowed and advanced by the assessee-company (Duggal & Co. v. CIT [1996] 220 ITR 456/[1994] 77 Taxman 331 (Del.))

1.2. There can be no doubt that merely on the basis of presumption or surmise or suspicion, an order under section263 cannot be passed. The Tribunal failed to appreciate that in this case the inference drawn by the Commissioner was not based either on presumptions or surmises or suspicion. Therefore, the Tribunal was not justified in setting aside the order of the Commissioner. (PCIT v. India Finance Ltd. (2016) 389 ITR 242: (2017) 81 taxmann.com 135 (Cal.))

1.3. It is the order of the PCIT/CIT which is in challenge before the Hon'ble Tribunal. The appellant is required to show and prove the "reasons to interfere" with the order of the PCIT/CIT. It is not proven by the assesse that the opinion of the PCIT is based on either presumptions or surmises or suspicion. It is not proven by the assessee that the opinion of the PCIT is malafide or without jurisdiction. The law has granted "judicial discretion to the PCIT/CIT in exercise of his powers and the same cannot be substituted in appeal proceedings on merits if there is mere disagreement with such opinion of the PCIT. PCIT is to form a "prima-facie" finding and he is mere required to come to an "opinion" and he is not required to "prove" what he has opined in his order Order u/s 263 of the Act setting aside the assessment

order merely leads to initiation of proceedings of enquiry by the A.O. and does not in itself results into levy of tax.

3. NO LEVY OF TAX BY THE COMMISSIONER IN ORDER U/S 263

MATTER HAS BEEN SET ASIDE SUBSEQUENTLY ASSESSEE COULD PRESENT HIS ISSUES BEFORE THE A.O.

2.1. In the order under section 263 of the Act, the PCIT/CIT has not levied any tax and the matter has set aside to the file of the AO for passing a fresh order on the issue after affording proper opportunity of being heard to the assesse. The degree and extent of evidence required by the PCIT/CIT in arriving at his "opinion would be much lower than the evidence which would have been required to fasten a tax liability on the assesse. In the present case the issue will be examined by the A.O. in the set-aside proceedings.

2.2. In the case of Vedanta Ltd. v. CIT (2021) 279 Taxman 358: 124 taxmann.com 435 (Bom.) it was observed in the judgement that the Tribunal held that since only direction was issued for passing fresh assessment, issues raised by assessee could always be gone into by Assessing Officer after granting full opportunity to assessee. Since assessment was completed without proper inquiries, it was competent for Commissioner to invoke revisional jurisdiction and direct fresh assessment.

3. NECESSARY FURTHER INQUIRIES REQUIRED TO BE DONE BY THE ASSESSING OFFICER IF NOT DONE THAT ITSELF RENDERS ORDER - AS ERROENOUS AND PREJUDICIAL TO THE INTEREST OF REVENUE

SCOPE OF SECTION 263 IS NOT LIMITED TO AND IS MUCH BROADER THAN APPARENT ERROR OF FACT OR LAW

ASSESSING OFFICER IS ALSO AN INVESTIGATOR INCUMBENT UPON HIM TO INVESTIGATE THE FACTS STATED HE IS NOT LIKE A CIVIL COURT

3.1. The order passed by the Assessing Officer becomes erroneous because an enquiry has not been made or genuineness of the claim has not been examined where the inquiries ought to have been made and the genuineness of the claim ought to have been examined and not because there is anything wrong with his order if all the facts stated or claim made therein are assumed to be correct. The Commissioner may consider an order

of the Assessing Officer to be erroneous not only when it contains some apparent error of reasoning or of law or of fact on the face of it but also when it is a stereo-typed order which simply accepts what the assessee has stated in his retur and fails to make enquiries or examine the genuineness of the claim which are called for in the circumstances of the case. Supported by the decisions of the Hon'ble Supreme Court in Rampyari Devi Saraogi v. CIT [1968] 67 ITR 84. Smt. Tara Devi Aggarwal v. CIT [1973] 88 ITR 323 (SC), and Malabar Industrial Co. Ltd.'s ([2000] 243 ITR 83 (SC))

3.2. 3.2. The Apex Court in Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83 (SC) laid down a four-way test for orders being erroneous in-so-far as they are prejudicial to the interest of the revenue, liable for revision, viz. incorrect application of law; wrong assumption of facts; non-observance of the principles of natural justice, and lack of inquiry. The Hon'ble Supreme Court in the instant case held that if the AO has accepted the entry in the statement of account filed by the taxpayer without making enquiry, the said order of the AO shall be deemed to be erroneous and prejudicial to the interest of the Revenue.

3.3. The position and function of the Income Tax Officer is very different from that of a civil court. The statements made in a pleading proved by the minimum amount of evidence may be accepted by a civil court in the absence of any rebuttal. The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which comes before it. The Income Tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. The meaning to be given to the word "erroneous" in section 263 emerges out of this context. It is because it is incumbent on the Income Tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word "erroneous" in section 263 includes the failure to make such an inquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct. (M/s Gee Vee Enterprises 99 ITR 375 (Delhi High Court)[1995])

3.4. Mere failure on the part of the Assessing Officer to make the necessary inquiries or to examine the claim made by the assessee in accordance with law, renders the resultant order erroneous and prejudicial to the interest of the revenue. Nothing more is required to be established in such a case. If the

Assessing Officer passes an order mechanically without making the requisite inquiries or examining the claim of the assessee in accordance with law, such an order will clearly be erroneous in law as it would not be based on objective consideration of the relevant materials. (Mahalakshmi Liquor Promoters (P) Ltd vs. Commissioner of Income Tax [2013] 29 taxmann.com 70)

3.5. Where the Assessing Officer takes a wrong decision without considering the materials available on record or he takes a decision without making an enquiry into the matters, where such inquiry was prima facie warranted. The Commissioner will be well within his powers to regard an order as erroneous and prejudicial to the interest of the revenue. (Dr. Rabindra Kumar Singh vs. CIT (Central), Patna [2011] 131 ITD 39 (Ranchi))

3.6. Where assessee explained source of cash deposit in its savings account as received from closure of previous loans given by him but same was not substantiated with any record or evidence, Principal Commissioner was justified in making revision of assessment order under section 263. (AvathanMarimuthuVs. Assistant Commissioner of Income tax, Circle-III, Trichy, the Ho'ble ITAT Chennai Bench C, [2017] 84 taxmann.com 104 (Chennai - Trib.))

3.7. If the Assessing Officer fails to conduct the said investigation, he commits an error and the word "erroneous" includes failure to make the enquiry. In such cases, the order becomes erroneous because enquiry or verification has not been made and not because a wrong order has been passed on merits. (ITO versus DG Housing Projects Limited, (2012) 343 ITR 329 (Delhi))

3.8. The assessee claimed provision made for standard assets also as a provision for bad and doubtful debts under section 36(1)vila). Assessing Officer allowed the deduction under section 36(1)(vila). CIT initiated proceedings under section 263 of the Act. As per CIT, the provision for standard assets could not be considered as provision for bad and doubtful debts which could be allowed under section 36(1)viia) of the Act. Before the Tribunal the assessee submitted that Assessing Officer has taken a lawful view and therefore, CIT could not substitute his view with that of Assessing Officer. The Tribunal upheld the revisional order passed by the CIT and observed that there was no enquiry made during the course of assessment proceeding. Therefore, the order which was silent on the claim made by assessee, and allowing such claim, without any discussion will definitely

render it erroneous and prejudicial to the interest of revenue. Tribunal dismissing the appeal followed the decision of Apex Court in case of Malabar Industrial Co. Ltd. v. CIT (2000) 243 ITR 83 (SC). (Bharat Overseas Bank Ltd. v. CIT (2013) 152 TTJ 546: 82 DTR 373 (ITAT Chennai))

WHAT CAN BE CONSIDERED A VIEW/OPINION OF THE ASSESSING OFFICER

WHEN IT CAN BE SAID THAT AO HAS FORMED AN OPINION/TAKEN A VIEW VIEW IS DIFFERENT THAN CHANCE RESULT

4.1. 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 was 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, 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 by the Commissioner proper and valid. [CIT. Nagpur v. Ballarpur Industries Ltd.(2017) 85 taxmann.com 10 (Bombay High Court)]

4.2. Non-application of mind is a ground for interference under Section 263 in the case of CIT v. ShriBhagwan Das, (2005) 272 ITR 367 (All) the Division Bench opined that exercise of power under Section 263 was proper when there was no discussion regarding the question as to whether the amount of income shown by the assessee which was claimed to be exempted had actually been earned by him and whether the entire amount of income from agriculture and Poultry Farming was exempted from tax. (Gauhati High Court in the case of CIT v. Jawahar Bhattacharjee [2012] 24 taxmann.com 215/209 Taxman 174)

4.3. The assessee claimed depreciation on goodwill and operational expenses. The Principal Commissioner invoked the provisions of section 263

of the Act on the ground that the Assessing Officer had not discussed and verified the claim of the assessee. On appeal, the assessee contended that the Assessing Officer had raised specific enquiries during the course of assessment proceedings and accepted its claim and it was not necessary to discuss about the enquiries made by the Assessing Officer in the assessment order. Held that the Assessing Officer had not discussed the issues that arose for consideration in the assessment order. The proceedings before the Assessing Officer being judicial proceedings, he was expected to record his own reasons for the conclusion reached. Whether it was an administrative order or judicial order, the reasons for the conclusion or decision taken had to be recorded in the order itself. There was no infirmity in the order of the Principal Commissioner. The Assessing Officer was directed to conduct an independent enquiry and pass a speaking order recording his own reasons without being influenced by any of the observations made by the Principal Commissioner. (Health Care (P) Ltd.v. CIT (2016) 46 ITR 36 (ITAT Chennai)])

5. MERE FILING OF DETAILS BY THE ASSESSEE IS NOT SUFFICIENT AND DOES NOT ITSELF CONSTITUTES APPLICATION OF MIND BY THE ASSESSING OFFICER

PROPER VERIFICATION AND SPECIFIC ENQUIRIES REQUIRED TO BE DONE BY THE ASSESSING OFFICER IF NOT DONE MEANS NON APPLICATION OF MIND BY THE AO

CALLING OF INFOMRATION BY THE AO DURING ASSESSMENT PROCEEDINGS IS PER SE NOT A BAR ON THE REVISION UNDER SECTION 263

5.1. Mere filing of an explanation was not sufficient and at the same time, it could not be inferred that the Assessing Officer had applied his mind. There was also no proper verification in respect of creditors from whom the assessee had accepted unsecured loans. No specific enquiries to prove the genuineness of these loans had been conducted by the Assessing Officer. The Assessing Officer had simply obtained account extracts of these parties as appearing in the books of the assessee and accepted the loan as genuine. No confirmation letters were filed from these parties. (Ambika Agro Suppliers vs. ITO, Jalgaon [2005] 95 ITD 326 (Pune))

5.2. The observation that full facts were brought to the notice of the Inspecting Assistant Commissioner (Assessment) is also not correct in as

much as after giving statement with regard to the actual cost of the assets and depreciation claimed thereon. the assessing authority was bound to consider the Explanation. Simply because the facts have been disclosed by the assessee, it does not give immunity from revisional jurisdiction which the Commissioner can exercise under section 263 and as such even in a case where the facts have been disclosed by the assessee to the assessing authority and the correct provisions of law have not been examined by the assessing authority, the power under section 263 can be invoked. (CIT v. Emery Stone Mfg. Co. [1995] 213 ITR 843/83 Taxman 643 (Raj.))

5.3. Merely asking a question which goes to the root ofthe matter and not carrying it further is a case of non-enquiry. the query not otherwise satisfied while responding to another query. In the instant case, the Assessing is Officer raised query regarding valuation of shares in question to which response was only that the unquoted shares were valued at costs. No method of valuation of the shares was submitted to the Assessing Officer during the proceedings, leading to the assessment order. It, therefore, appeared that the Assessing Officer after having asked a pertinent question of the method of valuing unlisted shares did not pursue that line of enquiry. Thus, this was a case of non- enquiry and not inadequate enquiry. Therefore, the order of the Assessing Officer was certainly erroneous and prejudicial to the revenue. (Jeevan Investment & Finance (P.) Ltd. Vs. Commissioner of Income Tax, City- 1, Mumbai, [2017] 88 taxmann.com 552 (Bombay))

5.4. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Assessing Officer should have made further inquiries before accepting the statements made by the assessee in his return. (Rajalakshmi Mill Ltd vs. ITO, Coimbatore [2009] 31 SOT 353 (Chennai) (SB))

5.5. The principle that a mere change of opinion could not be a basis for reopening completed assessments would be applicable only to situations where the Assessing Officer had applied his mind and taken a conscious decision on a particular matter in issue. It would have no application where the order of assessment did not address itself to the aspect which was the basis for reopening of the assessment. Therefore, it was inconsequential whether or not the material necessary for taking a decision was available to the Assessing officer either generally or in the form of a reply to the questionnaire served upon the assessee. (Consolidated Photo &Finvest Ltd. v. Asstt. CIT [2006] 281 ITR 394/151 Taxman 41 (Delhi))

5.6. Records were filed before Assessing Officer. A detailed questionnaire was also issued by Assessing Officer a reply was filed by assessee, but Assessing Officer did neither apply his mind nor did he conduct an enquiry into matter although he recorded in note-sheet that reply filed by assessee was not satisfactory and did not explain all facts. Tribunal recorded a finding that Assessing Officer had simply accepted claim of assessee without examining records. Lack of enquiry by Assessing Officer led to rendering his order erroneous and prejudicial to interest of revenue. Commissioner was justified in passing an order invoking power under section 263 and remitting matter back to Assessing Officer for conducting a proper assessment. (Nagal Garment Industries (P) Ltd. v. CIT (2019) 415 ITR 134 (MP))

5.7. It was observed that Assessing Officer, did seek an explanation from assessee in 'general terms' for adoption of sale consideration as against stamp duty valuation, but, there was neither any specific reference to facts of case nor application of section 50C- Whether thus, view adopted by Assessing Officer being clearly unsustainable in law, even if matter was examined by Assessing Officer and it was conscious call of Assessing Officer to accept plea of assessee; such a situation would not take matter outside ambit of section 263. Therefore, revision proceedings under section 263 were justified and there was no infirmity in order of Commissioner directing re-examination of claims on merits.(Babulal S. Solanki v. ITO (2019) 176 ITD 642: 104 taxmann.com 155 (ITAT Ahmedabad))

5.8. The assessee had made payments to small labourers and machine repairers for which it did not have any valid vouchers. During the assessment proceedings it was stated before the Assessing Officer that the payments were made under emergent conditions and that the expenses were actually incurred. The Assessing Officer disallowed a sum of Rs. 2 lakhs, which disallowance was accepted by the assessee. The CIT exercised revisionary powers under section 263 and directed the Assessing Officer to modify the assessment order since according to the CIT the 4 aspects mentioned in his notice were not considered by the Assessing Officer. Tribunal set- aside the order of the CIT. On appeal by the department, the High Court observed that there was no application of mind on the part of the Assessing Officer and that the 4 points mentioned by the CIT have not been considered by the Assessing Officer. Accordingly, the High Court allowing the appeal held that the CIT was justified in directing the Assessing Officer to redo the matter afresh.(CIT v. Alloy Steels (2013) 359 ITR 355: 217 Taxman 262: 36taxmann.com514(Karn.))

6. APPLICATION OF MIND BUT INCORRECT ASSUMPTION OF FACTS / INCORRECT APPLICATION OF LAW BY THE ASSESSING OFFICER

APPLICATION OF MIND BUT BASIS OF ESTMATION BY THE A.O. IS EITHER NOT HAVING REASONABLE NEXUS WITH MATERIAL ON RECORD OR THE SAME IS NOT UNBIASED OR THE SAME IS NOT RATIONALLY MADE

6.1. Pr. CIT while exercising his revisionary jurisdiction u/s 263 can examine the basis for estimation, whether such basis for estimation has reasonable nexus with the material on record, whether the estimates made and conclusion drawn by the Assessing officer are unbiased and rationally made and the authority so exercised by the Assessing officer is vindictive or capricious or not. (Hon'ble ITAT, Jaipur A Bench in ITA No. 449/JP/2019 dated 25.10.2019 in the case of Rameshwar Prasad Sharma, A.Y 2014-15)

6.2. Not application of mind to relevant material or an incorrect assumption of facts or an incorrect application of law will satisfy the requirement of order being erroneous and prejudicial to the interest of the revenue. (CIT Vs. Jawahar Bhattacharjee 342 ITR 0074 (Gauhati High Court) [2012])

6.3. Where the Assessing Officer takes a wrong decision without considering the materials available on record the Commissioner will be well within his powers to regard an order as erroneous and prejudicial to the interest of the revenue, (Dr. Rabindra Kumar Singh vs. CIT (Central), Patna [2011] 131 ITD 39 (Ranchi))

7. EXPLANATION 2(a) IN SECTION 263 OF THE ACT ORDER IS PASSED WITHOUT MAKING INQUIRIES OR VERIFICATION WHICH SHOULD HAVE BEEN DONE

7.1. It is also worthwhile to note that Explanation 2(a) below section 263 of the Act specifies has further clarified and strengthened and enlarged the scope of section 263 that the that the order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the revenue if in the opinion of the Pr. Commissioner, the order was passed without making any inquiries or verification which should have been made by the Assessing Officer. The aforesaid explanation was inserted with effect from 01.06.2015.

7.2. It is important to mention that in number of judgements it has been held event without considering the above explanation that order would be erroneous in so far as it is prejudicial to the revenue if it was passed without making any inquiries or verification which should have been made by the Assessing Officer.

7.3. The amendment to section 263 of theAct by insertion of Explanation 2 to Section 263 is declaratory in nature and is inserted to provide clarity on the issue as to which orders passed by the AO shall constitute erroneous and prejudicial to the interest of Revenue whereby it is provided, inter-alia, that if the order is passed without making inquiries or verification by the AO which, should have been made or the order is passed allowing any relief without inquiring into the claim; the order shall be deemed to be erroneous and prejudicial to the interest of Revenue. (Anuj Jayaendra Shah vs PCIT-35, Mumbai [2016] Reported in 67 taxmann.com 38)

8. WHAT RECORD CAN BE CONSIDERED/EXAMINED COMMISSIONER IN ARRIVING AT HIS OPINION BY THE

COMMISSIONER CAN TAKE INTO CONSIDERATION NEW MATERIAL WHICH WAS NOT AVAILABLE TO THE A.O. WHEN THE ASSESSMENT WAS MADE

COMMISSIONER CAN TAKE INTO CONSIDERATION NEW MATERIAL COMING TO HIS POSSESSION AFTER HE CONDUCTS ENQUIRY

8.1. Such a narrow interpretation of the word "record" is not justified in view of the object of the provision and the nature and scope of the power conferred upon the Commissioner. The revisional power conferred on the Commissioner under Section 263 is of wide amplitude. It enables the Commissioner to call for and examine the record of any proceeding under the Act. It empowers the Commissioner to make or cause to be made such enquiry as he deems necessary in order to find out if any order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. After examining the record and after making or causing to be made an enquiry, if he considers the order to be erroneous, then he can pass the order thereon as the circumstances of the case justify. Obviously, as a result of the enquiry he may come into possession of new material and he would be entitled to take that new material into account. If the material, which was not available to the Income-tax Officer when he made the assessment could thus be taken into consideration by the Commissioner after holding an

enquiry, there is no reason why the material which had already come on record though subsequent to the making of the assessment, cannot be taken into consideration by him. (CIT v. Manjunathesware Packing Products & Camphor Works [1998] 231 ITR 53/96 Taxman 1 (SC))

9. REVISION OF ORDER UNDER 263 WITH REFERENCE TO SECTION 14A

9.1. Main operating portion is sub-section (1) of Section 14A and the subsequent amendments has not changed the wordings of sub section (1). The Finance Act, 2006 has introduced w.e.f. 1.4.2007, sub section (2) and sub section (3) of section 14A. The sub section (2) of Section 14A basically lays down the manner in which the disallowance u/s 14A has to be calculated, read with Rule 8D of the IT Rules, 1962 Further, sub section (3) of Section 14A only clarifies that even if the assessee claims that no expenditure has been incurred in relation to the exempt income then also, sub section (2) of section 14A can be applied. The legislature in its own wisdom, to remove the subjectivity involved in the calculation of disallowance under section 14A has standardized the amount of disallowance to be made under section 14A. This amendment was necessary as the Assessing Officers were making disallowances u/s 14A on estimate basis. It is precisely for this reason that Rule 8D has been inserted w.e.f. 24.3.2008

9.2. The requirement of the provision of section 14A has not been satisfied. The interference by the Commissioner was based on facts and not any change of opinion. (Commissioner of Income-tax-III, Kolkata v. RKBK Fiscal Services (P) Ltd (32 taxmann.com 153) (Hon'ble Calcutta High Court)

9.3. Provisions of section 14A are deeming provisions and mandatory in nature, Circular issued by the CBDT is binding on the Assessing Officer. The principle enumerated in the following judgement is squarely applicable to revision of assessment in connection with section 14A of the Act. In case of Vithal Nagar Co. Operative Housing Society Ltd. and Ors. v. CIT (2017) 185 TTJ 780 88 taxmann.com 890: (2016) 52 ITR(T) 21(ITAT Mumbai) it was held by Hon'ble ITAT that the provisions of section 50C are deeming provisions and mandatory in nature. The application of such provisions is made by operation of law. Exception to these provisions can be made only in accordance with law, as provided in section 50C only. The Assessing Officer did not raise any query with regard to application of section 50C, the Assessing Officer committed a mistake and, thus, it rendered the order of the Assessing Officer as erroneous. Since non-application of section 50C would

also amount to under assessment of income and tax payable thereon, it was prejudicial to the interests of the revenue. Further, the provisions of section 263 are widely worded and clearly lay down that the power of the Commissioner to revise an assessment order shall continue to extend in all those matters which have not been considered and decided in any appeal. Where the matter pertaining to application of section 50C had neither been considered nor decided in appeal by the Commissioner (Appeals), the Commissioner had requisite power under the law to consider and examine the application of section 50C for revision under section 263, since the 'doctrine of merger would not apply upon such matter.

9.4. In the case of Daga Capital Management (P) Ltd. (2009) 117 ITD 169, the Hon'ble ITAT (Special Bench, Mumbai) has held thatSec. 14A applies to all heads of income and aims at disallowing expenditure incurred in relation to income not forming part of total income even though such expenditure may be allowable under any other provision, e.g., s. 36(1)(ii); provisions of s. 14A are applicable with respect to the dividend income earned by the assessee engaged in the business of dealing in shares and securities, on the shares held as stock-in-trade; provisions of sub-ss. (2) and (3) of s. 14A are procedural in nature, hence applicable retrospectively.

9.5. In the case of Indiabulls Financial Services Ltd. Vs DCIT[2016] 76 taxmann.com 268 (Delhi), the Hon'ble Delhi High Court has held that where the Assessing Officer after carrying out elaborate analysis and following steps enacted in statute, had determined amount of expenditure incurred for earning tax exempt income, merely because he did not expressly record his dissatisfaction about assessee's calculation, his conclusion could not be rejected.

9.6. The Hon'ble Bombay High Court in the case of CIT v. Amritaben R. Shah [1999] 238 ITR 777 considered the facts where, admittedly, shares in a company were purchased by the assessee for the purpose of acquiring controlling interest in the company and not for earning dividend, it was held as under :-
"Held that in order to get deduction under s. 57(iii), the expenditure should be incurred wholly and exclusively for the purpose of making or earning the income from other sources and that it should not be in the nature of capital expenditure. The shares in question were purchased by the assessee for the purpose of acquiring controlling interest in the company and not for earning dividend. That being so, the expenditure incurred by way of interest on the loan taken by the assessee for the said purpose cannot be held to be an

expenditure incurred wholly or exclusively for the purpose of earning income by way of dividends. From the nature of transaction. is clear that expenditure was not for the purpose of earning income by way of dividends but for the purpose of acquiring controlling interest in the company and, therefore, it would not be allowable as deduction under s. 57(iii) of the IT Act."

9.7. Further, Central Board of Direct Taxes (CBDT), vide circular No.5 of 2014 dated 11/2/2014, has clarified that disallowance u/s.14A is to be made even if no exempted income had been earned by the assessee during the year. It has been further clarified that even if the assessee claims that no expenditure in respect of exempted income was made; such disallowance has to be made. The contents of the circular are reproduced as under :-

“Section 14A of the Income-tax Act, 1961 ('Act) provides for disallowance of expenditure in relation to income not includible in total income.

2. A controversy has arisen in certain cases as to whether disallowance can be made by invoking section 14A of the Act even in those cases where no income has been earned by an assessee which has been claimed as Exempt during the financial year.

3 The matter has been examined in the Board It is pertinent to mention that section 14A of the Act was introduced by the Finance Act, 2001 with retrospective effect from 01.04.1962. The purpose for introduction of section14Awith retrospective effect since inception of the Act was clarified vide Circular No. 14 0f 2001as under

"Certain incomes are not includible while computing the total income, as these are exempt under various provisions of the Act. There have been cases where deductions have been claimed in respect of such exempt income. This in effect means that the tax incentive given by way of exemptions to certain categories of income is being used to reduce also the tax payable on the non-exempt income by debiting the expenses incurred to earn the exempt income against taxable income. This is against the basic principles of taxation whereby only the net income, ie., gross income minus the expenditure, is taxed. On the same analogy, the exemption also in respect of the net income. Expenses incurred can be allowed only to the extent they are relatable to the earning of taxable income."

Thus, legislative intent is to allow only that expenditure which is relatable to earning of income and it therefore,follows that the expenses which are

relatable to earning of exempt income have to be considered for disallowance, irrespective of the fact whether any such income has been earned during the financial-year or not

4. The above position is further clarified by the usage of term 'includible' in the Heading to section 14A of the Act and also the Heading to Rule 8D of I.T.Rules, 1962 which indicates that it is not necessary that exempt income should necessarily be included in a particular year's income, for disallowance to be triggered Also, section 14A of the Act does not use the word "income of the year but income under the Act". This also indicates that for invoking disallowance under section 14A, it is not material that have earned such exempt income during the financial year under consideration, should have earned such exempt income during the financial year under consideration.

5. The above position is further substantiated by the language used in Rule8D(2(i)&8D(2)(ii) of T.Rules which are extracted below:

"(ii)in a case where the assessee has incurred expenditure by way of interest during the previous year which is not directly attributable to any particular income or receipt an amount computed in accordance with the following formul a,namely:-

A*B/CWhere.....

B =the average of value of investment, income from which does not or shall not form part of the total income as appearing in the balance sheet of the assessee, on the first day and the last day of the previous year;

(iii)an amount equal to one-half percent of the average of the value of investment, income from which does not or shall not form part of the total income, as appearing in the balance- sheet of the assessee, on the first day and the last day of the previous year."

6. Thus, in light of above, Central Board of Direct Taxes, in exercise of its powers under section 119 of the Act hereby clarifies that Rule 8D read with section 14A of the Act provides for disallowance of the expenditure even where tax payer in a particular year has not earned any exempt income."

9.8. To sum up, the provisions of Section 14A require that any expenditure which is incurred in relation to the income which does not form part of the total income under the Act has to be disallowed. It is not necessary that there

should be positive exempt income. Such dividend income can be zero also, but the only requirement for invoking the provisions of section 14A read with Rule 8D is that such income should not form part of the total income under the Act. The assessee starts incurring expenditure from the day it has made investment in the purchase of shares.

9.9. The provisions of Section 14A clearly make a distinction between exempt income and taxable income. It treats both of them as separate classes for the purposes of computation of income and mandates that no deduction in respect of any expenditure shall be allowed against taxable income, which is incurred in relation to exempt income. The underlying object is to compute both the exempt income and taxable income separately and correctly, which is possible only after the expenditure incurred in relation to each category of income is allocated properly.

9.10. In other words, Section 14A bars the deduction of expenditure incurred in relation to exempt income out of taxable income as this would have the effect of artificially inflating the exempt income and thereby deflating the taxable income. The term "expenditure" occurring in section 14A takes into its sweep not only direct expenditure but also all forms of expenditure, regardless of whether they are fixed, variable, direct, indirect, administrative, managerial or financial. The phraseology used in section 14A prohibiting the deduction in respect of expenditure incurred by the assessee in relation to exempt income is thus wide enough to cover all forms of expenses provided they have a bearing with the exempt income. This is based on the principle that expenses must be allocated to that income to which they are connected to avoid distortions in the computation of both taxable as well as exempt income.

9.11. It is difficult to accept the hypothesis that one can earn exempt income without incurring any expenses. By same logic, it is equally difficult to accept that the only expense involved in earning the dividend income are those incurred on collection of dividend or on en-cashing a few dividend warrants. A company cannot earn dividend without the active involvement and participation of the management. Investment decisions are very complex in nature and needs special attention of the top management. They require substantial market research, analysis of market trends and decisions are required to be made with regard to acquisition, retention and sale of such shares/investments at the most appropriate time. They require huge investment and consequential blocking of funds. It is well known that capital has cost and that element of cost is represented by interest. Besides,

investment decisions are generally taken in the Board meetings of the company for which administrative expenses are incurred. So, it will not be correct to assume that dividend income can be earned by incurring nil or nominal expenditure. Such expenses, relating to the investments made for earning exempt income have to be disallowed as per section 14A of the Income Tax Act. Further, the intention of the legislature was not to allow any expenditure against the tax free income. Therefore, section 14A was inserted by the Finance Act, 2001 with retrospective effect from 1.4.1962.

9.12. On the issue of revisionary proceedings u/s 263 of the Act for making disallowance u/s 14A, it is extremely pertinent to refer to the judgment of the Hon'ble Delhi High Court in ITA No. 1179/2010 in the case of CIT(Central-II) Vs. Goetze(India) Ltd. (A.Y. 2000-01), wherein it was held as under:-

"28. Commissioner in her order under Section 263 on the second aspect has recorded that the Assessing Officer had failed to disallow expenditure in respect of exempt income as per the mandate of Section 14A of the Act. Commissioner held that the said provision was applicable and the Assessing Officer had erred and had passed an erroneous order prejudicial to the interest of the Revenue as the respondent-assessee had earned gross exempt dividend income of Rs.1.34crores and Rs.23.43 lacs, but no disallowance under Section14A was made. She worked out and calculated the disallowance of expenditure under Section14AtobeRs. 183.63/acs.

1. It is accepted and admitted that the Assessing Officer had not applied Section 14A and no deduction under the said Section was made. In respect of the present assessment year, i.e., Assessment Year 2000-01, the contention of the respondent- assessee is that in view of the proviso to Section 14A, the said provision could not have been invoked in a revision. It is not possible to accept the said contention. Section 14A was introduced by Finance Act, 2001, was tabled in the Parliament on 28th February, 2001. The said provision was introduced with retrospective effect from1stApril, 1962 and reads as under:-

"14-A. Expenditure incurred in relation to income not includible in total income.- For the purposes of computing the total income under this Chapter no deduction shall be allowed in respect of expenditure incurred by the in relation to income which does not form part of the total income under this Act:

Provided that nothing contained Assessing Officer either to in this section reassess under Section147or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the Assessee under Section 154, for any assessment year beginning on or before the 1stdayof April, 2001."

29. Interpreting the said provision in Honda Siel Power Products versusDeputy Commissioner of Income Tax and Another, (2012) 340 ITR 53 (Delhi), ithasbeenheldasunder-

"8. The Petitioner has relied upon the proviso to Section 14A of the Act. The proviso according to us is not applicable in view of the factual matrix of the present case and does not protect or come to the aid of the Petitioner. In the present case, after return of income for the assessment year 2000-01 was filed on November 30, 2000, the case was taken up in scrutiny. Assessment order under Section 143(3) of the Act was passed on March 7, 2003. The proviso only bars reassessment/rectification and not original assessment on the basis of the retrospective amendment. The proviso does not stipulate that Section14Aof the Act cannot be relied upon during the course of the original assessment proceedings. The therefore, required assessing Officer to apply Section14A when he passed the assessment order under Section 143(3) of the Act dated March 7, 2003 has prima facie resulted in escapement of income. The proviso is not intended to apply to the cases of the present nature. The object and purpose of the proviso is to ensure that the retrospective amendment is not made as a tool to reopen past cases, which have attained finality."

30. In view of the aforesaid legal position, we hold that the Commissioner was justified in invoking Section 263 of the Act as the order of the Assessing Officer was erroneous and prejudicial to the interest of the Revenue. The assessment order was made on 28 th February, 2003, which is after Section 14A of the Act was enacted. The Assessing Officer should have been applied the said Section Failure to invoke Section14A had resulted in an order both erroneous and prejudicial to the interest of the Revenue.

31. On the question of quantum of deduction to be made under Section14A the tribunal has not gone or quantum has to be decided in light of decision of the Delhi High Court in the case of Maxopp investment limited versus Commissioner of Income Tax (2012)3471TR272(Delhi) and other cases

32. In view of the aforesaid position, the substantial question of law is decided in favour of the Revenue and it is held that the Commissioner had rightly invoked Section 263 of the Act as the order of the Assessing Officer was erroneous and prejudicial to the interest of the Revenue to the extent that adjustment of Rs.1.35 crores should not have been allowed under clause (oExplanation to Section115JA and deduction should have been also made towards expenditure t o earn dividend income, which did not form part of taxable income under Section14A of the Act. However, on the question of quantum of deduction to be made under Section 14A, the matter remanded to the tribunal."

The assessment order was passed by the AO without making the necessary enquiries and verification of these issues, which he was statutorily bound to make for ascertaining the relevant facts for the purpose of deciding the issues at hand. There is incomplete and incorrect appreciation of facts by the AO. The assessment order, therefore, suffers from these infirmities and the same is erroneous in so far as it is prejudicial to the interest of therevenueintermsoftheprovisionsofsection263of the Act.

It is prayed that the Hon'ble ITAT be pleased to upheld the order u/s 263 of the Act."

6.1 The ld. DR in addition to the written submission vehemently argued that the assessing officer is holding the co-judicial post and he need to act as investigator also based on the submission available before him. The ld. AR of the assessee failed to demonstrate that on the issues raised by the PCIT there is no material or query raised by the ld. FAO in the notices issued as regard to late deposit of PF and 14A(APB page 41-44). On relying the computation of income filed on page 14-15 in the paper book the ld. DR pointed out that there is no allocation of common expenses while claiming the deduction wind

power and solar units of the assessee. The PCIT on page 16 of his order specifically computed the common expenditure which the FAO failed to compute. As regards the investment in the firm the ld. DR relied upon the CBDT circular of computing the disallowance and no query was raised the FAO on this issue. Even for ESI and PF also no query was raised and after the decision of the apex court in the Checkmate Service the same is not allowable.

7. In the rejoinder the ld. AR of the assessee drawing out attention to page 2 of the order of the FAO wherein it is categorically wrriten that the case was selected to examine the two issues only (1) verification of duty drawback received as shown in the Export Import Data and (2) Large deduction claimed under section 80I/80IA/80IC as compared to turnover. The issue of 14A and ESI PF were not subject matter of assessment and the PCIT has not power u/s. 263 to enlarge the scope of the assessment and section 263 does not empower to go beyond the scope of the assessment beyond what is available on record and what is subjected to verification of the AO. The ld. FAO cannot be expected to enlarge the issue which was not subject matter of scrutiny

criteria and therefore, the contentions raised by the revenue is even not in accordance with the provision of law.

8. We have heard the rival contentions, perused the material placed on record and also gone through the judicial decision cited by both the parties to drive home to the contentions so raised. The brief fact of the case is that the case of the assessee was selected under CASS for verification of duty drawback received as shown in the Export Import Data and Large deduction claimed u/s. 80I/80IA/80IC as compared to turnover. The issue flagged for verification in the scrutiny assessment for which we note that the notice for asking the details were called for vide notice dated 22.09.2019 and 14.12.2020 (APB-40 to 44). The assessee submitted all the details called for vide letter dated 28.12.2020 (APB-45) wherein the assessee has submitted following details

> "With reference to the above said notice dated 22/09/2019 for A.Y. 2018-19, kindly find below the following information as requested by you.
> 1. Total amount of Duty Drawback claimed in the A.Y. 2018-19 is Rs.48901.00. Enclosed herewith Invoice and Shipping Bill.
>
> 2. Deduction under Section 80IA (4) (iv) was claimed for 3 branches located at Sadiya. Sodamada & Coimbatore in the A.Y. 2018-19.
> i) Please refer enclosed Balance Sheets of the specified businesses for which deduction under section 80IA (4)(iv).

ii) Enclosed list of all the business premises and godowns and the nature of activity carried out. In addition to this 10CCB of all the 3 branches is also enclosed as a documentary evidence.
iii) Please refer copy of Power Purchase Agreements enclosed of all the 3 branches.
iv) Please refer 10CCB of all the branches for the date of commencement of business.
v) The business formed is new at the time of commencement.
vi) No, it is not the first year of deduction. For documentary evidence kindly refer enclosed 10CCB of all the undertakings."

8.1 Thus, out of the two issues for one issue the ld. PCIT satisfied with the conduct of the enquiry done by the FAO. But so far as the second issue of allocation of common expense the assessee has challenged the action of the ld. PCIT in ground no. 2. From the details so submitted by the assessee, the ld. AO on both the issues noted following remark in the order of the assessment.

"As regards to the above stated reasons for selection of scrutiny, notice u/s. 142(1) of the Income Tax Act, 1961 was issued on 14.12.2020 along with questionnaire asking about the details of duty drawback claimed and sanctioned along with documentary evidences and details of deduction claimed u/s. 80I/80IA/80IB/80IC. In response to the statutory notice issued, the assessee company filed details and information electronically, which have been examined."

8.2 Thus, we see that the ld. AO has called for the details, applied his mind on the details for which the assessment selected for scrutiny and thereby taken a plausible view of the matter. Not only that the assessment was under faceless regime where there are as much four

units headed by the Commissioner of Income and the assessment has to be passed with the four unit for quality check, Assessment unit, Verification Unit, Technical Unit, Review Unit. Thus, on the issue for which the case was selected the ld. PCIT noted in her order that the while completing the assessment FAO has not allocated the common expenses to be eligible business and non-eligible business and in the opinion of the PCIT a sum of Rs. 29,13,664/- should have been disallowed and thus, the order was considered for revision.

8.3 As against this the ld. AR of the assessee submitted that the claim of the assessee is not for the first year the same has been claimed in the earlier year also and to support the deduction so claimed he has furnished all the details which is required for a common investigator and adjudicator was submitted and based on that details the ld. AO has considered the claim of the assessee. As the common expenditure the assessee's claim has already been considered in earlier year. Not only that the ld. AR of the assessee submitted that all the units wise computation of income, Profit and Loss account and Balance Sheet and submitted that unit wise separate books are kept and the same is also audited by an

independent Chartered Accountant. As regards the allocation of expenses the ld. AR of the assessee submitted that the nature of operation of wind mill and other formalities with state power agencies, billing of power generation and sale, other expenses like repairs and maintenance, insurance and all other expenses incurred on wind mill is charged by the company who supplied and installed the wind mill unit. Therefore, company is not incurring any expenditure other then what is debited in the respective separate accounts submitted. The ld. AR of the assessee submitted that on the similar pattern the deduction is allowed from A. Y. 2010-11 and therefore, proportionate expenses of other frit manufacturing unit not allocated to the wind mill units and the revenue is considering the stand of the assessee since A. Y. 2010-11 consistently. On the other hand. Ld. DR based on the written submission and arguments so recorded here in above supported the order of the PCIT and submitted that though the FAO has called for the details but has not analyzed and not raised further questions to the details so filed.

8.4 Thus after taking into consideration entire conspectus of the case, we do not concur with the findings of the ld. PCIT on the issue in

question. The Id. AO has called for the details, the same is supported by the Balance Sheet and profit and loss account of each unit, Form no. 10CCB duly certified by CA the claim of the assessee, clarification that the deduction claim is not first year and the business is new at the time of commencement of claim. All the details were sufficient to justify the claim and the same claim is accepted by the revenue since AY. 10-11. In the earlier no such issue raised and the revenue should be consistent in taking a view of the matter which the FAO has done and therefore, we see no error on the part of the FAO and twin condition to invoke the provision of section 263 for making the order of the FAO prejudicial and erroneous so as to affect the interest of the revenue is absent on this issue. Hence taking into consideration entire conspectus of the case, we do not concur with the findings of the Id. PCIT on the issue in question. Thus Ground Nos. 2 of the assessee are allowed.

8.5 So far as the ground no. 3 for disallowance u/s. 14A & Ground no 4 for disallowance of PF raised by the issue we are in agreement with the contention of the Id. AR of the assessee that the issue that the Id. PCIT is raising was not a subject matter of the limited scrutiny

assessment. Therefore, ld. FAO has not authority to look beyond what is subject matter of limited scrutiny. The remark of the PCIT on the other issues indicates the ld. PCIT is going to enlarge the scope of the limited scrutiny and directing the ld. FAO what was not earlier to be verified by making him. The ld. FAO should not be expected to see what is not required to be seen from the records which is against the concept of limited scrutiny. Even in that case the ld. AO has power to enlarge the scope in the pendency of the assessment proceeding but not after the same is completed. Thus, what cannot done by the ld. AO cannot be done by the PCIT u/s. 263 and thus, expanding the scope of limited scrutiny is not permitted under the law and is beyond the mandate of the limited scrutiny issued by the CBDT. Hence, the directions of the ld. PCIT which are beyond the selection criteria of scope of scrutiny for the instant year cannot be held to be legally valid. Based on this observation ground no. 2 & 3 raised by the assessee is allowed.

9. So, even on facts we have discussed that on the issues raised there is no error or prejudice caused to the revenue and does not attract the clause (a) or (b) to explanation 2 of section 263 of the Act

and thus, it is nothing but a change of opinion which is not permitted in the eyes of the law. In the light of the aforesaid discussion, we hold that the order of the PCIT is not in accordance with the provisions of section 263 of the Act.

In the result, appeal of the assessee is allowed.

Order pronounced under rule 34(4) of the Appellate Tribunal Rules, 1963, by placing the details on the notice board.

Sd/-

(Dr. S. Seethalakshmi)
Judcial Member

Sd/-

(Rathod Kamlesh Jayantbhai)
Accountant Member

Dated : 09/08/2023
Ganesh Kumar, PS
Copy to:
1. The Appellant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR
6. Guard File

Assistant Registrar
Jodhpur Bench