

**IN THE INCOME TAX APPELLATE TRIBUNAL,
'A' BENCH, KOLKATA**

**Before Shri Rajpal Yadav, Vice-President
&
Shri Rajesh Kumar, Accountant Member**

**I.T.A. No. 1006/KOL/2019
Assessment Year: 2014-2015**

***IMC Limited,.....Appellant
232A, A.J.C. Bose Road,
Kolkata-700020
[PAN: AAACI6884R]***

-Vs.-

***Principal Commissioner of Income Tax-4,..Respondent
Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square,
Kolkata-700069***

Appearances by:

Shri J.P. Khaitan, Sr. Counsel, appeared on behalf of the assessee

Shri S. Datta, CIT (D.R), appeared on behalf of the Revenue

Date of concluding the hearing : August 22, 2023

Date of pronouncing the order : August 25, 2023

O R D E R

Per Shri Rajpal Yadav, Vice-President (KZ):-

The assessee is in appeal before the Tribunal against the order of ld. Principal Commissioner of Income Tax-4, Kolkata dated 11th February, 2019 passed under section 263 of the Income Tax Act, 1961 in A.Y. 2014-15.

2. The assessee has taken eleven grounds of appeal along with sub-grounds. However, ld. Counsel for the assessee did not press any other grounds except Grounds No. 5, 6(a) & 6(b). In brief, the grievance of the assessee is that the impugned order passed under section 263 of the Income Tax Act by the ld. Principal CIT is not sustainable in the eyes of law.

3. Brief facts of the case are that the assessee filed its return of income on 29.11.2014 declaring total income of Rs.40,32,73,720/-. The case of the assessee was selected for scrutiny assessment and an assessment order was passed under section 143(3) on 22.12.2016.

4. The ld. Pr. CIT has perused the assessment order as well as the record carefully and formed an opinion that the assessment order is erroneous and has caused prejudice to the interest of revenue. Accordingly he issued a show-cause notice u/s 263 of the Income Tax Act. Copy of show-cause notice is available on pages no. 360 to 361 of the paper book. A perusal of this show-cause notice would indicate that it is based on two-fold of reasoning, namely-

(a) the ld. Assessing Officer was required to disallow expenditure attributable to earning of tax-free income as provided in Section 14A read

with Rule 8D of the Income Tax Rules, 1962. According to him, the ld. Assessing Officer has made disallowance under section 14A of the Income Tax Act read with Rule 8D only on one of the limbs provided in Rule 8D. The ld. Assessing Officer failed to explore the other conditions enumerated in this Rule, namely the ld. Assessing Officer failed to verify the details of loans, if any, taken by the assessee for making investment, which has resulted tax-free income in the shape of dividend.

(b) There is a domestic transaction between inter-related parties and ld. Assessing Officer was required to make a reference to the ld. TPO mandatorily. He failed to make such reference and, therefore, his order is erroneous.

5. In response to the notice of hearing, the assessee filed detailed reply and submitted that ld. Assessing Officer has accepted the claim of assessee after due examination of both the facts, but ld. Pr. CIT was not satisfied and passed the impugned order, whereby he set aside the issue to the file of ld. Assessing Officer for re-adjudication.

6. The ld. Counsel for the assessee while impugning the order of ld. Pr. CIT submitted that as far as the first-fold of reasoning given by the ld. Pr. CIT is concerned, he submitted that the assessee has dividend income of Rs.1,42,84,882/-, which was claimed as exempt. The ld. Assessing Officer has consciously considered this aspect. He has discussed this issue from paragraph no. 4 to paragraph no. 4.3 of the assessment order. The ld. Assessing Officer after taking cognizance of the investment disallowed the expenditure towards administrative cost under Rule 8D(2) at Rs.44,02,222/-. The assessee is aggrieved with the computation of this disallowance and carried the matter in appeal before the ld. CIT(Appeals) and the issue is pending before the ld. 1st Appellate Authority. Therefore, as per clause (c) appended to Section 263, the ld. Commissioner ought to have not invoked jurisdiction under section 263 of the Income Tax Act on this fold of dispute because it is already subject matter of appeal and in case, some enhancement is required to be made, then, it can be looked after by the ld. 1st Appellate Authority while exercising the co-terminus powers of an Assessing Officer.

7. In the second fold of submission on this point, he submitted that as per Rule 8D, there can be a disallowance out of interest expenditure as provided in

the formula under Rule 8D(i) of the Income Tax Act. As far as this part is concerned, he took us through page no. 53 of the paper book, wherein details of the financial are available. He pointed out that the total interest-free funds in the shape of share capital as well as reserve & surplus is of Rs.381 crores, against this, the total non-current investment is of Rs.107 crores. He drew our attention towards Schedule 13 of the Balance-sheet and submitted that all investments are to the tune of Rs.133 crores whereas reserve & surplus with the assessee is of Rs.381 crores. He further pointed out that in earlier year, i.e. on 31.03.2013, the total investment was Rs.152 crores, which has gone down to Rs.133 crores in this year. Therefore, there is no fresh borrowing in the hands of the assessee, which can goad the ld. Assessing Officer to form an opinion that interest expenditure deserves to be disallowed. He factually demonstrated that no interest expenditure is attributable towards investment made, which has generated tax-free income and, therefore, ld. Assessing Officer did not make any disallowance under Rule 8D(i) read with 14A. Therefore, according to the ld. Counsel for the assessee, the ld. Pr. Commissioner has committed an error by not construing the facts in right perspective.

8. With regard to his second-fold of reasoning given by the ld. Pr. Commissioner, the ld. Counsel for the

assessee drew our attention towards the CBDT Circular No. 3/2016, which has been referred by the ld. Pr. Commissioner also, taking us through paragraph no. 3.2 and 3.3. He submitted that this Circular contemplated two conditions. The first condition is that if the case is being selected on the basis of transfer pricing risk parameters, then, it was incumbent for the ld. Assessing Officer to make a reference to the ld. TPO regarding domestic transaction. But in case it is not selected for scrutiny on the basis of transfer pricing risk parameters, then, the conditions enumerated in paragraph no. 3.3 of the Circular would be applicable. He took us through these conditions and submitted that none of the conditions is available in the case of the assessee.

9. On the other hand, ld. CIT(DR) relied upon the order of the ld. Pr. CIT and submitted that a reference to the TPO ought to have been made. He drew our attention towards paragraph no. 4 & 4.1 of the order of the ld. Commissioner passed under section 263.

10. We have duly considered the rival contentions and gone through the record carefully. Before we embark upon an enquiry on the facts and issues agitated before us to find out whether the action u/s 263 of the Act, deserves to be taken against the assessee or not, it is pertinent to take note of this section. It reads as under:-

“263(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

[Explanation.- For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,-

(a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include-

(i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income Tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;

(ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorized by the Board in this behalf under section 120;

(b) “record shall include and shall be deemed always to have included all records relating to any proceeding

under this Act available at the time of examination by the Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.

Explanation.- In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded.”

11. A bare perusal of the sub section-1 would reveal that powers of revision granted by section 263 to the

learned Commissioner have four compartments. In the first place, the learned Commissioner may call for and examine the records of any proceedings under this Act. For calling of the record and examination, the learned Commissioner was not required to show any reason. It is a part of his administrative control to call for the records and examine them. The second feature would come when he will judge an order passed by an Assessing Officer on culmination of any proceedings or during the pendency of those proceedings. On an analysis of the record and of the order passed by the Assessing Officer, he formed an opinion that such an order is erroneous in so far as it is prejudicial to the interests of the Revenue. By this stage the learned Commissioner was not required the assistance of the assessee. Thereafter the third stage would come. The learned Commissioner would issue a show-cause notice pointing out the reasons for the formation of his belief that action u/s 263 is required on a particular order of the Assessing Officer. At this stage the opportunity to the assessee would be given. The learned Commissioner has to conduct an inquiry as he may deem fit. After hearing the assessee, he will pass the order. This is the 4th compartment of this section. The learned Commissioner may annul the order of the Assessing Officer. He may enhance the assessed income by modifying the order. He may set aside the order and direct the Assessing Officer to pass a fresh order. At this

stage, before considering the multi-fold contentions of the ld. Representatives, we deem it pertinent to take note of the fundamental tests propounded in various judgments relevant for judging the action of the CIT taken u/s 263. The ITAT in the case of Mrs. Khatiza S. Oomerbhoy Vs. ITO, Mumbai, 101 TTJ 1095, analyzed in detail various authoritative pronouncements including the decision of Hon'ble Supreme Court in the case of Malabar Industries 243 ITR 83 and has propounded the following broader principle to judge the action of CIT taken under section 263.

(i) The CIT must record satisfaction that the order of the AO is erroneous and prejudicial to the interest of the Revenue. Both the conditions must be fulfilled.

(ii) Sec. 263 cannot be invoked to correct each and every type of mistake or error committed by the AO and it was only when an order is erroneous that the section will be attracted.

(iii) An incorrect assumption of facts or an incorrect application of law will suffice the requirement of order being erroneous.

(iv) If the order is passed without application of mind, such order will fall under the category of erroneous order.

(v) Every loss of revenue cannot be treated as prejudicial to the interests of the Revenue and if the AO has adopted one of the courses permissible under law or where two views are possible and the AO has taken one view with which the CIT does not agree. It cannot be treated as an erroneous order, unless the view taken by the AO is unsustainable under law.

(vi) If while making the assessment, the AO examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determine the income, the CIT, while exercising his power under s 263 is not permitted to substitute his estimate of income in place of the income estimated by the AO.

(vii) The AO exercises quasi-judicial power vested in him and if he exercises such power in accordance with law and arrive at a conclusion, such conclusion cannot be termed to be erroneous simply because the CIT does not interfere with the conclusion.

(viii) The CIT, before exercising his jurisdiction under s. 263 must have material on record to arrive at a satisfaction.

(ix) If the AO has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation by a letter in writing and the AO allows the claim on being satisfied with the explanation of the assessee, the decision of the AO cannot be held to be erroneous simply because in his order he does not make an elaborate discussion in that regard.

12. In the light of above, let us examine the facts in the present case. As observed earlier, a perusal of the financial statement would indicate that the assessee was having more interest-free funds than the investment. The interest-free funds are to the tune of Rs.381 crores, whereas the investment which yielded tax-free income in the shape of dividend is only Rs.133 crores. Therefore, there is no error in the order of the Id. Assessing Officer by not making any disallowance under Rule 8D(i). Apart from the above, we are of the view that as per clause (c) of Section 263, if an item is under dispute before the Id. 1st Appellate Authority, then, proceeding under section

263 will not be taken up on that item. In the present case, the ld. Assessing Officer has made the disallowance under section 14A read with Rule 8D that disallowance is subject matter of appeal before the ld. 1st Appellate Authority at the instance of assessee. In case, the ld. 1st Appellate Authority forms an opinion that ld. Assessing Officer has committed an error by not making complete disallowance on all the limbs of Rule 8D, then, he could have issued a notice for enhancement of income by exercising his appellate power. Therefore, this issue ought to have not been taken up in 263 proceeding. The order of ld. Pr. CIT is not sustainable on the first-fold of reasoning given by him.

13. As far as the second-fold of reasoning is concerned, we would like to take note of the guidelines issued by the CBDT. The relevant part of which reads as under:-

“3.2 All cases selected for scrutiny, either under the Computer Assisted Scrutiny Selection [CASS] system or under the compulsory manual selection system (in accordance with the CBDT's annual instructions in this regard - for example. Instruction No. 6/2014 for selection in F.Y 2014-15 and Instruction No. 8/2015 for selection in F.Y 2015-16), on the basis of transfer pricing risk parameters [in respect of international transactions or specified domestic transactions or both] have to be referred to the TPO by the AO, after obtaining the approval of the jurisdictional Principal Commissioner of Income-tax (PCIT) or Commissioner of Income-tax (CIT). The fact that a case has been selected for scrutiny on a TP risk parameter becomes clear from a perusal of the reasons for which a particular case has been selected and the same are invariably available with the jurisdictional AO. Thus, if the reason or one of the reasons for selection of a case for scrutiny is a TP risk parameter, then the case has to be mandatorily referred to the TPO by the AO, after obtaining the approval of the jurisdictional PCIT or CIT.

3.3. Cases selected for scrutiny on non-transfer pricing risk parameters but also having international transactions or specified domestic transactions, shall be referred to TPOs only in the following circumstances:

(a) where the AO comes to know that the taxpayer has entered into international transactions or specified domestic transactions or both but the taxpayer has either not filed the Accountant's report under Section 92E at all or has not disclosed the said transactions in the Accountant's report filed;

(b) where there has been a transfer pricing adjustment of Rs.10 Crore or more in an earlier assessment year and such adjustment has been upheld by the judicial authorities or is pending in appeal; and

(c) where search and seizure or survey operations have been carried out under the provisions of the Income-tax Act and findings regarding transfer pricing issues in respect of international transactions or specified domestic transactions or both have been recorded by the investigation Wing or the AO.

14. The ld. Counsel for the assessee took us through the notice issued under section 143(2) of the Income Tax Act, which is available on the paper book. As per this notice, the assessee was called upon to submit details on seven counts and in none of the seven counts, the issue of selection of the case of assessee for scrutiny assessment on the basis of transfer pricing risk parameters is included, therefore, as per clause no. 3.2 of the Circular, it was not mandatory for the ld. Assessing Officer to make a reference to the ld. TPO on the alleged domestic transaction.

15. As far as the cases selected for scrutiny on non-transfer pricing risk parameters are concerned, the

conditions are enumerated in paragraph no. 3.3 of the Circular and these conditions contemplate that a reference to the ld. TPO would be made if it came to the notice of the ld. Assessing Officer that the assessee has entered into a specified domestic transaction, but it has neither filed Accountant's Report under section 92E and/or has not disclosed the said transaction in the Accountant's report. The audited accounts are placed in the paper book running into 369 pages, wherein the assessee has placed all these details and domestic transactions with related parties have duly been disclosed by it, therefore, clause (a) is not applicable.

16. As far as clause (b) is concerned, it contemplates if there has been a transfer pricing adjustment of Rs.10 crores or more in an earlier assessment year and such adjustment has been upheld by the Judicial Authorities or is pending in appeal. Now in the case of assessee, this adjustment was not made in earlier year therefore, this condition is not applicable.

17. As far as clause (c) is concerned, in the third condition it has been provided if a search and survey operation has been carried out upon the assessee but in this case, no search and seizure operation has been carried out upon the assessee. Therefore, it was not mandatorily required at the end of the ld. Assessing

Officer to make a reference to the ld. TPO for determining the Arm's Length Price or Domestic Transaction with related parties, which is covered under section 40A(2)(b) of the Income Tax Act. Thus we are of the view that ld. Pr. Commissioner has misread the facts and misconstrued the proposition of law. He failed to apply the Circular in its true spirit. Apart from the above, ld. Counsel for the assessee has further pointed out that Section 92BA(i) provides that if an assessee has a transaction with the persons specified in section 40A(2)(b) of the Income Tax Act i.e. related person, then, Arm's Length Price of such transaction was required to be determined. This clause (i) of section 92BA has been omitted by way of an amendment carried out by Finance Act, 2017 w.e.f. 01.04.2017. The ld. Counsel has contended that since this clause has been omitted from the provision, therefore, as per Section 24 of General Clauses Act, it would be construed as if this clause never existed in the Statute Book. He pointed out that it is not repealed of section rather it is omission of a section. He submitted that this aspect has been considered by the Tribunal in the case of Eveready Industries India Limited -vs.- PCIT in ITA No. 805/KOL/2019. He took us through the paragraph no. 30 of this order on page 23 and submitted that Tribunal has placed reliance upon its earlier decision of Coordinate Bench rendered in the case of DVC Emta Coal Mines Limited & Ors -vs.- ACIT in ITA

Nos. 2430-2432/KOL/2017. Thus on the strength of this fold of contention, he submitted that if it is construed that this provision was never existed in the Statute Book, then, no reference ought to have been made to the Id. TPO. Finance Act, 2017 was passed before the Id. Commissioner took cognizance under section 263 of the Income Tax Act.

18. Id. CIT(DR), on the other hand, contended that the earlier decision of the Tribunal in the case of DVC Emta Coal Mines Limited and Eveready Industries India Limited are based upon the decision of the Hon'ble Karnataka High Court and appeal against such decision is pending. There is no judgment by the Hon'ble Jurisdictional High Court on this aspect and, therefore, on the basis of this fold of contention, the order of Id. CIT cannot be quashed.

19. We have duly considered this fold of contention raised by the Id. Counsel for the assessee. We are of the view that Coordinate Benches have taken a view that since clause (i) of section 92BA stands omitted from the provision and omission of such is to be construed as if it never existed in the Statute Book and if it never existed in the Statute Book, then, no Arm's Length Price is required to be determined for a transaction with specified persons in section 40A(2)(b) of a domestic

transaction. If no Arm's Length Price is required to be determined, then, no reference was required to be made. Therefore, on this fold of contention also, the order of the Id. Pr. Commissioner is not sustainable. Considering the above facts and circumstances in their setting as a whole, we allow this appeal and quash the order of Id. Pr. Commissioner dated 11th February, 2019 passed in A.Y. 2014-15.

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

Order pronounced in the open Court on August 25, 2023.

Sd/-
(Rajesh Kumar)
Accountant Member

Sd/-
(Rajpal Yadav)
Vice-President(KZ)

Kolkata, the 25th day of August, 2023

Copies to :

- (1) IMC Limited,
232A, A.J.C. Bose Road,
Kolkata-700020*
- (2) Principal Commissioner of Income Tax-4,
Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square, Kolkata-700069*
- (3) Commissioner of Income Tax ,*
- (4) The Departmental Representative*
- (5) Guard File*

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By order

*Assistant Registrar
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.