

**IN THE INCOME TAX APPELLATE TRIBUNAL  
COCHIN BENCH, COCHIN**

Before Shri Sanjay Arora, Accountant Member and  
Shri Manomohan Das, Judicial Member

**ITA No. 654/Coch/2022**  
(Assessment Year: 2017-18)

Cochin Shipyard Ltd. Administrative Building Shipyard Premises Perumanoor P.O. Kochi 682015 [PAN:AAACC6905B]	vs.	Dy. CIT, Corporate Circle 1(1) C.R. Building, I.S. Press Road Kochi 682018
(Appellant)		(Respondent)

Appellant by:	Shri Radhesh L. Bhat, CA
Respondent by:	Shri Sanjit Kumar Das, CIT-DR

Date of Hearing:	16.01.2024
Date of Pronouncement:	28.03.2024

**ORDER**

Per: Sanjay Arora, AM

The instant Appeal by the Assessee agitates the Order under section 263 of Income Tax Act, 1961 (the Act) dated 30.03.2022 by the Principal Commissioner of Income Tax-1, Kochi (Pr.CIT), setting aside the assessee's assessment u/s.143(3) of the Act dated 29.12.2019 for Assessment Year (AY) 2017-18.

2. The first of the two aspects on which assessment stands set aside for being examined, is in respect of the assessee's claim for deduction in the sum of Rs.182.11 lakhs, forming part of the initial public offer (IPO). The assessee, *on enquiry during the revisionary proceedings*, explained to have claimed expenditure only proportionate to the existing share capital (Rs.1132.80 lakh shares), i.e., to have regarded the expenditure in relation to the fresh issue of capital (Rs.226.56 lakh shares) as on capital account. Accordingly, only Rs.182.11 lakhs, out of total

Rs.218.28 lakhs incurred, stood claimed as operating expenses. The second issue is *qua* additional depreciation u/s. 32(1)(ia). The ld. Pr. CIT observed – with reference to the tax audit report, the assessee’s claim, on 2021.84 lakhs, as in excess by Rs.77.21 lakhs. The assessee explained the same to represent the balance 50% additional depreciation on the eligible plant and machinery acquired during the previous year relevant to AY 2016-17, the immediately preceding assessment year, claimed on the basis of the amendment to s. 32(1)(ii) by Finance Act, 2015, w.e.f. 01.04.2016, by way of insertion of third *proviso* thereto. No enquiry *qua* these aspects having been made by the Assessing Officer (AO) in the assessment proceedings, the ld. Pr.CIT, invoking s. 263 of the Act, set aside the assessment for examining the same, adverting to the provisions of law (s. 263), as indeed to the decisions in *Malabar Industries Ltd. v. CIT*[2000] 243 ITR 83 (SC) and *Raja & Co. v. CIT*[2011] 335 ITR 381 (Ker), i.e., toward the legal basis of his revision.

3. We have heard the parties, and perused the material on record.

3.1 Admittedly, no enquiry in the matter was made by the AO during the assessment proceedings, much less responded to, on which the AO is therefore required to apply his mind, either accepting or rejecting the assessee’s claim upon due verification and enquiry, i.e., as deemed proper under the given facts and circumstances, including the law in the matter, passing a speaking order. Non-application of mind is one of the four infirmities which, as explained in *Malabar Industries Ltd.* (supra), upholding the order by the Hon'ble jurisdictional High Court, renders an order as erroneous and prejudicial to the interest of the Revenue; the other three being:

- wrong assumption of facts;
- incorrect application of law; and
- omission to observe the principles of natural justice,

prescribing thus a four-way test for an order being liable for revision. Case law in the matter is legion; the law being well-settled by a series of decisions by Hon'ble Apex

Courts, as indeed by the Hon'ble jurisdictional High Court and, in fact, stands since co-opted on the statute by way of *Explanation 2(a)* to s. 263(1) by Finance Act, 2015, w.e.f. 01.06.2015. As explained in *Gee Vee Enterprises v. Addl. CIT* [1975] 99 ITR 375 (Del), again with reference to judicial precedents, that the order of the AO becomes erroneous on a failure to make enquiry where the circumstances call for it. This is not because there is anything wrong in the order if all the facts stated therein are assumed to be correct. However, the AO is not only an adjudicator but also an investigator and, therefore, cannot remain passive in the face of a return which is apparently in order but calls for further enquiry. 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 enquiry. In *CIT v. Toyota Motor Corporation*[2008] 306 ITR 49 (Del), since confirmed in the decision reported at [2008] 306 ITR 52 (SC), it was explained that the Tribunal could not have substituted its own reasons which were required to be recorded by the AO, and ought to have remanded the matter to the latter.

3.2 As afore-noted, we observe a complete absence of any enquiry, much less followed by due examination and adjudication, deciding the issue/s delineated. Both the aspects of the assessment flagged by the revisionary authority are contentious. The submissions on merits before him, where he decides to set aside the matter for consideration afresh, are to no consequence. We, accordingly, find no infirmity in the impugned order. Even so, we may, if only for the sake of completeness of our order, state the relevant aspects *qua* which both the issues may require being considered.

3.3 The issue, *ex-facie*, *qua* the first aspect would be if the expenditure on IPO could be regarded as in part toward the existing capital? Even so, could it be regarded as *qua* revenue and, therefore, admissible u/s. 37(1) of the Act. Some of the decisions that come readily to mind, and which may therefore require being visited and examined for their applicability, i.e., *vis-à-vis* their ratio, are *PSIDC v. CIT* [1997]

225 ITR 792 (SC); *Brook Bond (I) Ltd. v. CIT* [1997] 225 ITR 798 (SC); *CIT v. Tisco Ltd.* [1998] 231 ITR 285 (SC); *India Cements Ltd. v. CIT* [1966] 60 ITR 52 (SC).

3.4 The issue *qua* the second aspect flagged by the ld. Pr.CIT is the retrospectivity or otherwise of the amendment to s. 32(1)(ia) of the Act. Even as an amendment is, otherwise than where expressly so, or by necessary implication, to be regarded as prospective (*CIT v. Vatia Township (P.) Ltd.* [2014] 367 ITR 466 (SC)), most of the decisions in the matter, including by the Cochin Bench of the Tribunal (in *Diadora Shoes Pvt. Ltd.*, bearing ITA No. 213/Coch/2023, dated 28/3/2024), have held the said amendment as retrospective.

4. In the result, the assessee's appeal is dismissed.

*Order pronounced on March, 2024 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963*

Sd/-  
(Manomohan Das)  
Judicial Member

Sd/-  
(Sanjay Arora)  
Accountant Member

Cochin, Dated: March 28, 2024  
n.p.

Copy to:

1. The Appellant
2. The Respondent
3. The Pr. CIT concerned
4. The CIT- DR, ITAT, Cochin
5. Guard File

By Order

Assistant Registrar  
ITAT, Cochin