IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI "A" BENCH : MUMBAI

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
AND
SHRI RAJ KUMAR CHAUHAN, JUDICIAL MEMBER

ITA No.	A.Y.	Appellant	Respondent
2709/Mum/2024	2018-19	Agricom Foods Private Limited, Plot No. 14, 5th Floor, Sidhwa House, N.A.Sawant Marg, Near Colaba Fire Station, Colaba Mumbai [PAN: AABCA3230A]	Pr.Commissioner of Income Tax – (Central), Mumbai-2, Room No. 1920, 19th Floor, Air India Building, Nariman Point, Mumbai.
2716/Mum/2024	2019-20		

Assessee by : Shri Dharan Gandhi,
Revenue by : Dr.K.R.Subhash,CIT-DR

Date of Hearing : 14/11/2024
Date of Pronouncement: 09/12/2024

PER B.R. BASKARAN, A.M :

Both the appeals filed by the assessee are directed against the orders passed by the Ld. Pr. Commissioner of Income Tax (Central)-Mumbai-2, u/s. 263 of the Income Tax Act, 1961 ('the Act') for the Assessment Year (AYs.) 2018-19 and 2019-20.

2. The facts relating to the case are discussed in brief. The assessee herein is a part of Allana Group, which is engaged in the business of export of food products and agro commodities including frozen meat processed/frozen food, edible products, agro products etc. The Revenue carried out search and seizure operation u/s. 132 of the Act on 03-01-2019 in the hands of Allana Group. Consequent thereto, the AO completed the assessment for the AY 2018-19 u/s. 153A of the Act and assessment for the AY.2019-20 was completed u/s.143(3) of the Act.

The AO accepted the returned income of Rs.1,33,59,250/- and Rs.6,50,20,360/- declared in AY 2018-19 and 2019-20 respectively.

2.1. The Ld.PCIT examined the assessment records of both the years under consideration and noticed that the assessee had acquired a meat processing unit located at Unnao, U.P. from a partnership firm, named, M/s J.S. International for a lump-sum consideration of Rs.100 crores, vide agreement for sale executed on 27-10-2016. He noticed that the value of building and machinery, lease hold land. Plant & machinery and other assets acquired from the above said firm was shown at Rs.69.77 crores in the sale agreement. The balance amount of Rs.30.23 crores was shown as the value of Intangible assets. However, the sale agreement did not specify the break-up details shown the nature of intangible assets. In both the years under consideration, the assessee claimed depreciation on the intangible assets amount of Rs.30.23 crores.

2.2. The Ld. PCIT noticed that the AO did not examine the correctness or otherwise of depreciation claimed on the Intangible assets in both the years under consideration. He also noticed that the AO had examined the said issue in the immediately preceding year, i.e., in AY.2017-18 and noticed that the sale agreement did not give break-up details of intangible assets. Accordingly, in the absence of exact nature of those intangible assets, the AO had taken the view in AY 2017-18 that the depreciation is not allowable on the intangible assets valued at Rs. 30.23 crores. Accordingly, the AO had disallowed the depreciation amount of Rs.7.55 crores related to the intangible assets in AY 2017-18. However, in both the years under consideration (AY 2018-19 and 2019-20), as noticed by Ld PCIT, the AO did not examine the issue and accordingly did not disallow the depreciation claimed on the intangible assets. Hence the Ld PCIT took the view that the assessment orders passed for AY 2018-19 and 2019-20 are erroneous and prejudicial to

the interests of revenue, since the AO had omitted to disallow the depreciation claimed on the intangible asset, as per the view taken by him in AY 2017-18. Accordingly, he initiated revision proceedings u/s 263 of the Act for both the years under consideration.

3. Before the Ld.PCIT, the assessee contended that the due enquiries were made by the Investigation Wing with regard to acquisition of the undertaking from M/s J S International. It was submitted that, during the course of search proceedings, a statement was recorded on 06-01-2019 from Shri Chetan Salot, who was handling tax related matters for Allana group of entities. In the said statements several questions related to the acquisition of undertaking from M/s J.S. International were asked. In the replies given, he had fully explained the transaction relating to purchase of the undertaking from M/s. J.S. International. It was submitted that the AO has gone through the reports and record of investigation wing in the current years and has accordingly allowed the claim of depreciation. Accordingly, it was contended that the claim of depreciation was allowed by the AO after due application of mind. Accordingly, it was contended that impugned assessment orders cannot be termed as erroneous and prejudicial to the interests of revenue. Accordingly, the ld A.R prayed for dropping of revision proceedings.

3.1. The Ld.PCIT, however, did not accept the above said contentions of the assessee. He held that the enquiries conducted by different official (the Investigation Wing) cannot be considered as the enquiry of AO and hence, it cannot be said that there was application of mind by the AO. The Ld.PCIT also observed that the AO did not discuss anything about the claim of depreciation on the intangible assets in the impugned assessment orders. Accordingly, he held that, the impugned assessment orders are rendered erroneous and prejudicial to the interests of revenue on this count also. In support of this proposition, the Ld PCIT

took support of the decision rendered by Hon'ble Karnataka High Court in the case of Infosys Technologies Ltd., [341 ITR 293], wherein the Hon'ble Karnataka High Court has held that *non-discussion of claim of deduction allowed by the AO in the assessment order would make it erroneous and prejudicial to the interest of the Revenue*. Accordingly, the Ld.PCIT held that the assessment orders passed by the AO for both the years under consideration are rendered erroneous and prejudicial to the interest of the Revenue. Accordingly, he set aside the assessment orders passed for both the years and restored them to the file of the AO for the limited purpose of conducting enquiry with regard to the claim of depreciation of intangible assets and taking decision as per law. The assessee is aggrieved by the revision orders so passed by the Ld.PCIT in both the years under consideration.

4. We heard rival contentions and perused the record. We may first refer to the decisions rendered by Hon'ble High Courts, wherein the law relating to the scope of revision proceedings initiated u/s 263 of the Act have been laid down. We may first refer to the case of Grasim Industries Ltd. V CIT (321 ITR 92)(Bom), wherein the Hon'ble Bombay High Court has rendered its decision taking into account the law laid down by the Hon'ble Supreme Court in the case of Malabar Industrial Co Ltd vs. CIT (2000)(243 ITR 83)(SC). The relevant observations made by Hon'ble Bombay High Court are extracted below:

> *"Section 263 of the Income-tax Act, 1961 empowers the Commissioner to call for and examine the record of any proceedings under the 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 interests of the Revenue, to pass an order upon hearing the assessee and after an enquiry as is necessary, enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment. The key words that are used by section 263 are that the order must be considered by the Commissioner to be "erroneous in so far as it is prejudicial to the interests of the Revenue". This provision has been interpreted by the Supreme Court in several judgments to which it is now necessary to turn. In Malabar Industrial*

Co. Ltd. v. CIT [2000] 243 ITR 83, the Supreme Court held that the provision "cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer" and "it is only when an order is erroneous that the section will be attracted". The Supreme Court held that an incorrect assumption of fact or an incorrect application of law, will satisfy the requirement of the order being erroneous. An order passed in violation of the principles of natural justice or without application of mind, would be an order falling in that category. The expression "prejudicial to the interests of the Revenue", the Supreme Court held, it is of wide import and is not confined to a loss of tax. What is prejudicial to the interest of the Revenue is explained in the judgment of the Supreme Court (headnote) :

> *"The phrase 'prejudicial to the interests of the Revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer, cannot be treated as prejudicial to the interests of the Revenue, for example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the Income-tax Officer is unsustainable in law."*

The principle which has been laid down in Malabar Industrial Co. Ltd. [2000] 243 ITR 83 (SC) has been followed and explained in a subsequent judgment of the Supreme Court in CIT v. Max India Ltd. [2007] 295 ITR 282."

4.1. Under the provisions of sec. 263 of the Act, the Ld Pr. CIT can revise the order only if it is shown that the assessment order is erroneous in so far as prejudicial to the interests of the revenue. The question as to when an order can be termed as "erroneous" was explained by the Hon'ble Bombay High Court in the case of Gabriel India Ltd (203 ITR 108) as under:-

> *"From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law.* ***If an income tax officer acting in accordance with the law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately.*** *This section does not visualise a case of substitution of the judgment of the*

Commissioner for that of the Income-tax Officer, who passed the order, unless the decision is held to be erroneous. Cases may be visualised where the Income tax officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. The Commissioner, on perusal of records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income tax officer. That would not vest the Commissioner with power to examine the accounts and determine the income himself at a higher figure. It is because the Income tax officer has exercised the quasi judicial power vested in him in accordance with law and arrived at a conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion.... There must be some prima facie material on record to show that the tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed"

5. We shall now examine the facts prevailing in the instant case. We noticed that the assessee had purchased a meat processing undertaking from M/s J S International for a sum of Rs.100 crores. The said purchase transaction is not being doubted with. It was stated that M/s J S International is an unrelated party. The assessee has furnished the break-up details of the purchase cost as under:-

Lease hold land	-	23,24,16,175
Building	-	22,97,45,639
Plant & Machinery	-	28,45,26,974
Intangible assets	-	30,22,73,567
Other assets	-	45,00,000
Stores & Spares	-	47,28,420
Less: Current liabilities	-	(5,75,500)
Total		1,00,00,00,000

Though the purchase consideration specifically included a sum of Rs.30.23 crores as pertaining to "Intangible assets", yet the sale agreement entered between the parties did not mention the details of intangible assets. This lacunae was noted by the AO in the immediately

preceding assessment year, i.e., AY 2017-18, wherein he had disallowed depreciation specifically holding that the depreciation cannot be allowed in the absence of nature and break-up details of Intangible assets. The Ld.AR submitted that the assessee actually did not claim any depreciation in AY.2017-18 and hence the question of making any disallowance did not arise in that year. However, the AO disallowed depreciation amount of Rs.7.55 crores under erroneous impression that the assessee had claimed the same. Hence, the assessee has moved a rectification petition u/s 154 of the Act in AY 2017-18 for correcting above said mistake apparent from record and the same is still pending before him. He submitted that the assessee has, however, claimed depreciation on intangible assets in both the years under consideration and the same has been allowed by the AO while completing the assessment.

5.1. The case of the Ld.PCIT is that the AO, having disallowed depreciation on intangible assets in AY 2017-18, should have continued the same stand in the years under consideration also and should have disallowed the depreciation claimed on intangible assets. Since the AO did not examine the claim again and did not disallow the same, the Ld PCIT has held that the assessment orders passed for both the years under consideration are erroneous and prejudicial to the interests of revenue.

5.2. We also notice that the AO did not examine the issue of allowing depreciation in both the years under consideration, even though he had taken a conscious decision to disallow the claim of depreciation in AY 2017-18 with the reasoning that the break-up details and nature of intangible assets were not available. In the absence of any specific enquiry on this issue conducted in both the years under consideration, in our view, it cannot be said that there was conscious application of ind by the AO in allowing depreciation claimed on intangible assets. in

both the years under consideration. We may refer to clause (b) of Explanation 2 to sec.263 of the Act, wherein it is stated that an order passed allowing any relief without inquiring into the claim shall be deemed to be erroneous in so far as prejudicial to the interests of revenue.

5.3. The Ld.AR submitted that, even in the absence of break up details of intangible assets, the difference between the purchase consideration and the Net asset Value (NAV) should be considered as "Good will" and depreciation should be allowed u/s 32 of the Act under the category of "Intangible assets". In support of this proposition, the Ld A.R relied upon the decision rendered by Hon'ble Supreme Court in the case of CIT vs. Smifs Securities Ltd (2012)(24 taxmann.com 222)(SC), wherein the Hon'ble Supreme Court did not find fault with the claim of the assessee that the purchase consideration paid over and above the NAV of the undertaking acquired by the assessee should be treated as goodwill falling within the meaning of "Intangible rights" and accordingly held that the depreciation is allowable thereon. In our view, the assessee is entitled to make all these kinds of submissions and contentions before the AO. In the appeal filed against the revision order passed u/s 263 of the Act, what is required to be seen by the Tribunal is whether the AO has taken a possible view, after proper application of mind or not. Admittedly in these two years, the AO did not examine this issue at all, even though he had examined the same in AY 2017-18 and had taken a conscious view against the claim. In the normal course, the higher authorities would expect that the AO should follow the view taken on an identical issue in the earlier years, unless the circumstances warrant for taking contrary view.

5.4. The Ld.DR took support of the decision rendered by the Hon'ble Karnataka High Court in the case of Infosys Ltd (supra) and contended that the non-discussion of the issue in the assessment order would

make it erroneous and prejudicial to the interests of revenue. However, we notice that the jurisdictional Hon'ble Bombay High Court has held a contrary view, i.e., the decision of the AO cannot be held to be 'erroneous' simply because in his order, he did not make an elaborate discussion in that regard. There should not be any dispute that the decision rendered by jurisdictional High Court shall be binding on us.

6. In view of the foregoing discussions, we hold the impugned revision orders passed by Ld.PCIT holding the assessment orders as erroneous and prejudicial to the interests of revenue, in the facts and circumstances of the case, cannot be found fault with. Since the assessee contends that the depreciation claimed by the assessee is in accordance with the law laid down by the Hon'ble Supreme Court in the case of Smiffs Securities Ltd (supra), we direct the AO to examine this issue of depreciation claimed on intangible assets by taking into consideration the above said decision of Hon'ble Supreme Court. As directed by Ld.PCIT, the AO should decide this issue in accordance with law without being influenced by any of the observations of Ld PCIT and after affording adequate opportunity of being heard to the assessee.

7. In view of the foregoing discussions, we uphold the revision orders passed by the Ld.PCIT in both the years under consideration.

8. In the result, both the appeals of the assessee are dismissed.

Order pronounced in the open court on 09-12-2024

Sd/-	Sd/-
[RAJ KUMAR CHAUHAN]	[B.R. BASKARAN]
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dated: 09-12-2024

TNMM

Copy to :

1) The Appellant
2) The Respondent
3) The CIT concerned
4) The D.R, "A" Bench, Mumbai
5) Guard file

By Order

Dy./Asst. Registrar
I.T.A.T, Mumbai