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

BEFORE SHRI SAKTIJIT DEY, VP AND SHRI GIRISH AGRAWAL, AM

ITA No. 2612/Mum/2024
(Assessment Year:2018-19)

Bharat Bijlee Limited 6th Floor, Electric Mansion, A M Marg, Prabhadevi, Mumbai-400 025	Vs.	Additional-Joint-Deputy-Assistant Commissioner of Income Tax National e-Assessment Centre, Delhi
PAN/GIR No. AAACB 2900 K		
(**Appellant**)	:	(**Respondent**)

Appellant by	:	Shri Yogesh Thar & Shri Karan Jain
Respondent by	:	Shri Kailash C. Kanojiya

Date of Hearing	:	11.12.2024
Date of Pronouncement	:	19.12.2024

O R D E R

Per Saktijit Dey, VP:

The present appeal, at the instance of the assessee, calls into question the validity of the order dated 11.03.2024, passed u/s.263 of the Income Tax Act, 1961 ('the Act' for short) by learned Principal Commissioner of Income Tax, Mumbai ('ld.PCIT' for short), pertaining to the assessment year (A.Y.) 2018-19.

2. Briefly stated, the assessee is a resident corporate entity. For the assessment year under dispute, the assessee had filed its return of income declaring Nil income. The return of income filed by the assessee was picked up for scrutiny and the Assessing Officer (AO) issued notices u/s. 143(2) and 142(1) of the Act, seeking various information and details on a number of issues. In response to the queries made in the statutory notices, the assessee appeared from time to time and furnished the requisite reply/details. After examining the reply /details furnished by the assessee, the A.O., vide order dated 07.05.2021, completed

the assessment u/s. 143(3) r.w.s. 144B of the Act, determining the total income at Rs.15,26,53,134/-.

3. Against the assessment order so passed, the assessee preferred an appeal before learned first appellate authority. Be that as it may, after completion of the assessment, ld. PCIT, in exercise of powers conferred u/s. 263 of the Act, called for and examined the assessment records. While doing so, he noticed that in the year under consideration, the assessee had earned exempt income by way of dividend amounting to Rs.2,47,18,033/-. Whereas, *suo motu*, the assessee has disallowed an amount of Rs.58,456/-, being expenditure attributable to earning of exempt income. On further examination, he found that during the year under consideration, assessee's investments in equity shares and mutual fund stood at Rs.34,737.60 lacs. According to him, in terms with section 14A read with Rule 8D(2)(iii), the disallowance, has to be made at 1% of the average value of investment, which would work out to Rs.3,4,79,214/-. Whereas, the AO has completed the assessment accepting the *suo motu* disallowance made by the assessee. Thus, he was of the view that such acceptance of *suo motu* disallowance of the assessee has resulted in under-assessment of income, which made the assessment order erroneous and prejudicial to the interest of the Revenue. Accordingly, he issued a show cause notice, requiring the assessee to explain as to why the assessment order should not be revised.

4. In response to the show cause notice issued, the assessee furnished a detailed reply, not only objecting to the assumption of jurisdiction u/s. 263 of the Act, but also emphasizing that the A.O. having accepted assessee's claim after proper enquiry and due application of mind, the assessment order cannot be termed as 'erroneous and prejudicial to the interest of Revenue'. In support of such contention, the assessee relied upon a catena

of judicial precedents. The ld. PCIT, however, remained unconvinced with the submissions of the assessee. He was of the view that while accepting assessee's claim, the A.O. has not made full and proper enquiry, as was required to be made. Further, referring to clause (c) under *Explanation* 2 to section 263 of the Act, he observed that the A.O. has not passed the order in accordance with CBDT Circular No. 05/2014, which mandates computation of disallowance u/s. 14A of the Act read with Rule 8D. Thus, he ultimately concluded that non computation of disallowance in terms of Rule 8D has made the assessment order erroneous and prejudicial to the interest of Revenue. Having held, he set aside the assessment order, directing the A.O. to make enquiry on the issue of disallowance u/s. 14A of the Act and reassess the income after providing opportunity of being heard to the assessee.

5. Before us, the ld. Counsel appearing for the assessee submitted that, the assessee is carrying out its investment activities from past several years and from 2012 onwards, the investments have remained steady. He submitted that, since there was no fresh investments made during the current year, the assessee had not incur any interest cost for investment. He submitted, insofar as, the administrative and other miscellaneous expenses are concerned, the assessee from the past years has adopted a methodology, under which *suo motu* disallowance is computed after considering the salary cost of certain employees assigned to investment activity, proportionate electricity, telephone, society cost, etc. He submitted, the methodology adopted by the assessee was accepted by learned first appellate authority in assessee's case in A.Y. 2012-13 and 2013-14, though the A.O. had made disallowance adopting the method provided under Rule 8D(2). He submitted, in subsequent assessment years, until the current assessment year, no disallowance was ever made in

addition to the *suo motu* disallowance. He submitted, in course of the assessment proceeding, the A.O., in the notice dated 17.02.2020 issued u/s. 142(1) of the Act, has specifically enquired into the *suo motu* disallowance made by the assessee *qua* applicability of Rule 8D. In this context, he drew our attention to a copy of the said notice, along with its Annexure placed at pg. no. 141 of the paper book. He submitted, in response to the query raised by the A.O., the assessee furnished a detailed reply on 09.03.2020, justifying the computation of *suo motu* disallowance. He submitted, after making necessary enquiry and applying his mind to the facts and materials brought on record, the A.O., being satisfied that the *suo motu* disallowance made by the assessee is correct, having regards to its accounts, accepted it. Thus, he submitted, in such circumstances, the assessment order cannot be considered as erroneous and prejudicial to the interest of the Revenue, merely because the A.O. has not computed the disallowance strictly in terms of Rule 8D(2)(iii). He submitted, various judicial precedents relied upon by the ld. PCIT to support his reasoning are not applicable to the facts of assessee's case, as they are distinguishable on facts. In support of his contention, ld. Counsel relied upon a number of judicial precedents, as submitted in case law compilation.

6. The learned Departmental Representative ('ld. DR' for short), strongly relied upon the observations of the ld. PCIT. Further, he submitted that *Explanation* 2 to section 263 of the Act, empowers the Revisionary Authority to declare an assessment order erroneous and prejudicial to the interest of the Revenue, if in his opinion, the conditions enumerated under the said explanation are fulfilled.

7. We have considered rival submissions, in light of the decisions relied upon and perused the materials on record. Undisputedly, the only issue on which ld. PCIT has

invoked his powers u/s. 263 of the Act to revise the assessment order, is the disallowance u/s. 14A of the Act read with Rule 8D. As discussed earlier in the order, in the year under consideration, the assessee has earned exempt income amounting to Rs.2.47 crores, whereas, *suo motu*, it has disallowed Rs.58,456/-. At this stage, what is required to be examined is, whether in course of assessment proceeding the A.O. had enquired into and examined, the issue of disallowance to be made u/s. 14A of the Act. As we find, on 17.02.2020, the A.O. issued a notice u/s. 142(1) of the Act, wherein, an Annexure was attached specifying various aspects in relation to claims made in the return of income and computation of income, on which the assessee was required not only to furnish the necessary details, but also to justify the claim. One of the issues specifically raised in the said Annexure is, with regard to, non computation of *suo motu* disallowance of expenses relating to exempt income in terms with Rule 8D.

8. It is evident, in response to the query raised by the A.O., the assessee furnished its reply on 09.03.2020, wherein, detailed submission was made justifying the *suo motu* disallowance of expenses relating to earning of exempt income. In the said reply, the assessee further brought to the notice of the A.O., the past assessment history relating to the very same issue and stated that the disallowances made in various assessment years, have been deleted by the appellate authorities, being ld. CIT(A) or the Tribunal. In the said reply, it was explained by the assessee that it has computed the *suo motu* disallowance by considering the salary cost of the employees assigned to the investment activity, electricity and certain other costs on proportionate basis.

9. A reading of the assessment order clearly reveals that the A.O. has passed the assessment order after examining in detail the various issues raised in the notices issued either u/s. 142(1) of the Act or u/s. 143(2) of the Act. The assessment order certainly cannot be considered to be a cryptic or non-speaking order accepting assessee's claim. In fact, as against the nil income declared by the assessee, the A.O. has determined the total income at Rs.15,26,53,132/-, after making couple of disallowances. These facts clearly reveal that the A.O. has passed the assessment order after conducting thorough enquiry and due application of mind.

10. At this stage, we need to examine the provisions of section 14A of the Act. A reading of the said provision, reveals that it has an overriding effect and provides for disallowance of expenses attributable to earning of exempt income. Sub section (2) of section 14A of the Act empowers the A.O. to compute disallowance, in case, he is satisfied that the disallowance computed by the assessee is incorrect, having regard to the accounts of the assessee. Therefore, the catch is, the A.O. must be satisfied that the *suo motu* disallowance computed by the assessee is incorrect having regards to the accounts. In other words, the A.O. is empowered to reject the *suo motu* disallowance made by the assessee, only when he records a dissatisfaction regarding the incorrectness of assessee's claim having regard to the accounts. In case, the A.O. is satisfied with the correctness of assessee's claim having regard to its accounts, there is no requirement in law that the A.O. must record such satisfaction in the body of the assessment order itself.

11. In the facts of the present appeal, having perused the materials on record, we are of the view that after examining the explanation of the assessee, the A.O. *prima facie* was satisfied with the correctness of the *suo motu* disallowance made by the assessee, having

regard to its accounts. Hence, he did not discuss the issue in the body of the assessment order itself. A careful reading of the provision contained u/s. 14A(2) of the Act, read with Rule 8D(1), clearly indicates that the satisfaction postulated in the aforesaid provisions is that of the A.O. and no other authority. Therefore, by merely stating that the A.O. has not properly recorded his satisfaction, the revisionary authority cannot substitute the satisfaction of the A.O. with his own, that too, without making any enquiry himself.

12. Now coming to the enquiry part, ld. PCIT himself admits that assessee's case does not fall under no enquiry. According to ld. PCIT, the A.O. has made partial enquiry and has not carried the enquiry to its logical end. In this context, ld. PCIT has referred to CBDT Circular No. 05/2014 and has observed that it mandates disallowance to be made in terms with the methodology provided under Rule 8D. If such a view is adopted, then the recording of satisfaction in terms of section 14A(2) of the Act read with Rule 8D(1) becomes otiose. This is so because, in case Rule 8D(2) has to be applied mandatorily, then there is no need to record satisfaction. In our view, the sanctity of recording satisfaction u/s.14A(2) of the Act has been judicially settled, hence, the issue should not detain us any further. At this stage, it needs to be observed that while justifying his action u/s. 263 of the Act, ld. PCIT has taken shelter under clause (c) to *Explanation* 2 which reads as under:

> ***Section 263 in The Income Tax Act, 1961***
> ***263. Revision of orders prejudicial to revenue.***
>
> *Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer [or the Transfer Pricing Officer, as the case may be,] shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal [Chief Commissioner or Chief Commissioner or Principal] Commissioner or Commissioner,—*
> *(a) ……..*
> *(b) ……*
> *(c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or*

13. In our view, *Explanation* 2 cannot militate against the basic preconditions of invoking section 263 of the Act as provided under sub-section (1) to section 263 of the Act, which are, the order sought to be revised, must not only be erroneous, but at the same time must be prejudicial to the interest of the Revenue. Both these conditions have to be satisfied cumulatively. Therefore, the revisionary authority has to establish on record that the aforesaid conditions of sub section 1 to section 263 of the Act stand satisfied. It is evident from the past history relating to the issue in dispute, the assessee has been consistently following a particular method for making *suo motu* disallowance u/s. 14A of the Act. Assessee's contention that in the past assessment years, the methodology adopted has been accepted, either at the stage of assessment or in appellate proceeding, remains uncontroverted. Therefore, if the A.O., having been satisfied with the explanation of the assessee, has accepted the *suo motu* disallowance, which is otherwise consistent with the methodology adopted by the assessee in past assessment years, in our view, the assessment order cannot be considered to be erroneous. Interestingly, though, the revisionary authority accepts that to substantiate allegation of incomplete enquiry the authority concerned must himself conduct enquiry to demonstrate that the action of the A.O. is erroneous and prejudicial to the interest of the Revenue, however in reality, he has not undertaken any such exercise in the instant case to falsify assessee's computation of disallowance, having regard to the accounts. Merely because a particular methodology has been provided under Rule 8D(2)(iii), that cannot be adopted as a straight jacket formula giving a complete go bye to the provision of section 14A(2) read with Rule 8D(2)(i). Therefore, in our considered view, the view taken by the A.O., in the present case is a possible view. That being the case, in our view, the assumption of jurisdiction u/s. 263 of the Act, is invalid.

Accordingly, we reverse the impugned order passed u/s. 263 of the Act and restore the order of the A.O.

14. In the result, the appeal is allowed.

Order pronounced in the open court on 19.12.2024

Sd/-	Sd/-
(Girish Agrawal) Accountant Member	(Saktijit Dey) Vice President

Mumbai; Dated : 19.12.2024
Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai