

आयकर अपीलीय अधिकरण "A" न्यायपीठ मुंबई में।

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

**BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.3587/Mum/2014

(निर्धारण वर्ष / Assessment Year : 2009-10)

Lakshmiwadi Mines & Minerals Private Ltd., Yusuf Building, Room No. 20, 43-45, M.G. Road, Fort, Mumbai - 400 001.	बनाम/ v.	Commissioner of Income Tax - 2, 3 rd floor, R. No. 344, Aayakar Bhavan, Mumbai - 400 020.
स्थायी लेखा सं./PAN : AAACL 1756 F		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by	Shri Vipul Joshi
Revenue by :	Shri A. Ramachandran

सुनवाई की तारीख / **Date of Hearing** : 27-6-2016

घोषणा की तारीख / **Date of Pronouncement** : 21-09-2016

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee company, being ITA No. 3587/Mum/2014, is directed against the order dated 28th March, 2014 passed by learned Commissioner of Income Tax- 2, Mumbai (hereinafter called "the CIT") u/s 263 of the Income Tax Act, 1961 (Hereinafter called "the Act"), for the assessment year 2009-10, the proceedings initiated by the learned CIT u/s 263 of the Act is aimed at exercising revisionary powers directed against the assessment order dated 21st December, 2011 passed by the learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Act.

2. The grounds of appeal raised by the assessee company in the memo of appeal filed with the Income Tax Appellate Tribunal, Mumbai (hereinafter called "the Tribunal") read as under:-

“1. BREACH OF THE PRINCIPLES OF NATURAL JUSTICE

1.1. The Learned Commissioner of Income - tax - 2, Mumbai ["Ld. CIT"], erred in framing the revision order u/s. 263 of the Income - tax Act, 1961 ["the Act"] by not giving proper, sufficient and effective opportunity of being heard to the Appellant.

1.2 It is submitted that in the facts and the circumstances of the case, and in law, the order is required to be held as bad and illegal in breach of the principles of natural justice, as well as non-application of mind to the facts and the contentions brought on record by the Appellant.

2. REVISION ILLEGAL

2.1 The Ld. CIT erred in passing the order u/s. 263 of the Act, revising the assessment order passed by the A.O. u/s. 143 (3) of the Act.

2.2 It is submitted that in the facts and the circumstances of the case, and in law, the order is bad, illegal and void as necessary pre-conditions for initiating the revision proceeding as well as the completion thereof were not fulfilled.

2.3 Without prejudice to the generality of the above, the CIT failed to appreciate that:

(i) The order which he was seeking to revise had already merged with the appellate order and, accordingly, was not the "record" within the meaning of section 263 of the Act;

(ii) In any case, the assessment order framed was not "erroneous" within the meaning of section 263 of the Act; and

(iii) The assessment order was not "prejudicial to the interest of the revenue" within the meaning of section 263 of the Act.

2.4 It is submitted that in the facts and the circumstances of the case, and in law, no revision u/s 263 of the Act was called for.

WITHOUT PREJUDICE TO THE ABOVE

3.1 Even on merits, it is submitted that the order of the Ld. CIT is bad in law as it is based on total misinterpretation of section 14A of the Act read with Rule 8D of Income - tax Rules, 1962.

3.2 It is submitted that in the facts and the circumstances of the case, and in law, the computation of disallowance u/s 14A as returned by the Appellant and as confirmed by the CIT (A) was proper and reasonable and no variation / enhancement was called for.

3.3 It is submitted that in the facts and the circumstances of the case, and in law, no such revision was called for even on merits also.”

3. The brief facts of the instant case are that the return of income was filed by the assessee on 30th September, 2009 declaring total loss of Rs. 1,00,26,688/-. The assessment was completed by the AO u/s 143(3) of the Act on 21st December, 2011 , assessing the total loss at Rs. 95,22,971/-. On verification of the records , it was observed by the learned CIT that while calculating disallowance under section 14A of the Act read with Rule 8D of Income Tax Rules, 1962, the A.O. did not disallow the proportionate interest expenditure incurred at Rs. 98,42,238/- as it was stated by the assessee that the interest paid during the year was for the term loan from State Bank of India at Gandhidham. It was further stated that no fund was transferred out of borrowed funds to Mumbai wherein investments are held. The A.O. accepted the explanation of the assessee and did not disallow the interest expenditure u/s.14A of the Act for earning the exempted dividend income.

It was observed by the learned CIT that the interest paid during the year for the term loan from State Bank of India at Gandhidham was only Rs.13,51,398/- instead of Rs. 98,42,238/- and hence, the balance interest expenditure of Rs.84,90,840/- was required to be considered for disallowance u/s 14A of the Act against the dividend income of Rs. 1,16,56,557/- which is exempt from tax under provisions of the Act.

Thus, it was observed by the learned CIT that the assessment order u/s. 143(3) of the Act passed by the AO was without conducting proper inquiries and without proper application of mind and was an erroneous order in as much as the same was prejudicial to the interest of Revenue. Notice u/s 263 of the Act were issued to the assessee company on 17th January, 2013 and the assessee was asked to file objections, if any, to the proposal to set aside the assessment order dated 21-12-2011 passed by the AO u/s 143(3) of the Act under the revisionary powers of the learned CIT u/s. 263 of the Act. The assessee was also given opportunity of personal hearing by the learned CIT.

The assessee filed the submissions before learned CIT whereby the assessee objected to the notice dated 17-01-2013 issued by the learned CIT u/s 263 of the Act mainly on technical grounds and not on merits. The learned CIT observed that the A.O. had accepted the assessee's contention regarding interest expenditure in the assessment order dated 21.12.2011 passed u/s. 143(3) of the Act without any verification . The learned CIT observed that the AO had made the disallowance with regard to Rule-8D(2)(iii) of Income Tax Rules, 1962 only and no disallowance under Rule 8D(2)(i) or (ii) of Income Tax Rules, 1962 was made by the AO while framing assessment order u/s. 143(3) of the Act. It was observed by the learned CIT that if the assessee has earned exempt income , the interest expenses as are debited to P&L account, the expenditure towards interest is to be considered for disallowance for the purpose of Rule 8D (2)(ii) of Income Tax Rules, 1962. On going through the assessment order dated 21-12-2011 passed by the AO u/s 143(3) of the Act , it was observed by the learned CIT that the A.O. had not conducted proper inquiry into the above issues and there was an error in the assessment order in as much as the same is prejudicial to the interest of revenue . The learned CIT relied on decision of Hon'ble Allahabad High Court in the case of CIT v. Bhagavandas , 272 ITR 267 and P.T. Laskar Ram v. CIT (2005)272 ITR 309(All.HC) and held that action u/s. 263 of the Act is valid as the

assessment order dated 21-12-2011 passed by the AO u/s. 143(3) of the Act is passed without application of mind by the AO and without conducting proper enquiry . It was observed that the same view was confirmed by the Hon'ble Madras High Court in the case of Ashok Leyland Limited v. CIT (2003)260 ITR 599(Mad. HC). The learned CIT held that the assessment framed by the A.O. was not correct and is required to be reframed and accordingly the learned CIT set aside the assessment order dated 21-12-2011 passed by the AO u/s. 143(3) of the Act for making fresh assessments de-novo after undertaking proper enquiries, vide revisionary order dated 28.03.2014 passed by the CIT u/s 263 of the Act.

4. Aggrieved by the revisionary order dated 28.03.2014 passed by the ld. CIT u/s 263 of the Act, the assessee filed first appeal before the Tribunal.

5. The ld. Counsel for the assessee submitted that the assessee has submitted the entire details before the A.O. during the course of assessment proceedings u/s 143(3) read with the Section 143(2) of the Act conducted by the AO with respect to the disallowance u/s 14A of the Act. The said details before the AO are placed in paper book pages 43 to 75 filed with the Tribunal which were given vide written submissions dated 15-11-2011, 08-12-2011 and 08-12-2011. The ld. Counsel submitted that all the details were submitted before the A.O. with respect to the disallowance u/s 14A of the Act and the A.O. after applying his mind disallowed an amount of Rs. 6,05,192/- u/s 14A read with Rule 8D(2)(iii) of Income Tax Rules 1962 and since the assessee has voluntarily made disallowance of Rs. 1,20,000/- in the return of income filed with the Revenue, balance addition of Rs.4,85,192/- was confirmed by the AO vide assessment order dated 21-12-2011 passed by the AO u/s. 143(3) of the Act. The ld. Counsel drew our attention to the assessment order of the A.O. u/s 143(3) of the Act dated 21st December, 2011 wherein the detailed observations were given by the AO with respect to the

disallowance u/s 14A of the Act after considering the submissions of the assessee . It was submitted that the assessee carried the matter before the ld. CIT(A) in the first appellate proceedings who deleted the additions as were made in the assessment order dated 21.12.2011 u/s. 143(3) of the Act, vide appellate orders dated 19-12-2012 passed by learned CIT(A). It was submitted that after the passing of the appellate order by the ld. CIT(A) dated 19th December, 2012, the Revenue invoked revisionary powers u/s. 263 of the Act vide notice dated 17th January, 2013 which is clearly impermissible as is against the law as the matter was settled by the ld. CIT(A). After the appellate orders dated 19.12.2012 passed by learned CIT(A) in favour of the assessee by deleting the addition made by the AO u/s 14A of the Act read with Rule 8D of Income Tax Rules, 1962 , the Revenue raised the same issue of disallowance u/s 14A of the Act once again which was a concluded matter so far as the assessee is concerned. It was submitted that the powers of learned CIT(A) is co-terminus with the powers of the AO and learned CIT(A) could have enhanced assessment after complying with the provisions and scheme of the Act but learned CIT(A) considered the submissions of the assessee and held that disallowance of Rs.1,20,000/- made by the assessee voluntarily is reasonable keeping in view the facts and circumstances of the case. The ld. Counsel drew our attention to the appellate order of the ld. CIT(A) dated 19.12.2012 which is placed in the file. It was submitted that the investments as per balance sheet as at 31st March, 2009 were of Rs. 12,31,07,108/- (Rs.11,91,40,827/- as at 31-03-2008) and the assessee's own funds were Rs. 21,14,51,971/- as at 31-03-2009 (Rs. 20,97,42,428/- as at 31-03-2008) comprising of share capital of Rs. 48,51,200/- as at 31-03-2009 (Rs. 48,51,200/- as at 31-03-2008) and Reserves and surplus of Rs.20,66,00,771/- as at 31-03-2009 (Rs. 20,48,91,228/- as at 31-03-2008) and hence presumption will apply that the assessee has invested its own funds in making investments in the securities which are capable of yielding exempt income in the absence of any finding by the Revenue that the

assessee has diverted interest bearing funds for making investments in securities capable of yielding exempt income. Reliance was placed on the decision of Hon'ble Bombay High Court in the case of CIT v. Reliance Utilities and Power Ltd., (2009)313 ITR 340(Bom. HC) and HDFC bank Limited v. DCIT (2016) 383 ITR 529(Bom. HC) and submitted that in the absence of any cogent material brought on record by the Revenue that interest bearing funds were diverted in making the investment in securities capable of yielding exempt income, the presumption shall apply that the assessee has invested own funds in making investment in securities capable of yielding exempt income as the assessee has sufficient own funds which are much more than the investments in securities capable of yielding exempt income held by the assessee as at 31-03-2009 and 31-03-2008 as borne out from audited accounts. The said audited financial statements are placed in paper book /page 2-22. The assessee drew our attention to notice dated 17-01-2013 issued u/s 263 of the Act by the learned CIT , which is placed in paper book/page 91. The learned counsel for the assessee drew our attention to assessment order dated 21-12-2011 passed by learned AO u/s 143(3) of the Act, which is placed in paper book page 86-90. The assessee submitted that complete details were submitted before the learned AO whereby details as to financials of Head Office and factory at Gandhidham were submitted separately reflecting complete bifurcations of these two profit centre's in the company for which even separate books of accounts are maintained by the assessee, the said financials are placed at page 70 /paper book which clearly shows that investments in securities are reflected in profit centre HO and was Rs.12.31 crores as at 31-03-2009 while own funds of HO is Rs.23.49 crores as at 31-03-2009, which clearly reflects that the assessee's own funds are much higher than investment in securities which are capable of yielding exempt income . It was submitted that during the previous year relevant to the impugned assessment year, only Rs. 40 lacs share application money has been invested for which the share has not been allotted by the issuing

company by the end of the year. The learned counsel for the assessee drew our attention to page 16-17/paper book and submitted that secured loans were raised from the banks which are term loans against charge on factory building and plant and machinery , further it was submitted that cash credit facilities were obtained against hypothecation of stock and book debts and also hire purchase loan was taken for movable assets against hypothecation of assets. The learned counsel for the assessee drew our attention to page 92-109 of paper book being replies submitted to learned CIT during revisionary proceedings u/s 263 of the Act. The learned counsel drew our attention to page 76-78 being ledger account of interest bearing ICD raised by the assessee during the year. The complete utilization of the ICD's raised during the year were also submitted which is placed in the file which reflects that the assessee has either granted loans and advances out of the same or have repaid loans raised earlier during the year. It was submitted that the assessee has duly submitted all the details before the A.O. hence the ld. CIT cannot invoke section 263 of the Act which is bad in law liable to be quashed. The assessee relied upon following judgments /orders:

- 1 CIT v. K Sera Sera Productions Limited (ITA no 1027 of 2013, order dated 18-03-2015)-Hon'ble Bombay High Court
2. CIT v. Fortaleza Developers (2015) 374 ITR 510(Bom. HC)
3. CIT v. Nirma Chemicals Works Private Limited (2009) 309 ITR 67(Guj.)
4. Sonal Garments v. JCIT (2005) 95 ITD 363(Mum.Trib.)
5. Marico Industries Limited v. ACIT (2009) 312 ITR 259(AT) (Mum)-27 SOT 73(Mum-Trib.)

6. The ld. D.R., on the other hand, relied on the order of the ld. CIT.

7. We have considered the rival contentions and also perused the material placed on record including the case laws relied upon . The case of the assessee for the impugned assessment year was selected for scrutiny by the Revenue for framing the assessment u/s 143(3) of the Act read with Section 143(2) of the Act and the A.O. made enquiries with respect to disallowances u/s 14A of the Act before framing assessment u/s 143(3) of the Act , wherein the assessee submitted replies with respect to disallowance u/s 14A of the Act which are placed in paper book page 43-75 filed by the assessee before the Tribunal vide written submissions dated 15-11-2011 and 08-12-2011 along with enclosures/annexures. The assessee submitted details with respect to the disallowance u/s 14A of the Act which was considered by the A.O. before framing assessment u/s 143(3) of the Act. Perusal of the written submission filed by the assessee before the AO, it was observed that the assessee submitted details of secured loans raised from banks and utilization thereof, raising of unsecured loans by the assessee and details of interest expenditure, granting of interest bearing loans by the assessee, details of dividend received , working of disallowance u/s 14A of the Act read with Rule 8D of Income Tax Rules, 1962. The bank statements were submitted by the assessee before the AO. The assessee also submitted that company has not made investments during the year out of borrowed funds . It was also submitted before the AO that separate books of accounts are maintained for Head Office(HO) and factory at Gandhidham. It was submitted that factory at Gandhidham paid interest on term loans and cash credit. Separate columnar Profit and Loss Account of HO and factory at Gandhidham was submitted before the AO. The assessee disallowed an amount of Rs. 1,20,000/- voluntarily u/s 14A of the Act in the return of income filed with the Revenue. The A.O. worked out disallowance of Rs. 6,05,192/- u/s 14A of the Act read

with Rule 8D(2)(iii) of Income Tax Rules, 1962 , out of which Rs. 1,20,000/- was declared voluntarily by the assessee and the addition of the balance amount of Rs.4,85,192/- was made by the AO while framing assessment order dated 21-12-2011 passed u/s 143(3) of the Act. The AO did not made any disallowance for direct expenses incurred in relation to earning of exempt income , nor interest expenditure was disallowed by the AO u/r 8D(2)(i) and 8D(2)(ii) of Income Tax Rules, 1962 read with Section 14A of the Act, while the AO at the same time chose to apply Rule 8D(2)(iii) of Income Tax Rules, 1962 for making disallowance u/s 14A of the Act of Rs.6,05,192/- . We have observed that the assessee has made investment of Rs. 12,31,07,108/- as on 31st March, 2009 (Rs. 11,91,40,827/- as on 31-03-2008) while the assessee's own funds are to the tune of Rs. 21,14,51,971/- as on 31-03-2009 (Rs. 20,97,42,428/- as on 31-03-2008) as borne out from audited financial statements which is sufficient to cover the investments in securities made by the assessee and presumption as contemplated vide decision of Hon'ble Bombay High Court in the case of Reliance Utilities and Power Limited(supra) shall apply in the absence of cogent evidence on record brought by Revenue. The additions made by the A.O. was deleted by the ld. CIT(A) in the appellate order dated 19.12.2012 passed by the learned CIT(A).The assessee had given separate break up of financials of Head Office and factory at Gandhidaham before the AO vide reply dated 08-12-2011 and the investments as reflected are mainly old investments wherein this year it is observed that investment of Rs. 40 lacs was made by the assessee which is held in the form of share application money as at 31-03-2009 in Oriental Power Cables Limited. It is also observed from the financials of the HO that no interest was incurred as expenditure during the preceding year, while in this year the incremental investment is only Rs. 40 lacs in the share application money with Oriental Power Cables Limited for which the assessee has given the details that this investment is made out of interest free funds raised by the company from Sakarwadi Trading Company Private Limited which is placed at paper book

page 79-80 . The assessee has also submitted bank statement to that effect which is placed at paper book page 99. Further, profits of the company before depreciation are to the tune of Rs 59.46 lacs during the year which are also more than sufficient to cover incremental investment of Rs 40 lacs made during the year. It was stated vide reply dated 08-12-2011 before the AO that separate books of accounts have been maintained by the assessee for Head office and factory at Gandhidham and said factory has paid interest for term loan and cash credit facility. Further, the assessee has brought before the AO that the assessee has paid interest on HO account for the first time this year on ICD's raised during the year which were deployed to repay old loans as well to grant interest bearing loans from which interest income of Rs. 27.87 lacs were earned by the assessee . In our considered view, the A.O. has taken a plausible and possible view while framing assessment u/s 143(3) of the Act vide orders dated 21-12-2011 keeping in view the facts and circumstances of the case and after considering the replies of the assessee before him whereby no disallowance was made by the AO u/s 14A of the Act read with Rule 8D(2)(ii) of Income Tax Rules, 1962 of interest expenditure as the assessee has given an explanation to the AO with respect to raising of interest bearing funds and submitted that no investments have been made out of interest bearing funds which explanation was accepted by the AO and is supported by books of accounts . The assessee contentions of not making investments in securities out of borrowed funds is further supported by own funds of the assessee of Rs. 21.14 crores as at 31-03-2009 while investments in securities stood at Rs. 12.31 crores which own funds are much more than the investments and presumption shall apply as contemplated by decision of Hon'ble Bombay High Court in the case of CIT v. Reliance Utilities and Power Ltd., (2009)313 ITR 340(Bom. HC) and HDFC Bank Limited v. DCIT (2016) 383 ITR 529(Bom. HC) in the absence of rebuttal by the Revenue . There is nothing incriminating on record whereby presumption is rebutted by the Revenue. We are of the considered view that invocation of provisions of

section 263 of the Act is not warranted in the instant case as the AO took a plausible and possible view after considering replies of the assessee while framing assessment order u/s 143(3) of the Act which , and keeping in view the decision of the Hon'ble Bombay High Court in the case of CIT v. Reliance Utilities and Power Ltd., (2009)313 ITR 340(Bom. HC) it cannot be said that the said view as taken by the AO was erroneous so far as it is prejudicial to the interest of Revenue to enable the CIT to exercise his extraordinary revisionary powers u/s. 263 of the Act. The assessment order was subject to challenge before the learned CIT(A) who has passed appellate order dated 19-12-2012 whereby the learned CIT(A) deleted the additions made by the AO u/s 14A of the Act read with Rule 8D(2)(iii) of Income Tax Rules, 1962 . The Revenue invoked Section 263 of the Act by issuing notice dated 17-01-2013 u/s 263 of the Act post appellate order passed by the learned CIT(A) on 19-12-2012 which was also on the same issue of disallowance of expenditure under Section 14A of the Act read with Rule 8D of Income Tax Rules, 1962 in relation to earning of income which does not form part of the total income, which was earlier adjudicated by learned CIT(A) vide orders dated 19-12-2012 which in our considered view is not permissible with respect to the same issue of disallowance u/s 14A read with Rule 8D of Income Tax Rules, 1962. The learned counsel for the assessee rightly relied on the decisions/judgment in this regard which are cited in preceding para's . Keeping in view our detailed discussions and reasoning, we hereby order quashing of the revisionary order passed by learned CIT dated 28-03-2014 u/s. 263 of the Act proposing to set aside assessment order dated 21.12.2011 passed by the AO u/s. 143(3) of the Act for making de-novo assessment. We order accordingly.

8. In the result, appeal filed by the assessee in ITA No. 3587/Mum/2014 for the assessment year 2009-10 is allowed.

Order pronounced in the open court on 21st September, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 21-09-2016 को की गई ।

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 21-09-2016

1

व.नि.स./ R.K., Ex. Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "A" Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai