IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH
KOCHI

BEFORE S/SHRI ABRAHAM P GEORGE, AM & GEORGE GEORGE K, JM

ITA No 555/Coch/2015
(Asst Year 2012-13)

Acumen Capital Marketing (I) Ltd 3rd Floor St Reddiar & /sons Bldg Veekshanam /Road Ernakulam	Vs	The Income Tax Officer Ward 1(1), Kochi
(Appellant)		**(Respondent)**

PAN No.	AABCP6449J
Assessee By	Sh P M Veeramani
Revenue By	Sh Shanthom Bose, CIT- DR
Date of Hearing	23rd March 2017
Date of pronouncement	24th March 2017

ORDER

PER GEROGE GEORGE K, JM:

This appeal, at the instance of the assessee, is directed against the CIT's order dated 27th Nov 2015 passed u/s 263 of the I T Act. The relevant assessment year is 2012-13.

2 The grounds raised read as follows:

1. The Order of Principal Commissioner of Income Tax is against facts and law.

2. The Principal Commissioner of Income tax erred in his conclusion that the assessing officer had not examined the issues mentioned in the notice. It was explained in detail in the reply to the notice that each point was examined by the assessing officer and assessing officer has taken one of the possible views and hence action under section 263 was not correct.

3. The assessing officer vide his pre-assessment notice dated 23.1.2015 asquestion no.8, called for the purpose of the bank guarantee and letter from the bank in this

regard. Your appellant vide reply dated 9.2.015 had furnished detailed note on the bank guarantee, along with sanction letter from Federal Bank Ltd. The assessing officer has taken one of the possible view after considering the details furnished by the appellant.

4. Without prejudice to our argument above, a Bank guarantee is a promise from a bank that the liabilities of a debtor will be met in the event that the debtor fails to fulfill the contractual obligations. It is not a borrowing or a debt incurred. It is only a facility extended by the bank for which charges are recovered. The bank has not extended any funds to the appellant while issuing a bank guarantee. Hence, the bank guarantee commission should not be considered as interest on borrowings. Thus there was no error in the assessment order and hence the order under section 263 was not correct.

5. The Rule 8D(iii) requires the value of investment , the income from which is exempt from tax alone to be considered for the disallowance. The sum of Rs.8,94,800 written off during the year is in respect of joint venture in Dubai in Peninsular Middle East DMCC. The income from this investment is not exempt from tax and hence the same need not be considered for disallowance under section 14A read with Rule 8 D. Thus there was no error in the assessment order and hence the order under section 263 was not correct.

6. The appellant had mentioned as a foot note in the statement of total income that no disallowance was made towards leave encashment following the decision of the Jurisdictional Kerala High Court in the case of Hindustan Latex Ltd. The assessing officer has accepted the same while completing the assessment. There is no error in the assessment since the assessing officer has followed the decision of the jurisdictional high court. The assessing officer has taken one of the possible view after considering the details furnished by the appellant and hence the action under section 263 was not warranted.

7. The assessing officer vide his pre-assessment notice dated 23.1.2015 asquestion no.3, called for the details of the loss in trading debited to profit and loss account. Your appellant vide reply dated 9.2.015 had furnished the details called for. The assessing officer has taken one of the possible view after considering the details furnished by the appellant and hence the conclusion of the Principal Commissioner of Income tax that the issue was not examined by the assessing officer is not correct

8. Without prejudice to our grounds above, your appellant is engaged in the business of trading in shares on self account, derivative transactions and share broking activity. The AO treated the aforesaid loss arising from purchase and sale of shares on self account, done on delivery basis, as normal business loss to be set off against other business income i.e. brokerage. The I.T Act, 1961 has been amended by Finance Act, 2005 w.e.f 1.4.2005 and by clause Proviso of sub- Section 5 of Section 43 it has been provided that trading in derivative carried out in the recognized stock exchange should not be considered asspeculative business.

3 Brief stated the facts of the case are as follows:

The assessee is a company engaged in the business of online share trading. For the assessment year 2012-13, the return of income was filed on 23.9.2012. The assessment u/s 143(3) of the Act was completed vide order dated 9.3.2015. Subsequently, notice dated 16.10.2015 was issued by the Commissioner of Income tax u/s 263 of the I T Act. The CIT was of the view that the order passed by the Assessing Officer u/s 143(3) of the Act (order dated 9.3.2015) is erroneous and prejudicial to the interest of the revenue for the following reasons:

i) Bank Guarantee commission to be considered as interest for disallowance u/s 14A :

ii) Investment written off during the year amounting to Rs.8,94,800 was not considered for arriving at disallowance under Rule 8 D(iii)

iii) Provision for Leave encashment amounting to Rs.83,670 not disallowed following Kerala HC decision in the case of Hindustan Latex Ltd

iv) Loss on trading in shares amounting to Rs.21 ,30,564 is not considered as loss from speculation business as required under explanation to section 73.

3.1 The assessee filed reply vide letter dated 16.11.2015 and the assessee's authorized representative appeared before the CIT on various hearing dates and submitted that the proposed revision is bad in law because there is no error in the assessment order warranting interference u/s 263 of the Act. The assessee's authorized representative had raised specific points with regard to each of the reasons stated in the notice issued u/s 263 of the Act to contend that there is no error in the assessment order and the Assessing Officer had taken a conscious decision to allow the deductions.

4 The CIT rejected the contentions raised by the assessee and passed order u/s 263 of the Act. The CIT, set aside the assessment order dated 9.3.2015 and directed the Assessing Officer to pass fresh assessment order, after examining the points of error mentioned by the CIT in the impugned assessment order. The relevant finding of the CIT, reads as follows:

> *"7. ..... I have considered the contentions of the assessee. On examination of the records it can be seen that the Assessing Officer has not examined all the above points while allowing the claim of the assessee. On examination of issues will attract provisions of sec u/s 263 of the I T Act.*
>
> *8 I, therefore, set aside the assessment order dated 9.3.2015 on all the issues discussed above. The Assessing Officer is directed to examine these issues after bringing into record all material facts and pass a speaking order. Needless to say, that the Assessing Officer will give ample opportunity to the assessee before passing an order."*

5 Aggrieved by the order of the CIT, passed u/s 263 of the Act, the assessee is in appeal before us. The ld counsel for the assessee reiterated the submissions made before the CIT. It was contended that each reasons pointed out by the CIT invoking his revisionary jurisdiction, is wrong and there is no error in the assessment order, warranting interference by CIT u/s 263 of the Act. Therefore, the order passed u/s 263 is to be quashed. For the above proposition, the ld counsel relied on the following orders of the Tribunal:

i) ITO vs Snow Tex reinvestment Ltd 129 DTR (Trib) 203
ii) Lohia Securities Ltd vs DCIT 157 ITD 265
iii) Fiduciary shares & Stock Pvt Ltd Vs ACIT – ITA no.321/Mum/2013
iv) Sri Sahul Hammed vs ITO 498/Coch/2015

5.1 The ld DR, on the other hand, submitted that the order of the assessment is bad in law since there is no proper enquiries conducted by the Assessing Officer with regard

to the points noted by the CIT in his revisionary order passed u/s 263 of the Act. Therefore, it was submitted by the ld DR that the order passed by the Assessing Officer is amenable to interference u/s 263 of the Act. For the above proposition, the ld DR relied on the judgment of the Hon'ble Apex Court in the case of Toyota Motor Corporation vs CIT reported in 306 ITR 52.

6 We have heard the rival submissions and perused the material on record. As mentioned earlier, the CIT had listed out four reasons to invoke his revisionary jurisdictional u/s 263 of the Act. For ready reference, we reproduce the four reasons as under:

i) Bank Guarantee commission to be considered as interest for disallowance u/s 14A :

ii) Investment written off during the year amounting to Rs.8,94,800 was not considered for arriving at disallowance under Rule 8 D(iii)

iii) Provision for Leave encashment amounting to Rs.83,670 not disallowed following Kerala HC decision in the case of Hindustan Latex Ltd

iv) Loss on trading in shares amounting to Rs.21,30,564 is not considered as loss from speculation business as required under explanation to section 73.

6.1 Now, let us examine whether the above four reasons stated by the CIT is a good ground to hold that the assessment order passed u/ 143(3) of the Act dated 9.3.2015 is an order erroneous and prejudicial to the interest of the revenue.

6.2 <u>Bank Guarantee commission to be considered as interest for disallowance u/s 14A:</u>

Section 2(28A) of the I T Act defines “interest” which reads as follows:

> *“interest’ means interest in any manner n respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized.”*

6.3 A bank guarantee is a promise from a bank that the liabilities of a debtor will be met in the event that the debtor fails to fulfill the contractual obligations. It is not a borrowing or a debt incurred. It is only a facility extended by the bank for which charges are recovered. Hence, the bank guarantee commission cannot be considered as interest on borrowing. The board notification no. 56/2012 dated 31.12.2012 had clearly held that bank guarantee commission paid to a bank need not suffer deduction of tax at source under Chapter XV of the I T Act. Moreover, the Assessing Officer, in the course of assessment proceedings has called for details of bank guarantee commission paid. The assessee in its reply dated 9.2.2015 had submitted the details called for by the Assessing Officer and on examination of the same no disallowance was made. It also to be noted that the Assessing Officer, in the assessment had made disallowance by invoking provision u/s 14A of the Act. Therefore, according to us, the Assessing Officer has taken a conscious decision not disallow bank guarantee commission paid by the assessee by invoking section 14A of the Act. For the aforesaid reasons, we are of the view that the bank guarantee commission paid by the assessee is not in the nature of interest expenditure warranting disallowance u/s 14A r.w.r 8D(2)(ii).

6.4 Investment written off during the year amounting to Rs. 8,94,800/- was not considered for arriving at disallowance u/r 8D(iii)

Rules 8D(iii) of the I T Rules read as under:

> *"An amount equal to one half per cent of the average of the value of investment, income from which does not or shall not form part of the total income, as appearing in the balance sheet of the assessee, on the first day and the last day f the previous year."*

The rule requires the value of investment, the income from which is exempt from tax alone to be considered for the disallowance. The sum of Rs. 8,94,800/- written off during the year is in respect of joint venture in Dubai in Peninsular Middle East DMCC. The Income from this investment is not exempt from tax and hence the same need not be considered for disallowance u/s 14A r.w.r 8D. Therefore, it cannot be said that there is error in the assessment order.

6.5 **Provision for leave encashment amounting to Rs.83,670/-**

The assessee in the statement of total income had mentioned in the footnote that no disallowance was made towards leave encashment, following the decision of the jurisdictional Kerala High Court in the case of Hindustan Latex Ltd. The Assessing Officer has accepted the same while completing the assessment. There is no error in the assessment since the Assessing Officer has followed the judgment of the jurisdictional High Court.

6.6 **Loss on trading in shares amounting to Rs. 21,30,564 is not considered as loss from speculation business as required under explanation to section 73**

The brief fact in relation to the above issue are as follows:

The assessee is engaged in the business of trading in shares on self account, derivatives transactions and share broking activity. The Assessing Officer treated the aforesaid loss arising from purchase and sale of share on self account, done on delivery basis, as normal business loss to be set off against other business income i.e brokerage. The IT Act 1961 has been amended by Finance Act 2005 w.e.f 1.4.2005 and by clause Proviso of sub. Sec 5 of section 43 it has been provided that trading in derivative carried out in the recognized stock exchange should not be considered as speculative business. The assessee, in the assessment proceedings, vide its reply dated 9.2.2015 has answered in detail the loss in trading, scrip wise profit and loss etc., (details are furnished from pages 38 to 47 of the paper book filed by the assessee). The AO during the course of assessment proceedings had examined the evidence furnished and had concluded the assessment. On examination of record, it is clear that loss on trading in shares amounting to Rs. 21,30,564/- cannot be from speculative business and there is no error in the Assessment order to the above extent.

6.7 Section 263 is attracted only if order of assessing officer is erroneous in so far as it is prejudicial to the interest of the revenue. Thus, if one of the twin conditions namely; (i) the assessment order is erroneous and (ii) prejudicial to the interest of revenue, is not satisfied, the CIT does not have power to exercise his revisionary

powers u/s 263 of the Act. In the instant case, as mentioned earlier, on examination of facts, we find there is no error in the assessment order for the CIT to invoke his powers u/s 263 of the Act, hence, we quash the same. It is ordered accordingly.

4 In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on this 24th day of March 2017.

Sd/- Sd/-

(ABRAHAM P GEORGE)	**(GEORGE GEORGE K)**
Accountant Member	Judicial Member

Cochin: Dated 24th March 2017
Raj*

Copy to:

1. Appellant –
2. Respondent –
3. CIT(A)
4. CIT,
5. DR
6. Guard File

By order

Assistant Registrar
ITAT, COCHIN