

IN THE INCOME TAX APPELLATE TRIBUNAL
Jodhpur Bench

Before Shri B.R. Baskaran (AM) & Shri Sandeep Gosain (JM)

I.T.A. No. 49/Jodh/2022 (A.Y. 2017-18)

Satya Narayan Dhoot C/o Rajendra Jain Advocate 106, Akshay Deep Complex 5 th B Road, Sardarpura Jodhpur, Rajasthan-342 001. PAN : AANPD4945L (Appellant)	Vs.	PCIT-1 Jodhpur (Respondent)
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Assessee by	Shri Rajendra Jain
Department by	Smt. Alka Rajvanshi Jain
Date of Hearing	03.11.2022
Date of Pronouncement	17 .01.2023

O R D E R

Per B.R.Baskaran (AM) :-

The assessee has filed this appeal challenging the revision order dated 29-03-2022 passed by Ld PCIT-1, Jodhpur and it relates to the assessment year 2017-18. The assessee is challenging the validity of initiation of revision proceedings in the revision order passed by Ld PCIT.

2. The facts relating to the case are stated in brief. The return of income filed by the assessee for Assessment Year 2017-18 was completed by the AO u/s 143(3) of the Act on 09-12-2019. On examination of assessment record, the Ld PCIT took the view that the AO has not properly examined the following issues:-

(a) AO has allowed deduction u/s 80IA of the Act without setting off brought forward unabsorbed depreciation of wind mill as required u/s 80IA(5) of the Act.

(b) AO has allowed brought forward losses without proper details of unabsorbed loss brought forward from AY 15-16 to AY 16-17.

(c) AO has allowed set off of unabsorbed depreciation of Rs.71,31,099/- pertaining to M-77 unit, which was not eligible for set off, since this unit commenced operation from current year, i.e., AY 2017-18 only.

(d) The AO has allowed benefit of exemption u/s sec. 10(38) on the gains arising on sale of a security named "JM Arbitrage Annual Bonus Option". The AO has not examined how the sale of security was exempted.

(e) The AO has not examined the applicability of sec. 14A of the Act on exempt income. In this year, the assessee has claimed interest expenses of Rs.14,47,032/- on bank loan. The claim of interest was directly related to investment which might result into earning the exempt income. This amount should have been disallowed by the AO as per CBDT Circular No.5/2014 dated 11.2.2014.

The Ld A.R submitted that the above said issues pertaining to following three issues:-

- (i) Deduction allowed u/s 80IA
- (ii) Exemption granted u/s 10(38) of the Act
- (iii) Disallowance of expenses u/s 14A of the Act.

Even though the Ld D.R submitted that the Ld PCIT has taken one more issue, yet we confine ourselves to the above said three issues only, since the argument was advanced on the above said three issues only.

3. The first issue relates to the deduction allowed u/s 80IA of the Act. The assessee has operated two wind mills named as M-77 and DLG-95. The assessee claimed deduction u/s 80IA of the Act in respect of the above said two units. The assessee has started claiming deduction u/s 80IA of the Act for M-77 unit taking AY 2017-18 as the initial year. The Ld PCIT noticed that the assessee has got brought forward unabsorbed depreciation of Rs.71.31 lakhs and Rs.415.02 lakhs relating to AY 2015-16 and 2016-17 respectively. According to Ld PCIT, the above said brought forward unabsorbed depreciation should have been deducted from the profits generated from M-77 before computing deduction u/s 80IA of the Act. Since it was not so set off, it has rendered the assessment order to be erroneous and prejudicial to the interests of revenue.

4. The Ld A.R submitted that the assessee has taken the initial year for claiming deduction u/s 80IA as AY 2017-18. Hence the loss incurred in any of the earlier years is not required to be adjusted as assumed by the Ld PCIT. Accordingly, he submitted that the view so taken by Ld PCIT is not in accordance with law and hence, on this ground alone, the impugned revision order passed by Ld PCIT is liable to be dismissed. He submitted that the above said view pressed by him would get support from the decision rendered by Ahmedabad bench of ITAT in the case of DCIT vs. Chhotabhai Jethabhai Patel & Co. (ITA No.567/Ahd/2017). He further submitted that the AO has made necessary enquiries with regard to the claim made u/s 80IA of the Act and accordingly allowed the claim. Accordingly, he submitted that the view taken by AO to allow the deduction u/s 80IA without adjusting brought forward loss/depreciation pertaining to the prior to the initial year is one of the possible views and hence the Ld PCIT was not justified in initiating revision proceedings.

5. The Ld D.R, on the contrary, supported the order passed by Ld PCIT. We have heard rival contentions and perused the record. The scope of revision proceedings initiated under section 263 of the Act was examined by Hon'ble Bombay High Court, in the case of Grasim Industries Ltd. V CIT (321 ITR 92) by taking into account the law laid down by the Hon'ble Supreme Court. The relevant observations 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.”

The principles laid down by the courts are that the Learned CIT cannot invoke his powers of revision under section 263 if the Assessing Officer has conducted enquiries and applied his mind and has taken a possible view of the matter. If there was any enquiry and a possible view is taken, it would not give occasion to the Commissioner to pass orders under section 263 of the Act, merely because he has got a different opinion in the matter. The consideration of the Commissioner as to whether an order is erroneous in so far it is prejudicial to the interests of Revenue must be based on materials on record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. The Commissioner cannot initiate proceedings with a view to start fishing and roving enquiries in matters or orders which are already concluded.

6. In the instant case, we notice that the method of claiming deduction u/s 80IA without adjusting losses of the years prior to the initial year would get support from the decision rendered by Ahmedabad bench of ITAT in the case of DCIT vs. Chhotabhai Jethabhai Patel & Co. (supra), wherein it was held as under:-

8. We have carefully considered the rival submissions. The short issue that arises for consideration in the present case is whether the assessee is entitled in law for claim of deduction of income arising from eligible business during the year under s. 80IA(1) r/w.s. 80IA(4) of the Act without making adjustments towards losses arising in the earlier assessment years prior to exercise of option of 'initial assessment year' with reference to the eligible business. Hence, the central question for consideration is whether the losses arising in eligible business, if any, prior to exercise of option towards 'initial assessment year' is required to be artificially carried forward and notionally adjusted from the profits arising from eligible business in the 'initial assessment year' and subsequent assessment years for the purposes of Section 80IA(5) of the Act.

9. The manner of determination of quantum of deduction as provided under s.80IA(5) of the Act has since been **clarified by the CBDT Circular No.1 of 2016 dated 15.02.2016** and is devoid of controversy any more. Having regard to the wide ranging controversies, the CBDT circular has given categorical interpretation on exercise of option of choosing 'initial assessment year' referred to sub-section (5) of Section 80IA of the Act in favour of the assessee. The CBDT has also clarified that embargo placed under s.80IA(5) of the Act for quantification of deduction of profits and gains of an eligible business would apply from the assessment years immediately succeeding 'initial assessment years' only. Having regard to express elucidation by CBDT, the CIT(A), in our view, has rightly decided the issue of manner of computation of quantum of deduction under s.80IA(5) of the Act in favour of the assessee. The assessee, thus, while determining the eligible profit, is not required to notionally reduce losses arising from eligible business in the earlier years already set off against other business of assessee in terms of Sections 70, 71 & 72 of the Act prior to exercise of option of 'initial assessment year'. The losses arising in 'eligible business', if any, subsequent to earmarking of 'initial assessment year' shall however continue to be governed by embargo placed in Section 80IA(5) of the Act.

10. Hence, in the light of above discussion and in consonance with the decision of the co-ordinate bench in AY 2013-14 as well as CBDT Circular referred above, we see no merit in the grievance of the Revenue."

It can be noticed that the CBDT has clarified in the Circular referred above that the losses arising in 'eligible business', if any, subsequent to earmarking

of 'initial assessment year' shall however continue to be governed by embargo placed in [Section 80IA\(5\)](#) of the Act, i.e., the losses incurred in the years prior to the initial year need not be adjusted while computing the deduction u/s 80IA in the initial year. Hence the view expressed by Ld PCIT goes against the Circular of CBDT referred above. There should not be any doubt that the circulars issued by CBDT are binding on the tax authorities. In the instant case, it can be noticed that the view expressed by Ld PCIT is contrary to the Circular issued by CBDT. On the contrary, the deduction allowed by the AO is in accordance with the view expressed in the Circular issued by the CBDT.

7. Accordingly, we are of the opinion that the view expressed by Ld PCIT with regard to the computation of deduction u/s 80IA cannot be sustained. Accordingly, we quash the impugned revision order passed by Ld PCIT on this issue.

8. The next issue referred to by Ld PCIT relates to the exemption allowed to the assessee u/s 10(38) of the Act in respect of gains arising on sale of JM Arbitrage Advantage Annual Bonus Plan. The case of Ld PCIT is that the AO has allowed exemption without examining the above said claim. Before Ld PCIT, the assessee submitted that the above said plan is equity oriented mutual fund unit plan and the sale has suffered STT and hence the gains arising on such sale is exempt u/s 10(38) of the Act. Before us, the Ld A.R submitted that the AO has made due enquiries with regard to the above said claim. Accordingly, he contended that the Ld PCIT has initiated revision proceedings on this issue on surmises only.

9. We heard Ld D.R on this issue and perused the record. We notice that the AO has issued notice dated 20-06-2019 u/s 142(1) of the Act, wherein he has called for details of exempt income and also the details of expenses incurred in relation to the above said exempt income. If so claimed, the justification for claiming it was also called for. In question no.12, the AO has asked for justification for various exemptions and deduction claimed in the

return of income including the profit on sale of investments, being securities chargeable to STT Rs.5.77 crores. In reply to thereto, the assessee has furnished the break-up details of exempt income, which included exemption of long term capital gain claimed u/s 10(38) of the Act to the tune of Rs.1.42 crores (as against Rs.5.77 crores mentioned by AO). Be that as it may, before Ld PCIT, the assessee has also submitted that the JM Arbitrage advantage fund is a equity oriented fund and the sale transactions have suffered STT, which is the condition for claiming exemption u/s 10(38) of the Act. The said submission has not been examined by Ld PCIT. Accordingly, we are of the view that the Ld PCIT was not justified in initiating revision proceedings on this issue. Accordingly, we quash his order passed on this issue.

10. The last issue relates to the disallowance to be made u/s 14A of the Act. The case of the Ld PCIT is that the assessee has incurred interest expenses and it should have been disallowed u/s 14A of the Act. In the notice issued u/s 142(1), referred above, the AO has asked break-up details of long term investments, the expenses incurred in relation to exempt income, details of availability of non-interest bearing funds. Further, vide notice u/s 142(1) dated 09-08-2019, the AO has asked clarification on the note given by tax auditor as under on the expenses related to exempt income:-

“Separate records are not maintained through which we can identify the items related to expenditure.”

Hence, the AO has asked explanations on the above said observation. The assessee replied that it has not earned any expenditure relating to exempt income.

11. With regard to the interest expenses, the Ld A.R submitted that the own funds available with the assessee is far more than the value of investments and hence no portion of interest expenses is liable to be disallowed. A perusal of the Balance sheet would show that the assessee is

having capital balance of Rs.229.34 crores, as against the investments of around Rs.130 crores. Hence no part of interest expenses is liable to be disallowed in terms of the decision rendered by Hon'ble Bombay High Court in the case of HDFC Bank Ltd (366 ITR 505)(Bom).

12. The foregoing discussions would show that the AO has made enquiries during the course of assessment proceedings with regard to the disallowance to be made u/s 14A of the Act. Further, since the assessee is having enough own funds, no disallowance out of interest expenses is also called for. On these reasoning, the order passed by Ld PCIT on this issue is also liable to be quashed.

13. In the result, the appeal of the assessee is allowed in respect of above said three issues.

Pronounced on 17-01-2023

Sd/-
(SANDEEP GOSAIN)
Judicial Member

Sd/-
(B.R. BASAKARAN)
Accountant Member

Rajasthan; Dated : 17/01/2023

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Rajasthan

PS

S.No	Description	Date	Intls	
1	Prepared by BRB	4.1.23		
2	Draft dictated on	4.1.23		Sr.P.S.
3	Draft placed before author	4.1.23		Sr.P.S.
4	Draft proposed & placed before the second Member			JM/AM
5	Draft discussed/approved by second Member			JM/AM
6	Approved Draft comes to the Sr.P.S./PS			Sr.P.S.
7	Kept for pronouncement on	17 .1.23		Sr. P.S.
8	File sent to the Bench Clerk	17 .1.23		Sr.P.S.
9	Date on which file goes to the Head Clerk			
10	Date of Dispatch of order			