

1 TXA NO.42-2016
IN THE HIGH COURT OF BOMBAY AT GOA
TAX APPEAL NO. 42 OF 2016

The Pr. Commissioner of Income Tax,
Panaji – Goa. ... Appellant

Versus

Zuari Maroc Phosphates Ltd.
Jaikisaan Bhawan, Zuari Nagar,
Goa-403726. ... Respondent

Ms. Amira Razaq, Standing Counsel for the Appellant.
Mr. Salil Kapoor along with Ms. Priyanka Kamat, Advocates for the
Respondent.

Coram:- M. S. SONAK &
DAMA SESHADRI NAIDU, JJ.

Reserved on:- 7th January 2021

Pronounced on:- 14th January 2021

JUDGMENT (Per M. S. Sonak, J.):

Heard Ms. Amira Razaq for the Appellant and Mr. Salil Kapoor
who appears along with Ms. Priyanka Kamat for the Respondent.

2. This Appeal was admitted on 15.11.2016 on the following
substantial questions of law:-

(I) Whether the learned Income Tax Appellate Tribunal (ITAT) is justified in law in allowing the appeal filed by the assessee when the twin conditions for invoking the power under Section 263 had been fully satisfied, there being failure on the part of Assessing Officer in not considering the issue of legality of expenses/expenditure allowable as deduction or whether there was at all any business income after investigating the facts ?

(II) Whether in facts and circumstances of the case tribunal was justified in law, in passing impugned order thereby holding that order passed by the Assessing Officer is not erroneous and prejudicial to the interest of the revenue and accordingly was justified to quash the order passed under Section 263 of the I.T. Act ?

3. The assessee filed return of income in the Assessment Year 2009-10 declaring a total loss of ₹1,78,57,950/-. The case was selected for scrutiny under CASS and accordingly, notices were issued to the assessee. The Assessing Officer (AO), vide assessment order dated 30.09.2011 added an amount of ₹2,31,010/- by assessing the same as income from other sources to the total income of the assessee. However, the AO, accepted that the assessee had incurred total business income (losses) to the extent of ₹1,78,57,950/-, which was eventually allowed to be carried forward for the next assessment year.

4. The Commissioner of Income Tax, invoked his revisional jurisdiction under Section 263 of the Income Tax Act, 1961 (said Act) and by his order dated 06.03.2014 set aside the aforesaid assessment order dated 30.09.2011 and directed the AO to pass a fresh order after granting the assessee reasonable opportunity of being heard. The

Commissioner also directed the AO to verify the claim of the assessee in respect of the allowability of the expenditure and carry forward of the losses to the extent of ₹1,78,57,950/- in terms of the law.

5. The assessee appealed to the Income Tax Appellate Tribunal (ITAT) which, by order dated 11.02.2015, set aside the Commissioner's order dated 06.03.2014. Hence the present appeal by the respondent on the aforesaid substantial questions of law.

6. Ms. Razaq, the learned counsel for the respondent submitted that in this case the twin conditions of the AO's order being erroneous and prejudicial to the interest of the respondent were satisfied and therefore, there was no legal bar to the invocation of revisional jurisdiction by the Commissioner. She submits that the record very clearly disclosed that the assessee had neither carried out any business during the relevant assessment year nor had it charged any fees from its subsidiary for technical or management services allegedly rendered during the relevant assessment year. She submits that the AO himself pointed out the error in his order dated 30.09.2011 and the Commissioner, upon independent application of mind was also satisfied with the existence of such error. She points out that on account of the erroneous view of the AO, the assessee was incorrectly permitted to carry forward losses of ₹1,78,57,950/- to the next assessment year and thereby avoid payment of tax to the extent of almost ₹60,69,917/-. She submits that in this case an audit objection

was raised and therefore, despite the tax effect being less than ₹1 Crore, the respondent, was justified in pursuing the present appeal before this Court. She relied upon *Malabar Industrial Co. Ltd. v. Commissioner of Income Tax, Kerala State – 2000-(243)-ITR-83 (SC)*, *Commissioner of Income Tax v. Amitabh Bachchan – (2016) 69 taxmann.com 170 (SC)* and *Daniel Merchants P. Ltd. & Anr. v. Income Tax Officer & Anr. - SLP (C) No.23976/2017*, in support of her submissions.

7. Mr. Salil Kapoor, the learned counsel for the respondent submitted that there was no dispute that the assessee was engaged to carry business as an investment company and to acquire, hold, or otherwise deal in shares, stocks, debentures, bonds, and other securities. Besides, the assessee was also providing technical and strategic management services to its subsidiary M/s. Paradeep Phosphates Ltd. He, therefore, submits that there was no basis to hold that the assessee had not undertaken any business during the relevant assessment year.

8. Mr. Kapoor submits that the findings of fact recorded by the AO were in no manner perverse. Similarly, the view taken by the AO was entirely correct or in any case eminently plausible. He also relied upon *Malabar Industrial Co. Ltd. (supra)* and *CIT V. Max India Ltd. - (295) ITR 282 (SC)* to submit that where two views are possible and the AO has taken the view favourable to the assessee, the same

cannot be interfered with, in the exercise of revisional jurisdiction under Section 263 of the said Act.

9. Mr. Kapoor submits that since the order of the AO was not at all erroneous, one of the two conditions necessary for the exercise of revisional jurisdiction under Section 263 of the said Act was not fulfilled. Further, he submits that every loss of the Revenue as a consequence of an order of the AO cannot be treated as prejudicial to the interest of the Revenue particularly where the AO has adopted a permissible and a plausible view. He once again relied upon *Malabar Industrial Co. Ltd. (supra)* and *Max India Ltd. (supra)* in support of his submissions.

10. Finally, Mr. Kapoor submits that in this case, the Commissioner has not recorded any firm finding that the order of the AO was erroneous but has merely observed that the order of the AO was “*prima facie erroneous*”. He submits that until and unless the Commissioner was satisfied that the order of the AO was indeed erroneous, there was no question of setting aside the same by invoking the revisional powers under Section 263 of the said Act. He submits that in any case, the Commissioner was duty-bound to himself hold an inquiry to find out whether the losses claimed by the assessee were indeed incurred by the assessee during the relevant assessment year and the matter could not have simply being remanded by the AO for reconsideration. He relies on *CIT v. Gabriel India Ltd. - 1993-*

(203) ITR 108 (Bom) and PCIT v. Delhi Airport Metro Express P. Ltd. - ITA No.705/2017 in support of this contention. Mr. Kapoor submits that for all the aforesaid reasons this appeal is liable to be dismissed.

11. The rival contentions now fall for our determination.

12. The record, in this case, indicates that the assessee claimed to have earned an amount of ₹2,31,010/- on account of interest on fixed deposits and it was the case of the assessee that this was its business income. Further, the assessee also claimed business expenses to the tune of ₹2,84,09,850/- as against the business income of ₹2,31,010/- for the relevant assessment year. This included the salary paid to the directors of the subsidiary company to the extent of ₹1,34,07,740/- and exchange losses of ₹1,03,20,890/-.

13. Now the AO in his assessment order dated 30.09.2011 has held that there was no nexus between this interest income of ₹2,31,010/- and the so-called business activities of the assessee. On this basis, the AO directed that this income of ₹2,31,010/- be treated not as business income but as income from other sources, and the expenses claimed on such interest income came to be disallowed by invoking the provisions of Section 57 of the said Act.

14. The assessment order dated 30.09.2011 then refers to the

explanation offered by the assessee in its order dated 19.08.2011 and then proceeds to simply state as follows in paragraph 4.2 of its order dated 30.09.2011:-

*“4.2 The explanation filed by the assessee has been carefully perused. **It may be true that the assessee may have to incur certain expenditure which may be relevant to keep the company in operation.** However, those expenditures are relating to its business activity and the same cannot be claimed out of the income from other sources. As per section 57 of the I. T. Act, only such expenditure which are expended wholly and exclusively for the purpose of earning of such income can be allowed as deduction. The expenses claimed by the assessee out of the interest income are not expended wholly and exclusively for the purpose of earning such income. Therefore, the same cannot be allowed as deduction from the income from other sources.”*

[Emphasis supplied]

15. The above-emboldened portion, is perhaps, the only portion in the assessment order dated 30.09.2011, which suggests that the AO has accepted the version of the assessee that during the relevant assessment year, it incurred business expenses to the tune of ₹2,84,09,850/- and suffered losses to the tune of ₹1,78,57,950/-. According to us, this is indicative of non-application of mind on the part of the AO particularly because the record, as was observed by the Commissioner in his order dated 18.02.2014, did indicate that the assessee had not charged any fees whatsoever from M/s. Paradeep Phosphates Ltd. for any alleged technical or management services

rendered by the assessee to it. The assessee claimed to have earned a business income of only ₹2,31,010/- as against business expenditure of ₹2,84,09,850/- incurred by it during the relevant assessment year for earning such a paltry income. Besides, this income of ₹2,31,010/- was nothing but interest on certain fixed deposits and even the AO recorded a finding that this income had no nexus whatsoever with the business of the assessee.

16. According to us, it is not sufficient that the AO merely seeks an explanation from the assessee but further, the AO must apply his mind to such an explanation. If the assessment order dated 30.09.2011 is perused, then, all that transpires is that the AO has generally observed that it may be true that the assessee may have to incur certain expenditure which may be relevant to keep the company in operation.

17. As noted earlier, this type of reasoning is indicative of non-application of mind. It is also indicative of the circumstance that the AO has ignored the material on record or failed to inquire into the explanation furnished by the assessee in its letter dated 19.08.2011. Even going by the restrictive parameters of revisional jurisdiction under Section 263 of the said Act, in the facts of the present case, we feel that the twin conditions i.e. about the order of the AO being erroneous and prejudicial to the interest of the Revenue were satisfied and there was no jurisdictional infirmity in the exercise of revisional jurisdiction by the Commissioner.

18. In *Malabar Industrial Co. Ltd. (supra)*, the Hon'ble Supreme Court has held that though the revisional jurisdiction cannot be exercised to correct each and every type of mistake or error committed by the AO, an incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall the orders which are made by the AO without application of mind. The Hon'ble Supreme Court did not accept the view that no revisional jurisdiction could be exercised unless the order of the AO suffered from some grievous error that might set a bad trend or a pattern for similar assessments. The Hon'ble Supreme Court held that such interpretation was too narrow to merit acceptance and the Act schemed to levy and collect tax in accordance with the provisions of the Act and if due to an erroneous order of the AO, the Revenue is losing tax lawfully payable by a person, then, it will be certainly prejudicial to the Revenue.

19. In *Malabar Industrial Co. Ltd. (supra)*, the Hon'ble Supreme Court has held that the record made it evident that the assessee had stopped agricultural operation in November 1982 and the receipt under consideration did not relate to any agricultural operation. Therefore, the revisional jurisdiction was quite correctly invoked by the Commissioner in the said case.

20. In the present case as well the AO had himself held that the income of ₹2,31,010/- had no nexus with the business of the assessee.

The record did *prima facie* suggest that during the relevant assessment year there was no business undertaken by the assessee though, it had claimed business expenses to the tune of ₹2,84,09,850/- and on which basis, sought to carry forward losses to the extent of ₹1,78,57,950/-. Records very clearly indicated that the assessee had not charged any fees whatsoever to M/s. Paradeep Phosphates Ltd. for alleged technical or management services rendered by it during the relevant assessment year. Therefore, without a thorough inquiry and merely based on the vague premise that the assessee “*may have to incur certain expenses which may be relevant to keep the company in operation*”, the AO was not at all justified in allowing the assessee to carry forward losses to the extent of ₹1,78,57,950/-.

21. According to us, this is not a case where the Commissioner has not concluded that the order of the AO in the aforesaid circumstance was not erroneous or that it was not prejudicial to the interest of the Revenue. The only reason the Commissioner has used the expression “*prima facie*” in paragraphs 7 and 10 of the impugned order is that the Commissioner, intended to offer the assessee a reasonable opportunity of being heard by the AO, in the course of a detailed inquiry accompanied by due application of mind by the AO, in pursuance of a remand order. This is also not a case where the Commissioner failed to undertake inquiry in the course of the exercise of revisional jurisdiction. It is only in pursuance to such inquiry that the Commissioner recorded a categorical finding that the assessee had not

even claimed any fees from M/s. Paradeep Phosphates Ltd. in respect of any alleged technical or management services rendered by it.

22. Though, there can be no dispute about the propositions laid down in the various rulings relied upon by Mr. Kapoor, we feel that such propositions are not attracted to the facts and circumstances of the present case. This is not a case of some plausible view but this is a case where the decision was a result of non-application of mind to the materials on record. In similar circumstances, in the case of *Amitabh Bachchan (supra)*, the Hon'ble Supreme Court, after considering the law laid down in *Malabar Industrial Co. Ltd. (supra)* and *Max India Ltd. (supra)*, held that revisional jurisdiction was quite correctly invoked by the Commissioner.

23. In *Gabriel India Ltd. (supra)*, this Court has held that the decision of the AO cannot be regarded as erroneous simply because the AO did not make an elaborate discussion in the order. In our case, as noted earlier, there is no discussion whatsoever, much less any inadequate discussion. Moreover, in *Gabriel India Ltd. (supra)*, the Commissioner after initiating proceedings for revision, could not himself say that the allowance of the claim of the Assessee was erroneous and that the expenditure was not revenue expenditure, but an expenditure of capital nature. It is in these circumstances that the exercise of revision jurisdiction was interfered with by this Court.

24. The principles in *Max India Ltd. (supra)* and *Design Automation Engineers (Supra)* are of no assistance to the Assessee because this is not a case of interference with a plausible view of the AO based on some different opinion held by the Commissioner.

25. In *K.A. Ramaswamy Chettiar and anr. vs. CIT – 220 ITR 657 (Mad)*, it was held that when an officer is expected to make inquiry of a particular item of income and if he does not make any inquiry as expected, that would be a ground to interfere with the order passed by the officer, since such an order passed by the Officer is erroneous and prejudicial to the interests of the Revenue.

26. In *Rampyari Devi Sarogi v. CIT – 67 ITR 84 (SC)*, the Hon'ble Supreme Court has held that the Commissioner can regard the AO's order as erroneous on the ground, that in the circumstances of the case, the AO should have made further inquiries before accepting the statement made by the Assessee in his return. Besides, the Hon'ble Supreme Court, in the facts of the said case, held that the Assessee had not suffered in any way from the failure of the Commissioner to indicate results of inquiries since, the Assessee would have full opportunity of showing the AO whether he has jurisdiction or not, and whether the income assessed in the assessment orders which were originally passed was correct or not.

27. In several decisions, it has been held that it is incumbent on the

AO to investigate the facts stated in the return when the circumstance would make such an inquiry prudent and when the word 'erroneous' in Section 263 includes failure to make an inquiry, the order becomes erroneous when such an inquiry had been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct. *Duggal and Co. vs. Commissioner of Income Tax – 220 ITR 456 (Delhi); CIT vs. Pushpa Devi – 164 ITR 639 (Pat.) and CIT vs. Pushpa Devi – 173 ITR 445 (Pat.)*.

28. In *Amitabh Bachchan (supra)*, the assessee had initially claimed additional expenses of 30% of the gross professional receipts (₹3.17 Crores). The AO required the assessee to file requisite details. At that stage, the assessee resisted furnishing details by submitting that such details related to his security and any disclosure might be detrimental to his security. Then, by letter dated 13.03.2004, the assessee, asserted that his claim was allowable but since it will not be feasible to substantiate the same, such claim may be treated as withdrawn. Thereafter, a show-cause notice was issued to the assessee under Section 69C of the said Act as to why these additional expenses claimed not to be treated as an unexplained expenditure. Such withdrawal was accepted by the AO and the proceedings under Section 69C were ordered to be closed. The CIT, in such circumstances, exercised revisional jurisdiction under Section 263 of the said Act but the High Court, set aside the Commissioner's order on the basis that

the view taken by the AO was a possible view and revisional jurisdiction ought not to have been exercised merely because there was another possible view of the matter.

29. The Hon'ble Supreme Court set aside the High Court's order by holding that there was nothing wrong in the exercise of revisional powers particularly because the CIT felt that the matter needed further investigation. Such investigation was necessary because initially, the assessee had himself made such a claim but thereafter sought to withdraw the same without any substantiation. The Hon'ble Supreme Court held that making a claim which would *prima facie* disclose that the expenses in respect of which deduction has been claimed had been incurred and thereafter abandoning/withdrawing the same gives rise to the necessity of further inquiry in the interest of the Revenue. The notice under Section 69C of the said Act could not have been simply dropped on the ground that the claim has been withdrawn. The Hon'ble Supreme Court then held that the CIT was perfectly justified in exercising its revisional jurisdiction and such exercise ought not to have been interfered with by the High Court.

30. In the present case as well, taking into consideration the reasoning of the CIT, we feel that the ITAT was not justified in interfering with the CIT's order, since, the twin conditions prescribed under Section 263 of the said Act were fulfilled. Besides, the CIT, by the impugned order, had quite fairly, granted the assessee an

opportunity of being heard whilst directing the AO to verify the claim of the assessee in respect of the allowability of the expenditure and carry forward of the loss of ₹1,78,57,950/- in accordance with law. In similar circumstances the Hon'ble Supreme Court, in the case of *Daniel Merchants P. Ltd. (supra)*, upheld that order of the Commissioner which had directed the AO to carry a thorough and detailed inquiry.

31. For all the aforesaid reasons we set aside the ITAT's order dated 11.02.2015 and answer the substantial questions of law as framed, in favour of the Revenue and against the assessee. However, we make it clear that the observations in this Judgment and Order need not influence the AO in making a fresh order after giving the assessee a reasonable opportunity of being heard. The AO will have to decide the matter on its own merits and in accordance with the law.

32. The appeal is allowed in the aforesaid terms. There shall be no order as to costs.

DAMA SESHADRI NAIDU, J.

M. S. SONAK, J.