

आयकर अपीलिय अधिकरण, 'डी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री जी. मंजुनाथ, लेखा सदस्य के समक्ष
BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.: **1788/CHNY/2018**
निर्धारण वर्ष / Assessment Year: 2013-14

**M/s Shiva Distilleries Pvt.
Ltd.,**
No.1212, Trichy Road,
Coimbatore – 641 018.

The ACIT,
v. Corporate Circle – 2,
Income Tax Office,
63, Race Course Road,
Coimbatore – 641 018.

PAN: AACCS7199B

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by
प्रत्यर्थी की ओर से/Respondent by

: Shri R. Vijayaraghavan, Advocate
: Shri Abani Kantha Nayak, CIT

सुनवाई की तारीख/Date of Hearing : 11.11.2020

घोषणा की तारीख/Date of Pronouncement : 28.12.2020

आदेश /O R D E R

Per G. MANJUNATHA, AM:

This appeal filed by the assessee is directed against the order of the Principal Commissioner of Income Tax - 1, Coimbatore passed u/s.263 of the Income Tax Act, 1961 (hereinafter 'the Act'), dated 26.03.2018 and pertains to the assessment year 2013-14.

2. The assessee has raised the following grounds of appeal:-

1. *The order of the Principal Commissioner of Income Tax - 1 issued u/s 263 is opposed to law, facts and circumstances of the case' 2) The Principal commissioner of Income Tax has erred in passing order under section 263 for revision of assessment order u/s 143(3) for the A.Y 2013-14 to recompute the disallowance under Section 144 r.w.r 8D(2).*

a.. *The Appellant had preferred an appeal before CIT(A) on 29.03.2016 against the disallowance under section 144 as per the assessment order under section 143(3) and the appeal was decided in favour of the revenue. Further the appellant preferred an appeal before honorable ITAT on 01.06.2017 and it is pending till date.*

b. *The Principal Commissioner of Income Tax had passed the order under section 263 in relation to the disallowance under section 144 mentioned in the assessment order which is in appeal before the honorable ITAT without taking into account the relevant provision of Law which is stated below*

Clause c to Explanation 1 of section 263 (1) *"where any order referred to in this subsection and passed by the Assessing officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Principal commissioner or] commissioner under this subsection shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal."*

c. *Hence, the powers u/s 263 cannot be invoked when assessment order is subject to appeal because appellate order stands merged with the assessment order when the issues raised in the order u/s 263 deals with the issue subject to appeal.*

d. *The Learned PCIT has failed to appreciate the important principle that once the issue that has been considered for order u/s 263 has had already been dealt with by the Appellate Authority then the appellate order gets merged with the order of the Assessing Officer and consequently the administrative commissioner cannot invoke the provisions of section 263 and this has been the view expressed by the High Court of Bombay in the case of CIT vs K. sera Sera Productions Limited (2015) 374 ITR 503 (Bombay).*

e. *Reliance has also been placed on the following judicial pronouncements:*

I. *Commissioner of Income Tax vs Farida Prime Tannery (259 ITR 342), where it has been held that the issues on which the appellate authority had already deliberated, the matter could not be reopened by way of revision.*

- II. The same view has been held in the case of Fortaleza developers vs. commissioner of Income-Tax-15 (ITA No.2648/MUM/2012), and*
- III. Ranga Jewellers vs Additional commissioner of Income Tax (328 ITR 148)*

f. Further, the appellant had replied to the notice under section 263 mentioning of the details of the appeal pending before the ITAT regarding the disallowance under section 14A but the Principal Commissioner of income tax passed the order under section 263 without considering the above fact which is not legally tenable.

g. For these and such other grounds that may be adduced at the time of hearing. It is prayed that the order u/s263 passed by the Principal Commissioner of Income Tax may kindly be set aside.

3. The brief facts of the case are that the assessee company is primarily engaged in the business of manufacturing of Indian made foreign liquor, filed its return of income for the assessment year 2013-14 on 29.11.2013 declaring total income of Rs.Nil under normal provisions and book profit of Rs. (-)57,76,370/- under the provisions of Section 115JB of the act. The assessment for the impugned assessment year has been completed u/s.143(3) of the Act on 01.03.2016 and determined total income of Rs.Nil under normal provisions and book profit of Rs.(-)28,50,552/- under the provisions of Section 115JB of the Act by making addition towards disallowance u/s.14A of the Act for Rs.29,25,820/-.

4. The case has been subsequently taken up for revision u/s.263 of the Act by the Principal Commissioner of Income Tax-1 (PCIT), Coimbatore and accordingly issued show cause notice dated

12.03.2018 and called upon the assessee as to why the assessment order shall not be revised under the provisions of Section 263 of the Act for the reasons stated in the said show cause notice. The Id.PCIT in the said show cause notice has taken up the issue of disallowance of expenditure incurred in relation of exempt income u/s.14A of the Act and was of the opinion that although the AO has disallowed expenditure in relation to exempt income u/s.14A r.w.rule 8D(2)(iii), however failed to consider disallowance of interest expenditure under Rule 8D2(ii) although the assessee has incurred huge financial cost for the relevant year which rendered the assessment order is erroneous in so far as it is prejudicial to the interest of the Revenue. In response to show cause notice, the assessee submitted that the assessment order passed by the AO is neither erroneous nor prejudicial to the interest of the Revenue in so far as the issue of disallowance of expenditure u/s.14A r.w.rule 8D(ii) because the AO has considered the issue of disallowance and has made disallowance of Rs.27,39,148/- under Rule 8D(2)(iii) at the rate of 0.5% on average investments, however not considered interest expenditure for the reasons that the assessee has not utilized interest bearing funds for making investments in investments which yield exempt income. Further, the assessee has challenged the findings of the Id.AO before the appellate authority

on the issue and the appeal filed by the assessee is pending for adjudication. Therefore, the PCIT cannot take up the case for revision, the issue which is subject matter of appeal proceedings before the CIT(A). The PCIT after considering the submissions of the assessee and by relying upon certain judicial precedents including decision of the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd., vs. CIT was of the opinion that as could be seen from the assessment records, the AO while determining the aggregate amount of disallowance has taken Nil as per Rule 8D(2)(ii) even though the assessee has incurred huge interest expenses of Rs.5,41,70,506/- by incorrect application of law which rendered the assessment order erroneous in so far as it is prejudicial to the interest of the Revenue. In view of the above, set aside the assessment order passed by the AO u/s.143(3) of the Act dated 01.03.2016 and directed the AO to redo the assessment afresh considering the issues discussed. Aggrieved by the PCIT order, the assessee is in appeal before us.

5. The Id.AR for the assessee submitted that the Id.PCIT has erred in invoking revisional jurisdiction u/s.263 of the Act, even though the order passed by the AO is neither erroneous nor prejudicial to the interest of the Revenue. The Id.AR further

submitted that the issue of disallowance of expenditure u/s.14A of the Act was subject matter of consideration from the AO during the assessment proceedings and the assessee has challenged the findings of the AO before the Id.CIT(A) against the disallowance u/s.14A of the Act and the appeal was decided in favour of the Revenue. Further, the assessee preferred second appeal before ITAT on 01.06.2017, which is pending for disposal. It is further submitted that as per clause 'c' to Explanation 1 of Section 263(1) of the Act, it is very clear that the PCIT has power u/s.263 of the Act to revise an assessment order on such matters as had not been considered and decided in such appeal. If any issue is subject matter of appeal before the CIT(A), then the CIT(A) will have jurisdiction over such issue because the assessment order stands merged with the appellate order and the CIT(A) shall exercise his powers on the issue including enhancement of assessment and hence PCIT does not have any power to revise the assessment order on such issues. In this regard, the Id.AR relied upon the decision of the Hon'ble Delhi High Court in the case of CIT vs. Sera Sera Productions Limited, (2015) 374 ITR 503.

6. The Id.DR on the other hand submitted that the facts brought out by the Id.PCIT clearly indicate that the AO has not applied his

mind to the facts of the case in right perspective of law while disallowing expenses u/s.14A of the Act, which is evident from the fact that the AO has failed to compute disallowance of interest expenditure under Rule 8D(2)(ii) of the Act, even though the assessee has incurred huge financial expenditure for the relevant financial year, which rendered the assessment order erroneous in so far as it is prejudicial to the interest of the Revenue. The Id.PCIT after considering relevant facts has rightly exercised his powers u/s.263 of the Act to revise the assessment order and hence there is no reason to interfere in the findings of the Id.PCIT.

7. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below along with case law cited by the Id.counsel for the assessee. The facts borne out from the records clearly indicate that the AO has considered disallowance of expenditure u/s.14A of the Act and has computed total disallowance of Rs.29,37,148/- under Rule 8D(2)(iii) at the rate of 0.5% on average investments. It is also an admitted fact that the assessee has challenged the additions made by the AO towards disallowance of expenditure u/s.14A of the Act before the first appellate authority and was unsuccessful because the Id.CIT(A) has upheld the disallowance computed by the Id.AO.

The assessee has preferred further appeal before the ITAT on the same issue which was pending for disposal. In this factual background, if we examine the provisions of Section 263 of the Act, we find that as per clause (c) to explanation (1) of Section 263(1), *“where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Principal Commissioner of Income Tax under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal”*. A plain reading of Clause (c) to Explanation (1), makes it very clear that the PCIT shall have powers u/s.263 of the Act to examine the issues which had not been subject matter of appeal before the appellate authority. In other words, if any issue is a subject matter of appeal before the appellate authority, then the PCIT cannot exercise his powers on such issues which are subject matter of appeal before the appellate authority. In this case on perusal of facts available on record, we find that the issue of disallowance of expenditure u/s.14A of the Act is a subject matter of appeal before the appellate authority and further once an issue is before the appellate authority then the assessment order merged with the appellate order and the appellate authority shall have all powers

including enhancement of income. Therefore, when the Appellate Commissioner is having power to examine the issue, then the PCIT cannot have parallel jurisdiction to examine the same issue u/s. 263 proceedings, because if we allow the PCIT to have jurisdiction on said issue then it leads to multiple proceedings which is not the intention of the Legislature. This view is fortified by the decision of the Hon'ble High Court of Bombay in the case of CIT vs. Sera Sera Productions Limited, *supra*, where the High Court clearly held that once the issue that has been considered for order u/s.263 as had already been dealt with by the appellate authority then the appellate order gets merged with the order of the Assessing Officer and consequently the Administrative Commissioner cannot invoke the revisional jurisdiction u/s.263 of the Act.

8. In this view of the matter and respectfully following the decision of the Hon'ble High Court of Bombay in the case of CIT vs. Sera Sera Productions Limited, we are of the considered view that the powers exercised by the PCIT u/s.263 of the Act on the issue of disallowance of expenditure u/s.14A of the Act is contrary to the provisions of Clause (c) to Explanation (1) of Section 263 of the Act and hence we are of the considered view that the PCIT has erred in revising the assessment order u/s.263 of the Act. We, therefore,

quash the order passed by the PCIT u/s.263 of the Act and restore the assessment order passed by the AO u/s.143(3) of the Act.

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

Order pronounced on 28th December, 2020 at Chennai.

Sd/-

(महावीर सिंह)

(MAHAVIR SINGH)

उपाध्यक्ष /VICE PRESIDENT

Sd/-

(जी. मंजुनाथ)

(G. MANJUNATHA)

लेखा सदस्य /ACCOUNTANT MEMBER

चेन्नई/Chennai,

दिनांक/Dated, the 28th December, 2020

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|------------------------|--------------------------|------------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त /CIT | 5. विभागीय प्रतिनिधि/DR | 6. गार्ड फाईल/GF. |