

**IN THE INCOME TAX APPELLATE TRIBUNAL “E”
BENCH, MUMBAI**

**BEFORE SHRI C. N. PRASAD, JM &
SHRI S. RIFAUR RAHMAN, AM**

आयकरअपीलसं./ I.T.A. No. 3424/Mum/2019
(निर्धारणवर्ष / Assessment Year: 2013-14)

Tata Motors Ltd. Bombay House, 24, Homi Mody Street, Hutatma Chowk, Mumbai-400 001	बनाम/ Vs.	DCIT LTU-2, 29 th floor, Centre 1, World Trade Centre, Cuffe Parade, Mumbai-400 005
स्थायीलेखासं./जीआइआरसं./PAN No. AAECs8479E		
(अपीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri Raja Vora & Shri Nikhil Tiwari, ARs.
प्रत्यर्थीकीओरसे/ Respondentby	:	Shri R. Manjunatha Swamy, DR
सुनवाईकीतारीख/ Date of Hearing	:	08.01.2020
घोषणाकीतारीख / Date of Pronouncement	:	06.03.2020

आदेश / O R D E R

Per S. Rifaur Rahman, Accountant Member:

The present Appeal has been filed by the assessee against the order of Ld. Commissioner of Income Tax (LTU) in short referred as ‘Ld. CIT’, Mumbai, dated 25.03.19 for Assessment Year (in short AY) 2013-14.

2. The brief facts of the case are, assessee is a company engaged in the business of manufacturing of chassis and vehicles for transport of goods and passengers including motor car and parts thereof. The assessee filed its return of income on 29.11.13 declaring current year loss of Rs. 43,52,6863,114/- under the normal provisions of the Act and income of Rs. 49,03,02,282/- under section 115JB of the Act. Further the case was selected for scrutiny under CASS and various statutory notices were issued and served on the assessee. The assessment was completed u/s 143(3) r.w.s 144C(3) of the Act on 25.01.17 by determining the total loss of Rs. 36,96,63,03,000/- under normal provisions of the Act and book profit of Rs. 3,90,02,85,750/- u/s 115JB of the Act. Subsequently, Ld. CIT invoked the provisions of section 263 of the Act and issued a notice with the observation that assessee has received dividend from specified foreign company as defined u/s 115BBD of Rs. 14,21,97,83,025/-. Ld. CIT further observed that as per the provision of section 115BBD, the dividend amount needed to be taxed separately @ 15% which was not done by AO resulting in short levy of tax and corresponding interest u/s 234B of the Act. Further, interest of Rs. 25,25,44,648/- u/s 244A

already provided and MAT credit of Rs. 71,72,17,877/- also needed to be withdrawn. Accordingly, assessee was asked to submit the submission in this regard and in response, assessee filed a detail written submission on this matter and we are reproducing only relevant paragraphs:-

3. Exercise of powers u/s. 263 of the Act

3.1. Section 263 of the Act as amended by Finance Act, 2015, reads as follows.....

3.2. The Company respectfully submits before your honour that based on the reasons tabulated below, the conditions set out in Explanation 2 to sub-section 1 of section 263 of the Act are not satisfied in order to invoke the revision of the above mentioned order:

Condition	Reasons
a) the order is passed without making inquiries or verification which should have been made	During the assessment proceedings, the Company had submitted its return of income together with the computation of income and notes thereto giving the details of the claim of various expenses including details of dividend income received from the specified foreign companies. These details were examined by the

	<i>Ld. AO and inquiries were made vide Notice u/s 142(1) dated 17.10.2016. The Ld. AO called upon the assessee to furnish details in respect of all dividends received vide Point No. 4 of the Notice dated 17.10.2016 (refer Annexure 3 above). The Company furnished the details during the course of assessment hearings vide its letter dated 24.10.2016 (refer Annexure 4 above) which were examined and verified by the Id. AO.</i>
<i>b) the order is passed allowing any relief without Inquiring into the claim</i>	<i>the Company Had furnished the details in respect of the issue for which revision is proposed in its computation of income and the Notes thereof. Based on the Computation and the Notes, the id. AO had asked the Company to furnish the further details of dividend received and the Company had duly submitted the said details.</i>
<i>c) the order has not been made in accordance, w.l.th any order, direction or instruction issued by the C3&T under Section 119 of the Act</i>	<i>The order has not been made in violation of any order, direction or instruction issued by the CBDT under Section 119 of the Act.</i>

d) the. order has not been passed in accordance with any decision which is prejudicial to the assesses, rendered by the jurisdictional High Court or Supreme. Court in the case of the assesses, or any other person	The order has not been made disregarding any decision of the jurisdictional Bombay High Court or the Supreme Court, Farther, the Order is made in conformity with the jurisdictional Han'ble Bombay High Court decision in the case of British Insulated Calenders Ltd. (202 ITR 354) (refer Exhibit H of Case Laws Compilation)
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3,3. It is respectfully submitted that the revisionary power u/s. 263 of the Act can be exercised only if the following two conditions are satisfied simultaneously':

a) the order passed by the Assessing Officer must be an erroneous one: and

b) the. order must be prejudicial to the interests of the Revenue,

• The Supreme Court in the case of *Malabar Industrial Co. Ltd.* (243 ITR 83) (copy enclosed as Exhibit A of the Case Laws Compilation) held that:

“A bare reading of this provision makes it clear that the pre-requisite to the exercise of jurisdiction by the Commissioner suomoto under it, is that the order of the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the

Revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous.' and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent— if the order of the. Income Tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue — recourse cannot tie had to 5. 263(1) of the act."

Hence, it has to be ensured that both the conditions Have been satisfied before initiating the revision proceedings. The satisfaction must be one, which is objectively justifiable and cannot be the mere ipse

3.4, Meaning of the term/phrase "erroneous" and 'prejudicial to the interest of the revenue" An order can be termed as erroneous, if it: is not in accordance with law. The Himachat Pradesh High Court in Himachat Pradesh Financial Corpn (186 Taxman 105) (copy enclosed as Exhibit B of the Case Laws Compilation) held that on incorrect assumption of fact or an incorrect application of law would satisfy the requirement of the order being erroneous.

» In Malabar Industrial Co Ltd. (supra), the Hon'ble. Supreme Court has observed that orders passed without applying the principle of natural justice or without application of mind³ could be considered as erroneous.

- The Guwahati High Court in Smt. Lila Choudhary [ZOOB] (167 Taxman 1) (coy enclosed as Exhibit C of the Case Laws Compilation) held that an erroneous order would be an order which suffers from a patent lack of jurisdiction. Prejudicial to the interest of the revenue would mean an erroneous order which goes against the interests of revenue. Therefore, both the*

conditions must pre-exist to exercise revision u/S: 263 of the Act.

The Hon'ble jurisdictional. Bombay High Court in Gabriel India ltd. [1993] (203 ITR 108) (copy enclosed its Exhibit 0 of the Case Laws Compilation) held that in cases where the assessing officer passes an order after considering the documents and information submitted to him but without making elaborate discussion in the order, that does not make such an order passed by the AO as erroneous. In the above case, the order prejudicial to the interest of revenue but not erroneous and hence revision was held to be invalid.

- *The Hon'ble jurisdictional Bombay High Court in CIT vrs. Development Credit Bank Ltd (323 ITR 206) (emphasized as Exhibit E of the. Case Laws Compilation) held that when the assessment has been framed by the assessing officer after considering the. information and explanations furnished to him. the assessment cannot be set aside on such issues by exercising power under section 26.3 of the Act.*

- *The Delhi High Court in the case of Vodafone Essar South Ltd. [2012] (28 taxmann.com 273) (enclosed as. Exhibit F of the Case Laws Compilation) held that where the assesses was specifically queried regarding the nature and character of the claim, lack of any discussion on this in the assessment order cannot lead to the assumption that the assessing officer did not apply his mind to come to a conclusion that the claims are. correct. In such circumstances, the supervisory or revisionary powers under section 263. of the Act cannot be wildly exercised*

3.5: *.In view of the above judicial precedents, the. Company respectfully submits that the order sought to be revised by your*

Honour is not 'erroneous'. An 'erroneous' order would be an order where there, is a wrong application of law or an incorrect assumption of fact- In the assessing officer's order dated 25:01:2017, there, is no incorrect application of law, nor is there any incorrect assumption of fact: From the aforesaid details of the statutory documents and the proceedings u/s 143(3) of the: Act it is evidently dear that alt the information and documents were forming port of the record of the Ld. AO and considering the. fact that the company was specifically queried on dividend income, the id. AO has applied his mind and framed his opinion, the impugned order passed by the Ld. AO cannot be held to be erroneous in nature.

AS mentioned above, the Supreme Court in Malabar Industrial Co lid. (supra) has observed that orders passed without applying the principle of natural justice 'or without application of mind⁴ could be considered as erroneous. However, where detailed submissions have been called for and examined while passing the order, such order should not be. considered as erroneous.

Further, we wish to submit that the assessment order cannot be said to be erroneous, where the id, AO has taken one of the permissible views. In this regard we place our reliance on judgement of the Hon'ble Supreme Court in Greenworld Corporation (314 ITR 81) (enclosed as Exhibit 6 of the Case Laws Compilation) wherein it has held that Section. 263 of the Act cannot be invoked merely because another, view of a subject matter is possible.

In view of the above decisions and observations of the Hon'ble Supreme Court, it is submitted that the order of the assessing officer dated 25.01.2017 is not 'erroneous'.

Prejudicial to Interest of the Revenue

3:6. Without prejudice to the above, we would like to state that it is also in the interest of the Revenue to permit setoff of Business Loss against the foreign dividend as the Unabsorbed Depreciation and the Business Loss if not allowed for set-off would result in the same being carried forward for set-off against income of subsequent years on which maximum marginal rate of 30%- is applicable.

In the assessment order u/s 143(3) r.w.s 144C(_3) dated 25.01.2017, further rectified vide Order u/s 154 dated.16:06.2017, the Income under normal was assessed under following Heads

<i>Sr. No.</i>	<i>Heads of Income</i>	<i>Aa per order dated 25.01.17 further rectified vide order dated 16.06.17</i>
<i>1</i>	<i>Profits and Gains of Business or Profession</i>	<i>(50,17,44,76,970)</i>
<i>2</i>	<i>Income from House Property</i>	<i>4,83,07,330</i>
<i>3</i>	<i>Capital Gains (STCG).</i>	<i>43,91,49,810</i>
<i>4</i>	<i>Income from Other Sources (including foreign dividend income of Rs. 1422.11 crores)</i>	<i>14,94,20,70,830</i>

		(34,74,49,49,000)
	Total income	(34,74,49,49,000)

3.7. As per Section 115BBD of the Act dividend received from specified foreign companies is taxable at specified rate of 15% (plus applicable surcharge and cess). In the case of the assessee basis point no. 5.6 above, the assessed business loss for the current year has been set-off against the dividend income received from the specified foreign companies.

The effect of the aforesaid set-off is that the assessee company has foregone the carry forward of Unabsorbed Depreciation and Business Loss which would have been available for set-off against Business Profits in future which would be taxable at maximum marginal rate of 30% (plus applicable surcharge and cess) against foreign dividend income which are taxable at 15% (plus applicable surcharge and cess).

In view of the above, it is submitted that the Learned Assessing Officer has correctly allowed the set-off u/s 71 of the Act. If set-off of Business Loss for the year against Foreign Dividend Income is denied u/s 71 of the Act, by separately taxing Foreign dividend @ 15%, this would result in Loss to

the Revenue as the corresponding Business Loss for the year is being allowed to be carried forward

for set off in future which will result in tax credit at maximum marginal rate of 30% .

Considering the above., it is respectfully submitted to your Honour that the manner of taxability of dividend received from

specified foreign companies as referred in section 115BBD of the Act has been duly considered by the Ld. AO in the assessment order dated 25.01.2017 and the position adopted by AO on taxability in the Order u/s 143(3) rws 144C (3) dated 25.01.2017 is neither erroneous nor prejudicial to the interest of the revenue.

We accordingly humbly request your Honour to kindly drop the proceedings initiated u/s 263 of the Act.

Without prejudice and in alternative, in the ensuing paras our submissions on merits of the issue is also furnished for your Honor's kind consideration.

Submissions on merits

4. Taxability u/s 115BBD of dividend received from specified foreign companies separately @ 15% without set-off of business loss

4.1. In connection with Para 3 of the captioned notice, we have to submit that during the earlier year, the assessee Company has earned dividend income from specified foreign companies amounting to Rs. 1421,97,83,025/- from M/s TML Holdings Pte Ltd., Singapore and Rs. 13,31,028/- from Nita Co. Ltd., Bangladesh. The assessee Company was holding more than 26% in both the foreign companies and hence the aggregate amount of dividend income received from specified foreign companies as referred in section 115BBD of the Act is Rs. 1422,11,14,053/- . We would like to submit to your Honour that in the captioned notice dated 15.03.2019 the amount proposed to be considered u/s 115BBD of the Act for separately being taxed at 15% is Rs. 1421,97,83,025/- as against Rs. 1422,11,14,053/-.

4.2. The assessee company has in its computation of Total Income offered this overseas Dividend income aggregating to Rs. 14,22,11,14,053/- under 'Income from Other Sources'. The said dividend income has been assessed vide the Order dated 25.01.2017 also under 'Income from Other Sources'. The Income/ (Loss) computed under various heads of Income is tabulated herein below:

Sr. No.	Heads of Income	As per Return	As per Order dated 25.01.2017 further rectified vide Order dated 16.06.2017
	Profits and Gains of Business or Profession	(54,82,38,69,494)	(50,17,44,76,970)
	Income from House Property	4,83,07,330	4,83,07,330
	Capital Gains (STCG)	43,91,49,810	43,91,49,810
	Income from Other Sources (including foreign dividend income of Rs. 1422.11 crores)	14,94.20.70,830	14,94.20.70,830
	Gross Total Income	(39,39,43,41,524)	(34,74,49,49,000)
	Total Income	(39,39.43,41.524	(34,74,49,49,000

4.3. There being Total Loss, the assesses Company has not claimed any deduction under Chapter VI-A of the Act. The total assessed Loss of Rs. 34,74,49,49,000/- comprises of the following'-

a. Assessed Unabsorbed Depreciation - Rs. 13,60,51,30,779/-

fa. Assessed Unabsorbed Business Loss to be carry forward- Rs. 21,13,98,18,221/-

I. Set-off of loss i/A. 71 falling under Chapter VI of the Act is a mandatory provision and in the absence of any restriction under the Act, the same cannot be ignored

4.4. In this regard, at the outset, we would like to invite your Honour's kind attention to the provisions of section 71 of the Act, based on which the Company had computed the Income for the year and filed Return of Income. Section 71 of the Act as relevant for the year under reference reads as under:-

"71. (1) Where in respect of any assessment year the net result of the computation under any head of income, other than "Capital gains", is a loss and the assessee has no income under the head "Capital gains", he shall, subject to the provisions of this Chapter, be entitled to have the amount of such loss set off against his income, if any, assessable for that assessment year under any other head. (2) Where in respect of any assessment year, the net result of the computation under any head of income, other than "Capital gains", is a loss and the assessee has income assessable under the head "Capital gains", such loss may, subject to the provisions of this Chapter, be set off against his income, if any, assessable for that assessment year under any head of income including the head "Capital gains" (whether relating to short-term capital assets or any other capital assets).

(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), where in respect of any assessment year, the net

result of the computation under the head "Profits and gains of business or profession" is a loss and the assessee has income assessable under the head "Salaries", the assessee shall not be entitled to have such loss set off against such income.

(3) Where in respect of any assessment year, the net result of the computation under the head "Capital gains" is a loss and the assessee has income assessable under any other head of income, the assessee shall not be entitled to have such loss set off against income under the other head.

(4) Where the net result of the computation under the head "Income from house property" is a loss, in respect of the assessment years commencing on the 1st day of April, 1995 and the 1st day of April, 1996, such loss shall be first set off under sub-sections (1) and (2) and thereafter the loss referred to in section 71A shall be set off in the relevant assessment year in accordance with the provisions of that section. "

4.5. In view of the above provisions, your Honour will appreciate that except when there is a loss under the head 'Capital Gains' as per sub-section (3) above and in case assessee has income under the head 'Salaries' as per sub-section (2A) above, Income under any head, say Income from House Property, Income from Capital Gains and Income from Other Sources, such income are. entitled for being set-off against the loss under the head "Profits and Gains of Business or Profession "

4.6. During the year, the Company in its return of income accordingly, set-off the loss of Rs. 5,482.39 crores against Income from House Property - Rs.4.83 crores, Capital Gains - Rs.43.92 crores and Income from Other Sources Rs.1,494.21

crores, thereby resulting in Total Loss of Rs.3,939.43 crores which comprises of Unabsorbed Depreciation - Rs.1,424.18 crores and Unabsorbed Business Loss -Rs. 2,215. 26 crores; which is carried forward for set-off against Other Income / Business Profits in future. In the assessment order dated 25.01.2017 the same has been examined and after giving effect to the additions and disallowances the loss for the year was assessed at Rs. 3,474.49 crores which comprises of Unabsorbed depreciation - Rs. 1,360.51 crores and Unabsorbed Business Loss - Rs. 2,113.98 crores

4.7. It is submitted that even 'Long term Capital Gains' is taxable at the rate of 20% or 10%, as the case may be, whereas business income is taxable at marginal rate of 30%, however, still set-off of such loss is permissible as per the provisions of section 71 of the Act.

4.8. In this regard, we would like to draw your Honour's kind attention to the decision of the Hon'ble Bombay High Court in the case of British Insulated Calenders' Ltd. (202 ITR 354) (refer Exhibit H of Case Laws Compilation'), wherein it has been held that though dividend income was taxable at concessional rate of tax, the assessee is liable to first set off its loss under one head of income against income from other head of income u/s. 71 of the Act and only the balance loss available after set-off is allowed to be carried forward in subsequent years.

4.9. Thus, your Honour would appreciate that the law is very clear on the point that income taxable at specified rate must first be set-off against income/ (loss) taxable at higher rate. It is also a settled position that any income taxable at specified rate has

to be set-off against Income / (loss) under any head taxable at normal rate unless there is an express provision, otherwise, u/s. 71 of the Act.

4.10. We, therefore, humbly request your Honour to kindly permit the set-off of Business Loss for the year against Foreign Dividend that is offered for tax by the assessee under the head 'Income from Other Sources' as provided u/s. 71 of the Act.

4.11. We have in the foregoing paras discussed at length the provisions of section 71 of the Act, which provides for set-off of Business Loss against any head of Income except 'Salaries'.

4.12. As regards the applicability of the provisions of section 115BBD of the Act, we would at the outset first like to reproduce the provisions of section, which reads as under:

"115BBD. (1) *Where the total income of an assessee, being an Indian company, includes any income by way of dividends declared, distributed or paid by a specified foreign company, the income-tax payable shall be the aggregate of—*

(a) the amount of income-tax calculated on the income by way of such dividends, at the rate of fifteen per cent; and

(b) the amount of income-tax with which the assessee, would have been chargeable had its total income been reduced by the aforesaid income by way of dividends.

(2) Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance, shall be allowed to the assessee under any provision of this Act in computing its income by way of dividends referred to in sub-section (1).

(3) In this section,—

(i) "dividends" shall have the same meaning as is given to "dividend" in clause (22) of section 2 but shall not include sub-clause (e) thereof;

(ii) "specified foreign company" means a foreign company in which the Indian company holds twenty-six per cent or more in nominal value of the equity share capital of the company."

4.13. The above section clearly provides that where the total income of the assessee includes income by way of dividend declared, distributed or paid by a specified foreign company, then such dividend income shall be. subject to tax at 15% (plus applicable surcharge, and cess) and balance part of total income., i.e. as reduced by above foreign dividend income would be subjected to the prevailing rate of tax had there been no income by way of foreign dividend income.

4.14. The term 'total income' is defined in section 2(25) of the Act, which reads as under

"Total income" means the total amount of income referred to in section 5, computed in the manner laid down in this Act'
[Emphasis supplied]"

From the above, your Honour will appreciate that here the reference to section 5 is only for inclusion of income from whatever source derived which is received or deemed to be received, accrued or arises or is deemed to accrue or arise or accrues outside India for a person who is resident/ non-resident, as the case may be.

4.15. Apart from reference to Income u/s. 5 of the Act (as discussed above), total income t's required to be computed in the manner laid down in this Act. It thus, follows that income under various heads included in total income are required to be computed independently, as per the provisions guiding the same as per Chapter IV of the Act, which deals with Computation of Total Income and then the aggregation of income. "The Set-off and carry forward of losses are required to be computed as provided under Chapter VI of the Act before setting off any deductions from the total income as provided under Chapter VI-A of the Act.

4.16. In this regard, we would like to draw your Honour's kind attention to the decision of the Hon'ble Kolkata Tribunal in the case of Industrial Investment Bank of India Limited v. DCTT (1416/Kol/2014) refer Exhibit I of Case. Laws Compilation) where it has been held that Chapter V deals with inclusion in the total income of an assessee and Chapter VI deals with aggregation of Total Income and set-off or carry forward of losses. Dividend income is chargeable to tax u/s. 56 in Chapter V of the Act, subject to the aggregation of the total income and set off or carry forward of losses as per Chapter VI of the Act. Section 71 falling under Chapter VI of the Act provides for set-off of Business Loss against Income from Other Sources including dividend income. Section 71 of the Act does not provide any restriction on set-off of business loss against such dividend income taxable u/s 56 of the Act.

4.17. In the case of the assessee company, the total assessed income being loss of Rs.3,474.49 crores was rightly computed by the Ld. AO as per the provisions of the Act taking into consideration the provisions of Chapter I to VI of the Act. There

being a total loss, the assessee company did not lodge any claim under the provisions of Chapter VI-A of the Act.

4.18. Basis the provisions of section 115BBD of the Act, as the total income in the case of the assessee, as computed in the manner laid down under the Act and as defined u/s. 2(45) of the Act is a loss, the question of applicability of specified tax rate of 15% to foreign dividend income, does not arise.

II. Express provision for restriction for set-off of loss wherever intended has been specifically provided in the Act. In the absence of any express provision u/s. 115BBD of the Act, the set-off of loss against the Dividend Income referred u/s 115BBD is allowable as per law.

4.19. It is submitted that sub-section (2) of section 115BBD begins with a non-obstante clause stating that no deduction in respect of any expenditure or allowance shall be allowed to the assessee in computing its income by way of dividend, which means that no deduction towards any expenditure or allowance in relation to that dividend will be allowed.

4.20 It is submitted that the Company has not claimed any expenditure or allowance in computing its Foreign dividend income offered to tax under the head "Income from Other Sources "which is set-off against "Profits and Gains of Business or Profession" as provided u/s. 71 of the Act.

4.21. In light of the above discussion on the provisions of the Act, we submit that sub-section (2) to section 115BBC) of the Act only provides that no deduction of any expenditure or allowance shall be allowed while computing Foreign Dividend

Income and working out tax thereon. While it does not prohibit set-off of losses against the said dividend income.

4.22. The provisions of sub-section (2) of section 115BBD of the Act expressly deals with non-allowability of deduction of any 'expenditure' or 'allowance' against dividend income, however the Act does not prohibit set-off of losses against the said dividend income. It is settled legal position that the term 'expenditure or 'allowance' is different from loss' and it cannot be used interchangeably.

4.23. In this regard, we would like to draw your Honour's kind attention to the decision of the Hon'ble Supreme Court in the case of CTT v. Waif art Share & Stock Brokers (P.) Ltd. (326 ITR 1)(refer Exhibit J of Case Laws Compilation) where the Apex Court while adjudicating on the issue relating to whether the loss arising in the course of dividend stripping transaction prior to 01.04.2002 was disallowable on the ground that it was artificial and not business transaction dealt at great, length on the terms 'expenditure' and 'loss' while touching upon the provisions of section 14A and section 94(7) of the Act. The Apex Court categorically held that the two terms are conceptually different and cannot be used interchangeably.

4.24. Without prejudice to the above, we would like to submit that had the Legislature intended that no set-off of loss would be allowed against the foreign dividend income then it would have expressly provided so in the said section itself, as is provided in section 115BBE of the Act (inserted by the Finance Act 2012, w.e.f. 01.04.2013) and section 115SBD/4 of the Act (inserted by the Finance Act 2016. w.e.f. 01.04.2017).

4.25. On taxation of income at specified rate, as referred to in section 115BBE and section HSBBD A of the Act, we would like to further elaborate as under:

Section 115BBE of the Act which deals with specified rate of tax on income referred to in section 68, 69, 69A, 69B, 69C or 69D was inserted vide Finance Act, 2012 (w.e.f. 01.04.2013) which read as under:

" 115BBE. 1(1) Where, the total income of an assessee,—

(a) includes any income referred to in section 68, section 69, section 69A, section 69D, section 69C or section 69B and reflected in the return of income furnished under section 139; or

(b) determined by the Assessing Officer includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, if such income is not covered under clause (a),

the income-tax payable shall be the aggregate of—

(i) the amount of income-tax calculated on the income referred to in clause (a) and clause (b), at the rate of sixty per cent; and

(ii) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (i).]

(2) Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause (a) of sub-section (1)."

4.26. The Legislature observed that there was uncertainty prevailing on the issue of set-off of losses against income referred in section 115BBE of the Act and the judicial forums and courts in some cases took a view that losses shall not be allowed to be set-off against income referred in section 115BBE of the Act. Also the then prevailing language of the above section did not convey the desired intention, resulting in the matter being litigated, as can be seen in the following judicial pronouncements:

ACIT v. MA. Rah/7 Agencies (ITA No. 4413/M/2014) (Mum. TTAT); > ACIT v. Sanjay Bairathi Gems Ltd. (166 ITO 445) (Jaipur ITAT); Satish Kumar Goyal v. JCIT (ITA No. 143/Ag/2014)

4.27 In order to avoid unnecessary litigation, sub-section (2) of section 115BBE was amended by Taxation Laws (Second Amendment) Act, 2016 (w.e.f. 01.04.2017) as under:

(2) Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance or set-off of any loss (emphasis supplied) shall be allowed to the assesses under any provision of this Act in computing his income, referred to in clause (a) of sub-section (1)."

4.28 From the above, your Honour will observe that the Legislature suitably amended the above section in order to categorically not allow deduction in respect of set off of any loss while computing the income referred to in the above sections and this amendment was brought into effect prospectively.

4.29. brewing analogy from the above section which was introduced and subsequently amended suitably to set at rest the

litigation arising therefrom, had the Legislature intended not to allow deduction for set-off of losses, it could very well have amended sub-section (2) of section 115BBD of the Act prospectively as was done in the case of section 115BBE of the Act.

4.30. The Legislature based on experiences gathered from past enactments with regard to 'Chapter XII - Determination of Tax in certain Special Cases', while introducing section 115&BDA of the Act, which deals with tax on certain dividends received from domestic companies inserted by Finance Act 2.016 (w.e.f 01.04.2017), ensured that sub-section (2) which deals with non-availability of any deduction, expressly provided for non deduction of set-off of loss in computing the income by way of dividends at the time of insertion of the section itself.

4.31. We would like to further draw your Honour's attention to section 115BBF of the Act which deals with tax on income from* patent which was also inserted from Finance Act 2016 (w.e.f. 01.4.2017) wherein sub-section (2) which begins with a non-obstante clause similar to section 115BBD does not include the term 'set-off of loss' of being not available to the assessee.

4.32 It is also submitted that whenever any income is proposed to be taxed on gross basis at specified rates without grant of any deduction towards expenditure or allowance or set-off of loss, then it is expressly provided in the body of the section or the section is suitably amended otherwise. Hence, it is submitted that since, sub-section (2) to section 115BB& of the Act does not categorically provide that no deduction would be allowed for set-off of losses, it is to be construed that set-off of loss is

available as deduction while computing foreign dividend income.

III. Section 115BBD being a concessional provision under the law should be construed liberally

4.33. We would like to draw your Honour's attention to the Explanatory Memorandum to Finance Act, 2011 for the rationale behind introducing section 115BBD of the Act for taxing certain dividends received from foreign companies.

"Under the existing provisions of the Income-tax Act, dividend received from foreign companies is taxable in the hands of the resident shareholder at his applicable marginal rate of tax. Therefore, in case of Indian companies which receive foreign dividend, such dividend is taxable at the rate of thirty per cent plus applicable surcharge and cess.

'It is proposed to insert a new section 115BBD to provide that where total income of an Indian company for the previous year relevant to the assessment year 2012-13 includes any income by way of dividends received from a foreign subsidiary company, then such dividends shall be taxable at the rate of fifteen per cent (plus applicable surcharge and cess) on the gross amount of dividends. No expenditure in respect of such dividends shall be allowed under the Act.

This amendment is proposed to take effect from 1st April, 2012 and will accordingly, apply in relation to the assessment year 2012-13."

4. 34. Further, the relevant extract of the Budget speech to Finance Act, 2011, is also reproduced hereunder:

"146. It has been represented that the taxation of foreign dividends in the hands of resident taxpayers at full rate is a disincentive for their repatriation to India and they continue to remain invested abroad. For the year 2011-12, I propose a lower rate of 15 per cent tax on dividends received by an Indian company from its foreign subsidiary. I do hope these funds will now flow to India."

4. 35. In addition to the above, we also draw your Honour's kind attention CBDT Circular No. 02/2012 dated 22.05.2012 and Circular No. 1/2015, dated 21.01.2015, the relevant extract is enclosed herewith in Annexure 7 which deal with the period of applicability of the section and its subsequent extension.

4. 36. In view of the foregoing discussion, your Honour will appreciate that under Chapter XII -Determination of Tax in Certain Special Cases, section 115BBO has been introduced to provide for concessional rate of tax @ 15% on foreign dividend income instead of the maximum marginal rate of 30% so as to incentivize repatriation of foreign currency into the country. Being an incentive provision there was no restriction imposed with respect to any set-off of losses as per Chapter VI of the Act. Section 115BBD of the Act being a beneficial provision, to incentivize an assessee on repatriation of foreign currency into the country, cannot be interpreted to penalize the assessee Company with a tax of 15% when the assessee is otherwise in loss.

4. 37. In other words, the main objective behind introducing section 115BBD of the Act was to encourage repatriation of foreign dividends by the Indian companies from its foreign subsidiary companies and to provide concessional rate of tax, if

the total income as computed in the manner laid down under the Act includes foreign dividend income.

4.38. Thus, it is submitted that section 115BBQ of the Act being an incentive provision is a beneficial legislation and is to be construed liberally to grant benefit to the taxpayer to fulfill the mandate, of legislation which is to repatriate foreign dividends. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of *Bajaj Tempo Ltd. v. CTT* (196 ITS 188), wherein it is held as under'.

"The provision in a taxing statute granting incentives for promoting growth and development should be construed liberally: since the provision for promoting economic growth has to be interpreted liberally, restrictions on it too has to be construed so as to advance the objective of the provisions and not to

frustrate it."

4. 39. Considering the above, we humbly submit that the said provisions of section 115BBD of the Act be interpreted liberally and the assessee be allowed to set-off the Business Loss during the year against the foreign dividend income offered to tax under Income from Other sources.

4. 40. Thus, it is submitted that the Ld. AO in the assessment order dated 25.01.2017 has corrected taxed the dividend income received from specified foreign companies as referred in section 115BBC) of the Act in conformity with section 71 of the Act.

3. After considering the detail submission of the assessee, Ld. CIT rejected the contentions of the assessee and he observed that proceedings u/s 263 are proper and as per the provisions. According to his opinion, the assessment has been completed without proper application of mind to the existing statutory provisions and judicial position on this issue. The mere fact that the documents were available to the AO cannot provide immunity to the taxpayer because the AO made erroneous interpretation of facts and law. Consequently, made an order prejudicial to the revenue. Further, he observed that M/s Tata Daewoo Commercial Vehicle Co. Ltd. is a wholly owned subsidiary company and therefore is a specified foreign company as defined u/s 115BBD and it is undisputed fact. Accordingly, he directed the AO to tax the dividend income received from such specified foreign company to be taxed separately @ 15% and directed the AO to withdraw the MAT credit, if any, given to the assessee.

4. Aggrieved with the above order, assessee is in appeal before us raising the following grounds of appeal:-

1. Proceedings u/s 263 of the Act is invalid and bad in law

1.1 The learned CIT has erred in law and on facts in holding that order passed by the Assessing Officer ("AO") u/s. 143(3) r.w.s. 144C(3) of the Act dated 25.01.2017 is erroneous and prejudicial to the interest of the revenue, without appreciating that the assessment order cannot be said to be erroneous where the AO has taken one of the permissible views. The learned CIT ought to have appreciated that if two views are possible, revision u/s. 263 of the Act is not permissible.

1.2 The learned CIT has erred in law and on facts in holding that the order passed by the AO is not correct without appreciating that the AO has passed the order after enquiring and verifying the facts and documents on record, duly supported by various precedents including the judgements of the Hon'ble Supreme Court and Jurisdictional High Court which were available at the time of the assessment.

1.3 The learned CIT failed to appreciate and ought to have held that the action of the AO in allowing set-off of loss of current year against the dividend income received from specified foreign companies u/s. 115BBD of the Act is neither erroneous nor prejudicial to the interest of the Revenue inasmuch as if such dividend income is taxed in current year without allowing set-off u/s. 71 of the Act, assessee would be entitled to carry forward and set-off losses (to the extent of dividend income) against business income of subsequent years which otherwise would have been taxable at maximum marginal rate of tax.

1.4 The learned CIT has erred in law and on facts in ignoring the reasons given by the appellant on the proceedings u/s. 263 of the Act being invalid and bad in law.

2. Taxation of Dividend income received from specified foreign companies u/s. 115BBD of the Act: Rs. 1422.11.14.053/-

a.1 The learned CIT erred in separately taxing the foreign dividend income at the specified rate as per section 115BBD of the Act inasmuch as in the absence of any positive income after set-off of loss from one head of income against another head of income u/s. 71 of the Act, the chargeability provision as per section 115BBD of the Act fails to apply;

3^2 The learned CIT ought to have appreciated the fact that provisions of section 115BBD(2) of the Act which begins with non-obstante clause restricts allowability of only 'expenditure' or 'allowance' and thus, in the absence of any express provision for restriction on allowability of 'loss', the said business loss of current year is allowable to be set-off against such foreign dividend income as per provisions of section 71 of the Act;

3.3 The learned CIT ought to have appreciated that it is settled legal position that the term 'expenditure' and 'loss' are conceptually different and cannot be used interchangeably and thus, merely because restriction on allowability of 'expenditure' is provided u/s. 115BBD(2) of the Act, the same cannot be interpreted as 'loss' to be disallowed set off as provided under section 71 of the Act.

The appellant craves leave to add, alter, delete or substitute all or any of the aforesaid grounds of appeal during the course of or prior to hearing of the appeal.

5. Before us, Ld. AR of the assessee brought to our notice facts of the case and he more or less submitted the similar submission made by the assessee before Ld. CIT which we have reproduced in the earlier paragraphs. He further submitted that law is quite clear and no adjustment can be made separately for section 115BBD and the provisions of section 70 and 71 of the Act are applicable in the assessee's case. Therefore, the taxable income should be determined in accordance with section 70 and 71 first and then any tax has to be determined subsequently. Further, he submitted that Ld. CIT was wrong to invoke section 115BBD in the assessee's case and whatever material submitted before AO was properly appreciated by AO and completed the assessment, therefore the assessment order passed by AO is not erroneous nor it is prejudicial to the interest of revenue. In this respect, he relied on the decision of Coordinate Bench of ITAT in the case of **Pillala Ramakrishna Rao & Anr. Vrs. ACIT (ITA no. 81/Vizag/2016)** and **Osho Minerals India Pvt. Ltd. vrs. PCIT (ITA No. 3073/Mum/2019)** and submitted that there is no provision in section 115BBD to exclude the dividend income received from specified foreign company similar to

section 115BBE and 115BBDA, therefore the provision contained in section 115BBD does not contain such direction as specified in section 115BBE, etc. He further submitted that legislature was very clear not to include the dividend received from specified foreign company and he prayed that section 263 order may be set aside.

6. On the other hand, Ld. DR vehemently argued and placed reliance on the order passed by Ld. CIT.

7. Considered the rival contentions and the material placed on record, we notice from the record that the assessment was completed u/s 143(3) r.w.s. 144C of the Act and assessee has submitted all the information relating to the computation of income. Further, AO asked the information relating to receipt of dividend income in his notice and assessee has provided all the relevant information. Assessee in its reply to the notice u/s 263 of the Act submitted before Ld. CIT that AO has already verified the information relating to dividend receipt and rational of applying section 71 before him and further assessee submitted that the order passed by the AO is not erroneous and also not

prejudicial to the interest of revenue for the reasons that if the assessee asked to carry forward loss without adjusting the dividend income, erstwhile profit earned by the assessee is chargeable @ 30%, whereas the department will tax the dividend only @ 15%. He further brought to our notice that income has to be determined chapter wise i.e. from 4 to 7 and only after determining the taxable income rates of tax will be applied subsequently. Since assessee has incurred huge loss, the provision of section 71 has to be applied before application of section 115BBD. He further submitted that the provision of section 115BBD does not contain restriction to exclude the dividend received from specified foreign company in order to determine the taxable income and further it is submitted that 115BBD talks only to expenditure relating to earning of dividend income from specified foreign company. Even though assessee has made such detail submission before Ld. CIT, how the assessee's case not falling under provisions of section 263 of the Act either on erroneous nor prejudicial to the interest of revenue. We observed that Ld. CIT instead of addressing the issue raised by the assessee, he rejected the submission of the assessee and

observed and accepted that all the relevant documents were available before the AO and it cannot be the reason to provide immunity to the taxpayer. But, Ld. CIT has not separately brought on record how the order passed by AO is erroneous and also it is prejudicial to the interest of revenue.

8. After careful reading of section 115BBD, we agree with the submission of Ld. AR that there is no provision in that section to eliminate the dividend income from specified foreign company before setting off of loss and similar to the provisions and specific direction present in section 115BBE. In our considered view that taxable income has to be determined as per the provisions of Income Tax Act i.e. first to compute the total income based on the Chapter-IV and then apply the Chapter-VI and VIA in order to compare the aggregation and set off of losses. After determining the taxable income by applying the above Chapters and if still there is profit, then such taxable profit has to be taxed according to the prevailing rates as per the various applicable provisions of the Act. Since assessee is having substantial loss and as per the provision of Chapter-VI, the taxable income has to be adjusted first before applying any other

provisions contained in the Act particularly when there is no specific provision contained in section 115BBD wherein to impose restriction on carrying forward any loss similar to provision contained in section 115BBE and section 115BBDA. Therefore, we do not see any reason to treat this assessment as erroneous nor it is passed by erroneous interpretation of facts or law. Accordingly, the order passed u/s 263 of the Act by Ld. CIT is not as per provisions contained therein or as per the jurisdictional precedence. Hence, it is set aside. Resultantly, the grounds raised by the assessee are **allowed**.

9. In the net result the appeal filed by the assessee is **allowed**.

Order pronounced in the open court on 6th March 2020.

Sd/- (C. N. Prasad) न्यायिकसदस्य / Judicial Member मुंबई Mumbai; दिनांक Dated : Sr.PS. Dhananjay	Sd/- (S. Rifaur Rahman) लेखासदस्य / Accountant Member 06.03.2020
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आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned

5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File
आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai