

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA
[Before Shri M. Balaganesh, AM & Shri S. S. Viswanethra Ravi, JM]**I.T.A No. 1713/Kol/2013**
Assessment Year: 2006-07Akanksha Viniyog Ltd.
(PAN: AACCA8186C)
(Appellant)Vs. Commissioner of Income-tax-1, Kolkata
(Respondent)Date of hearing: 11.07.2016
Date of pronouncement: 15.07.2016For the Appellant: Shri Subash Agarwal, Advocate
For the Respondent: Shri Niraj Kumar, CIT, Sr. DR**ORDER****Per Shri M. Balaganesh, AM:**

This appeal by assessee is arising out of revision order of CIT-1, Kolkata vide dated 28.03.2013. Assessment was framed by ITO, Wd-1(4), Kolkata u/s. 147/143(3) of the Income tax Act, 1961 (hereinafter referred to as the “Act”) for AY 2006-07 vide his order dated 30.11.2011.

2. The only issue to be decided in this appeal is as to whether the Id CIT is justified in invoking revisionary jurisdiction u/s 263 of the Act in the facts and circumstances of the case.

3. The brief facts of this issue is that the return of income for the Asst Year 2006-07 was filed by the assessee on 15.11.2006 declaring total income of Rs. 65,831/- after adjusting brought forward business and depreciation loss of Rs. 1,42,209/- under normal provisions of the Act and declaring book profit u/s 115JB of the Act of Rs. 4,52,412/-. The assessment was completed u/s 143(3) of the Act on 3.7.2008 determining the total income 66,672/- under normal provisions of the Act after making disallowance u/s 14A of the Act in the sum of Rs. 841/- and determining the book profit u/s 115JB of the Act at Rs. 4,53,253/-. In the said assessment proceedings, the Id AO on perusal of profit and loss account including its schedules, directed the assessee to file the details of other income. The assessee filed the

details stating that other income comprises of dividend income of Rs. 82,876/- , profit on sale of units of mutual fund of Rs. 1,40,176/- and profit on sale of derivatives of Rs. 16,950/- through portfolio management scheme (PMS) of Prudential ICICI Asset Management Company Limited. It was also stated by the assessee that the assessee had disclosed the other income earned through PMS other than dividend income, under the head 'income from business'. This plea of business income has been accepted by the Id AO while completing the assessment u/s 143(3) of the Act on 3.7.2008. Later this assessment was sought to be reopened u/s 147 of the Act for the following reasons :-

It came to light that claim of assessee on insurance amounting to Rs. 2,28,780/- is apparently ineligible and a claim of depreciation on assets also not allowable as there was no business during that year.

In the re-assessment proceedings, the Id AO observed that keyman insurance premium is eligible for deduction as per CBDT Circular No. 762 dated 18.2.1998. However, in respect of depreciation, he observed that the same was claimed on assets such as air-conditioner, furniture, electrical fitting etc along with a car. The assessee claimed to have used the car for business purpose as well as in connection with new business venture. However, the Id AO observed that the claim is not fully substantiated that the car was entirely used for business and accordingly made proportionate disallowance of depreciation of Rs. 80,192/- and completed the reassessment u/s 147 / 143(3) of the Act on 30.11.2011.

4. The Id CIT issued show cause notice dated 22.3.2013 seeking to revise the assessment framed u/s 147/143(3) of the Act in as much as the Id AO had granted deduction towards keyman insurance of Rs. 2,28,780/- and allowed depreciation on assets as used for business purposes in the sum of Rs. 59,228/- instead of disallowing the same, which in the opinion of the Id CIT are not allowable for want of business being carried on by the assessee during the year under appeal. The assessee replied before the Id CIT that it is primarily engaged in the business of trading in shares, mutual funds and derivatives and during the financial year 2005-06 relevant to Asst Year 2006-07, it had earned profit on sale of units of mutual fund of Rs. 1,40,176/- and profit on sale of derivatives of Rs. 16,950/- through portfolio management scheme (PMS) of Prudential ICICI Asset Management Company Limited which are purely

business income of the assessee and assessed as such in the original 143(3) proceedings by the Id AO. Even in the reassessment proceedings the Id AO sought to only disallow proportionate depreciation on car as used for personal purposes also. It was argued that the Id AO had completely appreciated the fact that the assessee had indeed carried on business during the year under appeal and that is why he had assessed the profit on sale of units of mutual fund and profit on sale of derivatives as business income of the assessee and had also granted deduction towards business expenditure towards administrative expenses of Rs. 8,80,065/- comprising of salaries & bonus, staff refreshment expenses, bank charges & commission, interest paid to bank, travelling & conveyance, printing and stationery, repairs and maintenance, building repairs and maintenance, miscellaneous expenses, postage & stamps, rent, auditor's remuneration, car running & maintenance, stock exchange annual fees, trade licence & profession tax, legal expenses, licence & fees, filing fees, insurance, rates & taxes, electricity & water, books & periodicals, consultancy fees and securities transaction tax, apart from accepting the certain disallowances made voluntarily by the assessee in the return of income as per law. The Id DR vehemently relied on the order of the Id CIT.

5. We have heard the rival submissions and perused the materials available on record including the paper book filed by the assessee. The facts stated hereinabove remain undisputed and hence the same are not reiterated for the sake of brevity. We find that the Id CIT sought to disallow only the insurance premium of Rs. 2,28,780/- and remaining depreciation on assets in the sum of Rs. 59,228/-. We find that he did not bother to disturb either the business income in the form of profit on sale of mutual funds and derivatives to be treated as capital gains. Similarly we find that the Id CIT did not bother to disturb the grant of deduction of administrative expenses as detailed supra other than keyman insurance premium and depreciation on assets. We find that the Id CIT himself had partially allowed certain administrative expenses detailed supra to be business expenditure and having done so, it would be improper on his part to treat keyman insurance premium and depreciation alone as not meant for business purposes. We also find from the body of the assessment order that the Id AO had mentioned the nature of business of the assessee to be 'Trading in Shares / Units & Loan Advancing'. Under these circumstances, we find it would be improper on the part of the Id

CIT to hold the order passed by the Id AO to be erroneous warranting revisionary jurisdiction u/s 263 of the Act. It is not the case of the revenue that the profit on sale of mutual funds should not be treated as business income during the year under appeal. Similarly it is not the case of the revenue to treat the profit on sale of derivatives should not be treated as business income during the year under appeal. It is already well settled that transactions in derivatives would always be construed only as business transactions as the same activities are carried out without taking delivery of the instruments. Even the provisions of section 43(5)(d) of the Act had construed the transactions in derivatives to be regular business transactions only. It is not in dispute that the profit derived by the assessee on sale of units of mutual funds were earned under Portfolio Management Scheme with the assistance of Prudential ICICI Asset Management Company Ltd who also do PMS service by engaging in purchase and sale of shares and mutual funds for and on behalf of their clients. The Id AR vehemently argued that the profit derived from sale of units of mutual fund through PMS is only business income which has been rightly considered as such by the Id AO in the original assessment as well as in reassessment proceedings and there was no error committed by the Id AO thereon. In this regard, we find that the reliance placed by the Id AR on the decision of Co-ordinate Bench of Delhi Tribunal in the case of M/s Radials International vs ACIT in ITA No. 1368 (Del) of 2010 for Asst Year 2006-07 dated 16.12.2011 is very well founded, where it was held that :-

“13. The assessee had made investment under PMS. The profit has not arisen directly from deposits made, but from the securities purchased from such deposits, which were traded by the portfolio manager on behalf of the assessee. The quantity of share traded is huge as is evident from the list appended with the assessment order. The shares have been traded frequently with a motive to maximize profit and not with a view to hold them as investment. The volume of the transaction is very high. All these facts indicate that the portfolio manager had in fact done trading on behalf of the assessee. There is no difference between similar transactions carried out by an individual in shares and the transactions carried out by portfolio manager. Such transactions can be compared with trading in commodities or real estate. If an assessee gives money to a property dealer with the instructions to purchase, get possession and sale at a reasonable profit keeping in view the market conditions. The property dealer acting as an agent enters into series of transactions of purchase and sale earns profit in some of the transactions and incurs loss in some of them. The property dealer after charging his commission and expenses will handover the amount together profit to the principal. Can the profit earned or loss incurred on such transactions be treated as capital gain or loss. The answer is no. Therefore, in our considered opinion, the profits arising on purchase and sale of shares are in the nature of business and not as investment. Merely because the purchase and sale of shares had occurred through DEMAT account on delivery based; it would not change the nature of the transaction. Since the portfolio manager in the capacity of an agent has traded in shares on behalf of the assessee, the profits arising therefrom will be in the nature of business profits. Further simply because the assessee has treated the deposits made under

PMS as investments and balance shares lying in DEMAT account as on the last day of the accounting year under the head 'investment' would not change the character of trading done by the portfolio manager on behalf of the assessee. The shares purchased and sold during the year have not been recorded in the books of accounts as investment nor it is feasible to record as the details were not available with the assessee and the assessee has no control or say as to when and the type of shares or the period of holding of the shares. Therefore, in our considered opinion, the transactions are in the nature of business. The decision relied upon by the assessee in the case of Gopal Purohit (supra) is not applicable to the facts of the assessee's case."

5.1. The jurisdiction of the Id CIT u/s 263 of the Act can be exercised only when he finds that the order of the Id AO which is sought to be revised u/s 263 of the Act was erroneous and prejudicial to the interest of the revenue. The law is well settled that failure of the Id AO to make an enquiry which he ought to have made before concluding the assessment, in the given set of facts and circumstances of the case, renders his order erroneous and prejudicial to the interest of the revenue. But in the instant case, we find that the Id AO had accepted the profit on sale of mutual funds and derivatives to be assessed under the head 'income from business' which is also accepted by the Id CIT. The Id AO had allowed the claim of deduction towards keyman insurance premium in the sum of Rs. 2,28,780/- by placing reliance on the CBDT Circular No. 762 dated 18.2.1998 which is binding on him. In fact, we find that the Id AO though had reopened the assessment initially on the pretext that there was no business carried on by the assessee and accordingly keyman insurance premium and depreciation are not allowable business expenditure, was thoroughly convinced on the fact that the assessee was carrying on business and allowed the deduction towards keyman insurance premium by placing reliance on the CBDT Circular No. 762 dated 18.2.1998 which Circular is actually binding on him. However, he proceeded to disallow the portion of the claim of depreciation on car as not used for business purposes as assessee had not substantiated the usage of the same for the purpose of business. These facts go to prove beyond doubt that the Id AO had duly applied his mind on the aspect as to whether the assessee had indeed carried on any business during the year or not. It is not in dispute that the Id AO had allowed the claim of other administrative expenses as allowable business expenditure. Hence it could be safely concluded that the Id AO had indeed made requisite enquiry in the given set of facts and circumstances of the case and had taken a judicious view on the entire issue. Hence his order cannot be termed as erroneous within the meaning of section 263 of the Act. We find that even the Id CIT had not disturbed

the claim of administrative expenses to be allowed under the head 'income from business'. Hence either way, no prejudice is caused to the interest of the revenue by the order of the Id AO. Hence the twin conditions required for section 263 of the Act are not satisfied. In this regard, we place reliance on the following decisions :-

Malabar Industries Co Ltd vs CIT reported in 243 ITR 83 (SC)

"The phrase 'prejudicial to the interest of the revenue' has to be read in conjunction with an erroneous order passed by the A.O. Every loss of revenue as a consequence of an order of A.O. cannot be treated as prejudicial to the interest of the revenue. It was further held that if the A.O. has adopted one of the courses permissible in law or where two views are possible and the A.O. has taken one view with which CIT does not agree, the order cannot be treated as erroneous and prejudicial to the interest of the revenue unless the view taken by the A.O. is unsustainable in law."

Bongaigaon Refinery and Petrochemicals Ltd vs Union of India reported in 287 ITR 120 (Gau)

"Entertainment of a view different from the one adopted by the Assessing Officer, if plausible would not clothe the Commissioner with the power to interfere therewith under the said provision of the Act. Differently put, an error within the jurisdiction of the Assessing Officer on an evaluation of the materials available would not be exposed to interference in exercise of suo motu revisional powers under section 263 of the Act. The provision though permits the Commissioner to initiate an enquiry as he may deem necessary does not authorise a roving probe into the facts with the disposition to pick out errors to sustain the eventual interference. This assumes great significance in the context of the statutory framework of the Act outlining the jurisdictional contours of different authorities to adjudicate the issues as legislatively stipulated. The Commissioner in exercise of his revisional powers cannot-arrogate to himself a status to surrogate the other authorities and supplant their roles under the Act".

6. In view of the aforesaid findings in the given set of facts and circumstances of the case and the judicial precedents relied upon hereinabove, on the impugned issue, we have no hesitation in quashing the order passed by the Id CIT u/s 263 of the Act and allow the grounds raised by the assessee.

7. In the result, the appeal of the assessee is allowed.

Order is pronounced in the open court on 15.07.2016

Sd/-
(S. S. Viswanethra Ravi)
Judicial Member

Sd/-
(M. Balaganesh)
Accountant Member

Dated : 15th July, 2016

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. APPELLANT – Akanksha Viniyog Ltd., 1/1A, Biplabi Anukul Street, Kolkata-700072.
- 2 Respondent –CIT-1, Kolkata.
3. The DCIT, Kolkata
4. ITO, Ward-1(4), Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy,

By order,

Asstt. Registrar.

