* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA NO.973/2011**

% **Date of Decision** : 29th November, 2011.

CIT ..... Appellant
Through Mr. N P Sahni and Mr. Ruchesh Sinha, Advs.

versus

DLF POWER LTD ..... Respondent
Through Mr. Ajay Vohra, Ms. Kavita Jha and Mr. Somnath Shukla, Advs.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not ?
3. Whether the judgment should be reported in the Digest?

SANJIV KHANNA,J: (ORAL)

With the consent of the parties the matter is taken up for hearing and for final disposal on the following substantial question of law :-

> "Whether the Income Tax Appellate Tribunal (tribunal, for short) was correct in law in quashing the order passed by the Commissioner of Income Tax under Section 263 of the Act dated 31.12.2009?"

2. For the assessment year 2005-06, the respondent-assessee filed a

return declaring loss of Rs.47,83,774/- on 29.10.2005. Vide assessment order dated 26.12.2007, the Assessing Officer calculated the book profits under Section 115JB of the Act and assessed the gross total income at Rs.17,82,47,622/-. From the aforesaid amount, deduction of Rs.17,82,47,622/- was allowed under Section 80IA of the Act. Some more amounts were added and the book profits were ultimately computed at Rs.19,25,37,634/-.

3. Later on the Commissioner of Income Tax (CIT, for short) issued notice under Section 263 of the Act as he was of the opinion that deduction under Section 80IA had been wrongly computed by including (i) interest income of Rs.157.51 lakhs credited to profit and loss account and (ii) other income of Rs.141.64 lakhs also credited profit and loss account.

4. In response to the notice the assessee filed a reply stating that the assessee has two units; power generation unit and energy systems unit. The first unit was entitled to deduction under Section 80IA, whereas the second unit was not entitled to the said deduction. It was submitted that interest income of Rs.157.51 lakhs includes Rs.149.37 lakhs which relates to power generation unit and balance of Rs.8.15 lakhs relates to energy system unit on which no 80IA was claimed. Further Rs.4.95 lakhs relates to income earned on fixed deposits kept as margin money for importing store and spares and for purchasing gas etc. Balance of Rs.144.41 was interest on late payment by customers. It was stated that these two amounts of Rs.4.95/- lakhs and Rs.144.41/- lakhs were included and

should be taken into consideration for computing deduction under Section 80IA. With regard to the second aspect, it was stated that only Rs.10.95 lakhs relates to power generation unit and the balance amount relates to energy system unit.

5. The CIT considered the said contentions and in the final directions has held as under :

> "I have heard the authorized representative, gone through the submission as also the facts of records. Prima facie the assessee submission has gone (sic. same) strength and needs appropriate consideration as per law. At the same time it is also a matter of record that there is a lack of enquiry/investigation on the part of the Assessing Officer. To that extent it can certainly be held that the order of the AO is both erroneous as well as prejudicial to the interest of revenue. Therefore, the provision of section 263 of the Act and the order of the Assessing Officer is set aside to be redone afresh. The assessee shall be given reasonable opportunities of being heard."

6. The findings recorded by the CIT are clear that there was lack of enquiry and investigation and thus the order passed by Assessing Officer was erroneous and prejudicial to the interest of the Revenue. He did not examine the merits, bifurcation and justification elucidated by the assessee.

7. The assessee filed an appeal before the tribunal, which has been allowed by the impugned order dated 7.1.2011. The tribunal examined nature and character of the interest income on merits including bifurcation and held that the aforesaid income has to be substantially included for

computing deduction under Section 80IA. Thus there was no error in the order passed by the Assessing Officer and the said order was not erroneous and therefore there was no question of prejudice to the Revenue. It was stated that these aspects were already examined by the Assessing Officer at the time of the original assessment and therefore the CIT was wrong in holding that the Assessing Officer had not examined the said issues.

8. Section 263 gives supervisory jurisdiction to the CIT to interfere when twin conditions are satisfied i.e. when the order passed is erroneous and prejudicial to the interest of the Revenue. An order is erroneous, if, it involves an error; deviates from law; is contrary to law; upon mistaken view of law or upon erroneous application of legal principle. This decision can be rectified by exercise of revisionary power under Section 263. In the case of ***Gee Vee Enterprises v. Add. CIT,*** (1975) 99 ITR 375, it has been held that the word "erroneous" include cases where the Assessing Officer has remained passive and has failed to ascertain true facts by making necessary enquiry. Failure to deal and make necessary enquiry makes an order erroneous. [Also see ***Duggal and Co. vs. CIT***, (1996) 220 ITR 456 (Del)].

9. The term 'prejudicial to the interest of the Revenue" are of wide import and if the Assessing Officer fails to apply his mind to the case in the right perspective, there is prejudice to the interest of the Revenue. Loss of revenue may not be the sole criteria.

10. It has been held that when two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, power under Section 263 cannot be exercised. This, however, is subject to the condition that view taken by Assessing Officer is permissible and not erroneous. [See ***Malabar Industrial Co. Ltd. v. Commissioner of Income-tax***, (2000) 243 ITR 83 (SC)]. If the view taken by Assessing Officer is erroneous, or is not permissible, the order is erroneous and can cause prejudice to the Revenue. An order under Section 263 of the Act cannot be set aside on the ground of change of opinion, formed by two different authorities unless both opinions are legally tenable. The CIT, being a higher officer exercises revisionary and supervisory jurisdiction. When an order is erroneous, he can exercise jurisdiction under Section 263 and disagree with the wrong order which is contrary to law. Pre-requisites and jurisdictional conditions under Section 263 are different from 147 of the Act. In ***Commissioner of Income-tax v. Kelvinator of India Ltd.***, [2002] 256 ITR 1(Del), it has held as under:

> "It is a well settled principle of law that what cannot be done directly cannot be done indirectly. If the Income-tax Officer does not possess the power of review, he cannot be permitted to achieve the said object by taking recourse to initiating a proceeding of reassessment or by way of rectification of mistake. In a case of this nature the Revenue is not without remedy. Section 263 of the Act empowers the Commissioner to review an order which is prejudicial to the Revenue."

11. In the present case, the tribunal has disagreed with the CIT and felt that the Assessing Officer had examined the question and formed an opinion. The finding of the CIT that there was lack of enquiry was incorrect. Thereafter, the tribunal went into the bifurcation of interest income submitted by the assessee and examined it on merits and decided whether or not a particular income qualifies for deduction under Section 80IA. In the said exercise, the tribunal has relied upon submissions made by the assessee and accepted, the bifurcation and nature and character of interest income and then decided whether it qualifies for deduction or not. We do not know on what basis the said bifurcation in respect of the two units and the nature and character of income were accepted. This aspect had not been examined by the CIT, who had given only a tentative opinion that some element of interest income may be eligible. The right and proper course in the present case was to ask the CIT to examine the said factual aspect rather than the tribunal giving their own factual finding without there being factual examination and verification or full and proper rebuttal. Without anything more, the mere submission of a letter to the Assessing Officer giving bifurcation does not necessarily mean that proper verification and investigation was done and accepted. Averments made in the letter have to be verified and then accepted or rejected. If the Assessing Officer keeps a letter on record and does not carry out necessary investigations which are per se required to verify correctness of the averments, there is an error in the sense that he has failed to carry out the requisite enquiry which can be rectified in a revision. It is a different

matter if the course adopted by the Assessing officer is permissible, as then there is no error.

12. In view of the aforesaid, we answer the question of law framed above in negative i.e. in favour of the Revenue and against the assessee. The CIT will pass a fresh order under Section 263 of the Act after hearing the assessee. The contentions and issues raised by the assessee will be dealt with by the CIT. He shall also examine whether the issue in question was raised before the Assessing Officer and considered and verified or the course adopted is permissible. If this is correct, then his jurisdiction will be ascribed and limited to the extent of deciding whether the finding is erroneous i.e. contrary to law etc. In the facts of the case, there will be no order as to costs. Appeal is disposed of.

SANJIV KHANNA,J

R.V.EASWAR, J

November 29, 2011
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