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

RESERVED ON: 22.08.2012
PRONOUNCED ON:17.09.2012

\+ **ITA Nos.236/2010 & 384/2010**

COMMISSIONER OF INCOME TAX, DELHI IV ..... Appellant
Through: Mr. N.P. Sahni, Sr. Standing Counsel.

versus

M/S DLF LTD. ..... Respondent
Through: Mr. Ajay Vohra with Ms. Kavita Jha and Mr. Somnath Shukla, Advocates.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT

% The Revenue in these appeals is aggrieved by orders of the Tribunal dated 7.11.2008 (in ITA No.2004/Del/2007) and dated 3.6.2009 (in ITA-1137/B/2009). The question of law sought to be urged is

> "Whether the Tribunal fell into error in holding that the provisions of Section-263 of the Act could not be invoked having regard to the facts and circumstances of the present case."

2. The facts in brief are that the assessee is in real estate and development business. For the assessment years 2002-03, its returned income was Rs. 11.44 Crores. The AO issued notice under Sections 143 (2) and 142 (1) eliciting information which was furnished. The total income determined by the AO was Rs. 13.99 Crores which included various disallowance and additions. After the assessment was framed, a notice was issued under Section-263 of the Income Tax Act by the Commissioner. This was in respect of disallowance as far as it concerns a dividend income of Rs. 6,93,69, 402/- [for which an exemption has been claimed under Section 10 (33)] received by the assessee. The dividend had been received from DLF Power Limited, a sister concern. After considering the submissions of the assesse, and the views of the Revenue, the Commissioner held as follows: -

> *"In the instant case, it is clear from the assessment records that the Assessing Officer has not examined in the course of the assessment proceedings the issue relating to disallowance of expenditure relating to exempted dividend income Rs.6,93,20,030/- as was required u/s 14A. In the circumstances, the assessment order dated 31.03.2005 u/s 143 (3) of the I.T. Act, 1961, for the A.Y. 2002-03, is held to be erroneous and prejudicial to the interests of revenue within the meaning of section 263. However, in order to take a final view on this issue, further enquiries will be necessary which can be conducted only by the Assessing Officer and, therefore, it is not possible for me to record conclusive findings on this issue at this stage. In the circumstances, it is considered fair and reasonable to set aside the assessment on this limited point for fresh adjudication and decision. The assessing Officer is directed to decide the issue of disallowance of the proportionate expenditure related to the dividend income of Rs.6,93,69,402/- claimed exempt u/s 10 (33), as per provisions of section 14A,*

afresh as per law and after giving reasonable opportunity to the assessee to the assessee company of being heard."

3. The Commissioner, therefore, set aside the assessment on the question of disallowance of proportionate income pertaining to dividend and directed fresh adjudication in accordance with law. The Commissioner's order under Section-263 was challenged in an appeal to the ITAT which concluded after considering the order sheets and the materials placed on record that: -

"the AO has categorically asked the assessee the breakup of interest and dividend income. The assessee has also filed various details and also demonstrated before us the fact that dividend income was received through a single cheque and no extra expenditure was incurred for earning the same with regard to deployment of funds. Investment in shares was made in earlier years, sufficient own capital reserve was shown in the balance sheets out of which investment was made in the subsidiary company and it was submitted that no interest bearing funds was utilized for the same……"

After noticing scheme of the Act and the scope of revision under Section-263, the Tribunal observed as follows: -

"It is also pertinent to mention here that unlike the other provisions of the Act for claiming the expenditure, where the burden is on the assessee to substantiate the same, in case of disallowance under section 14A where the AO want to disallow expenditure which is alleged to be incurred for earning such exempted income, he has to pin point the particular expenditure, which is so incurred for earning such exempted income. He has cannot artificially disallow proportionate of exempted income or expenditure without linking the same with earning of which is otherwise incurred for the purpose of assessee's business. Not only the incurring of expenditure but also its relationship with the exempted income must be clear

and must capable of being ascertained. There was not specific finding by the CIT to the effect that any particular expenses has been incurred for earning the exempted income, he only asked the AO to make inquire and find out the proportionate expenses which can be disallowed u/s 14A. The issue with regard to disallowance of proportionate expenditure has been dealt by the ITAT Delhi Bench in case of Wimco Seeding 293 ITA 216 and Impulse Pvt. Ltd. 22 SOT 368, wherein it was observed that the provisions of Section-14A has been introduced to disallow the expenses identified has having been incurred for earning exempted income. On plain construction of Section-14A, it is very much clear that only the expenditure which have been proved to be incurred in relation to earning of tax free income can be disallowed and the section cannot be extended to disallow even the expenditure which is assumed to have been incurred for earning tax free income. While applying the section, there is no authority conferred by the section upon the Assessing Officer to deem or assume certain expenditure to have been incurred in relation to the tax free income. Accordingly, common expenditure incurred cannot be broken artificially to attribute for apportioning a part thereof to the earning of the tax free income on the assumption that such part of the common expenditure was incurred in relation to the tax free income."

4. In ITA-236/2010, the facts are that the Tribunal followed its previous orders setting aside the revisional order of the CIT. The Tribunal had to consider the correctness of the order made pursuant to the fresh proceedings directed by the CIT. The Tribunal merely followed its previous order observing that the AO while giving effect to the order made by the CIT under Section-263 had disallowed the proportionate expenditure and that since the revisional order itself had been set aside, the appeal against the AO's order also had to be set aside.

5. It is argued by counsel for the Revenue that the Tribunal fell into error in not saying that Section-14-A mandates the AO to determine proportionate expenditure in relation to exempt income such as dividend income. Neither the order nor the proceedings reflected any application of mind to this mandatory provision. It was urged in this context that the observations of the ITAT proceed on the assumption that the AO took into account all the necessary factors and had impliedly accepted the fact that no such deduction could be made. It was highlighted in this context that the expression *"prejudicial to the interest of Revenue"* has to be seen in the background of an erroneous order by the AO. According to settled principles it is only in cases where two views are possible that revisional order under Section-263 cannot be made. Counsel relied upon the judgment of the Supreme Court reported as *Malabar Industrial Company Ltd v. CIT*, 243 ITR 83. Learned counsel also relied upon the questionnaire furnished to the assesse dated 21.9.2004 which did not reflect any application of mind as far as the question of Section-14A or its applicability was concerned. It was submitted that even the order sheet merely showed that a breakup of interest and dividend income had been sought on 6.12.2004. In these circumstances, there could not have been any assumption that the AO had ever considered the question of proportionate expenditure and accepted the assessee's argument.

6. Learned counsel for the assessee emphasized that the facts of the present case would reveal that the assessee had received a single dividend cheque of Rs. 6,93,69, 402/-. The materials on record

clearly showed that the AO had called for particulars and held proceedings on a number of occasions. The materials were clearly before him as also was in the nature of investment i.e. in a subsidiary company for a purpose of business. Such being a case, the question of there being any error much less one prejudicial to the interest of Revenue did not arise.

7. It was argued next that the Tribunal's order should not be interfered with because if enquiries are conducted by the Commissioner, he cannot go into or scrutinize the question of appropriateness of the previous proceedings before the AO. It was submitted in this regard that the judgment of this Court in *CIT v. M/s Sunbeam Auto Ltd*, 332 ITR 167 shows that there can be no roving and fishing enquiry by the Commissioner and he has to merely confine himself to the materials on record of the proceedings called for by him. In other words, if the AO makes an assessment acting in accordance with law that cannot be branded as erroneous. Reliance was also placed upon the judgment reported as *CIT v. Anil Kumar Sharma*, 335 ITR 72 (Del). It was further argued that wherever two views are possible, the Commissioner is not justified in invoking the power of revision under Section-263. In support of this contention, the assessee's counsel relied upon *CIT v. Max India Ltd.*, 295ITR 282 (SC). It was lastly urged that any order of revision which does not specify the *prima facie* error in the order or approach of the AO, would be beyond jurisdiction. For this proposition, reliance was placed upon *Commissioner of Wealth Tax v. Prithvi Raj and Company*, 199 ITR 424.

8. Section 263, to the extent relevant for the present purposes, is extracted below:

> *"263. (1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment."*

9. In *Malabar* (supra) the Supreme Court explained the scope and content of revisional power of the Commissioner under Section 263 as follows:

> *"A bare reading of this provision makes it clear that the prerequisite to exercise of jurisdiction by the Commissioner suo moto under it, is that the order of the Income Tax Officer is erroneous insofar 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 be had to section 263(1) of the Act. The provision cannot be invoked to correct each and every type of mistake or error committed by the assessing officer, it is only when an order is erroneous that the section will be attracted. 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 orders passed without applying the principles of natural justice or without application of mind. The phrase 'prejudicial to the interests of the revenue' is not an expression of art and is not*

defined in the Act. Understood in its ordinary meaning it is of wide import and is not conferred to loss of tax. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the revenue. If due to an erroneous order of the Income Tax Officer, the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the revenue. The phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the assessing officer. Every loss of revenue as a consequence of an order of assessing officer cannot be treated as prejudicial to the interests of the revenue, for example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the Income Tax Officer is unsustainable in law."

In *CIT V. Max India Ltd*, 295 ITR 282 (S.C) after noticing the judgment in *Malabar*, the Supreme Court applied the law declared by it, and also clarified that:

"The phrase "prejudicial to the interest of the Revenue" in section 263 of the Income-tax Act, 1961 has to be read in conjunction with the expression "erroneous" order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interest of the Revenue. For example, when the Assessing Officer adopts one of two courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Assessing Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the Revenue, unless the view taken by the Assessing Officer is unsustainable in law."

10. It is thus, not mere prejudice to the revenue, or a mere erroneous view which can be revised, under Section 263. There should (post *Max India*) be the added element of "unsustainability" in the order of the AO, which clothes the Commissioner with jurisdiction to issue notice, and proceed to make appropriate orders.

11. In this case, the record reveals that the AO had issued notice, and held proceedings on several dates (of hearing) before proceeding to frame the assessment. He added nearly Rs. 2 crores to the income at that time. The Commissioner took the view that the assessment order disclosed an error, in that the deduction under Section 14-A had not been made. Now, while the statutory direction to the Assessing Officer to calculate, proportionately, the expenditure which an assesse may incur to obtain dividend income, for purposes of disallowance, cannot be lost sight of, equally, such a requirement has to be viewed in the context and circumstances of each given case. In the present case, it was repeatedly emphasized that the assesse's dividend income was confined to what it received from investment made in a sister concern, and that only one dividend warrant was received. These facts, in the opinion of this court, were material, and had been given weightage by the Tribunal in its impugned order. There is no dispute that the investment to the sister concern, was not questioned; even the Commissioner has not sought to undermine this aspect. Equally, there is no material to say that apart from that single dividend warrant, any other dividend income was received. Furthermore, there is nothing on record to say that the assessee had to expend effort, or specially allocate resources

to keep track of its investments, especially dividend yielding ones. In these circumstances, it can be said that whether the deduction under Section 14-A was warranted, was a debatable fact. In any event, even if it were not debatable, the error by the AO is not "unsustainable". Possibly he could have taken another view; yet, that he did not do so, would not render his opinion an unsustainable one, warranting exercise of Section 263.

12. For the above reasons, the question of law is answered against the revenue, and in favour of the assesse. Consequently, the appeals fail and are dismissed.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

SEPTEMBER 17, 2012