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

% *Judgment reserved on: 13.12.2023*
Judgment pronounced on: 05.01.2024

\+ **ITA 1395/2018**

PR. COMMISSIONER OF INCOME TAX-2 ..... Appellant
Through: Mr Shlok Chandra, Sr. Standing Counsel with Ms Madhavi Shukla, Ms Priya Sarkar, Jr. Standing Counsel and Mr Ujjwal Jain, Adv.

versus

M/S BT GLOBAL COMMUNICATIONS INDIA PVT. LTD. ..... Respondent
Through: Mr Deepak Chopra, Ms Manasvini Bajpai and Ankul Goyal, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE GIRISH KATHPALIA
[Physical Hearing/Hybrid Hearing (as per request)]

GIRISH KATHPALIA, J.:

1. By way of this appeal brought under Section 260A of the Income Tax Act ("the Act") the revenue has assailed order dated 29.01.2018 of the Income Tax Appellate Tribunal ("the Tribunal") whereby the appeal bearing No. ITA 3367/Del/2017 of the assessee (respondent herein) was allowed. On notice of this appeal, the respondent/assessee entered appearance through counsel. We heard learned counsel for both sides and examined the records.

2. Briefly stated, circumstances relevant for present purposes are as follows.

2.1 The respondent/assessee, a company engaged in the business of providing telecommunication and related support services including virtual private network, global management network and internet services to various customers within and outside India filed return of income on 07.10.2010, declaring its total income as nil on the basis of deduction of Rs.20,01,05,275/- under Section 80IA of the Act and book profit of Rs.5,33,99,601/-. On 23.11.2011, the respondent/assessee filed its revised return of income declaring total income of Rs.5,57,99,062/-, which was duly processed under Section 143(1) of the Act.

2.2 The return of income filed by the respondent/assessee having been selected for scrutiny, notice dated 26.08.2011 under Section 143(2) of the Act was served upon it. On 25.07.2012, reference under Section 92CA(1) of the Act was made to the Transfer Pricing Officer (the TPO), Mumbai to determine Arm's Length Price since the respondent/assessee had entered into international transaction with associated enterprises for an amount exceeding Rs. 15,00,00,000/-. On 30.01.2014, the TPO made upward adjustment to the Arm's Length Price by Rs. 2,23,16,22,270/- in relation to the said international transaction for assessment year 2010-11 under Section 92CA(3) of the Act and consequently a draft order proposing an addition of the said amount was issued under Section 92CA(4) of the Act against which the respondent/assessee raised objections before the Dispute Resolution

Panel (DRP).

2.3 On 14.11.2014, the DRP decided the objections of the respondent/assessee, directing the TPO to determine the Arm's Length Price, so on 30.12.2014, the TPO furnished revised working of the adjustment to the tune of Rs.6,45,87,22,468/-. On 31.12.2014, the Assessing Officer passed order under Section 143(3) read with Section 144C(13) of the Act, thereby assessing the income of the respondent/ assessee as Rs.6,51,45,21,530/- by way of addition of Rs.6,45,87,22,468/- on account of adjustment to the Arm's Length Price and deduction of Rs.20,01,05,275/- under Section 80IA of the Act.

2.4 Thereafter, the Principal Commissioner Income Tax (PCIT) invoked the revisional jurisdiction under Section 263 of the Act and issued show cause notice dated 15.03.2017 to the respondent/assessee. In the order dated 30.03.2017 passed under Section 263 of the Act, the PCIT took a view that the respondent/assessee was not eligible to any deduction under Section 80IA(4)(ii) of the Act.

2.5 Aggrieved by the said order under Section 263 of the Act passed by the PCIT, an appeal was preferred by the respondent/assessee before the Tribunal, which appeal was allowed by way of the impugned order. Hence, the present appeal.

3. At this stage, it would be apposite to extract order dated 01.12.2023 of this court, passed after preliminary hearing:

"1. This appeal concerns Assessment Year (AY) 2010-11.

2. Via the instant appeal, the appellant/revenue seeks to assail the order dated 29.01.2018 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"].

3. By the impugned order, the Tribunal set aside the order dated 30.03.2017 passed by the Principal Commissioner of Income Tax [in short, "PCIT"] under Section 263 of the Income Tax Act, 1961 [in short, "the Act"].

4. The record shows that the PCIT in exercise of his powers under Section 263 of the Act had set aside a final assessment order dated 31.12.2014 passed by the Assessing Officer (AO) under Section 143(3) read with Section 144C of the Act. According to the PCIT, the final assessment order dated 31.12.2014 was erroneous and prejudicial to the interest of the revenue.

5. The impact of the order passed by the PCIT was that the respondent/assessee was denied the deduction amounting to Rs.20,01,05,275/- claimed in the AY in issue under Section 80IA of the Act.

6. We may note that Mr Deepak Chopra, learned counsel, who appears on behalf of the respondent/assessee, has drawn our attention to the fact that the respondent/assessee had been allowed the deduction under Section 80IA in the three preceding AYs, i.e., AY 2007-08, AY 2008-09 and AY 2009-10.

7. Mr Chopra says that insofar as AY 2007-08 was concerned, the respondent/assessee's Return of Income (ROI) was processed under Section 143(1) of the Act, while the ROI for AY 2008-09 and AY 2009-10 was subjected to scrutiny and the assessment orders were framed under Section 143(3) of the Act.

8. In sum, the contention of Mr Chopra is that the PCIT need not have taken a position which resulted in the appellant/revenue taking a U-turn with regard to the respondent/assessee's eligibility to claim deduction under 80IA of the Act. It is emphasised by Mr Chopra that the respondent/assessee's case is covered under Section 80IA(4)(ii) of the Act.

9. According to Mr Chopra, the respondent/assessee's business will fall under the ambit of broadband network and internet services, which is one of the eligible undertakings referred to in the said provision. It appears that instead of referring to Clause (ii), the PCIT has referred to Clause (i) of subsection (4) of Section 80IA of the Act.

10. The second aspect which the PCIT has adverted has to do with the date from which the deduction claimed by the respondent/assessee under Section 80IA of the Act would kick in.

> *11. According to the PCIT, the deduction under 80IA of the Act is available to the respondent/assessee for any ten (10) consecutive AYs out of fifteen (15) years beginning with the year in with the respondent/assessee commence its business.*
>
> *11.1 Mr Chopra however contends that the correct date would be the date when the respondent/assessee claims the deduction. In other words, what needs to be determined is, which is the initial AY.*
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> *11.1 In support of this plea, Mr Chopra placed reliance on the Circular No.1 of 2016 dated 15.02.2016.*
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> *12. Prima facie, we are of the view that the PCIT should not have in the fourth year taken a view that the respondent/assessee was not entitled to deduction under Section 80IA of the Act, on the purported ground that it was not carrying on the eligible business.*
>
> *13. As noted above, the undertakings qua which deduction is claimed and is available is listed out in Section 80IA(4)(ii) of the Act.*
>
> *14. The position as to which is the initial AY seems to be covered by the Circular dated 15.02.2016. The respondent/assessee's appears to have been given an option in that behalf.*
>
> *15. Since Mr Shlok Chandra, learned senior standing counsel, who appears on behalf of the appellant/revenue, seeks a short accommodation, list the matter on 12.12.2023.*"

4. Basically, we are confronted with two issues in this appeal, namely the scope of Section 263 of the Act and scope of Section 80IA of the Act. According to the appellant/revenue, PCIT was justified in invoking revisional powers under Section 263 of the Act since in his opinion, the assessment order under Section 143(3) of the Act was erroneous and prejudicial to the interest of revenue, while according to the respondent/assessee, the revisional powers were wrongly exercised since mere difference of opinion between the Assessing Officer and the PCIT cannot serve as basis to invoke such powers. Further, according to the respondent/assessee, the revenue admittedly having allowed deductions under Section 80IA of the Act to the respondent/assessee in three preceding assessment years, there was no justification to take U-turn in fourth year,

invoking the revisional jurisdiction.

5. It would be apposite to briefly traverse through the legal position qua scope of revisional jurisdiction under Section 263 of the Act.

5.1 In the case of ***Commissioner of Income Tax (Central) Ludhiana vs Max India Ltd.***, (2007) 15 SCC 401, the Supreme Court referred to its earlier judgment in the case of ***Malabar Industrial Company Limited vs CIT***, (2002) 2 SCC 718 and reiterated that every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interest of revenue within the meaning of Section 263 of the Act; and that where the Income Tax Officer adopts one of the courses permissible in law and the same results 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 interest of the revenue, unless the view taken by the Income Tax Officer is not sustainable in law.

5.2 In the case of ***Commissioner of Income Tax, Gujarat II vs Kwality Steel Suppliers Complex***, (2017) 14 SCC 548, while dealing with Section 263 of the Act, the Supreme Court held thus:

> *"7. This provision has come for interpretation time and again before this Court. Such a power given to the Commissioner to revise the order of the assessing officer is held to be constitutionally valid having regard to the fact that the Department has no right of appeal to the CIT (A) against any order passed by the assessing officer. It is for this reason, Section 263 is enacted to empower the Commissioner with the authority of revising the order of the assessing officer, where the order is*

erroneous and the error has resulted in prejudice to the interests of the Revenue. As is clear from the language of the provision, ***there has to be a proper application of mind by the Commissioner to come to a firm conclusion that the order of the assessing officer is erroneous and prejudicial to the interests of the Revenue. Thus, two conditions need to be satisfied for invoking such a power by the Commissioner, which are:***

(i) the order of the assessing officer sought to be revised is erroneous; and

(ii) it is prejudicial to the interests of the Revenue. (See Malabar Industrial Co. Ltd. v. CIT)

8. At the same time, this Court has also laid down that this provision cannot be invoked to correct each and every type of mistake or error committed by the assessing officer. While interpreting the expression "prejudicial to the interests of the Revenue", it is also held that ***order of the assessing officer cannot be termed as prejudicial simply because assessing 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 assessing officer has taken one view with which the Commissioner did not agree. (See CIT v. Arvind Jewellers.)***

9. It is clear from the above that where two views are possible and the assessing officer has taken one view and the CIT again revised the said order on the ground that he does not agree with the view taken by the assessing officer, in such circumstances the assessment order cannot be treated as an order erroneous or prejudicial to the interest of the Revenue. Reason is simple. ***While exercising the revisionary jurisdiction, the CIT is not sitting in appeal.***" [Emphasis is ours]

5.3 In the case of ***CIT vs New Delhi Television Ltd.,*** (2014) 220 Taxman 43, a coordinate bench of this court examined the provision under consideration herein and observed thus:

"In paragraph 6 of the order dated 29th March, 2007, the Commissioner uses the expression "erroneous and prejudicial to the interest of revenue" but does not cite any reason or ground for the said conclusion. Use of the words without elucidation indicates, that the said observations are presumptive or a suspicion and mere repetition of words, but this does not

satisfy the requirements under Section 263 of the Act. ***Order under Section 263 must be clear and must set out logical ground and reason as to why the assessment is erroneous and prejudicial to the interest of the revenue."***

[Emphasis is ours]

6. So far as the second issue confronting us in this appeal is concerned, the respondent/assessee has placed on record a copy of CBDT Circular No. 1/2016 dated 15.02.2016, which categorically clarifies that the expression "initial assessment year" used in Section 80IA(5) of the Act means the first year opted by the assessee for claiming deduction under Section 80IA of the Act in the manner that total number of years for claiming deduction should not transgress the prescribed slab of 15 or 20 years, as the case may be and the period of claim should be availed in continuity. In the present case, as mentioned above, the respondent/assessee was being allowed deduction under Section 80IA of the Act since AY2007-08, but the appellant/assessee took a U-turn by denying the benefit in AY2010-11, that too invoking jurisdiction under Section 263 of the Act, which cannot be justified.

7. We have also examined the factual matrix relevant for present purposes. The respondent/assessee since the year 2003 was dealing in Internet Protocol-Virtual Private Network (IP-VPN) services license and in the year 2006, the Department of Telecommunication (DoT) granted National Long Distance-International Long Distance (NLD-ILD) license. As reflected from DoT Communication dated 23.12.2005, the respondent/assessee (*formerly named M/s i2i Enterprises Pvt. Ltd*) was allowed to migrate from IP-VPN services to NLD-ILD license, with the clear stipulation that services earlier being provided under IP-VPN license

would continue under NLD-ILD license. The necessary documents reflecting the same have been filed by the respondent/assessee through index dated 27.12.2019 in this appeal. The PCIT took a view that the provisions under Section 80IA(4)(ii) of the Act are silent about such migration of license; and that since business was commenced by the respondent/assessee in AY2004-05 having availed 100% deduction from AY2004-05 to AY2008-09, the respondent/assessee was entitled to claim deduction only to the extent of 30% from AY2009-10 to AY2013-14. The migration of licenses having occurred in December 2006 and the Assessing Officer for AY2007-08, AY2008-09 and AY2009-10 having allowed the deductions after making inquiries, we are in complete agreement with the Tribunal that in view of the judgment of the Supreme Court in the case of ***Shasun Chemicals and Drugs Ltd vs CIT***, 388 ITR 1(SC) the respondent/assessee could not be deprived of similar deductions for the subsequent period.

8. No material was brought on record by the appellant/revenue to show that merely by migration from IP-VPN to NLD-ILD license, a new and different "undertaking" of the respondent/assessee within the meaning of Section 80IA(4)(ii) of the Act came into existence. As held by this court in the case of ***PCIT vs Verizone Communications India Pvt. Ltd,*** 2023:DHC:8708-DB, mere addition of services or expansion of the same undertaking would not take it out of the realm of Section 80IA(4)(ii) of the Act.

9. Further, although PCIT did carry out an inquiry, but did not arrive at any finding challenging the sustainability of the view of the Assessing

Officer. According to the settled legal position as quoted above through various judicial precedents, merely because PCIT holds a view different from that of the Assessing Officer, the jurisdiction under Section 263 of the Act cannot be invoked to substitute the view of the latter with that of the former.

10. Therefore, we are of the considered view that the PCIT wrongly invoked jurisdiction under Section 263 of the Act and fell in error by taking a U-turn in fourth assessment year thereby denying benefit of Section 80IA of the Act to the respondent/assessee. The impugned order passed by the Tribunal suffers no infirmity and the same is upheld. In view of the aforesaid, we find no substantial question of law required to be examined by us in the instant appeal. The appeal is, accordingly, dismissed.

GIRISH KATHPALIA
(JUDGE)

RAJIV SHAKDHER
(JUDGE)

JANUARY 05, 2024/as