

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

ITA No.467/PUN/2020

निर्धारण वर्ष / Assessment Year: 2015-16

Kirloskar Oil Engines Ltd., 13, Laxmanrao Kirloskar Road, Khadki, Pune 411 003 PAN : AADCK5714H	Vs.	PCIT, Circle-6, Pune
Appellant		Respondent

Assessee by Shri C.H. Naniwadekar
Revenue by Shri Deepak Garg

Date of hearing 07-10-2021
Date of pronouncement 08-10-2021

आदेश / ORDER

PER R.S.SYAL, VP :

This appeal by the assessee is directed against the order dated 06-03-2020 passed by the Principal Commissioner of Income-tax u/s.263 of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') in relation to the assessment year 2015-16.

2. There is a delay of 64 days in presenting this appeal before the Tribunal. The assessee has filed a letter dated 08-07-2020 in support of the reasons which led to the filing of the instant appeal belatedly. We are satisfied with the reasons. As such, the delay is condoned and the appeal is admitted for disposal on merits.

3. Briefly stated, the facts of the case are that the assessee filed its return declaring total income of Rs.161.07 crore. The assessment u/s.143(3) of the Act was taken up in which the Assessing Officer (AO) observed that the assessee company had made investments in mutual funds under Dividend Option Scheme up to 30-09-2014 and from 01-10-2014 onwards the investments were shifted from Dividend Option Scheme to Growth Funds. The assessee earned dividend amounting to Rs.21,93,20,990/- which was received up to 30-09-2014. From 01-10-2014 to 31-03-2015, the assessee received short term capital gain of Rs.28.68 crore, which was offered for taxation. The amount of investment on 30-09-2014 stood at Rs.704.83 crore. The assessee offered disallowance u/s.14A only amounting to Rs.4,73,480/-. On being called upon to explain as to why the disallowance be not made under section 14A as per the mandate of Rule 8D, the assessee tendered its explanation. The AO computed disallowance under Rule 8D(2)(i) at Rs.4,73,480/-, being, the expenditure directly relating to exempt income. No disallowance was made under Rule 8D(2)(ii) towards interest and disallowance under Rule 8D(2)(iii) was made at 0.25% of the average value of investments as on

01-04-2014 and 30-09-2014, thus, computing the further amount disallowable under this clause at Rs.1,64,06,810/-. The Id. PCIT observed that the AO passed order in an erroneous manner which was prejudicial to the interest of the Revenue inasmuch as the disallowance under clause (iii) of Rule 8D(2) was computed at 0.25% as against the mandatorily prescribed rate of 0.50%. He, therefore, set-aside the assessment order and directed the AO to re-compute the disallowance under the clause at 0.50%. Aggrieved thereby, the assessee has come up in appeal before the Tribunal.

4. The Id. AR was fair enough to concede that the assessment order was definitely erroneous inasmuch as the disallowance under clause (iii) of rule 8D(2) ought to have been made at 0.50% instead of 0.25%. He, however, contended that the assessment order was not prejudicial to the interest of the Revenue. He bolstered this argument by placing on record an alternative determination under clause (iii) of Rule 8D(2) computing the amount disallowable under such clause at Rs.1,51,92,814/- (by taking average value of investment with opening figure as on 01-04-2014 at Rs.607.71 crore and Nil figure as on 31-03-2015 giving average value of investments at Rs.303.85 crore) as against the amount disallowed

by the AO at Rs.1.64 crore (with average value of investments at 01-04-2014 to 30-09-2014). For taking Nil figure of investments at the end of the year, the Id. AR relied on *ACB India Ltd. vs. CIT (2015) 374 ITR 108 (Del)* holding that the average value of investments, for the purposes of Rule 8D(2)(iii), should be confined to those securities in respect of which exempt income is earned and not the total investments.

5. We have heard both the sides and gone through the relevant material on record. It is an undisputed fact that the assessee was holding investments in mutual funds in Dividend Option Scheme up to 30-09-2014 and thereafter switched over to Growth Funds. The amount of exempt dividend income up to 30-09-2014 stood at Rs.21.93 crore. The only dispute is on computation of disallowance under clause (iii) of Rule 8D(2). Whereas the AO computed the disallowance at 0.25% by taking the average value of investment as on 01-04-2014 and 30-09-2014, the Id. PCIT has canvassed a view that the disallowance has to be made at 0.50% irrespective of the period during which the investments yielded exempt income.

6. Section 263 of the Act unequivocally provides that an assessment order can be revised if the CIT “*considers that any*

order passed therein by the AO is erroneous in so far as it is prejudicial to the interest of the Revenue". Thus, it is ostensible that an assessment order must be both erroneous and prejudicial to the interest of the Revenue so as to call for revision. If an assessment order is only erroneous but not prejudicial to the interest of the Revenue, the same cannot be covered within the fold of section 263. Similar is the position where the assessment order is not erroneous but only prejudicial to the interest of the Revenue. Thus, it becomes manifest that the power u/s.263 can be invoked only when the assessment order is found to be both erroneous as well as prejudicial to the interest of the Revenue. If one of these two elements is missing, then the power under this section is ousted. The Id. AR has made out a case that the assessment order in this case is certainly erroneous but not prejudicial to the interest of the Revenue. The calculation put forth before the Tribunal for demonstrating that the assessment order was not prejudicial to the interest of the Revenue has neither been vetted by the AO or the Id. CIT. We refrain from making any comment on its correctness without considering the corresponding details. In our considered opinion, it would be in the fitness of the things if the impugned order is set-aside and the matter

is restored to the file of Id. CIT for ascertaining if the order passed by the AO is also prejudicial to the interest of the Revenue in the manner in which the assessee is trying to make out so as to clothe him with the jurisdiction to take action under section 263 of the Act. If the calculation of the assessee is found to be flawed and the assessment order also remains prejudicial to the interest of the revenue, then the impugned order revising the original order has to be upheld. In the otherwise scenario, the power of the Id. PCIT for revising the assessment order would be lacking if the assessment order is found to be only erroneous but not prejudicial to the interest of the Revenue. Needless to say, the assessee will be allowed a reasonable opportunity of hearing by the Id. CIT before embarking upon the above fresh exercise.

7. In the result, the appeal is allowed for statistical purposes.

Order pronounced in the Open Court on 08th October, 2021.

Sd/-
(PARTHA SARATHI CHAUDHURY)
JUDICIAL MEMBER

Sd/-
(R.S.SYAL)
VICE PRESIDENT

पुणे Pune; दिनांक Dated : 08th October , 2021
Satish

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The PCIT, Circle-6, Pune
4. The Jt. CIT, Range-14, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे
“A” / DR ‘A’, ITAT, Pune
6. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	07-10-2021	Sr.PS
2.	Draft placed before author	08-10-2021	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

*