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* IN THE HIGH COURT OF DELHI AT NEW DELHI
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\+ ITA No. 759/2016

PR. COMMISSIONER OF INCOME TAX -6 ..... Appellant
Through: Mr. Rahul Chaudhary, Senior standing counsel.

versus

MODICARE LIMITED ..... Respondent
Through: Ms. Kavita Jha, Advocate.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE PRATHIBA M. SINGH

O R D E R
% **14.09.2017**

1. This appeal under Section 260A of the Income Tax Act, 1961 ('Act') filed by the Revenue is directed against the impugned order dated 19th April 2016 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 3007/Del/2014 for the Assessment Year ('AY') 2009-10.

2. The question urged by the Revenue in the appeal is whether the ITAT erred in law in setting aside the order of the Commissioner of Income Tax ('CIT') under Section 263 of the Act which in turn set aside the assessment order dated 31st October 2011 passed by the Assessing Officer ('AO') under Section 143 (3) of the Act and required the assessment proceedings to be undertaken afresh.

3. The Assessee filed its return of income for the AY in question on

30th September 2009, declaring income as Nil. The Assessee, being a listed company engaged in the business of marketing of household products, declared dividend income of Rs. 14,51,289/- which was exempt from tax. The Assessee had not made any disallowance in relation to such income under Section 14A of the Act.

4. After picking up the Assessee's return for scrutiny, the AO completed the assessment under Section 143 (3) of the Act making a disallowance of Rs. 3,23,475/- under Section 14A of the Act.

5. Thereafter, a proposal was sent by the AO to the CIT for invoking Section 263 of the Act and to revise the assessment order. A show-cause notice ('SCN') was issued to the Assessee by the CIT on 30th January 2014. The SCN *inter alia* stated that information had been received from the Deputy Director of Income Tax (Investigation)-Unit-II (2), Pune that during a search and seizure operation carried out on the Walchandnagar Industries Ltd. (WIL) Group, payment of Rs. 2,49,75,000/- made to the Assessee was detected as non-genuine commission payment. It was further alleged in the SCN that since no expenditure was incurred by the Assessee to receive the above commission, the above amount ought to have been included in the taxable income and disclosed by the Assessee. Consequently, the Assessee was asked to show cause as to why an order under Section 263 of the Act should not be passed to set aside the assessment order and the matter remanded to the AO for a fresh assessment.

6. The CIT, after considering the reply of the Assessee issued the impugned order dated 19th March 2014, the operative portion of which read thus:

"From the show cause issued as well as discussion held during the proceedings, it is established that order to be revised is erroneous and prejudicial to the interest of revenue. Also reasonable opportunities of being heard were provided to the assessee. However details of the facts on the basis of which 263 proceedings have been initiated, have been requested by the assessee to be given to him for detailed reply after due verification. It is observed that request of the assessee is valid and may be acceded to. Accordingly A.O. is directed to provide the details of the facts on the basis of which 263, proceedings have been initiated and then verify the reply of the assessee on the same issue.

In view of the above, Order dated 31.10.2011 passed u/s 143(3) of the I.T. Act is set aside u/s 263 of the I.T. Act with the specific direction to the A.O to provide the basis/reasons for initiations of proceedings ·u/s:263 of the I. T Act to the assessee, to verify the submission of the assessee on the issue and also the details of receipt declared by the assessee, to examine the details of service rendered and expenditure incurred to earn particular commission incomes and then decide the issues accordingly after giving reasonable opportunity of being heard to the assessee company."

7. The above order has been set aside by the ITAT by the impugned order in the appeal filed by the Assessee on the ground that Section 263 of the Act is to be invoked "not as a jurisdictional corrective or as a review of a subordinate's order in exercise of supervisory power, but is to be invoked and employed only for setting right distortions and prejudices to the Revenue, which is a unique conception which is to be understood in the context of and in the interests of the Revenue."

8. Mr. Rahul Chaudhary, learned Senior Standing Counsel for the Revenue, took exception to the above observations of the ITAT as being based on a

misconception of the scope of Section 263 of the Act as explained by the Supreme Court in ***Malabar Industrial Co. Limited v. Commissioner of Income Tax [2000] 243 ITR 83 (SC)***. Mr. Chaudhary submitted that the order of the CIT should be understood as being based on what was set out in the SCN issued to the Assessee even if the order did not indicate the reasons that weighed with the CIT in coming to the conclusion that the order of the AO was erroneous.

9. Although there may be some merit in the above submission, the Court finds that the order of the CIT does not conform to the legal requirements of Section 263 of the Act. It was not enough for the CIT to reproduce the SCN, the reply thereto and give the conclusion. The impugned order of the CIT gives no reasons for the conclusion that the assessment order of the AO was erroneous and prejudicial to the interests of the Revenue.

10. The CIT appears to have proceeded under the misconception that the AO could be "directed to provide the details of the facts on the basis of which 263 proceedings have been initiated and then verify the reply of the assessee on the same issue." The exercise under Section 263 of the Act could not have been 'outsourced' by the CIT to the AO. The CIT had himself to undertake a minimal enquiry and give reasons for coming to the conclusion that the assessment order was erroneous and prejudicial to the interest of the Revenue. This legal position has been explained in a number of decisions including ***Income Tax Officer v. DG Housing Projects Limited [2012] 343 ITR 329 (Del)*** and ***DIT v. Jyoti Foundation [2013] 357 ITR 388 (Del)***. This was reiterated by this Court recently in its decision dated 5th September 2017

in ITA No. 705 of 2017 (***Pr. Commissioner of Income Tax-3, New Delhi v. Delhi Airport Metro Express Pvt. Ltd***).

11. Consequently, the Court concurs with the ultimate conclusion of the ITAT that the order dated 19th March 2014 of the CIT under Section 263 of the Act is erroneous but for different reasons as explained above.

12. No substantial question of law arises for consideration in the appeal and it is dismissed as such.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

SEPTEMBER 14, 2017
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