

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'C', NEW DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA.Nos.2392 & 2393/Del/2018
Assessment Years 2013-2014 & 2014-2015

M/s. Great Heights Infratech Pvt. Ltd., C-134, Defence Colony, New Delhi – 110024 PAN AAECG7642P	vs.	The Pr. CIT, Central-2, New Delhi.
Appellant		Respondent

Assessee by :	Shri Hiren Mehta, C.A.
Revenue by :	Shri Sanjeet Singh, CIT-D.R.

Date of Hearing :	16.08.2018
Date of Pronouncement :	04.09.2018

ORDER

PER BHAVNESH SAINI, JM

Both the appeals by Assessee are directed against different Orders of the Ld. CIT (Central)-II, New Delhi, Dated 30.03.2018, for the A.Ys. 2013-2014 and 2014-2015 under section 263 of the I.T. Act, 1961.

2. A search and seizure operation under section 132 of the Income Tax Act, 1961 was conducted by the Investigation Wing of the Department in M/s AMQ India Pvt. Ltd., M/s Abdul Majeed Qureshi (Prop. Moin Akhtar Qureshi) pertaining to AMQ Group of cases on 15.02.2014. During the course of search and seizure proceedings, certain incriminating documents/hard disk pertaining to assessee were found and seized. Subsequently, assessment proceedings were completed on 31.03.2016 for both the assessment years by the Assessing Officer, Central Circle-19, New Delhi at total income of Rs.4,14,07,930/- against the return of income declaring loss of Rs.7,72,570/- declared by the assessee in A.Y. 2013-2014 and at total income of Rs.1,29,366/- against the return of income of Rs.1,29,366/- declared by assessee in A.Y. 2014-2015.

3. The Ld. CIT on examination of the records of assessments observed that both the assessment orders dated 31.03.2016 is erroneous, as well as prejudicial to the interests

of the Revenue to the extent that assessment was completed without proper examination/verification. The A.O. completed the assessments in which he allowed the rental income as income from business and profession without proper examination/verification. Show cause notices under section 263 of the I.T. Act were issued to the assessee, pointing out that rent of house property is taxable under section 22 of the I.T. Act, 1961, which have not been verified by the A.O. at assessment stage. The assessee filed written submissions in response to the show cause notices and submitted that the main objects for which assessee-company was incorporated comprises of dealing in Real Estates by way of trade and development of properties and activities incidental thereto which would also include leasing and renting of properties. A cogent examination of Memorandum of Association and the audited balance sheet would indisputably lead to the conclusion that apart from the rental income, the assessee-company does not have other activity. The assessee-company relied upon the judgments of Apex Court in the case of

Chennai properties and Investments Ltd. vs. CIT 373 ITR 673 (SC) and prayed that proceedings under section 263 of the IT Act, 1961 may be dropped.

3.1. The Ld. CIT, however, did not accept the contention of assessee and noted that the main object of the assessee company is construction and development of any type of properties, which is not same as in the case Chennai Properties & Investments Ltd. vs CIT (supra). The assessee has declared rental income and claimed depreciation against the income. The approach of the A.O. is not correct because the same should be taxed as income from house property. The assessment orders were, therefore, held to be erroneous in so far as prejudicial to the interests of the Revenue. Both the assessment orders were accordingly set aside and restored back to the file of the A.O. on the aforesaid issue only. A.O. was directed to pass fresh assessment orders, after giving opportunity of being heard to the assessee.

4. Learned Counsel for the Assessee reiterated the submissions made before the authorities below and submitted that assessee has main objects of carrying on business on construction and renting out properties. Copy of the Memorandum of Association of Assessee is filed at page-24 of the paper book and main objects 1 to 3 to be pursued by the Assessee-Company on its incorporation are as under :

- “1. To carry on the business of construction of any type of projects such as residential houses, commercial buildings, flats and factory’s sheds and buildings in or out side of India and to act as builders, colonizers and civil and constructional contractors and to do all activities as contractor.*
- 2. To purchase, take on lease or in exchange, hire or otherwise acquire, sell and mortgage any estates, lands, agricultural lands, buildings easements or such other interest in any immovable property and to develop and turn to account by laying out, plotting*

and preparing the same for building purposes, constructing building, furnishing, Fitting up and improving buildings and by paying, draining and building on lease.

3. *To buy, exchange or otherwise acquire, an interest in any immovable property such as houses, buildings and lands within or outside the limits of Municipal Corporation or such other local bodies and to provide roads, drains, water supply electricity and lights within these areas, to divide the same into suitable plots and rent or sell the plots to the people for building, houses, bungalows and colonies for workmen according to schemes approved by improvement Trusts Development Boards and Municipal Boards thereon and to rent or sell the same to the public and realise cost in lump-sum installments or otherwise to start any housing scheme in India or abroad.”*

4.1. He has submitted that assessee-company has one of the objects to be renting out the property and in assessment years under appeals. Assessee has only income from renting out the properties which is business income of the assessee. He has submitted that detailed reply was filed before Ld. CIT, on which, no enquiry have been conducted by him and explanation of assessee-company has not been considered in proper perspective. The explanation of assessee has been supported by material evidences produced on record. He has submitted that since one of the main objects of the assessee-company is renting out the properties, therefore, it was correctly considered as business income by the A.O. He has submitted that on change of opinion, Ld. CIT cannot revise the assessments and that too when two views are possible and A.O. has taken one of the view with which the Ld. CIT does not agree, it cannot be treated as erroneous order, prejudicial to the interests of the Revenue unless the view taken by the A.O. is unsustainable in Law. In support of this proposition, he has relied upon the decision of the Hon'ble Supreme Court in the

case of Malabar Industrial Company Limited 243 ITR 83. He has relied upon following decisions :

- (i) Judgment of Hon'ble Supreme Court in the case of Chennai Properties and Investments Ltd. vs. CIT (2015) 373 ITR 673 (SC);
- (ii) Judgment of Hon'ble Supreme Court in the case of Rayala Corporation (P.) Ltd. Vs. ACIT (2016) 386 ITR 500 (SC);
- (iii) Judgment of Hon'ble Delhi High Court in the case of Pr. CIT vs. Delhi Airport Metro Express Pvt. Ltd., ITA.No.705 of 2017 Dated 05.09.2017;
- (iv) Order of ITAT, Mumbai Bench in the case of Damsak Projects (P.) Ltd., vs. DCIT, Range-6(2), Mumbai (2016) 45 ITR (Tribu.) 278 (Mum.).

4.2. He has submitted that since on explanation of assessee, the Ld. CIT did not make any enquiry, therefore, the order passed under section 263 of the I.T. Act, 1961, cannot be sustained in law.

5. On the other hand, Ld. D.R. submitted that this issue has not been examined by the A.O. and no enquiry have been made. No opinion have been expressed by the A.O. on the issue. The A.O. has not applied his mind. Therefore, it was rightly set aside by the Ld. CIT, under section 263 of the I.T. Act.

6. We have considered the rival submissions. The Hon'ble Supreme Court in the case of Chennai Properties and Investments Ltd. vs. CIT (supra), held as under :

“Where in terms of memorandum of association, main object of assessee- company was to acquire properties and earn income by letting out same, said income was to be brought to tax as business income and not as income from house property.”

6.1. The Hon'ble Supreme Court in the case of Rayala Corporation (P.) Ltd. Vs. ACIT (supra), held as under :

“Where assessee-company was engaged in business of leasing out its house properties to earn rent, income so earned as rent should be treated as ‘business income’, and not as ‘income from house property’.”

6.2. The Honourable Delhi High Court in the case of Pr.CIT-3, New Delhi vs. Delhi Airport Metro Express Pvt. Ltd., (supra), held as under :

9. *It is seen in the order dated 30th March 2016, the PCIT has proceeded by setting out the contents of the SCN and the contents of the reply given by the Assessee. It appears that no inquiry, as such, was undertaken by the PCIT to come to the conclusion that the original assessment order was erroneous and prejudicial to the interests of the Revenue.*

10. *For the purposes of exercising jurisdiction under Section 263 of the Act, the conclusion that the order of the AO is erroneous and prejudicial to the interests of the Revenue has to be preceded by some minimal inquiry. In*

fact, if the PCIT is of the view that the AO did not undertake any inquiry, it becomes incumbent on the PCIT to conduct such inquiry. All that PCIT has done in the impugned order is to refer to the Circular of the CBDT and conclude that “in the case of the Assessee company, the AO was duty bound to calculate and allow depreciation on the BOT in conformity of the CBDT Circular 9/2014 but the AO failed to do so. Therefore, the order of the AO is erroneous insofar as prejudicial to the interest of revenue”.

11. In the considered view of the Court, this can hardly constitute the reasons required to be given by the PCIT to justify the exercise of jurisdiction under Section 263 of the Act. In the context of the present case if, as urged by the Revenue, the Assessee has wrongly claimed depreciation on assets like land and building, it was incumbent upon the PCIT to undertake an inquiry as regards which of the assets were purchased and installed by the Assessee out of its own funds during the AY in question and, which

were those assets that were handed over to it by the DMRC. That basic exercise of determining to what extent the depreciation was claimed in excess has not been undertaken by the PCIT.

12. Mr. Asheesh Jain then volunteered that the PCIT had exercised the second option available to him under Section 263 (1) of the Act by sending the entire matter back to the AO for a fresh assessment. That option, in the considered view of the Court, can be exercised only after the PCIT undertakes an inquiry himself in the manner indicated hereinbefore. That is missing in the present case.

13. Therefore, the Court is of the view that the IT AT was not in error in setting aside the impugned order of the PCIT under Section 263 of the Act. No substantial question of law arises.

14. The appeal is dismissed.”

6.3. The ITAT, Mumbai Bench in the case of Damsak Projects (P.) Ltd., vs. DCIT, Range-6(2), Mumbai (supra), held as under :

“Held that a detailed reply was filed during assessment proceedings by which the assessee extensively explained why the rental income should not be assessed under the head 'Income from House property'. Copies of lease agreement were filed. The purpose of transferring fixed assets as stock-in-trade was explained along with copies of purchase deed of immovable properties. A certified copy of the Board Resolution was also filed by which the accounting error of treating the properties under the head fixed assets was rectified and the same was resolved and treated as under the head 'inventory' and accordingly the claim of depreciation was reversed. Accordingly the accounts were revised and the revised accounts were adopted by the company. Considering all these

facts in totality in the light of the main objects of the company, there was no lack of enquiry on the part of the Officer for taxing the income under the head business income and not under the head income from house property.

Thus, even if the revised return had been completely ignored by the AO that would only make the assessment order erroneous but by any stretch of imagination, it could not be said to be prejudicial to the interest of the Revenue. Thus, there was no merit in the assumption of jurisdiction by the Commissioner under section 263”.

6.4. Where assessee-company claimed that it was engaged in real estate business, whether rental income was to be taxed under the Head “Business Income” or “Income from House Property” was to be decided as per objects of the assessee-company. The assessee-company filed copy of the Memorandum of Association and Learned Counsel for the

Assessee referred to main objects to be pursued by the assessee-company on its incorporation which provides that assessee-company would be carrying on business for construction of any type of property and to let-out or sell the same to the public, therefore, renting-out the properties is also one of the main objects of the assessee-company. Therefore, letting-out/renting-out the property was in fact business of the assessee-company. Therefore, same was correctly claimed by assessee-company as income from business and profession. The assessee-company in response to the show cause notice issued under section 263 of the I.T. Act, has specifically raised the above points in its reply before Ld. CIT. However, the Ld. CIT without considering the explanation of assessee-company, passed the impugned orders. The Ld. CIT did not examine the explanation of assessee-company at all and passed the order without giving any reasons for decision for the same. Thus, no enquiry have been conducted by the Ld. CIT to come to the conclusion that original assessment orders were erroneous and prejudicial to the interests of the Revenue. Such course

adopted by the Ld. CIT was not found favourable in favour of the Revenue as held by the Hon'ble Delhi High Court in the case of Pr. CIT vs. Delhi Airport Metro Express Pvt. Ltd., (supra). The Hon'ble Gauhati High Court in the case of Leela Choudhary vs. CIT 289 ITR 226 held that Order passed under section 263 of the I.T. Act without considering the reply of the assessee would not be valid. In the instant case, the assessee-company produced sufficient evidence and material before the Ld. CIT in support of the contention that rental income is in fact "Business Income" of the assessee-company which have been correctly accepted by the A.O. Therefore, before taking any adverse view against the assessee-company, the Ld. CIT should have examined the explanation of assessee-company and should have considered the reply of the assessee-company. However, nothing has been done and without any justification, the original assessment orders have been set aside. It may also be noted here that the A.O. in A.Y. 2013-2014 has specifically mentioned that necessary details, information and documents have been called for from the

assessee-company time to time which have been furnished. The A.O. accepted the returned income of the assessee-company and made addition on account of unexplained investment on protective basis. In A.Y. 2014-2015, the A.O. specifically mentioned in the assessment order that assessee-company has shown income from profits and gains from business or profession. The A.O. examined the source of such income on test check basis and reply/explanation of assessee-company has been duly considered. The A.O. accepted the returned income of the assessee-company which would show that A.O. was conscious of the fact that assessee-company has only declared income from business on account of rent received in both the assessment years. There is no other income declared by assessee-company in its accounts or in the return of income. Therefore, it appears to us that A.O. has accepted the rental income as business income of the assessee-company in the impugned assessment years after satisfying himself on such claim made by assessee-company by producing the necessary details on record. The view of the

A.O. is supported by the Judgments of the Hon'ble Supreme Court in the case of Chennai Properties and Investments Ltd. vs. CIT (supra) and in the case of Rayala Corporation (P.) Ltd. Vs. ACIT (supra). It is well settled Law that every loss of Revenue as a consequence of an Order of the A.O. cannot be treated as prejudicial to the interests of the Revenue, For example, when A.O. adopted one of the course permissible under Law and it has resulted in loss of Revenue or where two views are possible and A.O. has taken one view with which the Ld. CIT does not agree, it cannot be treated as an erroneous Order prejudicial to the interests of the Revenue unless the view taken by the A.O. is unsustainable in Law. We rely upon the decision of the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd., (supra). Considering the totality of the facts and circumstances of the case, we are of the view that A.O. has correctly accepted the rental income as business income in the facts and circumstances of the case. The Orders of the Ld. CIT, thus, cannot be sustained in Law. We, accordingly, set aside the impugned Orders of the Ld. CIT

passed under section 263 of the I.T. Act and restore the original assessment orders.

7. In the result, both the appeals of the assessee are allowed.

Order pronounced in the open court.

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Delhi, Dated 04th September, 2018

VBP/-

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT C-Bench, Delhi
6. Guard File

//By Order//

ASSISTANT REGISTRAR
ITAT : NEW DELHI.