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

+ **ITA No. 705/2017**

PR. COMMISSIONER OF INCOME
TAX - 3, NEW DELHI

..... Appellant

Through: Mr. Asheesh Jain, Sr. Standing
Counsel with Mr. Vikrant A.
Maheshwari, Advocates.

versus

DELHI AIRPORT METRO EXPRESS PVT. LTD. Respondent

Through: None.

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE PRATHIBA M. SINGH**

ORDER

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05.09.2017

1. The Revenue is in appeal against an order dated 12th January 2017 passed by Income Tax Appellate Tribunal ('ITAT') in ITA No. 2813/Del/2016 for the Assessment Year ('AY') 2011-12.

2. The short question urged by the Revenue is whether the ITAT was justified in setting aside the order of the Principal Commissioner of Income Tax ('PCIT') passed under Section 263 of the Income Tax Act, 1961 ('Act') setting aside the original assessment order dated 31st December 2013 passed by the Assessing Officer ('AO') under Section 143 (3) of the Act.

3. The background facts are that the Assessee is a Concessionaire of the Airport Metro Express Project of the Delhi Metro Rail Corporation Ltd. ('DMRC') under a Build-Operate-Transfer ('BOT') Scheme. The Assessee

had accepted the concession for a period of 30 years. During the AY in question, the Assessee claimed depreciation of Rs. 112,29,74,447/- on fixed assets of Rs. 1560,48,17,189/- at 50% of the eligible depreciation rates since, during the AY in question, the assets were used for less than 180 days.

4. The case of the Revenue is that the assets were developed under the BOT scheme and the Assessee was not eligible to claim depreciation as it was not the owner of the assets. The Revenue contended that the land for the project was handed over by the DMRC to the Assessee as Concessionaire without actual transfer of ownership. The design and construction of the basic structure was also done by the DMRC.

5. The case of the Assessee, on the other hand, is that during the AY in question it had purchased and installed plant and machinery and such plant and machinery was legally owned by it. It is further contended that since such assets were used for the purposes of Assessee's business, it was entitled to claim depreciation under Section 32 of the Act.

6. It appears that during the original assessment proceedings, the AO issued a questionnaire to the Assessee specific to the above issue. It is only after considering the assessee's replies thereto that the AO framed the assessment under Section 143 (3) of the Act allowing depreciation as claimed by the Assessee.

7. The PCIT, in exercise of powers under Section 263 of the Act, issued a show cause notice (SCN) dated 16th March 2015 to the Assessee pointing out that if the value of these fixed assets were to be amortized evenly over a

period of 30 years, the amount to be amortized would only be Rs. 52,01,60,572/- for each year. Therefore, the depreciation allowed to the Assessee was in excess by Rs. 60,28,13,875 and, to that extent, the order passed by the AO was prejudicial to the interest of the Revenue. In reply to the SCN, the Assessee took the stand that, during the AY in question, it “had purchased the assets from independent vendors, out of its own funds for setting up the project.”

8. Thereafter the impugned order dated 30th March 2016 was passed by the PCIT. It is seen that one of the factors that weighed with the PCIT in exercising jurisdiction under Section 263 of the Act was Circular No. 9 of 2014 dated 23rd April 2014 issued by the Central Board of Direct Taxes which stated that “under the BOT arrangement an assessee would only be allowed amortization in respect of expenditure incurred in creation of the infrastructure facility over the period of BOT arrangement and no depreciation would be allowed on such infrastructure under provisions of the Act”. The case of the Assessee was that such a Circular could not dictate to the AO how he should frame his assessment and, to the extent the Circular was prejudicial to the Assessee, its application would be beyond the scope and ambit of the powers conferred on the Board under Section 119 of the Act.

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 ITAT 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.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

SEPTEMBER 05, 2017

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