



IN THE INCOME TAX APPELLATE TRIBUNAL "I", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM

&

SHRI SANDEEP GOSAIN, JM

ITA No.3125/Mum/2017

(Assessment Year :2012-13)

M/s. Indus Best Hospitality & Realtors Pvt. Ltd., Formerly Known as Silvassa Realtors Pvt. Ltd., 105, Runwal & Omkar Esquare, Opp. Sion Chunabhathi Singal Off. E.E.Highway Sion (E) Mumbai – 400 022	Vs.	PR CIT 6 R.No.501, 5 th Floor Aayakar Bhavan M.K.Road Mumbai – 400 020
PAN/GIR No. AAMCS0212P		
Appellant)	..	Respondent)

Assessee by	Shri Dharmesh Shah and Shri Dhaval Shah
Revenue by	Shri C.S.Gulati
Date of Hearing	29/11/2017
Date of Pronouncement	19/01/2018

आदेश / O R D E R

PER R.C.SHARMA (A.M):

This is an appeal filed by the assessee against the order of CIT-6, Mumbai dated 23/03/2017 for A.Y.2012-13 in the matter of order passed u/s.263 of the IT Act.

2. In this appeal assessee has challenged revision by Ld. CIT on the issue of land development charges amounting to Rs. 50,60,000/- given to Smt. Sumitraben Chauhan. The Ld. CIT has revised the order passed u/s.

143(3) of the Act by the Assessing Officer on 21.11.2014, by directing him to re-examine the same afresh.

3. It was contended by learned AR that the issue has been thoroughly examined by the Assessing Officer and hence the said issue does not call for any revision u/s. 263 of the Act for the following reasons:

(i) The payment to Smt. Sumitraben Chauhan towards land development expenses was included in the cost of land purchased and the same was claimed as deduction while determining Short Term Capital Gains (STCG) during the year. In the notice u/s. 263 of the Act dated 12.09.2016 at para 2, the Ld. CIT has stated that the scrutiny carried out by the Assessing Officer was under CASS for the reasons of-

(i) large interest expenses relatable to exempt investment u/s. 14A; and
(ii) low capital gains with respect to sales consideration. Thus, the assessment was carried out by the Assessing Officer primarily to verify the issue of capital gain offered by the assessee.

4. Our attention was invited to the notice issued u/s.142(1) of the Act dated 09/09/2014. During the course of the assessment proceedings, wherein vide query no.10, the assessee was asked to file the details of STCG. These details were filed by the assessee vide letter dated 13.10.2014 which shows that the land development expenses claimed was to the tune of Rs. 1,43,23,210/- and the same were part of the total purchase cost of Rs. 3,54,34,469/-. The details of the purchase of Rs. 3,54,34,469/- was submitted vide letter dated 20.10.2014 alongwith copies of invoices raised by Smt. Sumitraben Chauhan.

5. Our attention was also invited to the copy of the confirmation letter given by Smt. Sumitraben Chauhan which shows that the said party had confirmed the supply of 'Hard Murram' to the assessee of Rs.50,60,000/-. Against the same, the assessee had also made payment on 05.07.2011.

6. Our attention was also invited to the notice issued by AO u/s.133(6) to verify the genuineness of the transactions to Smt. Sumitraben Chauhan calling for the detailed account of the assessee in her books of account for A.Y. 2012-13 and copy of the profit and loss account, balance sheet, computation of income and the acknowledgement of ITR for A.Y. 2012-13. In response to the said notice, Smt. Sumitraben Chauhan had filed her reply vide letter dated 03.11.2014 alongwith all the documents asked for, before the Assessing Officer.

7. In view of the above, it was contended by learned AR that since the issue has been thoroughly examined by the Assessing Officer, proceedings u/s.263 of the Act could not be taken up.

8. It was further submitted by learned AR that even the nature of enquiries directed by CIT does not justify disallowance of expenses in so far as expenditure so incurred for earning income which was fully supported by documentary evidence and actual payment made for the same.

9. Learned AR has also relied on the decision of Hon'ble Bombay High Court in case of CIT v. Nirav Modi (390 ITR 292). In the said case, the issue was whether in a case where the Assessing Officer has examined the gift received by the assessee and accepted the same as genuine, whether it was correct on the part of the Ld. CIT to direct the Assessing Officer for re-examination of the said issue u/s. 263 of the Act. The observation of the Hon'ble Bombay High Court was as under:

(a) The powers u/s. 263 of the Act can be exercised by the Commissioner on satisfaction of twin conditions viz. the assessment order should be erroneous and prejudicial to the revenue. This power cannot be exercised unless the Commissioner is able to establish that the order of the Assessing Officer is erroneous and prejudicial to the revenue. Thus, where there are two possible views and the Assessing Officer has taken one of the possible views, no occasion to exercise powers of revision can arise. It was also held that revisional powers also cannot be exercised for directing a fuller inquiry to find out if the view taken is erroneous, when a view has already been taken after inquiry. This power of revision can be exercised only where no inquiry as required under the law is done. It is not open to enquire in cases of inadequate inquiry.

(b) The Hon'ble Court held that it is not in every case that every evidence produced by the assessee has to be tested by cross examination of the person giving the evidence. It is only in cases where the evidence produced gives rise to suspicion about its veracity that further scrutiny is called for. If there is nothing on record to indicate that the evidence produced is not reliable and the Assessing Officer was satisfied with the same, then it is not open to the Ld. CIT to exercise his powers of revision without the Ld. CIT recording how and why the order is erroneous due to non-examination of the donors.

(c) With respect to examination of the source of source in respect of gift received by the assessee, the Hon'ble Court observed that the inquiry of source of source is not the requirement of law. Once the Assessing

Officer is satisfied with the explanation offered on inquiry, it is not open to the Ld. CIT to exercise of his powers u/s. 263 of the Act. The Hon'ble Court therefore held that it was at the very highest case of inadequate inquiry and not of no enquiry for which the provisions of s. 263 of the Act cannot be invoked.

(d) The Hon'ble High Court further observed that in case of inadequate enquiry, the order of the Assessing Officer could be erroneous in two classes of situation. The first class would be where orders passed by the Assessing Officer are rendered ignoring a binding decision in favour of the Revenue or where enquiry is per se mandated on the basis of the record available before the Assessing Officer and the enquiry not done by him. In the second class of cases, according to Hon'ble Delhi High Court, the Ld. CIT must himself conduct an enquiry and determine as to whether the order is ex facie erroneous. It is not permissible to the CIT to remit the issue to the Assessing Officer to re-examine the same and find out whether earlier order passed by him was erroneous.

10. Thus, with the above observations, the Hon'ble Bombay High Court observed and held the revision proceedings u/s. 263 of the Act were invalid.

11. On the other hand, learned DR relied on the order of CIT and contended that AO has not examined properly payment made for purchase of Hard Murram. There is nothing on record to suggest that Smt. Sumitraben Chauhan is a regular supplier of 'Hard Murram'. Learned DR further contended that the payment to the said party was outstanding at the end of the year. Learned DR

also invited our attention to the observation made by CIT to the effect that It was necessary to verify as to from whom Smt. Sumitraben Chauhan had purchased 'Hard Murram' and whether any payment was made by her to that supplier.

12. The Ld. DR had also relied upon the following decisions to support the order of Ld. CIT:

- a. Pragati Financial Management (P) Ltd. v. CIT [82 Taxmann.com 12 (Cal.)]
- b. Anuj Jayendra Shah v. Pr. CIT [67 Taxmann.com 38 (Mum.)]
- c. Rajmandir Estates (P) Ltd. v. Pr. CIT [77 Taxmann.com 285 (SC)].

13. We have considered rival contentions and carefully gone through the orders of the authorities below and found from record that CIT has invoked his power u/s.263 to examine the land development charges paid by the assessee to Smt. Sumitraben Chauhan. From the record, we found that payment was made for development.

14. In the scrutiny order passed u/s. 143(3), the AO has made detailed enquiry with regard to the payment made to Smt. Sumitraben Chauhan for development of land which was attributable to Hard Murram supplied to the assessee, the AO has issued query letter dated 09/09/2014 to the assessee asking to file details of short term capital gain, which was duly filed by the assessee vide letter dated 03/11/2014 which showed that land development expenses included the expenses incurred on payment to Smt. Sumitraben Chauhan. Assessee has also filed confirmation letter from Smt. Sumitraben Chauhan wherein she confirmed supply of 'Hard Murram' to the assessee for Rs. 50.60 lakhs. We also

found that assessee has made payment for the same on 05/07/2011. Even to verify the genuineness of transaction, AO has also issued notice u/s.133(6) of the Act to Smt. Sumitraben Chauhan calling for the detailed account of the assessee in its books of account for A.Y.2012-13 and also copy of profit and loss accounts, balance sheet, computation of income and acknowledgement of ITR for the A.Y.2012-13. In response to the said query Smt. Sumitraben Chauhan had filed her reply vide letter dated 03/11/2014 enclosing all the documents asked by the AO.

15. Thus, in view of the above documentary evidence called by the AO, clearly emphasize that AO has applied his mind to the said issue to the payment made by Smt. Sumitraben Chauhan and having satisfied with the correctness as claim made by the assessee allowed these payments as deduction while computing short term capital gain.

16. It is clear from our above discussion that the Assessing Officer has made thorough enquiry with respect to issue raised by the Ld. CIT in the revision proceedings. Moreover, even in the present case, one of the reasons given by Ld. CIT was that the Assessing Officer has not made any enquiry with respect to source from where Smt. Sumitraben Chauhan had purchased Hard Murram for supplying it to the assessee. Thus, even in the present case, according to Ld. CIT the source of source was to be examined by the Assessing Officer, which is beyond his purview.

17. Moreover, while passing order u/s. 263, no enquiry has been caused by Ld. CIT to find out whether the order passed by the Assessing Officer and his satisfaction with respect to the correctness of the claim of the assessee is found to be erroneous. In view of the finding of the Hon'ble

Bombay High Court, unless Ld. CIT himself make relevant enquiries and determines the order to be erroneous, the provisions of s. 263 cannot be invoked. Thus, the ratio of the aforesaid decision of the Hon'ble Bombay High Court squarely applies to the facts of the present case and the order passed by Ld. CIT deserves to be quashed. We also found that the SLP against the aforesaid decision of the Hon'ble Bombay High Court filed by Revenue has been dismissed by the Hon'ble Supreme Court in CIT v. Nirav Modi [389 ITR (St.) 42].

18. Hon'ble Mumbai Tribunal in the case of Narayan Tau Rane v. ITO [70 taxmann.com 227], at para 19, observed that Ld. CIT should show that the view taken by the Assessing Officer is unsustainable in law. The Hon'ble Tribunal further observed that the action of the Ld. CIT in directing the Assessing Officer to conduct enquiry in a particular manner is contrary to the law interpreted by the Hon'ble Delhi High Court in case of CIT v. Goetze (India) Ltd [361 ITR 505]. It was further observed that if such course of action is permitted, the Ld. CIT can find fault with each and every assessment order without making any enquiry or verification in order to establish that the assessment order is not sustainable in law. With these observations, the Hon'ble Tribunal held that the provisions of s. 263 of the Act invoked by the Assessing Officer are not in accordance with law.

19. We found that that in the case of Rajmandir Estates (P) Ltd. v. Pr. CIT [77 Taxmann.com 285 (SC)], as relied by CIT-DR, the Ld Pr. CIT had made certain enquiries which revealed that the

investors making investments in the said assessee were not genuine. Based on such enquiries, it was held by Ld. PR. CIT that the share capital **would** be liable to tax u/s. 68 for which the Assessing Officer was directed to carry out further verification. On these facts, the revision u/s. 263 was upheld by the Hon'ble Supreme Court. The said decision was later followed in the case of Pragati Financial Management (P) Ltd. v. CIT [82 Taxmann.com 12 (Cal.)]. Similarly, in case of Anuj Jayendra Shah v. Pr. CIT [67 Taxmann.com 38 (Mum.)], the Hon'ble Mumbai Tribunal observed that the Assessing Officer had merely accepted the affidavit of donor and based on the same, the gifts were accepted as genuine in the hands of the assessee. On these facts, the Hon'ble Mumbai Tribunal held that s. 263 was rightly invoked by the Pr. CIT.

20. However, the decisions relied on by CIT-DR are distinguishable on facts. In view of the above, we can safely conclude that proper enquiries have been made by the Assessing Officer while accepting the claim of the assessee. Enquiries have also been made u/s. 133(6) of the Act and the details filed by the assessee have not been accepted summarily by the Assessing Officer. Thus, due application of mind was made and pursuant to the enquiries made, claim of the assessee was accepted by the Assessing Officer after fully satisfying that the land development expenses are genuine. In light of the same, the aforesaid decisions are distinguishable and hence not applicable to the facts under appeal.

22. Further, Ld. DR also submitted that in light of the introduction of the Explanation 2 to s.263 by the Finance Act, 2015, the Ld. CIT had power to

conduct further enquiry even in a case where inadequate enquiries have been conducted by the Assessing Officer.

(a) Crompton Greaves Ltd v. CIT [ITA No. 1994/Mum/2013] dated 01.02.2016.

(b) Madhurima International Pvt Ltd v. Pr. CIT [ITA No. 421/Mum/2017] dated 28.04.2017.

23. In this regard, we observe that the aforesaid judgments have been later considered by Hon'ble Mumbai Tribunal in several other cases. Further, in the recent judgments, the Hon'ble Tribunal has taken a view that the provisions to Explanation 2 to s. 263 of the Act introduced by the Finance Act, 2015 is prospective in nature and would not apply to the year under consideration as follows:

(a) AV Industries v. ACIT [ITA No. 3469/Mum/2010] dated 06.11.2015.

(b) Metacaps Engineering and Mahendra Constructions Co. (JV) v. CIT [ITA No. 2895/Mum/2014] dated 11.09.2017

(c) Reliance Money Infrastructure Ltd. v. PCIT [ITA No. 3259/Mum/2017] dated 06.10.2017.

(d) Shantikrupa Estate Pvt. Ltd. [ITA No. 1252/Ahd/2015] dated 09.09.2016

(e) Amira Pure Foods Pvt. Ltd. v. PCIT [ITA No. 451/Del/2017] dated 29.11.2017.

24. In ground no.3, the assessee has objected to the revision proceedings on the issue of interest expenditure of Rs.18,81,000/-. In this regard, we observe that the CIT has stated in para 5.3 that the assessee had not

explained the rate at which the interest of Rs.18,81,000/- has been paid. It has been further alleged that the interest expenditure is not towards income from business but capital expenditure since the borrowed funds have been utilized for purchase of land. The CIT has therefore observed that the Assessing Officer has not examined as to when the interest expenditure of Rs.18,81,000/- is a capital expenditure, how it is allowable as business expenditure. It was therefore held that there was non-application of mind by the Assessing Officer to the above facts and the order has been passed without making enquiry or verification which should have been made.

25. We have considered rival contentions and carefully gone through the orders of the authorities below and found that the assessment was taken up by the Assessing Officer under CASS to verify the issue of large interest expenses relatable to exempt investments u/s. 14A. Thus, the issue of interest expenditure was one of the main objectives for taking up the case for scrutiny by the Assessing Officer.

26. As per the notice issued u/s.142(1) dated 09/09/2014, wherein, at serial no.9, query with respect to the details of interest paid of Rs.18,81,000/- were called for. Vide letter dated 13.10.2014, the assessee had filed complete details of the interest paid along with name and address of the party, PAN, rate of interest, amount of loan taken, interest paid and TDS deducted thereon. Thereafter, vide letter dated 20.10.2014, the explanation with respect to the allowability of said interest

were also filed. Further, the confirmation of the party was also filed along with the said letter.

27. During the course of the assessment proceedings, specific query was raised by the Assessing Officer as to why the interest was not received on the loans given to the related parties and also as to why disallowance of interest should not be made u/s. 14A of the Act. In response to the said query, vide letter dated 28.11.2014, the assessee filed detailed explanation on the aforesaid issue duly supported by judicial precedents.

28. In view of the above, we can safely conclude that that the issue with respect to the claim of interest expenditure had been thoroughly examined by the Assessing Officer by calling for the specific details and the explanations on the issue involved. Having satisfied with the claim of the assessee, the deduction was allowed by the Assessing Officer. In light of the above, the revision proceedings u/s. 263 of the Act even with respect to the interest expenditure directing the Assessing Officer to re-examine the same is incorrect and unjustified.

29. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on this 19/01/2018

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 19/01/2018
Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai