

**IN THE INCOME TAX APPELLATE TRIBUNAL
RAIPUR BENCH, RAIPUR**

**(BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
& SHRI RAM LAL NEGI, JUDICIAL MEMBER)**

**ITA. No: 76/Raipur/2015
(Assessment Year: 2010-11)**

Dolphin Promoters and Builders A-1 Sai Nagar Devendra Nagar, Raipur	V/S	CIT-1, Ayakar Bhavan, Central Revenue Building Civil Lines, Raipur
(Appellant)		(Respondent)

PAN: AAefd2588E

**Appellant by : Shri R. B. Doshi, C.A.
Respondent by : Shri P.K. Mishra, D.R.**

(आदेश)/ORDER

Date of hearing : 06 -03-2018
Date of Pronouncement : 08 -03-2018

PER N.K. BILLAIYA, ACCOUNTANT MEMBER

1. With this appeal, the Assessee has challenged the validity of the order of the Ld. CIT-1, Raipur dated 10.03.2015 framed u/s. 263 of the Act. The assessee strongly contends that the ld. CIT grossly erred in treating the assessment order

dated 31.03.2013 framed u/s. 143(3) of the Act as erroneous and prejudicial to the interest of the revenue.

2. Representatives of both sides were heard at length. Having heard the rival contentions, we have carefully perused the orders of the authorities below and with the assistance of the Id. Counsel, we have considered the relevant documentary evidences brought on record in the form of paper book in the light of Rule 18(6) of the ITAT Rules.
3. The assessee is in the business of Real Estate and Construction and for the year under consideration, the assessee has claimed deduction u/s. 80IB (10) for the first time. The return was selected for scrutiny assessment and after examining the details, the A.O. framed the assessment u/s. 143(3) of the Act vide order dated 31.03.2013.
4. Not satisfied with the order of the A.O. and assuming jurisdiction bestowed upon him by Section 263 of the Act, the Id. CIT issued show cause notice to the assessee which is as under:-

F.No.CIT/RPR/Tech/263/2013-14/999

Date:-09.10.2013

To,

M/s Dolphin Promoters & Builders,

Near Sai Mandir, Devendra Nagar,

Raipur (C.G.)

PAN: AAefd2588E

**SUBJECT-NOTICE U/S 263 OF INCOME-TAX ACT, 1961 FOR A.Y. 2010-11-
Regarding-**

On examination of your income-tax records for the above assessment year, I find that the order passed u/s 143(3) of the Income-Tax Act, 1961 on 31.03.2013 is erroneous in so far as it is prejudicial to the interest of revenue in the following manner-

2(a) You have claimed deduction u/s 80IB(10) of the I.T.Act,1961 at Rs.2,13,60,861/- in respect of the profit shown from the project “ Dolphin Empress-Mowa”. The Assessing Officer has disallowed the above deduction only to the extent of Rs. 3,90,506/- resorting to section section 80IB(10)(f). However, it is seen that no completion certificate issued by the local authority showing the date of completion of construction of housing project has been submitted by you during the course of the assessment proceedings and the AO has erroneously allowed the deduction in absence of the said completion certificate.

2(b) Further, it is seen that commercial area of the housing project named“ Dolphin Empress_Mova constituted more that 7500sq ft. which is more than that of allowable limit of 5000sq. ft. thereby disqualifying the assessee from claiming the benefit of deduction u/s 80IB(10) of the Act attributable to the income from the above project.

2(c) It is also found that you have invested Rs.2,28,77,820/- in ‘ Land at Mowa’ and shown as investment in the balance sheet as on 31.03.2010. You have given loans and advances amounting to approx. Rs.2,98,85,752/- to various concerns from which there is no interest income received by you. However, these loans/advances have been obtained from interest bearing loans taken from HUDCO-3 at Rs: 1,47,42,808/- and from unsecured loan at Rs.3,66,74,033/-. You have paid interest on secured loans at Rs.28,56,723/- and on unsecured loans at Rs.26,59,834/-. But, it is seen for the Profit & Loss account that Rs. 60,920/-has been shown credited as interest income during the year consideration which implies that the interest bearing funds have been utilized by the assessee in long term investment made in land at Mowa and substantial part have been utilized in giving interest free loans and advances to some outsider parties and some sister concerns. As the interest paid are not related to your business, the same should not have been allowed by the Assessing Officer as per the provisions of sec.36 (1) (iii) of the Act.

3. In view of the above facts, the assessment order u/s 143(3) dated 31.03.2013 for A.Y. 2010-11 passed by the Assessing Officer is erroneous and prejudicial to the interest of revenue. In these circumstances, it is proposed to take remedial action under section 263 of the IT Act, 1961.

You are therefore requested to show cause as to why action u/s 263 should not be taken. Your case is fixed for hearing on 22.10.2013 at 3:00 PM. at Office of the Commissioner of Income-Tax, Central Revenue Building, Civil Lines, Raipur.

Please note that in case of non-appearance or non-receipt of any written submission, it will be presumed that you have no objection to the proposed action u/s. 263 and the proceedings will be finalized as per law.

5. The Hon'ble Supreme Court in Malabar Industrial Co. Ltd., 243 ITR 83, has laid down the following ratio:-

"A bare reading of section 263 of the Income-tax Act, 1961, makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent—if the order of the Income-tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue— recourse cannot be had to section 263(1) of the Act. The provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous".

6. In the light of the settled proposition of law mentioned hereinabove, let us now see whether there is any wrong assumption of law or facts made by the A.O. while framing the assessment order dated 31.03.2013 u/s. 143(3) of the Act. During the course of the scrutiny assessment proceedings, the A.O. issued notice u/s. 142(1) of the Act dated 22.08.2012 interalia asking the assessee at

point no. 8- “justify the deduction claimed by you in computing your total income.” Vide reply dated 12.02.2013, the assessee explained as under:-“

1. That the assessee has claimed deduction u/s. 80IB(10) to the extent of Rs. During the year under consideration.

2. The project details as required by your goodself are as under:-

Name of project : Dolphim Empress (See page-2)

Location of Project : Vidhan Sabha Road, MOwa, Post-Saddu,
Tahsil & Dist. Raipur (CG) (See page-2)

Total Land Area : 66736 Square Feet (See Page-22)

Total Built up area : **Residential – (See Page 36)**

72 Flats of 975 Square Feet each

42 Flats of 1175 Square Feet each

Commercial – (See Page 45)

4 office of 1500 Square Feet each

10 Shops of 150 Square Feet each

Year of First approval in the project : 2005-06- (See Page-33)

Year of Completion of the project : 209-10-(See Page-49)

7. Subsequently, vide a reply filed on 30.03.2013 exhibited at page 18 & 19 of the paper book, the assessee explained that it has already applied for issuance of the building completion certificate to the Municipal Corporation, Raipur on 20.11.2009 along with a Certificate from approved Engineer/Architect to the effect that the said project is complete in every respect. In the same reply, the assessee further explained that it has applied for the requisite completion certificate on 28.11.2009 and 09.03.2010. It was specifically pointed out to the A.O. that the assessee has not claimed deduction of profit attributable to the commercial area. Detailed working evidencing the same was furnished which is as under:-

<i>Reconciliation of profit</i>	<i>Amount (in Rs.)</i>
<i>Profit from Residential part</i>	<i>21,360,861</i>
<i>Profit from Commerical part</i>	<i>215,593.00</i>

<i>Profit from other Projects</i>	<u>2,069,120</u>
<i>Project as per profit and loss account</i>	<u>23,645,574</u>

8. This is supported by the computation of total income which is placed at pages 23 & 24 of the paper book wherein the assessee has claimed deduction u/s. 80IB (10) of the Act at Rs. 2,13,60,861/-.
9. Considering the above facts on record the allegation of the CIT that the A.O. has wrongly allowed the claim of deduction u/s. 80IB(10) of the Act when the commercial area of the housing project is more than that of the allowable limit thereby disqualifying the assessee for claiming the benefit of deduction u/s. 80IB(10) of the Act is erroneous and against the facts on record which have been duly considered by the A.O. Moreover, as mentioned elsewhere, the assessee has applied for the completion certificate from the Municipal Corporation, Raipur on various dates as mentioned hereinabove and it can be safely concluded that the assessee has done what could be best done by it and well within the time prescribed by the Act. Therefore, the first allegation of the ld. Commissioner does not stand and the assessment order to this extent is neither erroneous nor prejudicial to the interest of the revenue. In the light of the ratio laid down by the Hon'ble Supreme Court in the case of Malabar Industrial Company Ltd. (supra), there is no wrong assumption of law nor there is any wrong assumption of facts.
10. Coming to the second allegation that the assessee has diverted interest bearing funds towards interest free loans and advances and therefore the interest paid are not related to the business of the assessee is ill-founded. Firstly, the three advances given namely-

(i) Gokul Education & Development	Rs. 1,860,250.00
(ii) Court Fee For Pandri Land	Rs. 4,615,000.00
(iii) Inderchand Dhariwal	Rs. 5,100,000.00
Total	Rs. 11575250/-

are all advances given for purchase of lands.

11. If these business advances are reduced from the total advances of Rs. 2,98,85,752/-, the so called interest free advances would come to Rs. 1,83,10,502/-. The assessee's own capital is Rs. 1,32,88,082/- and the sundry creditors of the assessee includes two creditors namely (i) Dolphin Associates Rs. 57,91,176/- and (ii) Dolphin Promoters Rs. 41,42,536/- which are group concerns of the assessee and are not trade creditors and therefore can be safely considered as part of the interest free funds thereby making the total interest free available funds with the assessee at Rs. 2,32,21,794/-. This means that the total interest free funds available with the assessee was far more in excess to the interest free funds alleged by the ld. CIT on which he proposed to disallow the claim of interest. The A.O. has not disallowed any interest and on the given facts as discussed hereinabove, the order of the A.O. cannot be considered as erroneous insofar as it is prejudicial to the interest of the revenue.

12. Where there are two possible views and the Assessing Officer has taken one of the possible views, no action to exercise powers of revision can arise, nor can revisional power be exercised for directing a fuller enquiry to find out if the view taken is erroneous, when a view has already been taken after enquiry. This power of revision can be exercised only where no enquiry, as required under the law, is done. It is not open to enquire in case of inadequate inquiry. Our

view is fortified by the decision of Hon'ble High Court of Bombay in the case of Nirav Modi, 71 taxmann.com 272.

13. The Hon'ble High Court of Gujarat in CIT vs. Nirma Chemical Works Ltd. 309 ITR 67 has observed that if assessment order were to incorporate the reasons for upholding the claim made by an assessee, the result would be an epitome and not an assessment order. In this case, during the assessment proceedings for both the Assessment Years, the Assessing Officer issued a query memo to the assessee, calling upon him to justify the genuineness of the gifts. The Respondent-Assessee responded to the same by giving evidence of the communications received from his father and his sister i.e. the donors of the gifts along with the statement of their Bank accounts. On perusal, the Assessing Officer was satisfied about the creditworthiness/capacity of the donors, the source from where these funds have come and also the creditworthiness/capacity of the donor. Once the Assessing Officer was satisfied with regard to the same, there was no further requirement on the part of the Assessing Officer to disclose his satisfaction in the Assessment Order passed thereon. Thus, this objection on the part of the Revenue cannot be accepted.

14. At this stage, it would not be out of place to refer to the decision of the Hon'ble Jurisdictional High Court of Gujarat in the case of Shri Prakash Bhagchand Khatri in Tax Appeal No. 177 with Tax Appeal No. 178 of 2016 wherein the Hon'ble Jurisdictional High Court with the following substantial question of law:-

"Whether the Tribunal is right in law and on facts in upholding the order passed by the CIT under section 263 of the Act on merits and still storing the issue of

allowability of deduction under section 54 of the Act to the file of Assessing Officer even though the working of allowability of deduction under section 54F is available in the order under section 263 which is not disputed by the assessee before ITAT."

15. And the Hon'ble High Court, after considering the facts, held as under:-

"6. It can thus be seen that though final order of assessment was silent on this aspect, the Assessing Officer had carried out inquiries about the nature of sale of land and about the validity of the assessee's claim of deduction under section 54F of the Act. Learned counsel for the Revenue however submitted that these inquiries were confined to the claim of deduction under section 54F of the Act in the context of fulfilling conditions contained therein and may possibly have no relevance to the question whether the sale of land gave rise to a long term capital gain. Looking to the tenor of queries by the Assessing Office and details supplied by the assessee, we are unable to accept such a condition. In that view of the matter, the observation of the Tribunal that the Assessing Officer having made inquiries and when two views are possible, revisional powers could not be exercised, called for no interference. Since with respect to computation and assertions of other aspects of deduction under section 54F of the Act, the Tribunal has remanded the proceedings, nothing stated in this order would affect either side in considerations of such claim.

7. No question of law arises. Tax Appeals are dismissed."

16. Similarly, Hon'ble Bombay High Court in the case of Gabriel India Ltd. 203 ITR 108 has held that *"the decision of the ITO cannot be held to be erroneous simply because in his order he did not make an elaborate discussion in that regard...."*

17. Considering the facts in totality, in the light of the judicial decisions discussed hereinabove vis-à-vis the facts of the case in hand, in our understanding of the

law, the assessment order is neither erroneous nor prejudicial to the interest of the revenue. We, therefore, set aside the impugned order passed by the Principal CIT u/s. 263 of the Act and restore that of the A.O. passed u/s. 143(3) of the Act.

Order pronounced in Open Court on 08 - 03- 2018

Sd/-

(RAM LAL NEGI)
JUDICIAL MEMBER True Copy
RAIPUR: Dated 08/03/2018

Sd/-

(N. K. BILLAIYA)
ACCOUNTANT MEMBER

Rajesh

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.
3. The CIT (Appeals) –
4. The CIT concerned.
5. The DR., ITAT, Ahmedabad.
6. Guard File.

By ORDER

Deputy/Asstt.Registrar
ITAT,Raipur