



IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH MUMBAI
BEFORE SHRI R.C.SHARMA, AM
&
SHRI RAM LAL NEGI, JM
ITA No.2490/Mum/2014 & ITA NO.5599/Mum/2014
(Assessment Year:2009-10)

Maharashtra Housing & Area Development Authority Finance Control, MHADA Griha Nirman Bhavan 4 th Floor, Kala Nagar Bandra (E), Mumbai – 400 051	Vs.	Director of Income Tax- (Exemption)- Mumbai
PAN/GIR No.AAAJM0344H		
Appellant)	..	Respondent)

Assessee by	Shri D. Nishant Thakkar
Revenue by	Shri Santanu Kumar Saikia
Date of Hearing	15/03/2018
Date of Pronouncement	20/03/2018

आदेश / O R D E R

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

ITA No.2490/Mum/2014

This is an appeal filed by assessee against the order of CIT-Mumbai dated 28/03/2014 passed u/s.263 for the A.Y.2009-10.

2. Following grounds have been taken by the assessee:-

1. *Invocation of s.263 of the Act*

The learned DIT(E) erred on facts and in law in applying s.263 of the Act to the facts of the case for A.Y.2009-10, by passing the impugned order dated 28 March,2014. The impugned order be held null and void.

2. *The impugned order neither erroneous nor prejudicial*

The learned DIT(E) erred on facts and in law not appreciating that the order sought to be revised is neither erroneous nor prejudicial to the interests of the Revenue. The impugned order be held null and void.

3. We have gone through the orders of the authorities below and found that in its order u/s.263, CIT observed that the Assessing Officer (AO) has assessed the total income at Rs.528,65,24,460/-. The reasoning for disallowances made by the AO was on the same account on which disallowance has been made in the previous assessment years viz., the assessee is not a local body covered u/s 10(20) and section 10(20A) of the Act.

4. CIT further observed that the section 2 (15) of the Income Tax Act, 1961 which defines the word "charitable purpose" was amended by the Finance Act, 2008 with effect from April 3, 2009. The amendment was done by inserting of proviso to the provisions of section 2(15) of the I.T. Act, 1961 which reads as under:

"Provided that the advance of any other object of general public utility shall not be a charitable purposes, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business for a cess or fee or any other consideration, irrespective of the nature of use of application, or retention of the income from such activity;

** Provided further that the first proviso shall not apply if the aggregate value of the receipts from the activities referred to therein is ten lakh rupees or less in the previous year. " (*Inserted by the Finance No.2) Act, 2009 with retrospective effect from April 1, 2009)"*

5. As per CIT, the insertion of the above proviso drastically changed the taxability of income of MHADA. The term "*not involving the carrying on of any activity for profit*" was omitted by the Finance Act, 1983, with effect from April 1, 1984. Thus with effect from 1 April 1984, whether there is any profit motive or not is not relevant.

6. CIT further observed that with reference to first proviso to section 2(15); object/activities need not be business itself but it being "*in the nature of business, trade or commerce*" is sufficient for its applicability. Moreover, carrying out of any activity in the nature of trade, commerce or business or any activity of rendering any service in relation to trade, commerce or business for a cess or fee or any other consideration, irrespective of the nature of use or application or retention of the income from such activity is clearly hit by the proviso to section 2(15) of the I.T. Act.

5. Further, vide Finance Act, 2012, section 13 (8) was inserted in the Income Tax Act, 1961 with retrospective effect from April 1, 2009. This newly inserted section reads as under:

"Nothing contained in section 11 or section 12 shall operate so as to exclude any income from the total income of the previous year of the person in receipt thereof if the provisions of the first proviso to clause (15) of section 2 become applicable in the case of such person in the said previous year,"

6. In this connection, during the AY 2009-10, the MHADA has shown income of Rs.114.48 Crs out of sale of houses etc. In addition to this the MHADA has also earned income by way of lease rent, Tenancy deposits etc., which are commercial activities.

7. It is also seen on perusal of the order u/s.143(3) of the Income Tax Act, 1961 passed by the AO that the above proviso to the provision of section 2(15) of the Income Tax Act, 1961 was not considered while

framing the said order u/s 143(3) of the Income Tax Act, 1961. Hence, it appears that to this extent the order is erroneous in nature. In short, the assessment has been made by only following the disallowances made in the earlier year. Since, the AO has framed the assessment order by ignoring the newly inserted provisions of the Act it appears to be an erroneous order. Further, it appears by invoking a wrong section to make a disallowance, the AO has prejudiced the interest of revenue.

8. In view of the above observation, CIT concluded that the order passed by the AO was erroneous as well as prejudicial to the interest of revenue.

9. Learned AR contended that no prejudice has been caused to the Revenue by the order passed by AO u/s. 143(3) dated 27/12/2011 in so far as income assessed by the AO was at Rs.528,65,24,460/-, however, the income assessed by the AO while giving effect to the order of CIT u/s.263 was also at the same figure. Learned AR also placed on record, the order passed by AO dated 30/10/2015 wherein income was assessed at Rs. 528,65,24,460/-.

10. Learned AR placed on record the order of the Co-ordinate Bench in case of Slum Rehabilitation Authority in ITA No.2435/Mum/2014 dated 30/10/2015, wherein exactly similar issue was considered by the Tribunal and held as under:-

9. We have heard the rival contentions, perused the relevant finding given in the impugned order and the material placed on record. It is an undisputed fact that the entire exemption of claim u/s 11 was denied by the AO in the assessment order passed u/s 143(3) which is the subject

matter of revision u/s 263 here in this appeal. As a result of such an order, the entire surplus amount revealed from income and expenditure account of Rs. 83.98 crores was assessed. The entire assessment order and the assessed income was subject matter of appeal before the CIT(A), wherein the entire exemption u/s 11 stood allowed. In the order giving effect to the appellate order, the income has been finally assessed at "nil". In the second appeal also the subject matter and the issue of exemption u/s 11 again got merged. Now, in the revisionary jurisdiction u/s 263, the Ld. DIT is trying to set aside the original assessment order u/s 143(3) dated 22.12.2011 on the ground that, AO has failed to consider the amended provisions of [section 2\(15\)](#), that is, the Proviso inserted by [Finance Act, 2008](#) w.e.f. assessment year 2009-10 has not been considered and examined. If the proviso would be applied then there might be a situation where assessee's activity may not be held to be for "charitable purposes" and exemption u/s 11 may not be available. In other words exemption u/s 11 is being sought to be denied on the ground of newly inserted Proviso to [section 2\(15\)](#). Even if such an exercise is done, then the result would be same, that is, again the entire assessment would be completed on the same income of Rs. 83,98,10,894/-. There would be no deviation of the income at all what was assessed originally u/s 143(3) and the income which is now being sought to be assessed as per the order of the Ld. DIT. In such a situation, two aspects needs to be seen, firstly, whether the assessment order which has been completely merged with the order of the Tribunal can be set aside by the Ld. DIT u/s 263; and secondly, whether the impugned order can be considered to be erroneous in so far as it is prejudicial to the interest of the revenue, because even after giving effect to the impugned order, there is no revenue effect.

10. On both counts, we are inclined to agree with the contention of the Ld. Senior Counsel. Because, firstly, when the entire basis of the assessment and the whole of the surplus amount has been challenged before the CIT(A), then the entire assessment order including taxing of the entire exempt income u/s 11 is the subject matter of appeal and there is complete merger with the order of the CIT(A) within the terms and ambit of [section 263](#) read with clause

(c) Explanation 1. Thus, if the subject matter of revision u/s 263 is again the denial of exemption u/s 11, though on different footing, then same is beyond the scope of [section 263](#). On these facts, it can be very well held that the issue of exemption u/s 11 which was the subject matter of appeal before CIT(A) and then before the Tribunal, the Ld. DIT do not have the power to consider and decide "such matter" within the scope of [section 263](#). On the second aspect also, which is purely academic, it is seen that, so far as tax effect is concerned, there is no difference at all between the income which was assessed in the original assessment order and the income which is now being sought to be

assessed in wake of order u/s 263. Under both the assessments the surplus amount of Rs. 83.98 crores will get taxed. Hence, no prejudice is caused to the revenue so far as tax effect is concerned, except for the fact that [section 11](#) is being sought to be examined from a different perspective. Accordingly, we hold that, firstly, the subject matter of revision u/s 263 has been merged with the order of the Tribunal, therefore, Ld. DIT is precluded to revise or set aside such order as it is beyond the second of [section 263](#); and secondly, such an order cannot be held to be 'prejudicial to the interest of the revenue', because the income which has been sought to be assessed in pursuance of order u/s 263, is the same which was originally assessed by the AO. Thus on both the counts, the impugned order passed u/s 263 is cancelled and the grounds raised by the assessee are thus allowed. Other arguments of Id. Sr. Counsel are not being adjudicated upon.

11. On the other hand, learned CIT DR contended that in so far as AO has not considered proviso to Section 2(15) which was introduced w.e.f. A.Y.2009-10, the order so passed by AO was erroneous and since AO has wrongly invoked section to disallow assessee's claim, prejudice has been caused to the interest of Revenue. Accordingly, both the conditions of order being erroneous as well as prejudicial to the interest of revenue have been complied with.

12. We have considered rival contentions and gone through the orders of the authorities below. We have also perused the order passed by Co-ordinate Bench in case of Slum Rehabilitation Authority (supra). The facts and circumstances in the case before us are same in so far as CIT has invoked power u/s.263 on the plea that AO has not considered proviso to Section 2(15) while deciding the case, accordingly, he was directed to consider proviso to Section 2(15). We found that the order passed by the AO while giving effect to the direction of CIT, the assessed income comes to the very same figure at which it was originally assessed by the AO vide

order dated 27/12/2011. Thus, the assessed income as per the original assessment dated 27/12/2011 vis-à-vis assessed income as per the order passed u/s.143(3) r.w.s. 263 dated 30/10/2015 comes to the very same figure of Rs.528,65,24,460/-. Accordingly, we observe that no prejudice has been caused to the Revenue in terms of assessed income and tax thereon. Once it is held that no prejudice has been caused to the Revenue, invocation of powers u/s.263 was not justified, in so far as twin condition of Section 263 with regard to order of AO being erroneous as well as prejudicial to interest of revenue is not complied with. Respectfully following the decision of the Co-ordinate Bench as narrated above, we do not find any merit in the order so passed by CIT u/s.263.

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

ITA No.5599/Mum/2014

14. This is an appeal filed by assessee against the order passed by CIT(A)-1, Mumbai dated 26/06/2014 for the A.Y.2009-10 in the matter of order passed u/s.143(3) of the IT Act. The grounds taken by assessee reads as under:-

Appellant denied exemption under s.l 1.

The learned CIT(A) erred on facts and in law in not considering all the grounds of appeal before him and particularly the claim of the appellant that it be allowed the benefits of s.11 of the I.T.Act.1961, and be accordingly granted exemption under s.l 1.

Relief claimed: *The CIT(A) be directed to dispose of all the grounds of appeal before him.*

2. Appeal not decided on merits

The learned CIT(A) erred in law and on facts in not considering merits of the case while disposing of the appeal.

Relief claimed: *the Appeal may be decided on merits. ∴*

3. Appeal wrongly disposed of as being non-est ".

The learned CIT(A) failed in holding that if the assessment order from which the appeal is flowing has been the subject matter of revision by DIT(E) under s.263 of the Income Tax Act, 1961. and set aside by DIT(E), the appeal becomes non-est, in disregard of the fact that the AO had not passed any order of assessment pursuant to the direction of the DIT(E), and the order appealed against was the only surviving Assessment Order. "

15. Learned AR has drawn our attention to para 6 at page 5 of the CIT(A) order, wherein CIT(A) has observed as under:-

6. In view of the above facts and circumstances of the case that the appealed order has been set aside by the order u/s.,263 of the I.T.Act, 1961 by learned DIT(E), Mumbai, the relevant part of which has been reproduced above, the present appeal is rendered lacking in cause of action and-becomes non-est because of being dependent and flowing from the assessment order which is set aside and non-est, as of now. Thus, for the reasons as above, the appeal is dismissed as being devoid of cause of action and being non-est.

16. As per learned AR, since the order passed by CIT(A) u/s.263 is not sustainable in law, the order of CIT(A) has no legs to stand.

17. It was argued by CIT DR that since the AO has not considered proviso to Section 2(15) introduced w.e.f. A.Y.2009-10, the CIT(A) should be directed to consider amended provisions of Section 2(15) while deciding the appeal afresh.

18. We have considered rival contentions and carefully gone through the orders of the authorities below and found that CIT(A) has dismissed assessee's appeal merely on the plea that the order of the AO against which assessee is in appeal has already been set aside by CIT u/s.263 of the IT Act, therefore, the appeal filed by the assessee becomes non-est

because of being dependent and flowing from the assessment order which is set aside by the CIT. However, we have allowed assessee's appeal in ITA No.2490/Mum/2014 against the order passed by CIT u/s.263, only on the technical plea that both the conditions of Section 263 being order of the AO erroneous as well as prejudicial to the interest of Revenue has not been satisfied. So far as merit of applicability of proviso to Section 2(15) is concerned, we had not given any of our verdict. Therefore, in the interest of substantial justice, we set aside the order of CIT(A) and restore the matter back to the file of CIT(A) for deciding afresh after considering the proviso to Section 215 introduced w.e.f. A.Y.2009-10. We also observe that CIT(A) has got coterminous powers with that of AO, therefore, what the AO has failed to do, he is competent enough to do the same. We direct accordingly.

19. In the result appeal is allowed for statistical purposes.

20. In the result, appeals filed by assessee are allowed for statistical purposes.

Order pronounced in the open court on this 20/03/2018

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

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

Mumbai; Dated 20/03/2018
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