



IN THE INCOME TAX APPELLATE TRIBUNAL
"J" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

ITA no.4025/Mum/2017
(Assessment Year :2009-10)

M/s. Janata Industries
162, Janata Compound
Tulsi Pipe Road, Senapati Bapat Marg Appellant
Lower Parel, Mumbai 400 013
PAN – AAAFJ4875E

v/s

Principal Commissioner of Income Tax
Circle-21, Mumbai Respondent

ITA no.4026/Mum/2017
(Assessment Year : 2010-11)

M/s. Janata Industries
162, Janata Compound
Tulsi Pipe Road, Senapati Bapat Marg Appellant
Lower Parel, Mumbai 400 013
PAN – AAAFJ4875E

v/s

Principal Commissioner of Income Tax
Circle-21, Mumbai Respondent

Assessee by : Shri Sanjay R. Parikh
Revenue by : Shri Abhijit Patankar

Date of Hearing – 27.02.2018

Date of Order –

ORDER**PERSAKTIJIT DEY, J.M.**

These two appeals by the assessee are against two separate orders of the learned Principal Commissioner of Income Tax, Mumbai, passed under section 263 Income Tax Act, 1961 (for short "*the Act*") for the assessment years 2009-10 and 2010-11.

ITA no.4025/Mum./2017 - A.Y. 2009-10

2. In grounds no.1 and 2, the assessee has challenged the impugned order passed under section 263 of the Act to be barred by the limitation prescribed under the statute. Ground no. 4 and 5 are on the issue of validity of exercise of jurisdiction under section 263 of the Act as well as on merit.

3. Brief facts are, the assessee a partnership firm filed its return of income for the impugned assessment year on 29th September 2009, declaring nil income. The return of income filed by the assessee, though, was initially processed under section 143(1) of the Act, however, subsequently it was selected for scrutiny and in course of the assessment proceedings, the Assessing Officer on the basis of AIR information available on record as well as other information made couple of adjustments to the returned income and accordingly completed the assessment under section 143(3) of the Act vide order

dated 28th November 2011, determining the total income at ₹ (-) 61,93,801. He also allowed carry forward of loss on house property amounting to ₹ 8,52,930 and business loss of ₹ 53,40,871. After completion of assessment as aforesaid, the Assessing Officer received information from the Maharashtra Sales Tax Department that the assessee has made fictitious purchases from M/s. Vinay Trading Co. On the basis of such information, the Assessing Officer re-opened the assessment under section 147 of the Act by issuing notice under section 148 of the Act on 18th March 2014. Ultimately, the Assessing Officer passed an order under section 143(3) r/w section 147 of the Act on 30th March 2015, after making an addition of ₹ 82,039 on account of bogus purchases. Learned Principal Commissioner of Income Tax after calling for and examining the assessment records of the assessee in exercise of power under section 263 of the Act observed that, though, the assessee has claimed depreciation on a building which is let out and rent received from which has been offered as income from house property, however, the Assessing Officer while completing the assessment under section 143(3) read with section 147 of the Act, has not disallowed the depreciation. Accordingly, he was of the view that the said assessment order is erroneous and prejudicial to the interest of Revenue, hence, proceeded to issue a show cause notice to the assessee proposing to revise the assessment order under

section 263 of the Act. Though, the assessee objected to the initiation of proceedings under section 263 of the Act, however, learned Principal Commissioner of Income Tax rejecting the objections of the assessee proceeded to pass an order under section 263 of the Act setting aside the assessment order passed under section 143(3) r/w 147 of the Act with a direction to verify the details of the property given on rent and as well as used for business for determining the value of the property which can be considered as related to the business activity for determining the correct depreciation allowable under the Act.

4. The learned Authorised Representative submitted, the re-opening of assessment under section 147 of the Act was made by the Assessing Officer for the specific purpose of bringing to tax the bogus purchases alleged to have been made from a party. He submitted, the issue of claim of depreciation on which the revisional authority exercised his power under section 263 of the Act was never a subject matter of dispute in the proceedings initiated under section 147 of the Act and the order passed in consequence thereof. He submitted, if at all, the issue relating to claim of depreciation will be arising out of the original assessment order passed under section 143(3) of the Act. Referring to the provisions of section 263(2) of the Act the learned Authorised Representative submitted, as per the said provision, the

order under section 263 of the Act has to be passed before expiry of two years from the end of the financial year in which the original assessment order was passed. He submitted, keeping in view the limitation prescribed under section 263(2) of the Act, the revisional authority should have passed the impugned order under section 263 of the Act on / or before 31st March 2014, whereas, the impugned order under section 263 of the Act was passed on 30th March 2017. Thus, the order is barred by limitation. In support of such contentions, the learned Authorised Representative relied upon the following decisions:-

- i) *CIT v/s Lark Chemicals Ltd. [2014] 368 ITR 655 (Bom.); and*
- ii) *LG Electronics India Pvt. Ltd. v/s PCIT, [2016] 388 ITR 135 (All.).*

5. Without prejudice to the aforesaid submissions, the learned Authorised Representative submitted, during the original assessment proceedings, the Assessing Officer has enquired into and examined all issues, including, the claim of depreciation on the building. In this context, he drew our attention to the notice issued under section 142(1) of the Act with annexure. He also drew our attention to the compliances made by the assessee from time to time with regard to the queries made by the Assessing Officer. Thus, he submitted, the Assessing Officer has allowed assessee's claim of depreciation after proper application of mind to the facts and material on record and

being satisfied with the apportionment of the value of the building for use in business and house property. He submitted, as per section 32(1)(ii) of the Act, the assessee is entitled to claim depreciation in respect of an asset which is owned by him either fully or partly and used for the purpose of his business. Referring to the provisions of section 38(2) of the Act, he submitted, in a case where the building is not exclusively used for the purpose of business, the depreciation shall be restricted to a fair proportionate part thereof which may be determined by the Assessing Officer having regard to the user of such building for the purpose of business. He submitted, the assessee has apportioned the value of the building towards business and house property in the financial year 2007-08 relevant to assessment year 2008-09 and accordingly made proportionate allocation of value of building for business purpose and claimed depreciation accordingly. He submitted, the closing written down value of the building shown by the assessee as on 31st March 2008, has been accepted by the Department. He submitted, in the impugned assessment year the assessee has claimed depreciation on the opening written down value of the building. He submitted, during the year, the depreciation claimed by the assessee was on a block of asset of which the building is a part of. Referring to the provisions of section 43(6)(c) of the Act, he submitted, as per the said provision, in the case of block of asset,

the Assessing Officer can make adjustment to the written down value of the assets within the block either by increasing the actual cost of any asset acquired during the previous year or reducing the value of any asset within the block which is sold or discarded or demolished during the previous year. Drawing our attention to the depreciation schedule, a copy of which is at Page-5 of the paper book, he submitted, there is neither any acquisition of asset nor reduction of the value of asset in terms of section 43(6)(c) of the Act requiring adjustment of the written down value. Thus, he submitted, under no circumstances depreciation claimed by the assessee on the written down value can be disallowed in the impugned assessment year when the Department has accepted the value of the asset in the preceding assessment year.

6. The learned Departmental Representative submitted that the revision order passed under section 263 of the Act is within the period of limitation prescribed under section 263(2) of the Act. He submitted, the Principal Commissioner of Income Tax has not revised the original assessment order but has revised the order passed under section 143(3) r/w 147 of the Act on 30th March 2015. Therefore, the revision order passed is within a period of two years. He submitted, since assessee's claim of deprecation was not examined by the Assessing Officer in the re-assessment order, the Principal Commissioner of

Income Tax has correctly exercised his power under section 263 of the Act as the re-assessment order passed is erroneous and prejudicial to the interest of Revenue. In support of such contention, he relied upon the Third Member decision of the Tribunal, Chennai Bench, in case of *Spencer & Co. Ltd. v/s ACIT*, [2012] 137 ITD 141 (Chh.). As regards the merits of the issue, the learned Departmental Representative submitted that as per section 38(2) of the Act it is the duty of the Assessing Officer to compute depreciation on the portion or part of the building used for the purpose of business and such determination has to be made by the Assessing Officer in a fair and reasonable manner. He submitted, neither in the original assessment nor in the re-assessment the Assessing Officer has made such apportionment for allowing depreciation. Thus, he submitted, the revisional authority was justified in exercising power under section 263 of the Act.

7. We have considered rival submissions and perused materials on record. We have also applied our mind to the decisions relied upon. At the outset, we propose to deal with the limitation issue raised by the assessee. As could be seen from the facts on record, in the original assessment order under section 143(3) of the Act for the impugned assessment year was passed on 28th November 2011, whereas, the re-assessment order under section 143(3) r/w 147 of the Act was passed on 30th March 2015. It is the contention of the assessee that

the depreciation issue on which the revisional authority has exercised power under section 263 of the Act was not at all an issue on which the Assessing Officer has re-opened the assessment under section 147 of the Act. On a perusal of the order dated 30th March 2015, passed under section 143(3) r/w section 147 of the Act, we find the aforesaid submission of the assessee to be correct. A reading of the reassessment order makes it clear that the re-opening of assessment was made only for the purpose of bringing to tax the alleged bogus purchases made by the assessee from M/s. Vinay Trading Co. Thus, it is clear from the facts on record that the issue of claim of depreciation on the building was never an issue in the re-assessment proceedings. Rather, the issue of claim of depreciation, if at all, arises out of the original assessment order passed under section 143(3) of the Act on 28th November 2011. Therefore, the issue before us is, whether the limitation period of two years as prescribed under section 263(2) of the Act is applicable from the original assessment order passed under section 143(3) of the Act 28.11.2011 or the order dated 30th March 2015, passed under section 143(3) r/w 147 of the Act? The Hon'ble Jurisdictional High Court in Lark Chemicals Ltd. (supra) while dealing with identical issue has held that if the issue on which the proceedings under section 263 of the Act is initiated is not a subject matter of the assessment order passed under section 143(3) r/w 147

of the Act, then the limitation period has to be reckoned from the original assessment order passed under section 143(3) of the Act or if the return of income was processed under section 143(1) of the Act, then from the date of intimation under section 143(1) of the Act. In this context, it is relevant to reproduce the observations of the Hon'ble Jurisdictional High Court:—

"We have considered the rival submissions. It is not disputed that save and except the issue of non-genuine purchases all other issues dealt with by the Commissioner of Income-tax in the order dated March 30, 2009, were not a subject matter of the assessment order passed on June 28, 2006, under section 143(3)/147 of the Act. All the other issues on which the Commissioner of Income-tax is seeking to exercise the jurisdiction under section 263 of the Act were concluded by virtue of an intimation under section 143(1) of the Act which admittedly was done beyond a period of two years prior to the notice dated March 17, 2009, issued under section 263 of the Act. Section 263(2) of the Act provides that no order would be made in exercise of the jurisdiction under section 263(1) of the Act after the expiry of two years from the end of the financial year in which the order sought to be revised was passed. It is an admitted position that the Commissioner of Income-tax has not exercised the revisional jurisdiction in respect of the order/intimation passed section 143(1) of the Act within two years of it being passed. Therefore, exercise of jurisdiction on those issues under section 263 of the Act is time barred as held by this court in CIT v. Anderson Marine and Sons P. Ltd. [2004] 266 HR 694 (Born). Moreover, in view of the decision of the apex court in the matter of Alagendran Finance Ltd. as well as our court in the matter of Ashoka Buildcon Ltd. (supra) the jurisdiction under section 263 of the Act cannot be exercised on issues which were not subject matter of consideration while passing the order of reassessment under section 143(3)/147 of the Act but a part of an assessment done earlier under the Act."

8. The same view has been expressed by the Hon'ble Allahabad High Court in LG Electronics India Pvt. Ltd. (supra). Thus, applying the ratio laid down by the Hon'ble Jurisdictional High Court and Hon'ble

Allahabad High Court as referred to above, we hold that the impugned order passed under section 263 of the Act is barred by limitation prescribed under section 263 of the Act, since, it was passed more than two years after the end of the financial year in which the original assessment order dated 28th November 2011, under section 143(3) of the Act was passed. Thus, the impugned order passed under section 263 of the Act is invalid, hence, deserves to be quashed.

9. Having held so, we propose to deal with the merits of the issue. As could be seen from the facts of the record, the building on which the assessee has claimed depreciation was partly used for the purpose of business and part of it was let out and the rental income received from the letout portion was offered as house property income. However, the assessee claimed depreciation on the part of the building used for the purpose of business which also formed part of the block of asset. It is seen from record, out of the total value of the building at ₹ 15,56,05,819, the assessee had allocated an amount of ₹ 7,92,92,270 towards the part of building used for business and such allocation was made by the assessee in the assessment year 2008-09 and also reflected in the books of account as well as tax audit report of the said assessment year. It is also a fact on record that on the aforesaid allocation for value of building the assessee claimed depreciation @ 10% in assessment year 2008-09 which was also accepted by the

Department. In the impugned assessment year, the assessee has claimed depreciation on the opening written down value of the building as stood reduced after reducing the depreciation allowed in assessment year 2008-09. Thus, the Department having accepted the apportionment of the value of building for house property purpose and business purpose, there is no occasion to re-visit the same in the impugned assessment year keeping in view the provisions of section 38(2) of the Act. Further, as rightly submitted by the learned Counsel for the assessee, as per section 43(6)(c) of the Act the Assessing Officer can make adjustment to the written down value only in case of acquisition of an asset or reduction of value in asset in the relevant previous year. Admittedly, no such event has happened in the impugned assessment year. That being the case, there is no occasion for the Assessing Officer to make adjustment to assessee's claim of depreciation by re-valuing the cost of the building. Further, in course of hearing, the learned Authorised Representative submitted before us that except the impugned assessment years in no other assessment year including the subsequent assessment years assessee's claim of depreciation has been disallowed. This fact has not been controverted by the learned Departmental Representative. Thus, in view of the aforesaid fact, assessee's claim deserves to be allowed on merit also.

Accordingly, we quash the impugned order passed under section 263 of the Act.

10. In the result, assessee's appeal is allowed.

ITA no.4026/Mum./2017- A.Y. 2010-11

11. Grounds no.1 and 2 in the present appeal are identical to grounds no.3 and 4 of ITA no.4025/Mum./2017. Therefore, following our decision in Para-9 of this order, we quash the impugned order of learned Principal Commissioner of Income Tax passed under section 263 of the Act.

12. In the result, assessee's appeal is allowed.

13. To sum up, both the appeals of the assessee are allowed.

Order pronounced in the open Court on 23.05.2018

**Sd/-
MANOJ KUMAR AGGARWAL
ACCOUNTANT MEMBER**

**Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER**

MUMBAI, DATED: 23.05.2018

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

(Sr. Private Secretary)
ITAT, Mumbai