

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ 'सी' अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
“ C ” BENCH, AHMEDABAD

सर्वश्री वसीम अहमद, लेखा सदस्य एवं महावीर प्रसाद, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And SHRI MAHAVIR PRASAD, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No.2528/Ahd/2016
(निर्धारण वर्ष / Assessment Year : 2009-10)

DCIT, Circle – 4(1)(2), Ahmedabad.	बनाम/ Vs.	M/s. The Grand Bhagwati Banquets and Hotels Ltd., 301, P Circle, Honest Cross Road, S.C. Highway, Ahmedabad.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCB 6825 A		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से / Appellant by :	Shri T. Sankar Sr. D.R.
प्रत्यर्थी की ओर से/Respondent by :	Shri S. N. Divatia, A.R.

सुनवाई की तारीख / Date of Hearing	11/05/2018
घोषणा की तारीख /Date of Pronouncement	24/05/2018

आदेश / ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Revenue against the appellate order of the Commissioner of Income Tax(Appeals)-1, Ahmedabad [CIT(A) in short] vide appeal no.CIT(A)-1/DCIT, Cir-1(1)(2)/57/2015-16 dated 28/07/2016 arising in the assessment order passed under s.143(3) r.w.s. 263 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") dated 11/03/2015 relevant to Assessment Year (AY) 2009-10.

2. The ground raised by the Revenue per its appeal is as under:-

“Whether the Ld. CIT(A) is right in law and on facts in his judgment to held the assessment order infructuous.”

3. At the outset it was brought to our notice by the Id. AR that the assessment u/s 143(3) was framed by the AO vide order dated 29.12.2011. Subsequently the assessment order was revised u/s 263 of the Act by the Id. CIT vide his order dated 4.3.2014. Accordingly the AO passed giving effect order u/s 143(3)/263 dated 11-3-2015 of the Act in pursuance to the directions issued by the Id. CIT u/s 263 of the Act.

4. However the assessee against the revision order passed u/s 263 of the Act preferred an appeal before Hon'ble Tribunal in **ITA No. 1279/AHD/2014** wherein it was held that there was no error in the order passed by AO dated 29.12.2011. Accordingly, the order passed by Ld. CIT u/s 263 of the Act was held unsustainable by the Tribunal vide order dated 19.02.2016. In this regard, Ld. AR before us submitted that the order passed in consequence to the direction issued u/s 263 of the Act by the AO has no leg to stand. Therefore, such order becomes infructuous/*non-est* in the eyes of law. Thus, it was pleaded by Ld. AR that the appeal filed by the Revenue against the order of Ld. CIT(A) becomes infructuous in consequence to the order passed under section 143(3)/263 of the Act dated 11-3-2015.

On the other hand, Ld. DR vehemently relied on the order of Assessing Officer.

5. We have heard the rival contentions of both the parties and perused the material available on record. In the instant case, there is no ambiguity that the order passed by Ld. CIT u/s 263 of the Act in the case of assessee pertaining to assessment year 2009-10 was quashed in **ITA No. 1279/AHD/2014** vide order dated 19.02.2016. The relevant extract of the order is reproduced below:-

7. *"We have carefully considered the rival submissions. The first thing which has to be considered is whether the ld. Commissioner has rightly assumed the power u/s. 263 of the Act. 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 ii, 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 hut 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"

8. *Now, let us see in the light of the above ratio whether the assessment has been made on an incorrect assumption of facts or an incorrect application of law. The first observation of the ld. CIT relates to the claim of 1/5th of IPO expenses u/s. 35D of the Act. The ld. CIT is of the firm belief that since the assessee is not an Industrial Undertaking such capital expenses cannot be claimed u/s. 35D after commencement of business as per provisions applicable for A.Y. 2009-10. We find that the Gujarat Pollution Control Board has given consent and authorization*

treating the assessee an Industrial Undertaking. Further we find that this view is also supported by the decision of the Hon'ble Kerala High Court in the case of P.Alikunju, M.A. Nazeer Cashew Industries 166 ITR 804. It would be pertinent to mention here, the observations of the Hon'ble Bombay High Court in the case of Ship Scrap Traders 251 ITR 806 wherein the Hon'ble High Court has observed as under:-

“The concept of industrial undertaking need not necessarily be confined to manufacture and production of articles and even in the absence of either of them there could be an industrial undertaking.”

- 9. In our understanding of the law, this is the reason for which the Hon'ble Kerala High Court (supra) has held the business of lodge to be an industrial undertaking. The finding of the Commissioner that the A.O has not enquired into this is incorrect. We find that the A.O has thoroughly examined this issue at length which is evident from the observations/findings given at para 3 of the assessment order.*
- 10. Since the claim of the assessee is backed by judicial pronouncement in favour of the assessee. It cannot be said that there was a wrong assumption of law.*
- 11. The second observation of the Commissioner is that no disallowance has been made by the A.O u/s. 14A of the Act. The Commissioner further observed that the A.O has proceeded on a wrong assumption of facts that the investments made by the assessee are out of non interest bearing funds whereas the correct facts are that the investments have been made out of interest bearing funds.*
- 12. This observation of the Commissioner is also against the true facts of the case, the following observations/findings of the A.O would explain the position. “The submission of the assessee has been considered. Regarding investments, the assessee has put on records from its accounts evidence to demonstrate that the source of investment is out of interest free funds. Further regarding administrative expenses, the assessee has offered 0.5% of the average investments as disallowance u/s. 14A amounting to Rs. 8,80,758/-. Considering the details, the disallowance offered by the assessee during the assessment proceedings is accepted and a disallowance of Rs. 8,80, 758/- is made u/s. 14A” . From the above, it can be seen that that the A.O. has thoroughly examined the*

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source of investment and after examination/verification , the A.O was convinced that the investment is out of interest free funds.

13. In the light of the above, it cannot be said that there is any wrong assumption of fact.

14. Having said all that, in our considered opinion neither there is any wrong assumption of law nor there is any wrong assumption of facts to make the assessment order erroneous and pre-judicial to the interest of the revenue.

15. The AO has taken a view which may be different from the view of the Ld. Commissioner and assuming that the view taken by the AO is a loss to the Revenue but the Hon'ble Supreme Court in Malabar Industrial Co. Ltd. (supra) has held that " every loss of revenue as a consequence of an order of the AO cannot be treated as prejudicial to the interest of the Revenue," for e.g. when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue or where two views are possible and the Income Tax Officer has taken one view with which the Ld. Commissioner does not agree, it cannot be treated as an order which is erroneous or prejudicial to the interest of Revenue unless the view taken by the Income Tax Officer is unsustainable in law.

16. The Bombay High Court in CIT Vs Gabriel India Ltd., (1993) 203 ITR 108 has held that "the decision of the Income Tax Officer could not be held to be erroneous simply because in his order, he did not make an elaborate discussion in that regard". Considering the facts in totality in the light of the judicial decisions discussed hereinabove, in our understanding of 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 Ld. Commissioner u/s. 263 and restore that of the Assessing Officer passed u/s. 143(3) of the Act.

17. In the result, the appeal filed by the assessee is allowed."

From the above proposition, there remains no doubt that the order passed by Ld. CIT u/s 263 of the Act was held as unsustainable. Therefore, the order passed in consequent to the direction issued u/s 263 of the Act becomes

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infructuous. Hence, we find no reason to interfere in the order passed by the Id. CIT(A) on the ground that the consequential order passed u/s 143(3)/263 of the Act is not maintainable and thus the appeal filed becomes infructuous. Hence the additions made by the AO in his giving effect order are not sustainable. Thus we dismiss the appeal filed by the Revenue.

6. In the result, Revenue's appeal stands dismissed.

This Order pronounced in Open Court on	24/05/2018
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Sd/-
(महावीर प्रसाद)
न्यायिक सदस्य
(MAHAVIR PRASAD)
JUDICIAL MEMBER

Ahmedabad; Dated 24/05/2018
Priti Yadav, Sr.PS

Sd/-
(वसीम अहमद)
लेखा सदस्य
(WASEEM AHMED)
ACCOUNTANT MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-1, Ahmedabad.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad