

आयकर अपीलीय अधीकरण, न्यायपीठ – “C” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH: KOLKATA
 (समक्ष) श्री ए. टी. वर्की, न्यायीक सदस्य एवं डॉ. अर्जुन लाल सैनी, लेखा सदस्य
 [Before Shri A. T. Varkey, JM & Dr. A. L. Saini, AM]

I.T.A. No. 1099/Kol/2017
Assessment Year: 2012-13

M/s. Bankebihari Vincom Pvt. Ltd. (PAN: AADCB6605L)	Vs.	Principal Commissioner of Income- tax-1, Kolkata.
Appellant		Respondent

Date of Hearing	28.03.2018
Date of Pronouncement	14.06.2018
For the Appellant	Shri Miraj D. Shah, AR
For the Respondent	Shri G. Mallikarjuna, CIT, DR

ORDER

Per Shri A.T.Varkey, JM

The appeal filed by the assessee is against the revision order of Ld. Pr. CIT-1, Kolkata dated 02.03.2017 for AY 2012-13 passed u/s. 263 of the Income-tax Act, 1961 (hereinafter referred to as the “Act”).

2. In this case, the assessee company filed return on 29.09.2012 disclosing total income of Rs.27,620/-. Later on the case was selected for scrutiny through CASS. After issuing statutory notices by the AO, and after the Ld. AR of the assessee appeared before the AO and produced the details, accounts etc. the AO assessed income at Rs.44,980/- u/s. 143(3) of the Act dated 13.06.2014. This order of the AO had been interfered by the Ld. CIT exercising his revisional jurisdiction u/s. 263 of the Act on the sole ground that AO has failed to carry out necessary inquiries or verification in respect of receipt of Rs.52,55,960/- which the assessee received from M/s. Balaji Developers against the surrender of booking of an office space. According to Ld. CIT, this receipt ought to have been characterized as “Income from Capital Gain” and not as shown by assessee as under the head “Business Income.” Since no inquiry was conducted by the AO, Ld. CIT held it as erroneous and prejudicial to the Revenue and was pleased to set aside the order of AO dated 13.06.2014 and directed him to pass a fresh assessment order. Aggrieved, the assessee is before us.

3. We have heard rival submissions and perused the material available on record. We note that the only ground on which the Ld. Pr. CIT has exercised his revisional jurisdiction u/s. 263 of the Act is the failure of AO to make relevant enquiry in respect to sale of rights in the immovable property and applicability of sec. 2(14) read with sec. 2(47) of the Act. Countering this finding of Ld. Pr. CIT, the Ld. AR of the assessee drew our attention to the notice u/s. 142(1) of the Act issued by AO on 20.12.2013, wherein our attention was drawn to 5th item of particulars to be furnished on hearing which we read as under:

“(5) Details of Dividend and profit on surrender of booking”

Thereafter the Ld. AR drew our attention to the assessment order passed by AO dated 13.06.2014, wherein the AO acknowledges the fact of issue of sec. 142(1) notice dated 20.12.2013 which reads as under:

“1.2. In response to the above mentioned notices, Mr. Tara Shankar Chatterjee, Accountant of the company, appeared from time to time and explained about the above mentioned return of income. He filed various details, accounts, and evidences, to explain the return.”

So, according to Ld. AR, the Ld. Pr. CIT erred in making a finding that AO failed to make relevant enquiry when it is apparent that AO inquired in his notice u/s. 142(1) and assessee's AR has appeared several times before AO and answered the queries to the satisfaction of AO. Further, according to Ld. AR, the assessee had intended to use the office space to be purchased as a “Stock-in-trade” so any income arising from it would be qualified as “Business Income” and so AO cannot be faulted in accepting assessee's stand. Further, according to Ld. AR even if for argument sake the said receipt is taken as “Income from Capital Gains” still there will nothing prejudicial to the interest of Revenue because the assessee had shown the receipt under the head “Business Income”, which attracts the highest marginal rate of 30% and even if the receipt is taxed as short term capital gain it would not be more than 30%. Thus, according to assessee, it is per se a debatable issue as to under which ‘head’ the receipt of income falls and since AO has taken a plausible view after enquiry and in any case the second limb of “prejudicial to the Revenue” fails. So, the very assumption of jurisdiction by Ld. Pr. CIT is absent and, therefore, the order needs to be quashed. On the other hand, the Ld. CIT, DR vehemently opposing the appeal of the assessee, supported the order of the Ld. Pr. CIT and does not want us to interfere in the impugned order.

4. Having heard the rival submissions and taking note of the facts as aforesaid, we note that the AO has passed the 143(3) order dated 13.06.2014 which order of the AO has been interfered by the Ld. Pr. CIT exercising his jurisdiction u/s. 263 of the Act, which action of the Ld. Pr. CIT is under challenge before us. The assessee company has challenged in the first place the very usurpation of jurisdiction by Ld. Pr. CIT to invoke his revisional powers enjoyed u/s. 263 of the Act. Therefore, first we have to see whether the requisite jurisdiction necessary to assume revisional jurisdiction is there existing before the Pr. CIT to exercise his power. For that, we have to examine as to whether in the first place the order of the Assessing Officer found fault by the Principal CIT is erroneous as well as prejudicial to the interest of the Revenue. For that, let us take the guidance of judicial precedence laid down by the Hon'ble Apex Court in Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83(SC) wherein their Lordship have held that *twin* conditions which needs to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer must be erroneous and so far as prejudicial to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed on incorrect assumption of fact; or (ii) incorrect application of law; or (iii) Assessing Officer's order is in violation of the principle of natural justice; or (iv) if the order is passed by the Assessing Officer without application of mind; (v) if the AO has not investigated the issue before him; then if any of the aforesaid condition is satisfied, then the order passed by the Assessing Officer can be termed as erroneous order. Coming next to the second limb, which is required to be examined as to whether the actions of the AO can result in causing prejudice to the interest of Revenue. When this aspect is examined one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industries (supra) held that this phrase i.e. "*prejudicial to the interest of the revenue*" has to be read in conjunction with an *erroneous order* passed by the Assessing Officer. Their Lordship held that it has to be remembered that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an

erroneous order, prejudicial to the interest of the revenue **“unless the view taken by the Assessing Officer is unsustainable in law”**.

5. Taking note of the aforesaid dictum of law laid down by the Hon'ble Apex Court, let us examine whether the Assessing Officer passed order u/s 143(3) dated 13.06.2014 is erroneous as well as prejudicial to the interest of the revenue. We note that the main fault attributed by Ld. Pr. CIT to invoke his revisional jurisdiction was the failure of AO to carry out necessary inquiries or verifications in respect of Rs.52,55,960/- which the assessee received from M/s. Balaji Developers against the surrender of booking of an office space and according to him, (Ld. Pr. CIT in para 5 of the impugned order) in his own words “no questionnaire issued in this matter by her.” This finding of Ld. Pr. CIT cannot be countenanced by us for the simple reason that in fact the AO in her Sec. 142(1) notice dated 20.12.2013 to the assessee company directed it's Principal Officer to produce, inter alia, details of *profit on surrender of booking* as observed above and the assessee was directed to appear before the AO on 14.01.2014 at 12.05 pm with the documents called for by her. The AO in her assessment order has acknowledged the fact that assessee's accountant has appeared before her several times and explained the return of income and assessee has filed various details, accounts and evidences to explain the return. In such a scenario, we cannot agree with the Ld. Pr. CIT that the AO did not issue questionnaire on this issue and thereby failed to carry out necessary inquiries or verification. So the main plank on which the Ld. Pr. CIT usurped the revisional jurisdiction fails. Moreover, we note that the issue as to which *head* the receipt from surrender of booking of office space in the facts and circumstances of the case is debatable and the view taken by the AO is a plausible view, which cannot be held as unsustainable in law. Further, we note that the second limb of satisfaction as required to be satisfied to invoke sec. 263 jurisdiction i.e. prejudicial to the interest of revenue is not at all attracted because the assessee has offered the receipt from surrender of booking as business income which is taxed at the maximum taxable limit 30% and so even if the receipt is taxed under the head *short term capital head* will not exceed 30%. So, no prejudice is caused to the interest of revenue. Therefore, looking from any angle, the order of AO passed on 13.06.2014 could not have been interfered by the Ld. Pr. CIT invoking revisional jurisdiction u/s. 263 of the Act in the given facts and circumstances of the case as

discussed above. Therefore, the said decision of the AO cannot be treated as erroneous and prejudicial to the interest of revenue as held by the Hon'ble Supreme Court in Malabar Industries Ltd. (supra). Therefore, in the facts and circumstances narrated above, usurpation of jurisdiction by Ld. Pr. CIT exercising his revisional jurisdiction is 'null' in the eyes of law and, therefore, we are inclined to quash the assumption of jurisdiction to invoke revisional jurisdiction u/s. 263 of the Act by the Pr. CIT. Therefore, we quash the order of the Principal CIT passed u/s. 263 of the Act. Appeal of the assessee is allowed.

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

Order is pronounced in the open court on 14th June, 2018.

Sd/-
(Dr. A. L. Saini)
Accountant Member

Sd/-
(Aby. T. Varkey)
Judicial Member

Dated : 14th June, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – M/s. Bankebihari Vincom Pvt. Ltd., 154, Lenin Sarani, 4th floor, Kolkata-700 013.
2. Respondent – Pr. CIT-1, Kolkata.
3. The CIT(A), Kolkata
4. DR, ITAT, Kolkata. (e-mailed)

/True Copy,

By order,

Senior Pvt. Secy.