

IN THE INCOME-TAX APPELLATE TRIBUNAL “A” BENCH, MUMBAI
BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER
AND SHRI PAWAN SINGH, JUDICIAL MEMBER
ITA No.6764/Mum/2017 (Assessment Year 2013-14)

Mr. Ashok M. Jain, B-2501, Emerald Bay CHS, Plot No. R3/B, Off. Palm Beach Road, Nr. B.P. Petrol Pump, Sector-14, Nerul, Navi Mumbai-400706. PAN: AAIPJ9350L	Vs.	Pr. CIT-28, Room No. 301, 3 rd Floor, Tower No.6, Vashi Railway Station Complex, Vashi, Navi Mumbai-400703.
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Appellant

Respondent

Appellant by	: Shri V.D. Parmar (AR)
Respondent by	: Shri R.P. Meena (CIT-DR)
Date of Hearing	: 01.05.2018
Date of Pronouncement	: 31.05.2018

Order under Section 254(1) of Income - Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER;

1. The instant appeal by assessee under section 253 of the Income-tax Act (the Act) is directed against the order under section 263 of Income tax Act dated 31.10.2017 passed by Id. Principal Commissioner of Income-Tax-28 [Id. PCIT], Mumbai for Assessment Year 2013-14.
2. Brief facts of the case are that the assessee filed its return of income for Assessment Year 2013-14 on 28.09.2013 declaring total income at Rs.32,53,380/-. The assessment was completed on 30.03.2016 under section 143(3) of the Act. The assessment order was revised by Id. PCIT vide its order dated 31.03.2017. The Id. PCIT issued notice under section 263 dated 23.03.2017. In the show-cause notice, the Id. PCIT raised the issue that the Assessing Officer while passing assessment order has not examined the

receipt of amount of Rs. 15.64 lakhs in the capital account by way of interest from M/s Milestone Domestic Scheme III. Therefore, the order passed by assessing officer is erroneous so far as prejudicial to the interest of Revenue. In response to the show-cause notice under section 263, the assessee filed his reply on 30.03.2017. In the reply, the assessee contended that the assessee furnished full details at the time of assessment proceedings related to the interest received for Rs. 15,64,000/-. The Assessment officer after going through the said details and satisfying himself passed the Assessing order. The Assessing Officer was satisfied that such interest is received from said trust is not taxable. The assessee further contended that he has received a pay out from M/s Milestone Domestic Scheme III, M/s Milestone Real Estate Fund (Trust), which is discretionary Trust and is being taxed at maximum marginal rate under section 164, so any amount received from such Trust on distribution of income in the hand of beneficiary is not taxable. Therefore, the Assessing Officer has not added the same as taxable income. The contention of the assessee was not accepted by Id. PCIT holding that section 164 relied by assessee does not exempt the shares of beneficiary of Trust. The assessee has invested in the fund. The assessee is not beneficiary for whose benefit, the Trust is created. The share of member of Association of Person ('AOP') is assessed as per section 67A of the Act, therefore, the assessee made a false claim of interest being exempt. The Id. PCIT declared the assessment order dated 30.03.2016 as erroneous and in so

far as prejudicial to the interest of Revenue. The Id. PCIT further concluded that Assessing Officer failed to conduct proper enquiries, investigation and examination of facts. The Assessing Officer was directed to pass the fresh assessment order in accordance with law after affording an opportunity of being heard to the assessee. Therefore, aggrieved by the order of Id. PCIT, the assessee has filed present appeal before us raising the following grounds of appeal:

(1) On facts and circumstances of the case and in law Ld. Pr. CIT erred in setting aside the order of AO passed u/s 143(3) dated 30-03-2016 and directing the AO to pass fresh assessment order in accordance with the law.

(2) On facts and circumstances of the case and in law Ld. Pr. CIT erred in giving finding that appellant has made false claim relating to interest of Rs 15.64 lacs received from Mile Stone Real Estate Fund (Trust) as exempt income.

(3) On facts and circumstances of the case and in law Ld. Pr. CIT erred in holding that order of AO u/s 143(3) is erroneous in so far as it is prejudicial to the interest of revenue without appreciating the fact that issue of taxability of interest of Rs 15.64 lacs was examined by AO at the time of assessment proceedings and only after examining such issue AO satisfied himself that same is exempt and accordingly passed order u/s 143(3).

3. We have heard the Id. Authorized Representative (AR) of the assessee and Id. Departmental Representative (DR) for the Revenue and perused the material available on record. The Id. AR of the assessee submits that during the assessment proceeding, the Assessing Officer raised proper queries related with M/s Milestone Real Estate Fund (Trust). The assessee furnished all details including interest from M/s Milestone Real Estate Fund of Rs. 15.04 Lakhs. The Assessing Officer after proper verification of the fact and considering the submission of the assessee passed the assessment order. The

Id. AR of the assessee further submits that the copy of notice issued by assessing officer under section 142(1) dated 30.11.2015 is placed on record. The Assessing Officer vide question no. 17 raised a query related with capital account and for seeking the details including the interest from M/s Milestone Real Estate Fund of Rs.15,164/-. The assessee in his reply dated 15.05.2015 furnished the statement of interest from M/s Milestone and the confirmation from M/s Milestone. Copy of which is placed on record (Page No. 13 & 14 of the Paper Book). The Id AR for the assessee submits that assessment the order passed by assessing officer is neither erroneous nor prejudicial to the interest of revenue. The assessment was passed after verification of facts. In support of his submission, the Id. AR of the assessee relied upon the decision of Hon'ble Jurisdictional High Court in CIT vs. Gabriel India 71 TAXMAN 585 (BOM) and CBDT Circular No. 13 of 2014 dated 28.07.2014.

4. On the other hand, the Id. DR for the Revenue supported the order of Id. PCIT. The Id. DR for the Revenue further submits that Assessing Officer has not made proper enquiry during the assessment proceeding. Moreover, the Assessing Officer shall find out in the fresh assessment proceedings, if the condition prescribed under section 164 is complied with or not.
5. We have considered the rival submission of the parties and have gone through the orders of authorities below. We have noted that during the assessment proceeding, the Assessing Officer raised query related with

the interest received from M/s Milestone Real Estate Fund (Trust) of Rs. 15.64 Lakhs. The assessee vide its reply dated 15.12.2015 furnished the necessary reply and the details. After considering the explanation, the Assessing Officer granted exemption to the assessee.

6. The Hon'ble Delhi High Court in DIT Vs Jyoti Foundation [2013]357 ITR 388(Delhi) while distinguishing the order passed after proper inquiry and without inquiry held that the orders which are passed without inquiry or investigation are treated as erroneous and prejudicial to the interest of revenue, but orders which are passed after inquiry or investigation on the issues are not per se or normally treated as erroneous and prejudicial to the interest of revenue. Because the revisionary authority feels and opines that further inquiry or investigation was required or deeper or further scrutiny should be undertaken, the Commissioner must record a finding that the order made is erroneous. Hon'ble Supreme Court in Malabar Industrial Co Ltd Vs CIT [2000] 243 ITR 83 (SC) has while examining the scope of revisionary power of Commissioner held that a bare reading of section 263 of the Act 1961, makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner of Income Tax *suo moto* under it, is that the order of ITO is erroneous, so far as it is prejudicial to the interest of revenue. The CIT has to be satisfied twin conditions, namely (1), the order of AO sought to be revised is erroneous and (2) it is

prejudicial to the interest of revenue. If one of them is absent- if the order of ITO 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 AO, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of fact or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category falls orders passed without applying the principle of natural Justice or without application of mind. The 'phrase prejudicial to the interest of revenue' is not an expression of art and is not defined in the Act. Understood it is ordinary meaning it is of wide import and is not confined to loss of tax. The scheme of the act is to levy and collect tax in accordance with the provision of the act and this task is entrusted to the revenue. If due to an erroneous order of the ITO, the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interest of revenue. The phrase prejudicial to the interest of revenue has to be read in conjunction with an erroneous order passed by the AO. Every loss of revenue as a consequence of an order of AO, cannot be treated as prejudicial to the interest of revenue, for example, when an ITO, adopted one of the course permissible in law and it has resulted in loss of revenue, or where two views are possible and the

ITO has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of revenue.

Unless the view taken by ITO is unsustainable in law.

7. The Hon'ble Jurisdictional High Court in CIT Vs Gabriel India (1993) 203 ITR 108 (Bom) held that if the assessing officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualize a case of substitution of the judgment of the Commissioner of Income Tax for that of the ITO, who passed the order, unless the decision is held to be erroneous. Cases may be visualized where the ITO while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the ITO. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure. The assessing officer has taken a reasonable and possible view.
8. In view of the above factual and legal discussion, we find that the Assessing Officer while passing the assessment order has taken one of the possible views while granting the exemption of interest income of Rs. 15.64 lakhs.

Thus, the order passed by Assessing Officer is not erroneous or prejudicial to the interest of Revenue. Even on merit we have seen that the assessee has received interest from Milestone Domestic Scheme III, the scheme of Milestone Real Estate Fund (Trust) which is discretionary trust and is being taxed at marginal tax rate under section 164 so any amount received from such trust on distribution of income in the hands of beneficiary is not taxable. Therefore, the assessee also succeeded on merit. Thus, the view taken by Id. PCIT is not sustainable. In the result, ground of appeal raised by assessee is allowed.

9. In the result, appeal filed by assessee is allowed.

Order pronounced in the open court on 31.05.2018.

Sd/-
G.S. PANNU
ACCOUNTANT MEMBER

Sd/-
PAWAN SINGH
JUDICIAL MEMBER

Mumbai, Date: 31.05.2018

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Copy of the Order forwarded to :

1. Assessee
3. The concerned CIT(A)
5. DR "A" Bench, ITAT, Mumbai
6. Guard File

2. Respondent
4. The concerned CIT

BY ORDER,
Dy./Asst. Registrar
ITAT, Mumbai