

आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ "ए", चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCH "A", CHANDIGARH

श्रीमती दिवा सिंह, न्यायिक सदस्य एवं, डा. बी.आर.आर. कुमार, लेखा सदस्य
BEFORE: SMT. DIVA SINGH, JM & Dr. B.R.R. KUMAR, AM

आयकर अपील सं./ ITA NO. 736/Chd/2017

निर्धारण वर्ष / Assessment Year : 2012-13

M/s Preet Land Promoters and Developers Pvt. Ltd. Vill: Nanu Majra, Sector-86 Mohali	बनाम	Pr. CIT-2 Chandigarh
स्थायी लेखा सं./PAN NO: AADCP8893L		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Shri. Parikshit Aggarwal

राजस्व की ओर से/ Revenue by : Shri. Jagjivan Kumar Garg

सुनवाई की तारीख/Date of Hearing : 30/08/2018

उदघोषणा की तारीख/Date of Pronouncement : 16/11/2018

आदेश/Order

PER DR. B.R.R. KUMAR, A.M:

The present appeal has been filed by the Assessee against the order of the Ld. PCIT-2, Chandigarh dt. 01/03/2017.

2. In the present appeal Assessee has raised the following grounds :

1. That on the facts, circumstances and legal position of the case, the Worthy Pr. CIT in its order dated 01.03.2017 has erred in passing that order in contravention of the provisions of Section 263 of the Income Tax Act, 1961.

2. That on law, facts and circumstances of the case, the Worthy Pr. CIT was not justified in cancelling the order of the Ld. AO on following issues even when the order of Ld. AO passed u/s 143(3) on said issues was not erroneous and prejudicial to the interest of revenue and therefore the Worthy CIT has erred in assuming jurisdiction u/s 263 of the Act :

a. The outstanding advances of Rs. 123.36 crores as on 31.03.2011 and Rs. 136.30 crores as on 31.03.2012 received against the booking of plots / flats / Showrooms are Advances from customers and they stand duly accounted in audited books, reflected in audited financial statements and details thereof duly filed before the Ld. AO during original assessment proceedings.

b. The outstanding advances given of Rs. 48.53 crores as on 31.03.2012 paid for purchase of stock in trade out of advances received from customers against the booking of plots / flats / Showrooms and they stand duly accounted in audited books, reflected in audited financial statements and details thereof duly filed before the Ld. AO during original assessment proceedings.

c. *The Income Tax of Rs. 77.79 Lacs deposited as disputed Income Tax demand for preceding years stands duly accounted in audited books, reflected in audited financial statements, details thereof already on record of Ld. AO and the same has no tax effect at all in the present assessment.*

d. *The site expenses outstanding as Revenue WIP at Rs. 352.26 lacs as on 31.03.2012 as project expenses stands duly accounted in audited books, reflected in audited financial statements and no part thereof was claimed as expenses during the year in question by the appellant.*

e. *The acceptance of interest free deposit of Rs. 400 lacs from M/s AB Apartments P Ltd. ("advancing company") for the purposes of s. 2(22)(e) has been factually misinterpreted by the Worthy CIT as the appellant is not the shareholder in the advancing company.*

f. *In the absence of any claim of expense as debit to P&L A/c, the question of invocation of s. 40(a)(ia) could not have been examined by the Ld. AO and even the CIT, in proceedings and order u/s 263, has erred in passing directions in this regard on a non-existent issue.*

g. *The question of examination of Wealth Tax liability of the appellant was beyond the purview of AO during Income Tax proceedings u/s 143(3) and also outside the powers of CIT u/s 263 of the Act.*

3. *That on law, facts and circumstances of the case, the Worthy Pr. CIT was not justified in cancelling the order of the Ld. AC) on account of above issues by assuming powers u/s 263 even when the order of Ld. AO passed u/s 143(3) was not erroneous and prejudicial to the interest of revenue.*

3. The first issue in order under section 263 pertains to current liabilities as on 31/03/2012.

4. The brief facts relating to this issue are that amount out of total amount of Sundry Creditors Rs. 1,37,20,42,484/- have not been properly examined by the Assessing Officer. The Ld. Pr. CIT held that no documentary evidence to prove the genuineness of its contention that the advances were genuine have been filed. He held that the perusal of assessment record reveals that during the course of assessment proceedings, the Assessing Officer did not make necessary enquiries regarding creditworthiness of the creditors and genuineness of transactions. Hence, the issue remains unverified/unexamined and hence the present order under section 263 on this issue.

5. Before us, as well as before the Ld. Pr. CIT it was submitted by the Ld. AR that an amount of Rs. 98,49,27,106/- was mainly received from two cooperative housing building societies namely The Dastkar Co-Operative House Building Society Ltd., Mohali and, the Akash Co-Op. House Building Society Ltd. Mohali and one associate concern M/s A.B. Apartments Pvt. Ltd. Another amount of Rs. 37,98,17,271/- represents the amount of advance received from customers against the booking of plots. It was further submitted that reply and justification

during the course of assessment proceedings was furnished but the same has not been reflected in the assessment order.

6. The Ld. DR on the other hand argued that the order of the Assessing Officer should be deemed to be erroneous as no enquiries have been conducted in this case. It was argued that the Assessing Officer has simply kept quiet by considering the final accounts submitted by the Assessee but has not travelled beyond the final accounts, hence the action of the Ld. Pr. CIT is in consonance with the Explanation 2 of Section 263 of Income Tax Act, 1961.

7. The matter has been examined as to whether this issue has been verified by the Assessing Officer or not during the assessment proceedings.

8. The Ld. AR submitted the details of the sundry creditors before the Assessing Officer vide letter dated 27/06/2014. The relevant parts of the reply are as under:

In the initial period immediately after incorporation of the Company M/s Preet Land Promoters and Developers Private Limited decided to execute the mega housing project for the members of two societies namely the Dastkar Cooperative House Building Society Limited, Mohali Registration no. 2689 dated 29/9/1999 and The Akash Co-Operative House Building Society Limited Mohali Registration no. 2668 dated 11/3/1999.

Since the cooperative societies namely The Dastkar Co-Operative House Building Society Limited, Mohali Registration No. 2689 dated 29/9/1999 and The Akash Co-Operative House Building Society Limited Mohali Registration No. 2668 dated 11/3/1999 have huge chunk of land acquired by these societies to colonize and allot the same to its members at cost to cost basis, hence both the members of societies offered their respective ownership of land to include the same for the development and accordingly passed a resolution (internally i.e. Within the societies) to hand over the land to the company and transfer the required funds for the further acquisition of land for the development of the same in residential plots and later on to allot the same to the members of the society subject to list provided by the society for the respective names to whom plots are to be allotted.

This is further submitted that the company has got the land registered (already registered in the name of societies) for the development and shall transfer the plotted area to the members of the societies on the completion of the project. Assessee holding land or building as trader (stock in trade) and on sale of that assessed for the same under the head "Income from business".

The major amount out of total amount of Sundry Creditors (Current Liabilities) Rs. 137,20,42,484/- representing the total amount of Rs. 98,49,27,106/- is mainly receipt from the these two cooperative house building societies and one Associate Concern M/s A B Apartments Private Limited (PAN NO: AAFCA7362R),, another amount of Rs. 37,98,17,271/- represents the amount OF Advance received from customers against the booking of plots to be allotted after the project is completed.

ASSET SIDE:

Amount of Inventories (Project in Progress)	Rs. 1,22,71,66,624/-
Amount of Advance for Purchase of Land etc.	Rs. 53,79,44,408/-
Total Investment in the Project (under completion)	Rs. 1,76,51,11,032/-

LIABILITY SIDE

Advances from Customers	
a) The Akash Coop H/B Society Limited	Rs. 44,36,22,441/-
b) The Dastkar Coop H/B Society Ltd	Rs. 37,21,73,360/-
c) A B Apartments P. Ltd.	Rs. 16,91,31,305/-
d) Others (individuals)	Rs. 37,98,17,271/-
Total Advances from Customers	Rs. 1,36,47,44,377/-

Further the assessee has explained to the Assessing Officer the details regarding the transfer, completed contract method how current liabilities are accounted and method of calculation of profits. The same can be gauged from the submissions of the Assessee filed before the Assessing Officer.

In normal case, profits or gains are computed at the time when goods are sold by transferring the ownership. In the case of real estate transaction, the same principle is applied when completed contract method (CCM) is adopted. As real estate transactions have a peculiar nature for real estate developers (that unless the asset comes into existence, there could not be any "transfer"), following the completion method for revenue recognition the amount which is accepted as advance from the Customers is shown under the Current Liabilities (Sundry Creditors) and the profit or gain from the real estate activity is required to be computed in the year of completion of project, accordingly the amount standing as Sundry Creditors (Advances from Customers) is Transferred to the Revenue account under Sale Consideration, as per the Guidance Note on Revenue Recognition for Real Estate Transactions issued by ICAI.

In a transaction involving the sale of goods, performance should be regarded as being achieved when the seller of goods has transferred the buyer the property in the goods for a price or all significant risks and rewards of the ownership have been transferred to the buyer and the seller retains no effective control of the goods transferred to a degree usually associated with the ownership and no significant uncertainty exists regarding the amount of the consideration that will be derived from the sale of the goods.

In case of real estate sales the point of time at which all significant risks and rewards of ownership can be considered as transferred is when the legal title of the property is got transferred to the buyer or giving possession of real estate to the buyer under an agreement for sale, Once the seller has transferred all the significant risks and rewards of ownership to the buyer then there should be recognition of revenue.

9. We have heard Ld. Representatives of both the parties and perused the material available on record.

10. It is a settled position in law that powers under section 263 can be exercised by the CIT on satisfaction of twin conditions viz. the assessment order should be erroneous and prejudicial to the Revenue. By erroneous is meant contrary to law. Thus where there are two possible views and the AO has taken one of the possible views, no occasion to exercise powers of revision can arise.

Nor can revisional power be exercised for directing a fuller inquiry to find out if the view taken is erroneous, when a view has already been taken after inquiry (Bombay High Court-CIT vs. Nirav Modi 138 DTR81).

10.1 The power of revision can be exercised only where no inquiry as required under the law is done. It is not open to enquire in cases of inadequate inquiry.

10.2 Regarding the advances from customers namely the Akash Cooperative Housing Society Ltd. of Rs. 44.36 Crores and the Dastkar Cooperative Housing Society of Rs. 37.21 Crores it was found that these societies are registered in the year 1999 and have huge chunk of land which was acquired by these societies to colonize and allot the same to its members at cost to cost basis hence members of both the societies offered their respective ownership of land to the assessee company and transfer the required funds for further acquisition of land for the development of the same in the residential plots and later on to allot the same to the members of the society as per the list given by the respective societies. Hence we see no reason to examine the land cost and the sources obtained from these two societies.

10.3 However, regarding the other individuals in the instant case, the Assessing Officer has not conducted absolutely any enquiry pertaining to the advances received of Rs. 37,38,17,271/- which gives rise to situation where the assessment was done without any enquiry. As enunciated in the case of Rampyari Devi 67 ITR 84 unlike a Civil Court which is neutral to give a decision on the basis of evidence produced before it, the Assessing Officer is not only an adjudicator but also an investigator. He cannot remain passive on the face of a return which is apparently in order but calls for further enquiry. If there is a failure to make such an enquiry the order is erroneous and prejudicial to the Revenue. This is not a case where a decision has already taken by the Assessing Officer and where a particular view taken by the Assessing Officer has been nullified by the PCIT by taking a different view possible on the similar set of facts. The Assessing Officer performs the quasi judicial function and the reason for his conclusion and findings should be forthcoming in the order.

10.4 There is no such activity conducted by the Assessing Officer in the instant case. This proposition has been held by the Hon'ble High Court of Karnataka in the case of CIT Vs. Infosys Technologies Ltd. 341 ITR 293. Similarly in the case of

Malabar Industrial Co. Ltd. 243 ITR 83 the Hon'ble Supreme Court held that an incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the instant case the Assessing Officer has presumed without any basic enquiry that the details filed or in order, to that extent the order of the Assessing Officer can be treated as erroneous and the action of the Ld. PCIT referring the matter for re-examination can be well accepted.

11. The second issue relates to non enquiry of validity of transactions of advances for land/ bianas / land pooling at Rs. 48,53,04,581/-. The Pr. CIT held that the Assessing Officer had not made any enquiry regarding validity of these transactions and no documentary evidences in the form of copies of agreements, sources of investments etc. were called for by the AO. Pr. CIT held that it is the duty of Assessing Officer to ascertain the truth of the facts stated by the assessee to by making necessary enquiries.

12. Before us, the Ld. AR submitted that the issue stands enquired properly by the Assessing Officer and argued that during the year the assessee has neither claimed expenditure set off against the Revenue generated from the business and hence no loss of revenue can be attributed on this head. He relied on the judgment in the case of Malabar Industrial Company Ltd. Vs. CIT 243 ITR 82 (Supreme Court) and CIT Vs. Max India Ltd. 295 ITR 282 (Supreme Court).

Ld. DR relied on the order of the Ld.PCIT.

13. We find that the amount of Rs. 48.53 Crores consists of Long Term Loans and Advances of Rs. 27.83 Crores on account of advance for land, Rs. 16.72 Crores on account of bianas, Rs. 3.97 Crores on account of land pooling. The argument that the assessee has not claimed this expenditure cannot be treated as valid as the assessment does not restrict itself to the claims in the P&L Account but to the entire financial affairs of the assessee. The amounts which stands capitalized would certainly have an impact on the profits and the taxation in the subsequent years. The amounts spent and subsequently capitalized or taken as work in progress would certainly a matter of examination in the year in which the amounts were spent or brought in to the books as it will have a corresponding effect in the future years on the taxation. Hence ,the contention of the Ld. AR that Revenue is not affected cannot be accepted as the

expenditure has not been claimed. Accepting such argument amounts to giving a very narrow perspective to the principles of taxation. A wrong capitalization or an incorrect capitalization of expenses in the current year would have a cascading effect on the revenue and taxation.

14. The Assessing Officer has not conducted any preliminary enquiries about the genuineness of the advances received. Thus making it a fit case for revision under the provisions of Section 263. Further the judgments submitted by the Ld. AR viz. CIT Vs. MAX India Ltd. and Malabar Industrial Company Ltd. Vs. CIT have been duly examined and found that they cannot be applied to the facts of the case before us. In the case of Swaroop Vegetable Products Industries Ltd. 187 ITR 412 it was held that it is beyond dispute that under section 263 of the Income Tax Act, 1961 the Commissioner does have the power to set aside assessment order and send the matter for a fresh assessment if he satisfied that further enquiry is necessary and that the order of the Assessing Officer is prejudicial to the interest of the Revenue wherein the Assessing Officer has accepted the contention of the assessee without proper enquiries. In the case of GEEVEE Enterprises Hon'ble Delhi High Court held that the Commissioner can regard an order as erroneous in case the Assessing Officer failed in his duty to investigate the facts. In the instant case also the Assessing Officer has accepted the bianas received of Rs. 48.53 crores without conducting any enquiry or investigation and hence the Ld. PCIT has rightly invoked the provisions of Section 263.

15. The third ground relates to Income Tax paid in dispute of Rs. 77,78,920/-. We find that this amount has been shown in the balance sheet as at 31/03/2011 and also as at 31/03/2012. Hence it can be conveniently taken that this amount cannot be an issue for investigation or examination for the year under consideration. Hence the action of the Ld. Pr. CIT on this ground cannot be held to be valid.

16. The fourth issue relates to the Site expenses. The Ld. Pr. CIT held that the assessee has shown site expenses of Rs. 3,52,26,858/- as on 31.03.2012 as per list of project expenses but the Assessing Officer did not make necessary enquiries about the nature and details of these expenses. The Ld. Pr. CIT held that even during the proceedings under section 263, the assessee has not filed any documentary evidence regarding reasonableness/correctness of these

expenses. Since no necessary enquiries were made by the AO during the assessment proceedings, the issue remains unexamined/unverified.

17. Before us the Ld. AR submitted that the site expenses have been duly examined by the Assessing Officer and submitted the copies of relevant order sheet entries and also the TDS statements pertaining to the expenditure.

18. Ld. DR argued that these examination of the TDS certificates is not sufficient to come to a correct conclusion of allowability of correct expenditure and also the genuineness of the expenses. He further argued that as per the order sheet the examination of books of accounts has been conducted only on test check basis hence cannot be deemed as complete examination of the books of accounts. He argued that Assessing Officer has not conducted in depth and complete enquiries regarding the expenses incurred.

19. Having perused the documents on record, we are not in agreement with the arguments of the Ld. DR that insufficient enquiry should be a reason for upholding of order under section 263. Ld. PCIT cannot determine as to what extent the enquiries have to be conducted for allowing an expenses as genuine. In this case, since the Assessing Officer has examined books of accounts, TDS details which allowed her to come to a reasonable conclusion, we cannot support the order of the Ld. PCIT on this ground.

Interest free deposit from associated concern

20. The Ld. Pr. CIT held that the Assessing Officer has not examined the interest free deposit of Rs. 4 Crores received during the financial year 2011-12 from its associate concern namely AB Apartments Pvt. Ltd. with reference to the provisions of Section 2(22)(e).

21. Before us, the Ld. AR submitted that the assessee has no money invested in the shares of AB Apartments Pvt Ltd. We also find that the matter stands examined by the Assessing Officer with reference to the reply submitted by the assessee vide their letter dt. 10/06/2014. Further it is apparent from the records that the amount has been received by the assessee on 16/03/2010 hence cannot be a subject matter of proceedings under section 263 for the A.Y. 2012-13. Assessee gets relief on this ground.

Applicability of Section 40(a)(ia)

22. The Ld. Pr. CIT held that the Assessing Officer has not looked into or made necessary enquiries regarding the applicability of 40(a)(ia) pertaining to project expenses.

23. The Ld. AR submitted that the applicability of TDS has been examined by the Assessing Officer vide the questionnaire issued on 28/02/2014. Further he submitted that the assessee has not claimed any deduction for the amount paid in the P&L Account. Since *prima facie* the facts have been examined and the amounts have not been claimed in P&L Account, hence 40(a)(ia) provisions attract to the items of expenditure claimed in P&L Account, we don't find any merit in the order of the Ld. Pr. CIT on this issue.

Applicability of wealth tax

24. The Ld. Pr. CIT held that the Assessing Officer failed to examine the case from the point of wealth tax liability with regard to the fixed assets mainly cars. This issue has not been examined by the Assessing Officer.

25. The Ld. AR submitted that motor cars used for business of running them on hire or held as stock in trade is exempt from the definition of "assets" as defined in the Wealth Tax Act. He submitted that since the assessee being a real estate company motor cars are deemed to be the stock in trade as the business of such type of industry substantially depends on the visit of the clients. He further argued that Section 25 of the wealth tax proceedings deals with the revisionary powers of the Commissioner.

26. Ld. DR relied on the order of the Ld. Pr. CIT.

27. We are not in agreement with the explanation of the Ld. AR that the motor cars be treated as stock in trade and hence to be exempted from the definition of the "asset". The cars cannot be treated as stock in trade of the assessee in this case and neither the assessee claimed them as part of stock in trade. In fact they have been duly made an integral part of the fixed assets. However, this issue of Wealth Tax cannot be a subject matter of proceedings under section 263 of Income Tax Act, 1961 which otherwise could well be taken care by the

Section 25(2) of the Wealth Tax Act which the Ld. Pr. CIT failed to invoke. Hence, the revision proposed by the Ld. Pr. CIT on this ground is hereby held to be invalid.

28. To conclude the order of the Ld. PCIT is upheld pertaining to the issues of examination of advances received from individuals of Rs. 37,98,17,271/-, examination of Rs. 48,53,04,581/- on account of advances of land / biana.

29. The order of the Ld. PCIT on the issues of advances received from Akash Cooperative Society, Dastkar Cooperative Society, AB Apartments Pvt. Ltd., on account of income tax paid, site expenses, interest free deposits, applicability of section 40(a)(ia) and applicability of wealth tax is hereby quashed.

Order pronounced in the open Court.

Sd/-
दिवा सिंह
(DIVA SINGH)

न्यायिक सदस्य/ Judicial Member

AG

Date: 16/11/2018

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

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
Guard File

Sd/-

डा. बी.आर.आर. कुमार,
(Dr. B.R.R. KUMAR)

लेखा सदस्य/ Accountant Member