

आयकर अपीलीय अधिकरण "E" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

**BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.4663/Mum/2017
(निर्धारण वर्ष / Assessment Year : (2010-11)

M/s. Top Class Capital Markets (P.) Ltd., 2 nd floor, Bombay Mutual Fund Building, Dr. D.N. Road, Fort, Mumbai 400001	बनाम/ v.	DCIT-1(3)(2), Aayakar Bhavan, R.No. 540, M.K Road, Mumbai 400020
स्थायी लेखा सं./PAN: AACCT5800G		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri. Jitendra Jain	
Revenue by:	Shri. O.P Meena (DR)	

सुनवाई की तारीख / **Date of Hearing** : 17.05.2019

घोषणा की तारीख / **Date of Pronouncement** : 22.05.2019

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member:

This appeal, filed by assessee, being ITA No. 4663/Mum/2017, is directed against appellate order dated 04.05.2017 in appeal no. CIT(A)-3/DCIT-1(3)(2)/IT-14/2016-17, passed by learned Commissioner of Income Tax(Appeals)-3, Mumbai (hereinafter called "the CIT(A)"), for assessment year 2010-11, the appellate proceedings had arisen before learned CIT(A) from the assessment order dated 01.03.2016 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) r.w.s. 263 of the Income-tax Act, 1961 (hereinafter called "the Act") for AY 2010-11.

2. The grounds of appeal raised by assessee in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called “the tribunal”) read as under:-

“1. The Commissioner of Income Tax(Appeals) - 3, Mumbai erred in confirming the disallowance of business promotion expenses of Rs.9,98,215/- u/s 37(1) of the Act made by the AO, being club membership fees of Appellant's representative, holding the same as expense not related to the business of Appellant.

The Appellant submits that the business promotion expenses is incurred wholly and exclusively for the purpose of business of the Appellant and same shall be allowed as deductible revenue expense u/s 37(1) of the Act.

Your Appellant craves leave to add, to alter or to amend the aforesaid grounds of appeal.”

3. The brief facts of the case are that the assessee is engaged in trading in shares & securities. The assessment was originally framed by AO u/s 143(3) of the 1961 Act vide assessment order dated 19.11.2012 . Later the revisionary proceedings u/s. 263 of the 1961 Act were concluded by learned CIT-1, Mumbai which culminated into an revisionary order dated 12.03.2015 passed u/s. 263 of the 1961 Act, wherein it was held by learned CIT-1 that an assessment order dated 19.11.2012 passed by AO u/s. 143 of the Act is erroneous so far as prejudicial to the interest of revenue which was set aside by learned CIT with directions to AO to frame assessment afresh. The learned CIT-1, Mumbai was of the view that the AO had totally missed the critical fact that the club membership had been taken in the name of one Mrs. Lata Vasvani, whom the assessee was claiming to be its representatives. The Ld. CIT observed that the AO has not verified the identity of the said person and did not ascertain whether said Mrs Lata Vaswani was Director or Employee of the assessee or a third person. In the opinion of learned CIT, It was also not verified whether the said expenses were incurred wholly & exclusively for the purposes of the business of the assessee. The learned CIT was prima

facie of the view that said Mrs Lata Vaswani was not associated with assessee company and appeared to be a third person and accordingly expenditure incurred according to learned CIT would be unrelated to the business activities of the assessee company. As per learned CIT , the AO did not made detailed enquiry as to how the assessee benefitted from the club membership taken in the name of one Mrs. Lata Vaswani . The learned CIT was of the view that since Mrs Lata Vaswani being third party , she will be able to utilise the benefits of club membership in any way and for any purpose whatsoever. For the aforesaid reasons, the learned CIT was pleased to set aside the assessment order dated 19.11.2012 passed by the AO by holding the same to erroneous so far as prejudicial to the interest of the Revenue , vide revisionary order dated 12.03.2015 passed by learned CIT u/s 263 of the 1961 Act.

4. The AO in compliance with directions of learned CIT u/s 263, initiated proceedings for framing of an assessment u/s. 143(3) r.w.s. 263 . The assessee was called upon to explain reasons and justification for incurring expenses to the tune 9,98,215/- towards club membership and charges for recreation center paid to Mumbai Cricket Association(MCA). The assessee claimed that it made payment of Rs. 9,98,215/- to Mumbai Cricket Association (MCA) towards membership fees of its representative Mrs. Lata Vasvani for utilising the facilities of the club for meeting and entertaining business associates with the intention of extending business relationship and promoting the business. It was also claimed that said Mrs Lata Vaswani by becoming the member in the club assisted the assessee to hold day to day business meetings, conferences and discussions with various customers, bankers etc. . The assessee submitted that owing to reasons as stated above, the said expenses were claimed as revenue expenses. During the assessment proceedings conducted by the AO u/s 143(3) read with Section 263 of the 1961 Act , the assessee however admitted that there was no agreement between the assessee

and said Smt Lata Vaswani and that she was also not an employee of the assessee company. It was further confirmed by assessee that no other payment was made to said Mrs Lata Vaswani in the past or in subsequent assessment years.

5. The AO rejected the contentions of the assessee and made the additions to the income of the assessee by holding that these expenses were not incurred wholly & exclusively for the purpose of business of the assessee and the assessee had failed to prove commercial expediency , vide assessment order dated 01.03.2016 passed by the AO u/s 143(3) read with Section 263 of the 1961 Act by holding as under :-

“5. I have carefully considered the submissions and reliance placed by the assessee on case laws and the same are not accepted. The assessee has claimed business promotion expenses amounting to Rs. 9,98,215/-. On perusal of the details, it is seen that the payment of Rs. 9,98,215/- has been made to Mumbai Cricket Association (MCA) towards life membership fees of one Mrs. Lata Vasvani. According to the assessee Mrs. Lata Vasvani is its representative. The assessee has not provided any copy of contract with the said person nominating her as its representative. The assessee has also clarified that she is neither a director nor an employee of the assessee company. The assessee has not thrown light on the terms and conditions under which it has appointed her as its representative. It is further confirmed that no other payments have been made to the said Smt. Lata Vasvani in the past or in subsequent assessment years. The onus is squarely upon the assessee to bring out all relevant facts relating to its relationship with Mrs. Lata Vasvani on whose behalf it made the impugned payment. The onus is also upon the assessee to bring out the facts and provide documentary evidences which will establish the rights and obligations of the parties involved i.e. Mrs. Lata Vasvani and the assessee. The assessee has failed to discharge its onus. In the absence of such clarification, the contention of the assessee that Mrs. Lata Vasvani assisted the assessee to hold day to day business meetings, conferences and discussions with various customers, bankers, etc. is generalized, vague, unsubstantiated, fictitious and self serving. On the basis of facts submitted by the assessee, it has necessarily to be concluded that the assessee has made a payment on behalf of Mrs. Lata Vasvani which is of a gratuitous nature.

6. Section 37(1) permits deduction of any expenditure not being expenditure of the nature described in section 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee, if it is laid out or expended wholly and exclusively for the purpose of business or profession.

7. The expenditure referred to in section 37(1) would obviously mean that liability for the expenditure should be the liability of the assessee's business.

It cannot be the liability of another person. It cannot be a gratuitous payment. An assessee cannot claim the liability of another person u/s 37(1) on the ground that it is revenue expenditure and spent wholly and exclusively for the purpose of its business. If commercial expediency is claimed then it is the assessee's burden to bring out the relevant facts and prove the existence of commercial expediency. In the instant case, as discussed in detail above, the assessee has failed to provide primary facts let alone prove commercial expediency. Therefore, it is being held that the assessee has for reasons best known to itself, discharged liability of Mrs. Lata Vasvani by paying an amount of Rs. 9,98,215/- on her behalf. Since the impugned expenditure is not related to the assessee's business, it is not allowable u/s 37(1) of the Act. Hence, the claim of business promotion expenses amounting to Rs. 9,98,215/- is being disallowed as unrelated to business activity of the assessee company and added back to the total income. Penalty proceedings u/s 271(1)(c) of the I.T. Act, is being initiated for furnishing inaccurate particulars of its income."

6. In the mean time , the revisionary order dated 12.03.2015 passed by Ld. CIT u/s. 263 was challenged by the assessee before the Mumbai-tribunal and the tribunal was pleased to dismiss the appeal of the assessee in ITA no. 2094/Mum/2015 for AY 2010-11 vide appellate orders dated 15.01.2016 , by holding as under:-

" 7. Before going into the merits of the issue, we would like to discuss about the legal position with regard to the power of Learned CIT to invoke revision proceedings under section 263 of the Act. The scope of revision proceedings initiated under section 263 of the Act was considered by Hon'ble Bombay High Court, in the case of Grasim Industries Ltd. V CIT (321 ITR 92) by taking into account the law laid down by the Hon'ble Supreme Court. The relevant observations are extracted below:

Section 263 of the Income-tax Act, 1961 empowers the Commissioner to call for and examine the record of any proceedings under the Act and, if he considers that any order passed therein, by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, to pass an order upon hearing the assessee and after an enquiry as is necessary, enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment. The key words that are used by section 263 are that the order must be considered by the Commissioner to be "erroneous in so far as it is prejudicial to the interests of the Revenue". This provision has been interpreted by the Supreme Court in several judgments to which it is now necessary to turn. In Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83, the Supreme Court held that the provision "cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer" and "it is only when an order is erroneous that the section will be attracted". The Supreme Court held that an incorrect assumption of fact or an incorrect application

of law, will satisfy the requirement of the order being erroneous. An order passed in violation of the principles of natural justice or without application of mind, would be an order falling in that category. The expression "prejudicial to the interests of the Revenue", the Supreme Court held, it is of wide import and is not confined to a loss of tax. What is prejudicial to the interest of the Revenue is explained in the judgment of the Supreme Court (headnote) :

"The phrase 'prejudicial to the interests of the Revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer, cannot be treated as prejudicial to the interests of the Revenue, for example, 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 Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the Income-tax Officer is unsustainable in law."

The principle which has been laid down in Malabar Industrial Co. Ltd. [2000] 243 ITR 83 (SC) has been followed and explained in a subsequent judgment of the Supreme Court in CIT v. Max India Ltd. [2007] 295 ITR 282."

8. Based on the legal principles enunciated by the Hon^{ble} Courts, if we examine the facts available in the present case, we notice that the assessee's explanation that the club membership fee was paid for a representative of the assessee was accepted by the AO on the face of it. The documents furnished along with the reply letter furnished by the assessee clearly show that the membership fee was paid for Mrs. Lata Vasvani. There should not be any dispute that the club membership fee was allowed u/s 37(1) of the Act, where in there is a requirement to show that the expenditure was incurred for the purpose of business, it was not personal expenditure or capital expenditure etc. We notice that Mrs. Lata Vasvani was not an employee or a director of the assessee company. She was not paid any other kind of compensation from the funds of the company. Normal business practice is to take the membership in the name of the company or in the name of top employees as per their service terms and conditions. Hence, in our view, the assessing officer has failed to apply his mind on the reply given by the assessee. The assessing officer, in our view, has failed to examine as to whether the conditions specified in sec. 37(1) were satisfied or not in the claim so made by the assessee. Accordingly, we are of the view, the present case is a case of lack of enquiry on the claim made by the assessee. Further, in the absence of required enquiry, it cannot be said that the assessing officer has taken one of the possible views. Accordingly, we are of the view that there is no infirmity in the action of the Ld CIT in initiating the revision proceedings u/s 263 of the Act. Accordingly, we affirm his order.

9. In the result, the appeal filed by the assessee is dismissed."

7. The assessee challenged the assessment order dated 01.03.2016 passed by the AO u/s. 143(3) r.w.s. 263 before Ld. CIT(A) who was also pleased to dismiss the appeal filed by the assessee vide appellate order dated 04.05.2017 ,by holding as under:-

“ 5. I have given my careful consideration to the rival submissions, perused the material on record and duly considered the factual matrix of the case as also the applicable legal position.

5.1 The original assessment was completed by the AO on 19.11.2012 u/s 143(3) of the IT Act at an income of Rs. 43,23,18,536/-. Subsequently, the then CIT-1, Mumbai vide its order dated 12.03.2015, u/s 263 of the IT Act, had set aside the original assessment order holding as erroneous and prejudicial to the interest of the revenue and thereby directed the AO to frame the assessment de novo. Against the order passed by the CIT-1, Mumbai u/s 263 of the IT Act, the appellant preferred an appeal before the Hon'ble ITAT, Mumbai.

5.2 The Hon'ble ITAT vide its order dated 15.01.2016 [ITA No. 2094/Mum/2015] has dismissed the appeal of the appellant and held that there is no infirmity in the action of the Ld. CIT in initiating the revision proceedings u/s 263 of the IT Act. The present appeal is against the order passed u/s 143(3) r.w.s. 263 of the IT Act dated 01.03.2016.

6. Ground No. 1 is general in nature, which does not require any specific adjudication hence, dismissed.

7. Ground No. 2 relates to disallowance of Rs. 9,98,215/- towards promotion expenses u/s 37(1) of the IT Act, being club membership fees. During the course of assessment proceedings, the AO observed that the club membership has been taken in the name of Mrs. Lata Vasvani, whom the appellant claimed to be its representative. After considering the submission of the appellant, the AO has held that the appellant has claimed business promotion expenses amounting to Rs. 9,98,215/-. This is the payment which has been made to Mumbai Cricket Association (MCA) towards life membership fees of one Mrs. Lata Vasvani, which according to the appellant is its representative. Further, it has been surfaced that Mrs. Lata Vasvani is neither a director nor an employee of the appellant company, under which she has been appointed as their representative. It is farther noticed that no other payment has been made to Mrs. Lata Vasvani in the past or in subsequent assessment years. The appellant has not brought any evidence relevant to its relationship with Mrs. Lata Vasvani on whose behalf such payment was made. Thus it has been held that that expenditure incurred under section 37(1) is not an allowable expenditure as it does not fall under the expenditure incurred for business purposes and therefore an amount of Rs. 9,98,215/- paid by the appellant on behalf of Mrs. Lata Vasvani is disallowed u/s 37(1) of the IT Act and added back to the income of the appellant.

7.1 On the other hand the appellant submitted that the appellant has made payment of Rs. 9,98,215/- to Mumbai Cricket Association towards

membership fees of its representative Mrs. Lata Vasvani for utilizing the facilities of the club for meeting and entertaining business associates with the intention of extending business relationship and promoting the business. The expenses were claimed as revenue expenses and debited to its P&L A/c as 'Business Promotion Expenses' under Schedule 13 as Administration Expenses as the payment is in the name of payment made to club, same was reported by the Tax Auditor in Form 3CD at point 17(d). It was further submitted that the appellant company is engaged in the business of trading in shares and securities, investment in shares and financing and Mrs. Lata Vasvani was instrumental in advising investment planning in shares and securities. Being representative of the appellant company as advisor, the appellant has made payment to Mumbai Cricket Association towards membership fees for Mrs. Lata Vasvani for utilizing the facilities of the club for meeting and entertaining business associates with the intention of extending business relationship and promoting its business. The expenses incurred is wholly and exclusively for the purpose of business of the appellant and the same shall be allowed a deductible revenue expense u/s 37(1) of the IT Act.

7.2 I have carefully considered the rival submissions and the facts of the case. The appellant has not produced any evidence either during the course of assessment proceedings or during the course of appellate proceedings; proving the contention of the appellant that Mrs. Lata Vasvani has ever had any relationship with the company or business of the company. The AR has not demonstrated as to how Mrs. Lata Vasvani is related to the company or to extend any support in the business of the appellant. Mrs. Lata Vasvani is not associated with the appellant company and is totally a third person and the expenditure incurred in her name is unrelated to the business activity of the appellant company. The AO has disclosed these aspects in its assessment order that the expenditure incurred is not remotely related wholly and exclusively for the purpose of business activity of the appellant company the fact remains that Mrs. Lata Vasvani is not an employee of the of the appellant company nor a director of the appellant company and therefore the expenditure incurred by the appellant company on behalf of Mrs. Lata Vasvani not at all falls under any of the conditions as laid down u/s 37(1) of the IT Act and therefore the claim of the appellant is totally false and an attempt of misuse of the provisions of section 37(1) of the IT Act. The appellant company does not have any obligation to bear the liability of a third person who is not related to the company in any manner. Therefore, I did not find any reason to interfere in the findings of the AO and hence, Ground No. 2 is dismissed. “

8. Now the matter is before tribunal at the behest of the assessee. The Ld. Counsel for the assessee explained that charges towards club membership fee were paid to Mumbai Cricket Association for taking membership in the name of Mrs. Lata Vasvani who is neither the Director nor an Employee of the assessee. It was explained that she is promoting the business of the assessee and is its representative . The

learned counsel for the assessee drew our attention to the orders of authorities below and submitted that since Mrs. Lata Vaswani is representative of the assessee , she was made member of MCA for arranging meetings and entertaining business associates with the intention of extending business relationships and promoting the business. It was submitted that these expenses were thus claimed as business expenses as these expenses were incurred wholly and exclusively for its business which should be allowed u/s 37(1) of the 1961 Act. Our attention was drawn to page no. 1 of the paper book wherein copy of acknowledgement of income-tax return is placed. Our attention was drawn to page 15 of the paper book wherein audited Profit and Loss account of the assessee is placed. Our attention was also drawn to page 20 of the paper book wherein details of payment made to Mumbai Cricket Association of Rs, 9,98,215/- is placed. Our attention was also drawn by learned counsel for the assessee to page 27 of the paper book wherein copy of reply submitted by the assessee before the AO on 15.09.2015 is placed . The learned counsel for the assessee submitted that complete facts were placed before the AO as to club membership taken in the name of representative of the assessee , Mrs Lata Vaswani. Our attention was also drawn to page 29 of the paper book wherein complete details of Mrs Lata Vaswani including her address and PAN were furnished before the AO , vide reply dated 04th January 2015 filed before the AO. The assessee has also placed reliance on following case laws:

- a) Mumbai-tribunal decision in the case of SKOL Breweries Limited v. ACIT (2013)142 ITD 49(Mumbai-trib.)
- c) Mumbai-tribunal decision in the case of Clariant Chemicals India Limited v. Addl. CIT (2015)152 ITD 191(Mum-trib.)
- d) Mumbai-tribunal decision in the case of DCIT v. Banc of America Securities (India) Private Limited (2011) 128 ITD 386(Mum-trib.)

9. The Ld. DR on the other hand submitted that assessee has not provided any documentary evidences to show that Mrs. Lata Vasvani had rendered any services to the assessee. The learned DR submitted that there is no evidence on record to prove that these membership and entrance fees paid to Mumbai Cricket Association for taking club membership in the name of Mrs Lata Vaswani was for promoting the business of the assessee. It was submitted by learned DR that no agreement entered into by assessee company with said Mrs. Lata Vasvani was produced before the authorities below to prove that she will be developing business of the assessee. It was submitted that onus is on the assessee to prove that these club membership expenses were incurred wholly and exclusively for business of the assessee which was not discharged by the assessee and onus is not on the revenue to issue summons u/s. 131 or notices u/s. 133(6) as the assessee has not discharged its onus itself which was on the assessee as per law. The Ld. DR relied upon the appellate order passed by Ld. CIT(A) and prayer is made to uphold the well reasoned order passed by learned CIT(A). It was submitted that these are club expenses toward entrance fees and membership of an unrelated party namely Mrs. Lata Vasvani and it cannot be said that these are expenses were incurred wholly and exclusively for the purposes of business of the assessee. It was submitted that Mrs. Lata Vaswani is neither Director of the assessee nor its employees. It was submitted by learned DR that Mrs Lata Vaswani has not rendered any services to the assessee as per material on record. It was submitted that no payments were made to said Mrs Lata Vaswani by assessee apart from these club membership fee paid on her behalf. It was submitted that these club membership fees are personal expenses of Mrs Lata Vaswani and authorities below rightly disallowed these expenses. It was prayed by learned DR that disallowance of these expenses be upheld.

10. We have considered rival contentions and perused the material on record including cited case laws. We have observed that the

assessee is engaged in trading in shares & securities. We have observed that assessee has paid Rs. 9,98,215/- towards club membership fees and entrance fees to Mumbai Cricket Association for seeking membership in the name of one Mrs. Lata Vasvani, which was claimed by the assessee as business/revenue expenses in return of income filed with Revenue. Originally assessment was framed by Revenue u/s 143(3) of the 1961 Act vide assessment order dated 19.11.2012 passed by the AO. Later, the Ld. CIT-1, Mumbai passed an revisionary order dated 12.03.2015 u/s. 263 of the 1961 Act setting aside assessment framed by the AO u/s 143(3) of the 1961 Act vide orders dated 19.11.2012 by treating the same to be erroneous so far as prejudicial to the interest of Revenue on the ground that the AO has not verified association of Mrs. Lata Vasvani with assessee before allowing deduction of club membership fee of Rs. 9,98,215/- as business/revenue expenses claimed by the assessee while framing scrutiny assessment u/s 143(3) of the 1961 Act. Mrs. Lata Vasvani was neither an employee of the assessee nor Director of the assessee . It was also not verified by the AO that the expenses were incurred wholly and exclusively for the purposes of business of the assessee. The learned CIT-1, Mumbai was prima-facie of the view that the said Mrs. Lata Vaswani was not associated with assessee company and appeared to be a third person and accordingly expenditure incurred towards club membership fee was unrelated to the business activities of the assessee company. The Ld. CIT-1, Mumbai held the assessment order of the AO to be erroneous so far as prejudicial to the interest of the revenue, vide revisionary orders dated 12.03.2015 passed u/s 263 of the 1961 Act.

The assessee went in appeal before tribunal challenging the revisionary order dated 12.03.2015 passed by learned CIT-1, Mumbai u/s 263 , wherein tribunal was pleased to dismiss the appeal of the assessee vide appellate orders dated 15.01.2016 in ITA no. 2094/Mum/2015 for AY 2010-11, by holding as under:-

“ 7. Before going into the merits of the issue, we would like to discuss about the legal position with regard to the power of Learned CIT to invoke revision proceedings under section 263 of the Act. The scope of revision proceedings initiated under section 263 of the Act was considered by Hon'ble Bombay High Court, in the case of *Grasim Industries Ltd. V CIT* (321 ITR 92) by taking into account the law laid down by the Hon'ble Supreme Court. The relevant observations are extracted below:

*Section 263 of the Income-tax Act, 1961 empowers the Commissioner to call for and examine the record of any proceedings under the Act and, if he considers that any order passed therein, by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, to pass an order upon hearing the assessee and after an enquiry as is necessary, enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment. The key words that are used by section 263 are that the order must be considered by the Commissioner to be “erroneous in so far as it is prejudicial to the interests of the Revenue”. This provision has been interpreted by the Supreme Court in several judgments to which it is now necessary to turn. In *Malabar Industrial Co. Ltd. v. CIT* [2000] 243 ITR 83, the Supreme Court held that the provision “cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer” and “it is only when an order is erroneous that the section will be attracted”. The Supreme Court held that an incorrect assumption of fact or an incorrect application of law, will satisfy the requirement of the order being erroneous. An order passed in violation of the principles of natural justice or without application of mind, would be an order falling in that category. The expression “prejudicial to the interests of the Revenue”, the Supreme Court held, it is of wide import and is not confined to a loss of tax. What is prejudicial to the interest of the Revenue is explained in the judgment of the Supreme Court (headnote) :*

“The phrase ‘prejudicial to the interests of the Revenue’ has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer, cannot be treated as prejudicial to the interests of the Revenue, for example, 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 Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the Income-tax Officer is unsustainable in law.”

*The principle which has been laid down in *Malabar Industrial Co. Ltd.* [2000] 243 ITR 83 (SC) has been followed and explained in a subsequent judgment of the Supreme Court in *CIT v. Max India Ltd.* [2007] 295 ITR 282.”*

8. Based on the legal principles enunciated by the Hon“ble Courts, if we examine the facts available in the present case, we notice that the assessee’s explanation that the club membership fee was paid for a representative of the assessee was accepted by the AO on the face of it. The documents furnished along with the reply letter furnished by the assessee clearly show that the membership fee was paid for Mrs. Lata Vasvani. There should not be any dispute that the club membership fee was allowed u/s 37(1) of the Act, where in there is a requirement to show that the expenditure was incurred for the purpose of business, it was not personal expenditure or capital expenditure etc. We notice that Mrs. Lata Vasvani was not an employee or a director of the assessee company. She was not paid any other kind of compensation from the funds of the company. Normal business practice is to take the membership in the name of the company or in the name of top employees as per their service terms and conditions. Hence, in our view, the assessing officer has failed to apply his mind on the reply given by the assessee. The assessing officer, in our view, has failed to examine as to whether the conditions specified in sec. 37(1) were satisfied or not in the claim so made by the assessee. Accordingly, we are of the view, the present case is a case of lack of enquiry on the claim made by the assessee. Further, in the absence of required enquiry, it cannot be said that the assessing officer has taken one of the possible views. Accordingly, we are of the view that there is no infirmity in the action of the Ld CIT in initiating the revision proceedings u/s 263 of the Act. Accordingly, we affirm his order.

9. In the result, the appeal filed by the assessee is dismissed.”

The AO framed an assessment order dated 01.03.2016 u/s 143(3) read with Section 263 of the 1961 Act in pursuance to directions given by learned CIT vide revisionary order dated 12.03.2015 u/s 263, holding that assessee could not prove that Mrs. Lata Vasvani was working for the assessee nor it could be proved that these expenses towards club membership fee to MCA were incurred wholly and exclusively for the purpose of business of the assessee , by holding as under:-

“5. I have carefully considered the submissions and reliance placed by the assessee on case laws and the same are not accepted. The assessee has claimed business promotion expenses amounting to Rs. 9,98,215/-. On perusal of the details, it is seen that the payment of Rs. 9,98,215/- has been made to Mumbai Cricket Association (MCA) towards life membership fees of one Mrs. Lata Vasvani. According to the assessee Mrs. Lata Vasvani is its representative. The assessee has not provided any copy of contract with the said person nominating her as its representative. The assessee has also clarified that she is neither a director nor an employee of the assessee company. The assessee has not thrown light on the terms and conditions under which it has appointed her as its representative. It is further confirmed that no other payments have been made to the said Smt. Lata

Vasvani in the past or in subsequent assessment years. The onus is squarely upon the assessee to bring out all relevant facts relating to its relationship with Mrs. Lata Vasvani on whose behalf it made the impugned payment. The onus is also upon the assessee to bring out the facts and provide documentary evidences which will establish the rights and obligations of the parties involved i.e. Mrs. Lata Vasvani and the assessee. The assessee has failed to discharge its onus. In the absence of such clarification, the contention of the assessee that Mrs. Lata Vasvani assisted the assessee to hold day to day business meetings, conferences and discussions with various customers, bankers, etc. is generalized, vague, unsubstantiated, fictitious and self serving. On the basis of facts submitted by the assessee, it has necessarily to be concluded that the assessee has made a payment on behalf of Mrs. Lata Vasvani which is of a gratuitous nature.

6. Section 37(1) permits deduction of any expenditure not being expenditure of the nature described in section 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee, if it is laid out or expended wholly and exclusively for the purpose of business or profession.

7. The expenditure referred to in section 37(1) would obviously mean that liability for the expenditure should be the liability of the assessee's business. It cannot be the liability of another person. It cannot be a gratuitous payment. An assessee cannot claim the liability of another person u/s 37(1) on the ground that it is revenue expenditure and spent wholly and exclusively for the purpose of its business. If commercial expediency is claimed then it is the assessee's burden to bring out the relevant facts and prove the existence of commercial expediency. In the instant case, as discussed in detail above, the assessee has failed to provide primary facts let alone prove commercial expediency. Therefore, it is being held that the assessee has for reasons best known to itself, discharged liability of Mrs. Lata Vasvani by paying an amount of Rs. 9,98,215/- on her behalf. Since the impugned expenditure is not related to the assessee's business, it is not allowable u/s 37(1) of the Act. Hence, the claim of business promotion expenses amounting to Rs. 9,98,215/- is being disallowed as unrelated to business activity of the assessee company and added back to the total income. Penalty proceedings u/s 271(1)(c) of the I.T. Act, is being initiated for furnishing inaccurate particulars of its income."

Aggrieved by an assessment framed by the AO u/s 143(3) read with Section 263 of the 1961 vide assessment order dated 01.03.2016 , the assessee filed first appeal with learned CIT(A) who also pleased to dismiss the appeal of the assessee vide appellate order dated 04.05.2017 , by holding as under:-

“ 5. I have given my careful consideration to the rival submissions, perused the material on record and duly considered the factual matrix of the case as also the applicable legal position.

5.1 The original assessment was completed by the AO on 19.11.2012 u/s 143(3) of the IT Act at an income of Rs. 43,23,18,536/-. Subsequently, the then CIT-1, Mumbai vide its order dated 12.03.2015, u/s 263 of the IT Act, had set aside the original assessment order holding as erroneous and prejudicial to the interest of the revenue and thereby directed the AO to frame the assessment de novo. Against the order passed by the CIT-1, Mumbai u/s 263 of the IT Act, the appellant preferred an appeal before the Hon'ble ITAT, Mumbai.

5.2 The Hon'ble ITAT vide its order dated 15.01.2016 [ITA No. 2094/Mum/2015] has dismissed the appeal of the appellant and held that there is no infirmity in the action of the Ld. CIT in initiating the revision proceedings u/s 263 of the IT Act. The present appeal is against the order passed u/s 143(3) r.w.s. 263 of the IT Act dated 01.03.2016.

6. Ground No. 1 is general in nature, which does not require any specific adjudication hence, dismissed.

7. Ground No. 2 relates to disallowance of Rs. 9,98,215/- towards promotion expenses u/s 37(1) of the IT Act, being club membership fees. During the course of assessment proceedings, the AO observed that the club membership has been taken in the name of Mrs. Lata Vasvani, whom the appellant claimed to be its representative. After considering the submission of the appellant, the AO has held that the appellant has claimed business promotion expenses amounting to Rs. 9,98,215/-. This is the payment which has been made to Mumbai Cricket Association (MCA) towards life membership fees of one Mrs. Lata Vasvani, which according to the appellant is its representative. Further, it has been surfaced that Mrs. Lata Vasvani is neither a director nor an employee of the appellant company, under which she has been appointed as their representative. It is farther noticed that no other payment has been made to Mrs. Lata Vasvani in the past or in subsequent assessment years. The appellant has not brought any evidence relevant to its relationship with Mrs. Lata Vasvani on whose behalf such payment was made. Thus it has been held that that expenditure incurred under section 37(1) is not an allowable expenditure as it does not fall under the expenditure incurred for business purposes and therefore an amount of Rs. 9,98,215/- paid by the appellant on behalf of Mrs. Lata Vasvani is disallowed u/s 37(1) of the IT Act and added back to the income of the appellant.

7.1 On the other hand the appellant submitted that the appellant has made payment of Rs. 9,98,215/- to Mumbai Cricket Association towards membership fees of its representative Mrs. Lata Vasvani for utilizing the facilities of the club for meeting and entertaining business associates with the intention of extending business relationship and promoting the business. The expenses were claimed as revenue expenses and debited to its P&L A/c as 'Business Promotion Expenses' under Schedule 13 as Administration Expenses as the payment is in the name of payment made to club, same was reported by the Tax Auditor in Form 3CD at point 17(d). It was further

submitted that the appellant company is engaged in the business of trading in shares and securities, investment in shares and financing and Mrs. Lata Vasvani was instrumental in advising investment planning in shares and securities. Being representative of the appellant company as advisor, the appellant has made payment to Mumbai Cricket Association towards membership fees for Mrs. Lata Vasvani for utilizing the facilities of the club for meeting and entertaining business associates with the intention of extending business relationship and promoting its business. The expenses incurred is wholly and exclusively for the purpose of business of the appellant and the same shall be allowed a deductible revenue expense u/s 37(1) of the IT Act.

7.2 I have carefully considered the rival submissions and the facts of the case. The appellant has not produced any evidence either during the course of assessment proceedings or during the course of appellate proceedings; proving the contention of the appellant that Mrs. Lata Vasvani has ever had any relationship with the company or business of the company. The AR has not demonstrated as to how Mrs. Lata Vasvani is related to the company or to extend any support in the business of the appellant. Mrs. Lata Vasvani is not associated with the appellant company and is totally a third person and the expenditure incurred in her name is unrelated to the business activity of the appellant company. The AO has disclosed these aspects in its assessment order that the expenditure incurred is not remotely related wholly and exclusively for the purpose of business activity of the appellant company the fact remains that Mrs. Lata Vasvani is not an employee of the of the appellant company nor a director of the appellant company and therefore the expenditure incurred by the appellant company on behalf of Mrs. Lata Vasvani not at all falls under any of the conditions as laid down u/s 37(1) of the IT Act and therefore the claim of the appellant is totally false and an attempt of misuse of the provisions of section 37(1) of the IT Act. The appellant company does not have any obligation to bear the liability of a third person who is not related to the company in any manner. Therefore, I did not find any reason to interfere in the findings of the AO and hence, Ground No. 2 is dismissed. “

The assessee is now before us . We have observed that club membership was taken by assessee with Mumbai Cricket Association in the name of one Mrs. Lata Vaswani for which the assessee has made payment of Rs, 9,98,215/- which was claimed as business/revenue expenses. The said Mrs Lata Vaswani is neither Director of the assessee nor employee of the assessee. It is also not brought on record that said Mrs Lata Vaswani was even working for assessee as professional or consultant rendering services to the assessee. No commercial relations of the assessee with said Mrs Lata Vaswani was brought on record by the assessee. Bald statements are made that said Mrs. Lata Vaswani is representative of the assessee

and she is arranging meetings and promoting business of the assessee which is not sufficient to discharge onus as is casted on the assessee under statute. The assessee has also not brought on record any business being generated through the efforts/introduction of said Mrs. Lata Vasawani. It is accepted and admitted by the assessee that apart from this club membership fee of Rs. 9,98,215/- being made to secure club membership in the name of Mrs. Lata Vaswani , no other payments were made to or on behalf of said Mrs. Lata Vaswani. On being asked by the Bench whether said Mrs Lata Vaswani has rendered any consultancy/professional services to the assessee for which any bills/invoices were raised by her in favour of the assessee, the Ld. Counsel for the assessee replied in negative. The assessee also could not bring on record any agreement entered into between said Mrs. Lata Vasvani and the assessee to define commercial relationship of the assessee with said Mrs Lata Vaswani which could have proved that Mrs. Lata Vasvani was working for the assessee in any capacity to promote business of the assessee. It is also not demonstrated by the assessee that any business were infact generated by said Mrs. Lata Vasvani in favour of the assessee. It could also not been explained by the assessee reasons /justification for taking this club membership with MCA in the name of Mrs Lata Vaswani instead of taking the same in the name of the assessee or its directors/employees. Thus, in nut-shell it could be said that ultimately it could not be proved by the assessee that these club membership fee expenses of Rs. 9,98,215/- were the expenses which were incurred wholly and exclusively for the purposes of business of the assessee. Thus there is a complete failure on the part of the assessee to prove genuineness of these expenses and there is a failure to prove that these expenses were incurred wholly and exclusively for the purpose of business of the assessee. The assessee had failed to discharge the onus as was casted on the assessee by virtue of Section 37(1) if the 1961 Act and in our considered view, there is no merit in the appeal filed by the assessee which stood dismissed. We have also carefully gone through

the case laws cited/relied upon by the assessee but we are afraid that these case laws are of no help to the assessee as the assessee has completely failed to prove nexus of these expenses with business of the assessee and that these expenses were incurred wholly and exclusively for the purposes of business of the assessee as is mandated u/s 37(1) of the 1961 Act. The assessee fails in this appeal. We order accordingly.

11. In the result, appeal filed by the assessee in ITA no. 4663/Mum/2017 for AY 2010-11 is dismissed.

Order pronounced in the open court on 22.05.2019.

आदेश की घोषणा खुले न्यायालय में दिनांक: 22.05.2019 को की गई

Sd/-

(MAHAVIR SINGH)

JUDICIAL MEMBER

Sd/-

(RAMIT KOCHAR)

ACCOUNTANT MEMBER

Mumbai, dated: 22.05.2019

Nishant Verma
Sr. Private Secretary

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

// Tue copy//

BY ORDER

DY/ASSTT. REGISTRAR
ITAT, MUMBAI