



ITA No.2593/Mum/2018
M/s. Asian Homes Private Limited
Assessment Year-2013-14

आयकर अपीलीय अधिकरण "ए" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, MUMBAI

श्री शक्तिजीत दे, न्यायिक सदस्य एवं
श्री मनोज कुमार अग्रवाल, लेखक सदस्य के समक्ष।
BEFORE SHRI SAKTIJIT DEY, JM AND
SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ I.T.A. No.2593/Mum/2018
(निर्धारण वर्ष / Assessment Year:2013-14)

M/s. Asian Homes Private Limited GF, Kiraboo Building CTS, E/291, 13 th Road, Khar (West) Mumbai-400 052.	बनाम/ Vs.	Pr. CIT-9 2 nd Floor, Room No.214 Aaykar Bhavan, M.K. Road Mumbai-400 020.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. AAGCA-6734-J		
(पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	S/Shri Paras Nath & Jitendra Trivedi-Ld. ARs
Revenue by	:	Shri Anadi Varma-Ld.CIT-DR

सुनवाईकीतारीख/ Date of Hearing	:	17/10/2019
घोषणाकीतारीख / Date of Pronouncement	:	03/01/2020

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member): -

1. By way of this appeal for Assessment Year [in short referred to as 'AY'] 2013-14, the assessee contest correctness of invocation of revisional jurisdiction u/s 263 by Ld. Pr. Commissioner of Income-Tax -9, Mumbai [in



short referred to as 'Pr.CIT'] vide order dated 27/02/2018. The grounds raised by the assessee read as under: -

1. Validity of Order passed under section 263 of the Income Tax Act, 1961 ('The Act')
That on facts and under the circumstances of the case, learned Principal Commissioner of Income Tax - 9, Mumbai, [Id. Pr. CIT], erred in holding that the assessment order dated 27.02.2016 passed under section 143(3) of the Act by learned Assessing officer [Id. AO] is erroneous and prejudicial to the interest of revenue and thereby setting aside and/or cancelling the order passed by Id. AO under section 263 of the Act .

1.1. Ld. Pr. CIT has erred in holding the order passed by Id. AO as erroneous and prejudicial to revenue on the contention that Id. AO passed the order without making enquiries and verification and therefore, without appreciating the fact that Id. AO had made detailed enquiry on the issue under consideration and after having satisfied himself with the same, order was passed by Id. AO.

1.2. Ld. Pr. CIT has erred in law in holding the order passed by Id. AO as erroneous and prejudicial to revenue while treating interest income as 'Income from Other Sources' by placing reliance on case laws which are not applicable to facts of the Appellant and has further erred in not appreciating that same issue has been categorically analyzed and decided in favour of Appellant by Id. CIT (A) in its own case for AY 2011-12 and AY 2012-13.

1.3. Ld. Pr. CIT has erred in law in holding the order passed by Id. AO as erroneous and prejudicial to revenue by applying decision of Malabar Industrial Co. Ltd. v. CIT [243 ITR 83] - [SC], without providing any basis or justification that the view taken by Id. AO is unsustainable in law and has further erred in not appreciating that the view of Id. AO is supported by judicial decisions and ii) allowed by CIT (A) in appellant own's case for AY 2011-12 and AY 2012-13.

1.4. Ld. Pr. CIT erred in law in holding the order passed by Id. AO as erroneous and prejudicial to revenue by not appreciating the fact that Id. AO has passed the order after making detailed enquiries and also following the categorical findings of his senior authority i.e., order of Id. CIT [A] in AY 2011-12 and 2012-13 and therefore, Id. Pr. CIT has erred in holding that order passed by Id. AO is erroneous and prejudicial to the interest of revenue.

1.5. Ld. Pr. CIT has erred in holding that order passed by Id. AO is erroneous and prejudicial to interest of revenue, without appreciating that an order based on an interpretation of law where two different views are possible, the order shall not be considered as erroneous and prejudice to the revenue.

Hence, Appeal.

2. Without prejudice to Ground No 1, Id. Pr. CIT has erred in law as well as on facts in considering the interest income as 'Income from Other Sources' under section 56 of the Act, without appreciating the submissions of Appellant and favorable CIT (A) order in Appellant own case for AY 2011-12 and AY 2012-13.

Hence, Appeal.

2. We have heard rival submissions, perused relevant material on record including judicial pronouncements as cited before us during the course of hearing. Our adjudication to the appeal would be as given in succeeding paragraphs.



3.1 Facts on record would reveal that assessee being resident corporate assessee, stated to be engaged as builders & developer, was assessed for year under consideration u/s. 143(3) on 26/02/2016 wherein the income of the assessee was determined at Rs.1.08 Lacs under normal provisions after certain additions / adjustments as against 'Nil' return filed by the assessee on 28/09/2013. The business income was determined at Rs.25.01 Lacs, against which brought forward business losses were set-off. While computing business income, an addition of Rs.2.27 Lacs representing interest income received from an entity was added since the same was not credited in the Profit & Loss Account. The said addition was made following the appellate orders for AY 2011-12. The interest on income tax refund and excess provisions written back aggregating to Rs.1.08 Lacs were brought to tax as *Income from other sources*. The Book profits u/s 115JB was accepted to be at Rs.23.18 Lacs as offered by the assessee. The assessee has been found liable to pay tax on *Book Profit* as per the provisions of Sec.115JB since the tax on income under normal provisions was lower than tax on *Book Profits* as computed u/s 115JB.

3.2 Subsequently, upon perusal of case records, Ld. Pr.CIT formed an opinion that the quantum assessment order was erroneous and prejudicial to revenue which require exercise of revisional jurisdiction u/s 263. Accordingly, a show-cause notice was issued on 30/11/2017, the contents of which have already been extracted in the impugned order in para-1. It was pointed out that interest income of Rs.27.13 Lacs as credited to Profit & Loss Account as *Other Income* was accepted as *business income* and



ITA No.2593/Mum/2018
M/s. Asian Homes Private Limited
Assessment Year-2013-14

the assessee has claimed set-off of brought forward business losses of earlier AY against the same. It was also stated that interest income was earned out of idle funds borrowed for the business which had neither commenced nor carried out during the year under consideration and therefore, the interest was to be assessed as *Income from other sources* and accordingly, not available for set-off against brought forward business losses. Since Ld. AO failed to verify the same during regular assessment proceedings, therefore the quantum assessment order was erroneous and prejudicial to revenue within the meaning of Sec. 263.

3.3 The assessee, in defense of quantum assessment order, submitted that Ld. AO vide point No. 10 of notice u/s 142(1) dated 14/09/2015 raised specific query as to why interest on loans should not be considered as *income from other sources*. The query was duly responded to by the assessee vide letter dated 12/02/2016 wherein the assessee submitted detailed explanation along-with supporting judicial decisions in relation to said query. After verifying the same, Ld. AO passed assessment order accepting the interest income as *business income*. Therefore, since the matter was specifically verified by Ld.AO during the course of scrutiny assessment proceedings and therefore, the said order could no be termed as erroneous or prejudicial to the revenue which would require revisions u/s 263.

3.4 However, not convinced, Ld. Pr. CIT chose to rely upon the decision of Hon'ble Supreme Court rendered in **Malabar Industrial Co. V/s CIT [243 ITR 83 10/02/2000]** and made observation that tax treatment of interest



ITA No.2593/Mum/2018
M/s. Asian Homes Private Limited
Assessment Year-2013-14

income was accepted as *business income* following the decision of appellate order of Ld. CIT(A) for AY 2011-12 dated 09/10/2015 on the wrong assumption / premises that the said decision was accepted by the department on merits. In fact, no appeal was filed by the department against appellate order for AY 2011-12 since the tax effect involved in the appeal was below prescribed monetary limit for filing of appeals. Therefore, the quantum assessment order was erroneous as it was passed without making requisite enquiries or verifications which should have been made before passing the order. The order was termed as prejudicial to revenue also since it would involve loss of revenue and the issue involved would have implications for future years.

3.5 Regarding assessee's submissions that loans were granted only on temporary basis pending revival of market, it was noted that the assessee was incorporated with an object to enter in real estate business and the interest income was accepted as *business income* on the wrong presumption that the appellate order for AY 2011-12 was accepted by the department, losing sight of the fact that no further appeal was filed due to low tax effect and in principal, the decision was not accepted by the department. Therefore, finding that Ld.AO failed to examine the chargeability of interest income, the explanation-2 to Sec. 263 was applicable to the factual matrix. Consequently, the assessment order passed on this issue was set-aside / cancelled and Ld. AO was directed to pass fresh order after providing reasonable opportunity of being heard to



the assessee. Aggrieved by aforesaid directions, the assessee is under further appeal before us.

4.1 Upon careful consideration, we find that the prime argument of Ld. AR would revolve around the fact that specific queries were raised by Ld. AO during regular assessment proceedings vis-à-vis chargeability of interest income which was duly responded to by the assessee along with sufficient details and explanations. The Ld. AO, after considering the same, chose to accept assessee's claim with due application of mind and adopted one of the two possible views and therefore, the order could not be termed as erroneous. *Au Contraire*, the prime argument of Ld. CIT-DR would revolve around the fact that mere raising of specific queries and assessee's reply thereto would not be sufficient rather there should be proper application of mind on the part of Ld. AO to the issue in hand before it could be said that a view was taken in the matter. If Ld. AO failed to apply his mind to the subject matter, the order would certainly become erroneous warranting revisional jurisdiction u/s 263.

4.2 After going through queries raised by Ld. AO during regular assessment proceedings, we find that vide notice u/s 142(1) dated 14/09/2015, a specific query was raised by Ld. AO regarding chargeability of interest income, in the following manner: -

10. Please explain as to why interest income earned should not be taxed under head 'Income from Other Sources' and also that why expenses, which were not incurred "wholly & exclusively" for earning of such interest income should not be disallowed while working out your taxable income for the year under consideration.



ITA No.2593/Mum/2018
M/s. Asian Homes Private Limited
Assessment Year-2013-14

In response, the assessee vide submissions dated 12/02/2016, *inter-alia*, drew attention to the fact that borrowings and grant of loans by assessee were well within the permitted objects as per Memorandum of Association of the assessee company. The attention was also drawn to order of Ld. CIT(A) for AY 2011-12 dated 09/10/2015 wherein interest income was held to be *business income* by relying upon various judicial pronouncements. The copy of the appellate order for AY 2011-12 was also enclosed with the said reply. Proceeding further, the assessee justified the grant of loan by submitting that in order to avoid huge financial losses, the idle money was advanced to associated entities. If the assessee would not have granted loans then accumulation of expenses may have even led to bankruptcy or liquidation of the assessee. The moneys were advanced in order to reduce financial losses and therefore, the same was rightly offered as *business income*. The loans were stated to be granted out of funds borrowed for business purposes for the reasons that projects had not started.

4.3 After due consideration of assessee's submissions, it is difficult to accept the fact that said submissions were omitted to be considered by Ld. AO while passing the quantum assessment order. This is evidenced by the fact that interest on tax refund offered as *business income* by the assessee was specifically brought to tax under the head *income from other sources*. Specific queries were raised by Ld.AO as to taxability of interest income under appropriate heads which were duly responded to by the assessee with requisite details and explanations. Therefore, we are of the considered opinion that there was due application of mind to the issue by Ld. AO and



ITA No.2593/Mum/2018
M/s. Asian Homes Private Limited
Assessment Year-2013-14

the claim was accepted after due consideration of factual matrix rather than by merely relying upon the appellate order for AY 2011-12. Therefore, the allegations of Ld. Pr.CIT that the interest was assessed as *business income* overlooking the fact that the appellate order for AY 2011-12 was not contested by the revenue due to low tax effect, could not be accepted.

4.4 We find that as per the provisions of Section 263 of Income Tax Act, 1961, specified revenue authorities may call for and examine the record of any proceedings under the Act and may proceed to revise the same provided two conditions are satisfied-(i) the order of the assessing officer sought to be revised is erroneous; and (ii) it is prejudicial to the interest of the revenue. If one of the condition is absent i.e. if the order of the Income-tax Officer is erroneous but is not prejudicial to the revenue or if it is not erroneous but it is prejudicial to the revenue - recourse cannot be had to Section 263 of the Act as held by Hon'ble Supreme Court in **Malabar Industrial Co. Ltd. V/s CIT [243 ITR 83 10/02/2000]** & noted by Hon'ble Delhi High Court in **CIT V/s Vikas Polymers [194 Taxman 57 16/08/2010]**. The Hon'ble Supreme Court in **Malabar Industrial Co. Ltd. V/s CIT (supra)** has held that 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 interest of the revenue, unless the view taken by the Income-tax Officer is unsustainable in law. The said principal has been reiterated by Hon'ble Court in its subsequent judgement titled as **CIT V/s Max India Ltd. (295 ITR 282)**. Similar principal has been followed by jurisdictional High Court in **Grasim Industries Ltd. V/s CIT (321 ITR 92)**.

4.5 The Hon'ble Delhi High Court in, **CIT V/s Vikas Polymers (supra)**, further observed that as regards the scope and ambit of the expression "erroneous", Hon'ble Bombay High Court in **CIT vs. Gabriel India Ltd. [1993 203 ITR 108 (Bombay)]**, held with reference to Black's Law Dictionary that an "erroneous judgment" means "one rendered according to course and practice of Court, but contrary to law, upon mistaken view of law; or upon erroneous application of legal principles" and thus it is clear that an order cannot be termed as "erroneous" unless it is not in accordance with law. If an Income-tax 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 differently or more elaborately. The Section does not visualize the substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is not in accordance with law. It was further observed that there is a fine though subtle distinction between "lack of inquiry" and "inadequate inquiry". It is only in cases of "lack of inquiry" that the Commissioner is empowered to



exercise his revisional powers by calling for and examining the records of any proceedings under the Act and passing orders thereon. In *Gabriel India Ltd. (supra)*, it was expressly observed: -

"The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity [Parashuram Pottery Works Co. Ltd. vs. ITO, (1977) 106 ITR 1 (SC)].

It was further observed as under: -

"From the aforesaid definitions as it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income-tax 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 for that of the Income-tax Officer, who passed the order unless the decision is held to be erroneous. Cases may be visualized where the Income-tax Officer 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 Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure. It is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion.

X X X X

There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed.

4.6 The Hon'ble Supreme Court in **CIT V/s Amitabh Bachchan (69 Taxmann.com 170 11/05/2016)** held that so long as the view taken by the



Assessing Officer is a possible view, the same ought not to be interfered with by the Commissioner under Section 263 merely on the ground that there is another possible view of the matter. Permitting exercise of revisional power in a situation where two views are possible would really amount to conferring some kind of an appellate power in the revisional authority. This is a course of action that must be desisted from.

4.7 The Hon'ble Bombay High Court in **Moil Ltd. Vs. CIT [81 Taxmann.com 420]** observed that if a query is raised during the assessment proceedings which was responded to by the assessee, the mere fact that the query was not dealt with in the assessment order then it would not lead to a conclusion that no mind has been applied to it and the Assessing Officer is not expected to raise more queries, if he was satisfied about the admissibility of claim on the basis of the material and the details supplied.

4.8 An Explanation-2 has been inserted by Finance Act 2015 in Section 263 with effect from 01/06/2015 to declare that order shall be deemed to be erroneous in so far as it is prejudicial to the interest of the revenue, if in the opinion of appropriate authority-(1) the order was passed without making inquiries or verifications which should have been made; (ii) the order is passed allowing any relief without inquiring into the claim; (iii) the order is not in accordance with any direction or instructions etc. issued by the Board u/s 119; or (iv) the order was not in accordance with binding judicial precedent. However, the said explanation would come into play only



ITA No.2593/Mum/2018
M/s. Asian Homes Private Limited
Assessment Year-2013-14

if the primary conditions i.e. order being erroneous and prejudicial to interest of revenue, were fulfilled.

4.9 Applying the above principles to the case in hand, we find that a view was already taken by Ld. AO in the issues which form subject matter of revision u/s 263 and the said view could not be held to be illegal or unsustainable in law, in any manner and therefore, the exercise of jurisdiction u/s 263 would be invalid in such a case. If Ld. AO adopted one of the possible views, the Ld. Pr.CIT, in our considered opinion, would be ousted to exercise jurisdiction u/s 263. Therefore, by quashing the impugned order, we allow assessee's appeal.

5. The appeal stands allowed in terms of our above order.

Order pronounced in the open court on 03rd January, 2020.

Sd/-
(Saktijit Dey)

न्यायिक सदस्य / **Judicial Member**

Sd/-
(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 03/01/2020
Sr.PS:-Jaisy Varghese

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

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent



ITA No.2593/Mum/2018
M/s. Asian Homes Private Limited
Assessment Year-2013-14

3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.