



**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"D" BENCH, MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND**  
**SHRI G. MANJUNATH, ACCOUNTANT MEMBER**

ITA no.2317/Mum./2018  
(Assessment Year : 2013-14)

Dighi Port Ltd.  
6<sup>th</sup> Floor, New Excelsior Building  
A.K. Nayak Marg, Fort  
Mumbai 400 001  
PAN – AABCD2607A

..... Appellant

v/s

Principal Commissioner of Income Tax  
Circle-2, Mumbai

..... Respondent

Revenue by : Shri Abhijit Patankar  
Assessee by : Shri K.K. Ved

Date of Hearing – 15.01.2020

Date of Order – 31.01.2020

**ORDER**

**PER SAKTIJIT DEY. J.M.**

The captioned appeal has been filed by the assessee challenging the order dated 11<sup>th</sup> December 2017, passed under section 263 of the Income Tax Act, 1961 (for short "*the Act*") by the learned Principal Commissioner of Income Tax-2, Mumbai, pertaining to the assessment year 2013-14.

2. Brief facts are, the assessee, a resident company, is engaged in the business of development of Port and related infrastructure. A concession agreement was executed between Maharashtra Maritime Board (MMB), a Statutory Body and Balaji Infra Projects Ltd. (BIPL) on 17<sup>th</sup> March 2002, for development, design, engineering, financing, procurement, construction, operation and maintenance of multipurpose, common-user Port at Dighi on Build, Own, Operate, Share and Transfer (BOOST) basis in terms of the concession agreement. Accordingly, BIPL has incorporated Dighi Port Ltd. (DPL) as the Special Purpose Vehicle (SPV) to develop and implement the project and the concession agreement has been novated in favour of DPL. In terms of the concession agreement, the assessee had started constructing the Dighi Port Project and for this purpose it has entered into a sub-concession agreement with IL&FS Maritime Infrastructure Co. Ltd. (IMICL), a subsidiary of Infrastructure Leasing and Financial Services Ltd. (IL&FS) for undertaking the development and implementation of Berth which entrusts IMICL with rights to use infrastructure facilities for a period of 30 years and as per the terms of the agreement IMICL has to share 40% of the gross revenue generated from the said Berth after it becomes operational. For the assessment year under dispute, the assessee filed its return of income on 30<sup>th</sup> September 2013, declaring loss of ₹ 44,41,81,900. The

assessment in case of the assessee was completed under section 143(3) of the Income Tax Act, 1961 (for short "*the Act*") vide order dated 20<sup>th</sup> March 2016, determining the loss at ₹ 33,14,53,278, and long term capital gain at ₹ 1,40,740. After completion of the assessment as aforesaid, learned PCIT, in exercise of power conferred under section 263 of the Act called upon the assessment records for examination. After examining the assessment records, he found that as per the sub-concession agreement with IMICL, the assessee is to receive, up-front, amount towards cost of construction of berths which are to be sub-leased and, in fact, during the year under consideration, the assessee has received a part of the lease premium amounting to ₹ 93,02,46,862, which has been directly credited to the capital reserve in the Balance Sheet without being routed through the Profit & Loss Account. Learned PCIT observed, the lease premium received by the assessee is a receipt for parting its future revenue with the lessee, hence, is to be treated as revenue receipt in the hands of the assessee. He observed, while completing the assessment under section 143(3) of the Act, the Assessing Officer has not examined/verified the taxability of the lease premium and has omitted to bring it to tax at the hands of the assessee. Thus, he was of the view that due to non-consideration of the aforesaid issue, the assessment order is erroneous and prejudicial to the interests of

Revenue. Accordingly, he issued a show cause notice to the assessee requiring it to explain as to why the assessment order should not be revised. In response to the show cause notice, the assessee filed its reply objecting to the initiation of proceedings under section 263 of the Act. Further, it was contended by the assessee that the lease premium being in the nature of capital receipt is not taxable. Learned PCIT, however, was not convinced with the explanation of the assessee. He observed, while completing the assessment, the Assessing Officer has neither enquired into nor applied his mind to the facts on record. Further, on verifying the terms of concession agreement as well as the sub-concession agreement, he held that the lease premium amounting to ₹ 93.02 crore is a revenue receipt and has to be treated as business profit and brought to tax at the hands of the assessee in the year under consideration. Accordingly, holding the assessment order to be erroneous and prejudicial to the interests of Revenue, he set it aside with a direction to the Assessing Officer to add the amount of ₹ 93.02 crore to the income of the assessee.

3. The learned Authorised Representative submitted, in the course of assessment proceedings, the Assessing Officer has specifically enquired into the nature of lease premium received from IMICL and after making proper enquiry and application of mind, he has accepted assessee's explanation that the amount received being in the nature of

capital receipt is not taxable. In support of such contention, he drew our attention to the letter dated 15<sup>th</sup> March 2016, claimed to have been filed before the Assessing Officer in the course of assessment proceedings, a copy of which is at Page-5 of the paper book. The learned Authorised Representative submitted, since after due enquiry and application of mind, the Assessing Officer accepted the nature of receipt as capital, the assessment order passed cannot be treated as erroneous and prejudicial to the interests of Revenue merely because learned PCIT is of the opinion that the receipt is of revenue nature. Further, learned Authorised Representative submitted, the amount received by the assessee is in the nature of advance, hence, cannot be treated as income. To support such contention, learned Authorised Representative drew our attention to the order dated 15<sup>th</sup> March 2019, passed by the National Company Law Tribunal (NCLT), Mumbai Bench. Thus, he submitted, exercise of power under section 263 of the Act to revise the assessment order is improper.

4. Drawing our attention to the assessment order, the learned Departmental Representative submitted, the assessment order passed is bereft of any reasoning and makes it very clear that the Assessing Officer has not all examined the issue on which the learned PCIT has invoked jurisdiction under section 263 of the Act. The learned Departmental Representative submitted, apart from the reply stated to

have been filed by the assessee during the assessment proceedings, there is absolutely no other material on record which indicates that the Assessing Officer has at all made any enquiry relating to the issue. He submitted, it is also not clear whether the Assessing Officer has examined the concession agreement and sub-concession agreement and other relevant facts to arrive at a proper conclusion relating to the nature of amount received by the assessee, whether revenue or capital. He submitted, the assessment order reveals complete lack of enquiry by the Assessing Officer on the issue. Therefore, due to non-consideration of the issue, the assessment order is not only erroneous but prejudicial to the interests of Revenue. He submitted, the order passed by the NCLT was neither available before the Assessing Officer nor before learned PCIT. Therefore, no cognizance can be taken of such order to decide the issue of validity of exercise of power under section 263 of the Act.

5. We have considered rival submissions and perused the material on record. On a careful reading of the impugned order passed under section 263 of the Act, it becomes amply clear that learned PCIT held the assessment order to be erroneous and prejudicial to the interests of Revenue primarily for the reason that the Assessing Officer has not made absolutely any enquiry with regard to the lease premium received from IMICL Dighi Maritime Ltd., which is a wholly owned

subsidiary of IMICL. Of course, learned PCIT has also concluded that the lease premium received by the assessee amounting to ₹ 93.02 crore is in the nature of revenue receipt, hence, taxable.

6. As regards the first issue relating to lack of enquiry, on a perusal of the assessment order dated 20<sup>th</sup> March 2016 passed under section 143(3) of the Act, we find that the assessment order has been passed in a routine manner with some general observations. There is absolutely no discussion/observations on the nature and character of the lease premium receipt and its taxability at the hands of the assessee. As observed by learned PCIT, the assessee had directly credited the amount of ₹ 93.02 crore representing the lease premium to capital reserve account in the Balance Sheet without routing it through the Profit & Loss Account. This fact itself should have triggered an enquiry by the Assessing Officer. As it appears from record, apparently, the Assessing Officer has not conducted any such enquiry. Though, the learned Authorised Representative has submitted that the Assessing Officer has made enquiry on the issue and referred to the compliance dated 15<sup>th</sup> March 2016, supposed to have been filed before him, however, on a specific query from the Bench to furnish the notice/letter issued by the Assessing Officer to reveal the nature of enquiry conducted by him, learned Authorised Representative expressed his inability to furnish any such document. In fact, the

compliance dated 15<sup>th</sup> March 2016, is also not very clear on the nature of the amount received from IMICL Dighi Maritime Ltd. on the sub-concession agreement. The aforesaid compliance even if, as claimed by the assessee, has been filed, however, it is very much general in nature without revealing too much regarding the nature of receipt. Even, it is not clear whether the concession agreement and sub-concession agreement and other relevant documents were either produced before the Assessing Officer or the Assessing Officer examined them. In fact, on a query from the Bench, the learned Authorised Representative fairly submitted that he does not have the necessary information in this regard. Thus, from the aforesaid facts, it is very much clear that in the course of assessment proceedings, there is complete failure on the part of the Assessing Officer in examining the nature and character of the lease premium received by the assessee from IMICL Dighi Maritime Ltd. and its taxability or otherwise at the hands of the assessee. Therefore, to that extent, the assessment order passed by the Assessing Officer is erroneous and prejudicial to the interests of Revenue. Therefore, learned PCIT was well within his jurisdiction to invoke his power under section 263 of the Act to revise the assessment order. So far so good. In our view, considering the fact that the Assessing Officer has not at all enquired into the issue relating to the nature and character of the lease

premium received by the assessee and its taxability, learned PCIT should have stopped at that stage and directed the Assessing Officer to examine the issue afresh and decide it after considering all aspects. Instead of doing so, it is evident, learned PCIT has himself determined the nature and character of the lease premium received as revenue receipt and has directed the Assessing Officer to add the amount to the income of the assessee. In our view, when learned PCIT is of the opinion that the Assessing Officer has not made any enquiry regarding the nature and character of the receipt, he should not have stepped into the shoes of the Assessing Officer to himself decide the nature and character of the receipt, but, should have directed the Assessing Officer to make necessary enquiry and decide the issue after proper application of mind. Therefore, in our considered opinion, learned PCIT was not justified in deciding the issue relating to the nature and character of lease premium received by the assessee and directing the Assessing Officer to make the addition. Therefore, the aforesaid direction of learned PCIT needs to be modified. In fact, in course of hearing, both, the learned Authorised Representative and the learned Departmental Representative have submitted that the nature and character of the receipt has to be examined by the Assessing Officer without any fetters being put by the higher authorities. In view of the aforesaid, while partly modifying the order of learned PCIT, we direct

the Assessing Officer to examine the nature and character of the lease premium received of ₹ 93.02 crore and its taxability at the hands of the assessee in the impugned assessment year. While deciding the issue, the Assessing Officer must allow full opportunity to the assessee to furnish all the evidences and relevant materials as well as to make submissions with regard to the nature and character of the receipt. The Assessing Officer must examine all such evidences and submissions of the assessee in the light of the decisions to be relied upon and decide the issue in accordance with law without being influenced of any of the observations of learned PCIT on merits of the issue. It is relevant to observe, in the course of hearing before us, the learned Authorised Representative has referred to the order dated 15<sup>th</sup> march 2019, passed by te NCLT, Mumbai Bench, to advance the proposition that the amount received is in the nature of advance, hence, cannot be treated as income of the assessee in the impugned assessment year. However, it is evident, the aforesaid order of the NCLT was neither available before the Assessing Officer nor before learned PCIT before completion of proceedings under section 263 of the Act. It is clear, while exercising power under section 263 of the Act, the revisional authority may call for and examine the record of any proceedings under the Act. The word "*record*" has been defined under the Explanation-1(b) to mean all records relating to any

proceedings under the Act available at the time of examination by the revisional authority. Admittedly, at the time of examination of record by learned PCIT or even while passing the order under section 263 of the Act, the order passed by the NCLT was not available. Therefore, there is no question of taking cognizance of such order while exercising the power under section 263 of the Act. Be that as it may, since, we have directed the Assessing Officer to examine the nature and character of the lease premium receipt and its taxability, the assessee is at liberty to furnish all the material/evidence including the order passed by the NCLT, Mumbai Bench, as referred to above, to advance its case. With the aforesaid observations, grounds raised are partly allowed for statistical purposes.

7. In the result, appeal is partly allowed for statistical purposes.  
Order pronounced in the open Court on 31.01.2020

**Sd/-**  
**G. MANJUNATH**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SAKTIJIT DEY**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 31.01.2020**

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

*Pradeep J. Chowdhury*  
*Sr. Private Secretary*

True Copy  
By Order

Assistant Registrar  
ITAT, Mumbai