

*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "SMC" KOLKATA*

Before **Shri S.S, Godara, Judicial Member**

ITA No.1591/Kol/2019 Assessment Year:2014-15
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Divine Light Finance Ltd. A-402, India Textile Market, Ring Road, Surat [PAN No.AAACD 9012 G]	बनाम/ V/s.	Income Tax Officer, Ward-9(1), Aayakar Bhawan, P-7, Chowringhee Square, Kolkata-700 069
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

अपीलार्थी की ओर से/By Appellant	Shri S.M. Surana, Advocate
प्रत्यर्थी की ओर से/By Respondent	Mrs. Ranu Biswas, Addl. CIT-SR-DR
सुनवाई की तारीख/Date of Hearing	29-01-2020
घोषणा की तारीख/Date of Pronouncement	19-02-2020

आदेश /O R D E R

This assessee's appeal for assessment year 2014-15, arises against the Commissioner of Income-tax (Appeals)-15, Kolkata's order dated 24.04.2019 passed in case No.242/CIT(A)-15/18-19/Wd-9(1)/R&T/KOL, involving proceedings u/s. 143(3) of the Income Tax Act, 1961; in short 'the Act'.

Heard both the parties. Case file perused.

2. Case file suggests at the outset that the assessee has raised an additional ground challenging Assessing Officer's territorial jurisdiction as per CBDT's notification No.50 of 2014 w.e.f. 15.11.2014 defining jurisdiction as per the postal PIN. Mr. Surana next invited my attention to the assessee's return dated 14.09.2014 filed at Surat whereas the Assessing Officer in Kolkata has framed the impugned assessment. The Revenue's case on the other hand is that the assessee is a stopped from

challenging territorial jurisdiction at this belated stage wherein the lower authorities have framed the same as per law.

3. I have given my thoughtful consideration to rival contentions. Hon'ble apex court's landmark decision in *National Thermal Power Co. Ltd., vs. Commissioner of Income Tax* (1998) 29 ITR 383 (SC) as considered in *All Cargo Global Logistic Ltd. vs. DCIT* (2012) 137 ITD 24 (Mum) (SB) holds that an additional ground can very well allowed to be raised before the tribunal in order to determine correct taxable income provided all the relevant facts are on record. I make it clear that the assessee has already filed the necessary details of as it had filed its return in Surat only as it is evident from a perusal thereof in page-1 of the paper book. I further find from page 2 in the paper book that the department's record also suggests the assessee's jurisdiction is in Surat only. The same makes it clear sufficiently clear that impugned assessment in Kolkata suffers from lack of territorial jurisdiction. This tribunal's co-ordinate bench's order in **ITA No.236/Kol/2015** *Emami Infrastructure Ltd., vs. Commissioner of Income Tax-IV, Kolkata* decided on 02.06.2017 holds that such a lacuna is fatal to the Revenue's case as under:-

"2. In this appeal assessee has challenged the proceedings initiated u/s. 263 of the Act on the ground that there is no error so far prejudicial to the interest of Revenue.

3. Briefly stated facts are that assessee is a limited company and is engaged in business of real estate development. The assessment for the year under consideration was completed by ITO Ward-12(2) Kolkata u/s. 143(3) of the Act vide order dated 21.03.2013. The Assessing Officer in his assessment order has made certain additions / disallowance to the total income of assessee. Thereafter Ld. CIT in his order u/s. 263 of the Act observed certain errors in so far as prejudicial to the interest of Revenue in the assessment order as detailed as under:-

(i) The assessee in the year under consideration has taken loan of ₹227,94,54,247/- on which interest expense of ₹23,41,50,202/- was incurred. The interest on such loan was paid @ 10.27% per annum. It was also observed that the assessee has given loan of ₹164,12,61,365/- on interest @ 10.07% per annum. Thus a difference of 0.19% in the rate of interest was found and therefore the assessee was found bearing more burden of interest expense by Rs. 27,15,7124.00 only. Therefore the income of the assessee was under assessed by ₹27,15,724/- on account of higher payment of interest.

ii) The assessee has written off a sum of ₹ 2.45 lacs on account of long term investment written off under the head "**administrative and other expenses**".

The impugned amount written off was allowed by the AO in assessment proceedings which, in fact, being capital in nature was not an allowable expenditure. Thus, there was under assessment of the total income of the assessee by ₹ 2.45 lakh only.

In view of above, a notice u/s. 263 of the Act was issued to the assessee dated 19.08.2014 for the opportunity of being heard and to clarify the aforesaid issue. The assessee in compliance thereto submitted that the loan was given out of the common fund and it was deployed solely for commercial purpose. It is not at all necessary that the all the investment in the business will generate desire rate of return and even at some times the investment may incur the losses. Therefore it is inappropriate to hold the order of the AO as erroneous and prejudicial to the interest of Revenue in the aforesaid facts & circumstances.

Similarly, the assessee submitted that the long term investment was written off in the course of business activity and therefore it is an allowable deduction as irrecoverable bad debt.

However, the Ld. CIT(A) in his order u/s. 263 of the Act concluded that the order of AO is erroneous and prejudicial to the interest of Revenue on the points as discussed above by observing that the calculation of interest and long term investment written off were not verified by the AO in its order dated 21.03.2013 passed u/s. 143(3) of the Act. Thus, the Ld. CIT(A) directed the AO to make the assessment *de novo* after providing reasonable opportunity of being heard to assessee.

Being aggrieved by this order of Ld. CIT assessee is in appeal before us on the following grounds:-

“1. That the learned Commissioner of Income Tax, Kolkata-IV, Kolkata erred in arbitrarily initiating the impugned proceeding sunder section 263 of the Income Tax Act, 1961, in the instant case of the Appellant Company, in respect of the assessment year 2010-11.

2. That the learned Commissioner of Income Tax Kolkata-IV, Kolkata had no jurisdiction, territorial or otherwise, whatsoever, to pass the order under section 263 of the said Act on 19th January 2015, in the instant case of the Appellant Company herein in respect of the assessment year 2010-11, in view of CBDT Notification No. SO.2752(E) Dt. 22/10/2014.

3. The without prejudice to the above, the learned Commissioner of Income Tax Kolkata-IV, Kolkata failed to appreciate that the conditions precedent for initiation of the impugned proceedings under section 263, were neither present nor satisfied, in the instant case of the Appellant Company herein in respect of the assessment year 2010-11.

4. That the learned Commissioner of Income Tax Kolkata-IV, Kolkata did not arrive at mandatory requisite satisfaction of existence of both the pre-conditions i.e. the order is erroneous and prejudicial to the interests of the Revenue stipulated in section 263 and the same was wrongly left to be

examined by Assessing Officer and as such the impugned order passed under section 263 is not valid in law.

5. That the order passed by the learned Assessing Officer ITO ward 12(2) Kolkata of the said Act dated 21/03/2013 for Assessment Year 2010-11, is neither erroneous nor prejudicial to the interest of revenue.

6. That in the facts and circumstances of the case, the learned Commissioner of Income Tax Kolkata-IV, Kolkata failed to appreciate that write-off of long term investments of Rs.245000 is not capital in nature and is allowable either under Section 28(i) of 36(vii) or 37 of the Act.

7. That in the facts and circumstances of the case, the learned Commissioner of Income Tax Kolkata-IV, Kolkata failed to appreciate that there is no correlation between interest earned and interest paid and the entire interest paid on borrowings which have been used by the appellant company for its business purposes only is fully allowable under section 36(1)(iii) irrespective of any interest earning.

8. That the appellant craves toad, delete or modify any grounds of appeal either before or during the course of hearing.”

4. Ld. AR for the assessee before us filed paper book which is running pages from 1 to 86 and submitted that Ld. CIT has passed the impugned order u/s. 263 of the Act without having jurisdiction over the assessee. The assessment under section 143(3) in the present case was completed on 21.03.2013 and subsequently the case was picked up u/s 263 of the Act by the Ld. CIT by issuing notice dated 19.08.2014. The assessee in compliance to the notice issued u/s. 263 of the Act made a submission dated 22.09.2014 before Ld.CIT(A). At the relevant time when the notice u/s 263 of the Act was issued, the Ld.CIT was having jurisdiction over the assessee. However subsequently the CBDT issued notification **No S.O. 2752(E)** dated 22.10.2014 whereby the jurisdiction over the assessee was transferred to Commissioner of Income-tax-II Kolkata from Commissioner of Income-tax-IV Kolkata. Ld AR for the assessee in support of assessee's claim drew our attention on the Notification issued by CBDT vide **No. SO 2752(E)** dated 22.10.2014 which is placed on pages 1 to 11 in the compilation of the case laws filed at the time of hearing. The Ld. AR further submitted that the jurisdiction over the assessee was changed from Ld. CIT-IV to Ld. CIT-II on the basis of Pin Code where the registered office of the assessee was situated. Registered office of the assessee comes under Pin Code 700107 and as per the CBDT's instruction, it fell under the jurisdiction of Ld. CIT(A)-II Kolkata. Besides the above, Ld. AR also filed letter which was written by ITO Ward-12(2) Kolkata to the ITO ward 6(4) for transferring the necessary files subsequent to the change of jurisdiction over the assessee as discussed above. The copy of said letter dated 28.10.2014 is placed on page 77 of the paper book. Ld. AR further submitted that Ld. CIT has passed the order u/s 263 of the Act dated 19.01.2016 holding the order of AO as erroneous in so far as prejudicial to the interest of Revenue without having jurisdiction over the assessee. The ld. AR relied on the order of AO.

5. On the other hand, Ld. DR submitted that the nature of the business of the assessee is a contractor and its jurisdiction as per the notification lies with the existing Ld.

CIT-IV Kolkata. Therefore the arguments placed by Ld. AR regarding that the jurisdiction of the assessee depends upon the Pin Code is not acceptable. The ld. DR vehemently relied on the impugned order of Ld. CIT(A).

6. We have heard the rival contentions of the parties and perused the materials available on record. Before us Ld. AR has raised the technical issue by challenging the jurisdiction of Ld. CIT-IV over the issue on the ground that file of assessee was transferred to Ld. CIT-II Kolkata by the circular of CBDT. In this regard, we find that the letter was written by ITO Ward-12(2) to ITO Ward-6(4) is sufficient enough to prove that the jurisdiction over the assessee was changed from Ld. CIT-IV to Ld. CIT-II Kolkata. On being query raised to the assessee from the Bench about the fact whether the assessee brought to the notice to Ld. CIT-IV about the change of jurisdiction. To this point the Ld. AR submitted that the proceedings were completed on 22.09.2014 as evident from the impugned order of Ld. CIT passed u/s 263 of the Act vide dated 19.01.2015. Thereafter there was no communication from the Ld. CIT(A)-IV Kolkata. Moreover, the jurisdiction over the assessee was changed by the CBDT Notification dated 22.10.2014 which was subsequent to the last date of hearing before Ld. CIT-IV Kolkata. In view of the above, we find that there was no jurisdiction under Ld. CIT-IV over the assessee which is evident from the CBDT's Notification as well as from the letter written issued by ITO Ward-12(2). Thus, the impugned order passed u/s 263 of the Act by Ld. CIT is without having jurisdiction over the assessee. In such situation, the Hon'ble jurisdictional High Court has held such order passed without having valid jurisdiction is not maintainable in the eyes of law in the case of *Ramshila Enterprises Pvt. Ltd. v. Principal Commissioner of Income-tax* (20116) 383 ITR 546 (Cal) and the relevant extract of the order is reproduced below:-

“The admitted position is that a notice under section 143(2) by the transferee-Assessing Officer was issued upon the assessee on 18-3-2013. The jurisdiction over the subject matter has to be conferred by law. The jurisdiction in the instant case had been transferred by the order dated 3-9-2012 by no other than the Commissioner, Kolkata-II himself. Once that was done, the Commissioner, Kolkata-II lost the seisin over the matter. He became 'functus officio'.

Applying the law laid down by the Supreme Court in the case of SBI v. S.N. Goyal [2009] 8 SCC 92, the Court is of opinion that the Commissioner, Kolkata-II had become functus officio prior to 18-3-2013, because the transferee-Assessing Officer had assumed jurisdiction without which the notice dated 18-3-2013 under section 143(2) could not have been issued. Therefore, the order of transfer was duly published/notified and/or communicated and thereafter acted upon by the transferee-Assessing Officer.

In view of the aforesaid, the issuance of the notice dated 18-3-2013 under section 263 and the consequent order dated 26-3-2013 passed under section 263 by the Commissioner, Kolkata-II were acts without jurisdiction and therefore a nullity.”

Respectfully following the judgment of Hon'ble jurisdictional High Court in the case of *Ramshila Enterprises Pvt. Ltd.* (supra) we find the principle laid down by the jurisdictional High Court are squarely applicable to the instant facts of the case and therefore we hold that the Ld. CIT had no jurisdiction over the assessee and the AO of the assessee while passing the impugned order u/s 263 of the Act dated 19.01.2015. Thus, the impugned order of Ld. CIT is not maintainable in the eyes of law. Therefore, it cannot be said that the impugned order passed by Ld. CIT is erroneous in

so far as prejudicial to the interest of Revenue. As we have allowed the appeal of assessee on technical ground, therefore, we are not inclined to adjudicate the remaining issues raised by the assessee on merit. Hence, this ground of assessee's appeal is **allowed.**"

I adopt the foregoing detailed reasoning mutatis mutandis to quash the impugned assessment since suffering from lack of territorial jurisdiction.

All these issues on merits are raised infructuous.

4. This assessee's appeal is allowed.

Order pronounced in open court on 19/02/2020

Sd/-
(S.S. Godara)
Judicial Member

Kolkata,
*Dkp/Sr.PS

दिनांक:- 19/02/2020 कोलकाता

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-Divine Light Finance Ltd., A-402, India Textile Market, Ring Road, Surat-395002
2. प्रत्यर्थी/Respondent-ITO Wd-9(1), Aayakar Bhawan, P-7, Chowringhee Sq.Kol-69
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।