IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI'H' BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President)
And Ram Lal Negi (Judicial Member)

ITA No.3043/Mum/2019
Assessment year: 2014-15

Kirtidevi S. Tejwani **…… Appellant**
601, Paramount Tower,
Plot no 428, 15th Road, Khar(W),
Mumbai 400052
[PAN:AABPT2281K]

Vs

Principal Commissioner of Income Tax-22 **……Respondent**
Mumbai

Appearances by
B.P Purohit*for the appellant*
B. Srinivas*for the respondent*

Date of concluding the hearing: : December 10th, 2019
Date of pronouncement : February 21st ,2020

ORDER

Per Pramod Kumar, VP:

1. By way of this appeal, the assessee appellant has challenged correctness of learned Principal Commissioner of Income Tax (PCIT)'s order dated 28th March 2019 in the matter of revision under section 263 r.w.s 143(3) of the Income Tax Act 1961 for the assessment year 2014-15.

2. Grievances raised by the appellant are as follows:-

1) On the facts and in circumstances of the case and in law, the learned Pr. CIT - 22 has erred in invoking provisions of sec. 263 alleging difference in stamp duty value and consideration is taxable u/s 56(2)(vii)(b) which the AO has not taxed.

2) On the facts and circumstances of the case and in law, the learned Pr. CIT -22 has erred in invoking provisions of sec. 263 with respect to the amount of advances given to Ankur Orbit Enterprises which is received back by the appellant and used by the appellant to make payments of properties purchased by the appellant in 2009 as according to the Pr. GIT, the repayment is not clear and verifiable.

3) On the facts and circumstances of the case and in law, the learned Pr. CIT -22 has erred in showing how the assessment order is passed by the AO is erroneous in so far as it is prejudicial to the interest of the revenue.

3. Briefly stated, the relevant material facts are as follows. The assessee before us is an individual, and his assessment under section 143(3) was completed on 29.08.2016 accepting the returned income of Rs. 11,34,570/-. Subsequently, however, the learned PCIT noticed that the assessee had entered into purchase assessments, on 21.12.2003, at the stated price of Rs. 2,13,75,000/- and Rs 1,42,00,000/- whereas stamp duty valuation for these properties was Rs. 3,58,76,190 and Rs. 2,42,33,000/- respectively. The PCIT also that, in terms of the provisions of Section 56(2) (vii) (b), such a difference between the stamp duty valuation and stated consideration was liable to be taxed, in the hands of the assessee, as income from other sources. It was also noticed that the assessee has taken loan of Rs. 3,30,00,000/- from one M/s. Ankur Orbit Enterprises but the Assessing Officer did not examine capacity of the firm to advance such loan or genuineness of transaction. On these facts the PCIT called upon the assessee to show as to why jurisdiction under Section 263 not be assumed. While doing so, he observed as follows:-

''On verification of the records, it is noticed that during the previous year, the assesses had purchased 02 premises i.e. 301 &, 302 in YastuPrecent at Oshiwara, Mumbai for Rs. 2,13,75,000/- & Rs. 1,44,37,500/- respectively as per agreement dated 21.12.2013. However, the market value for the purpose of stamp duty has been valued at Rs. 3,58,76,1907- & Rs. 2,42,33,000/- respectively.

As per the Finance Act, 2013, if any immovable property is received a consideration which is less than the stamp duty value of the property by an amount exceeding Rs. 50, 000/ -, then the difference between the stamp duty value and consideration ischargeable to tax as income from other sources u/s 56(2}{vii)(b) of the Act Therefore, the aforesaid differences between the stamp duty value and the purchase value for both properties amounting to Rs. 1,45,01,1901'-1(3,58,76,190)-(2,13,75,000)] & Rs, 97,95,500/ -[(2,42,33,000)-(1,44,37,500)] are taxable under the head income from the other sources. However, the assessee has neither offered these amounts in the return of income u/s 56{2){vii}(b) of the Act nor the Assessing

Officer added the same while assessing the total income u/s 143(3) of the Act dated 29.08.2016.

Besides the above facts, it is also noticed that the assessee has shown one of the sources of investment for the purchase of property le. Rs. 3,30,00,000/- inform of a loan which was taken from M/s Ankur Orbit Enterprises. During the assessment proceedings, the assessee has submitted only xerox copy of the letter from M/s Ankur Orbit Enterprises. No PAN, Bank A/c of the lenders, income tax return of the lenders has been brought on the records. Accordingly, the capacity of the creditor to advance money and genuineness, creditworthiness of the transaction has not been verified during the assessment proceedings. Also the loan taken does not appear in the Balance Sheet of the assessee as on 32.03.2014.

In view of the above facts, it is clear that the Assessment Order u/s 143(3) dated 29.08.2016 passed by the Assessing Officer is without conducting proper investigation and without proper application of mind and is an erroneous order which is prejudicial to the interest of revenue within the provisions of Sec. 263 of the Income-tax Act, 1961.

Therefore, this notice is being issued to the assessee within the meaning of Section 263(1) of the IT. Act requiring to show-cause as to why the undersigned should not invoke the jurisdiction u/s 263 of theI.T, Act and revise the assessment order u/s 143(3) of the Act passed on 29.08.2016, For the purpose, you may appear either personally or through your authorized representative to represent in the matter before the undersigned on 22.02.2019 at the address given above. In the alternative, you may represent through written submissions in the matter and the same shall be considered before finalization of the / proceedings.

4. In response to the aforesaid show cause notice, it was contended that since the purchase of property was made on 31.08.2009, and it was only registration that was done on 21.12.2013 the provisions of Section 56(vii)(b) did not come into play. It was contended that since initial payment was made on 31.08.2009 and since allotment letter by the builder was issued on 31.08.2009, it is market value as on 31.08.2009 which is material in the present context, and the PCIT has erroneously referred to stamp duty valuation as at the time of registration of documents, i.e. on 21.12.2013. As regards the loan of Rs. 3,30,00,000/- given by Ankur Orbit Enterprises, no adverse inference can be drawn in the course of proceedings under section 263. None of these, and other, erudite legal and factual submissions impressed the PCIT. He rejected the submissions so made by, inter alia, observing as follows:-

6. I have perused the relevant records and also the explanation as well as documents placed by the assessee before me in course of the proceedings u/s.263, however the contention of the assessee is not found to be acceptable due to the following reasons:-

(i) In respect of contention of AR for non-applicability of the said provisions, it is pertinent to note here that as per the Finance Act, 2013, if any immovable property is received in consideration which is less than the stamp duty value ofthe property by an amount exceeding Rs. 50,000/-,' then the difference between the stamp duty value and actual consideration, is chargeable to tax as income from other sources u/s 56(2)(vii)(b) of the Act. The above said provisions is applicable to all the property received since the effect of finance Act 2013 and in the instant case, since the property is registered during F.Y.-2013-14 relevant to A.Y.-2014-15 and said provision had come into effect, the same is applicable to the assessee.

(ii) The AR has further contended that he has purchased the property much earlier vide agreement dated 31.08.2009 prior to the registration of the agreement and has claimed payment of Rs. 3,00,000/- and Rs. 2,00,000/- for purchase of Unit No.-301 and for Unit No.-302 respectively. On perusal of agreement dated 31.08.2009 submitted during the revision proceedings, it is seen that this agreement is on stamp paper of Rs. 100/-, however this agreement is not the registered agreement and this does not contain the signature of witnesses. Further the claim of payment of Rs. 3.00.000/- and Rs. 2,00,000/- remains unverified as the assessee has failed to furnish the evidence of payment highlighting his/her bank statements. Even if the claim of AR of the assessee is verified, still the assessee cannot escape from the rigor of the said provisions of the Act, Further as per proviso to the said section, where the date of the1 agreement fixing the amount of consideration for the transfer ofimmovable property and the date of registration are not the same, the stamp duty value on the date of the agreement may be taken for this purpose. This proviso makes it clear that even the assessee claims to have purchased property prior to the date of registration of agreement, still the difference between the stamp duty value of property on any such prior date reduced by actual consideration paid is chargeable to tax.

7.1 The AO has not verified the claim of purchase of property on prior date of registration of agreement along with payment details. Even the claim of purchase of property prior to the date of registration of agreement is verified, still the stamp duty value of property as on date of purchase agreement is required to be verified and reckoned for computation of Income as per mandate of the said provisions of the Act and difference amount is taxable under the head Income from other sources.

7.2 The AO has not taken on record the creditworthiness of the amount of Rs.3,30,00,000/- taken from Ankur Orbit Enterprise w.r.to applicability of provisions of section 68 of the Income Tax Act, 1961. Upon query during the section 263 proceedings before the undersigned the assessee vide submission dtd 22/02/2019 has submitted that -"the assessee had given advance of Rs.3,30,00,000/- to the said Ankur Orbit Enterprises. We have paid Rs.2,75,00,000/- on 04/06/2007 to the said Ankur Orbit Enterprises by Bankers cheque no. 167803 of SBI, Pali Market Branch, Copy of the said cheque is attached. And that Rs.55,00,000/- were

paid to the said party on 05/12/2007 by cheque no. 290093 of ING Vyasa Bank. Copy of bank statement of the said bank evidencing the said payment is attached."

Upon going through these two enclosures, it is seen that the amount of Rs.2,75,00,000/- paid is through a bankers cheque which doesn't disclose the source is from assessee as there is no cross evidence of bank statement to the extent of Rs.2,75,00,000/-. It is seen from the confirmation of M/s. Ankur Orbit Enterprise, which is without date, that they have re-paid a sum ofRs.3,30,00,000/- to the assessee. To claim that it was a repayment, the Assessee should first give evidence that the amounts were first lend by it and had sources. This is not clear and verifiable.

In view of the circumstances, the AO should have gone in detailed enquiry w.r.to the sum of Rs.3,30,00,000/- received by assessee during the FY 2013-14 relevant to AY 2014-15 from M/s. Ankur Orbit Enterprise. It is also seen that the assessee had returned the following incomes in the past 4 assessment years:-

A.Y.	***Income from House Propety***	***Income from Other Sources***
2011-12	***1,44,900/-***	***1,44,385/-***
2012-13	***2,35,206/-***	***1,74,784/-***
2013-14	***3,36,354/-***	***1,01,8167-***
2014-15	***3,65,520/-***	***8,79,0527-***

It is further seen that there was no balance sheet /Statement of Affairs filed showing such advance and further the affairs of advancing such a huge amount without interest is also not established from the financial statement of the assessee.

5. Learned PCIT further observed that, as the law stands part amendment in Section 263 w.e.f. Finance Act 2014, an assessment order can also be subjected to the revision proceedings when, in the opinion of the PCIT, "the order is passed without making inquiries or verification which should have been made". It was in this backdrop that the learned PCIT invoked his powers under section 263 and held as follows:-

In view of the findings mentioned hereinabove and in terms of provisions of section 263 read with Explanation 2, it is clear that the Assessment Order passed u/s 143(3) dated 29.08.2016 in the instant case for A.Y.2014-15 is passed without conducting proper inquiries or verification and without proper application of mind and hence,

> ***is an erroneous order which is prejudicial to the interest of revenue within the provisions of Sec. 263 of the Income-tax Act, on the above discussed issue. I, therefore, invoke the provisions of section 263 and set aside the impugned assessment order to be made after conducting inquiry into the limited issues as stated above and allowing reasonable opportunity to the assessee.***

6. The assessee is aggrieved and is in appeal before us.

7. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the legal position.

8. Learned counsel's basic submission has three main planks (a) all the necessary facts were before the Assessing Officer and, as such, it cannot be presumed that the matter was not examined by the Assessing Officer; (b) the date of purchase is the date on which allotment letter was issued to the assessee, i.e. 31.08.2009, and, therefore, neither the stamp duty valuation as on the registration date is relevant, nor Section 56(2) (vii)(b) did not have any application in the matter, and (c) the Assessing Officer has duly examined the loan of Rs. 3,30,00,000/- from Ankur Orbit Enterprises, and, in any case, money was paid back. None of these submissions, however, appeal to us. Our line of reasoning is like this. It is well settled in law that when an Assessing Officer remains passive on the facts which call for further inquiry, such an inertia on the part of the Assessing Officer also renders the order erroneous and prejudicial to the interests of the revenue. As held in the case of ***Gee Vee Enterprises Vs ACIT [(1975) 99 ITR 375 (Del)],*** "the Commissioner can regard the order as erroneous on the ground that in the circumstances of the case, the ITO should have made further inquiries before accepting the statements made by the assessee in his return". Their lordships then set out the reasoning for this approach as follows:-

> ***The reason is obvious. The position and function of the Income-tax Officer is very different from that of a civil court. The statements made in a pleading proved by the minimum amount of evidence may be accepted by a civil court in the absence of any rebuttal. The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which comes before it. The Income-tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. The meaning to be given to the word***

> ***"erroneous" in section 263 emerges out of this context. It is because it is incumbent on the Income-tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word "erroneous" in section 263 includes the failure to make such an inquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct.***

9. On the facts of this case, we find that there is no material whatsoever to indicate, leave aside establish, that the Assessing Officer had examined the application of Section 56(2)(vii)(b) at all. Learned counsel's plea that this provision to section 56(2)(vii)(b) comes into play, overlooks the fact that application of proviso is entirely a factual matter which has not been examined at all, and, in any event, it is a highly contentious issue whether an allotment letter issued by a private builder, even if that allotment be bonafide, can be equated with DDA allotments referred to in CBDT Circular no 471 dated 15.10.1986. It is not each and every allotment by a builder which can be equated with the allotment letter by the DDA; that aspect has to be examined on merits and it is to be seen whether "the terms of the scheme of allotment and construction of flats/houses by the cooperative societies or institutions are similar to those mentioned in para 2 of Board Circular No. 471" as is stipulated in CBDT circular No. 672. Para 2 of the CBDT circular no. 471, for ready reference, is set out below:

> **2. The Board had occasion to examine as to whether the acquisition of a flat by an allottee under Self-Financing Scheme (SFS) of the D.D.A. amounts to purchase or is construction by she D.D.A. on behalf of the allottee. Under the SFS of the D.D.A.. the allotment letter is issued on payment of the first installment of the cost of construction. The allotment is final unless it is cancelled or the allottee withdraws from the scheme. The allotment is cancelled only under exceptional circumstances. The allottee gets title of the property on the Issuance the allotment letter and the payment of installments is only a follow-up action and taking the delivery of possession is only a formality. If there is a failure on the part of the D.D.A. to deliver the possession of the flat after completing the construction, the remedy for the allottee is to file a suit for recovery of possession.**

10. Clearly, no exercise was carried out to even examine this aspect of the matter. This inertia on the part of the Assessing Officer renders the order erroneous and prejudicial to the interests of the revenue. Similar is the case with respect to the loan of Rs 3.30 crores. No efforts were made to examine genuineness of the loan at all, and the mere fact that it has been

paid back would not take the matter outside the ambit of scrutiny by the Assessing Officer. The Assessing Officer thus clearly remained passive on the facts which clearly called for some basic inquiries. As a matter of fact, so far as application of section 56(2)(vii)(b) is concerned, the Assessing Officer did not examine the matter as all, and there was no occasion to examine whether the proviso to Section 56(2)(vii)(b) would come into play. The evidences being produced by the assessee now were never examined by the Assessing Officer, and, even with these evidences, the matter cannot be concluded one way or the other. The matter needs to be examined in detail. As regards the borrowing of Rs 3.30 crores from Ankur Orbit Enterprises, there is nothing before us to show that the matter was examined in reasonable detail by the Assessing Officer. In view of these discussions, as also bearing in mind entirety of the case, we uphold the impugned revision order passed by the learned PCIT, and decline to interfere in the matter.

11. In the result, the appeal is dismissed. Pronounced in the open court today on the day of 21st February, 2020

Sd/-	Sd/-
Ram Lal Negi	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the day of 21st February, 2020

Nishant Verma Sr.PS

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*CIT*	*(4)*	*CIT(A)*
	(5)	*DR*	*(6)*	*Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai