

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "A", MUMBAI**

BEFORE SHRI RAJESH KUMAR (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 2199/MUM/2018
Assessment Year: 2013-14**

M/s Laxmi Ventures (India) Pvt. Ltd., 36/40, Mahalaxmi Bridge Arcade Mahalaxmi , Mumbai - 400034 PAN: AAACL1082G	Vs.	The Principal Commissioner of Income Tax 7, Mumbai, Aaykar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

Assessee by : Shri Haridas Bhat (AR)

Revenue by : Shri Rajiv Harit (CIT DR)

Date of Hearing: 05/03/2020
Date of Pronouncement: 20/04/2020

ORDER

PER RAM LAL NEGI, JM

This appeal has been filed by the assessee against the order dated 15.02.2018 passed by the Ld. Pr. Commissioner of Income Tax) (for short 'the Pr. CIT 7, Mumbai, for the assessment year 2013-14, whereby the Ld. Pr. CIT has revised the assessment order passed u/s 143 (3) of the Act (for short the 'Act') by exercising jurisdiction u/s 263 of the Act

2. Brief facts of the case are that the assessee company filed its return of income for the assessment year under consideration declaring nil income after setting off of brought forward losses. The AO passed the assessment order u/s 143 (3) of the Act and determined the total income of the assessee at Rs. 14,24,69,214/- after making additions on account of unexplained cash credit u/s 68 of the Act, amounting to Rs.13,93,23,864/-, Rs. 15,12,000/- on account of annual letting value determined in respect of two flats sold by the

assessee company during the previous year, Rs. 15,71,000/- on account of disallowance made u/s 40(a)(ia) of the Act and Rs. 62,350/- and on account of disallowance u/s 14A of the Act.

3. The Ld. Pr. CIT noticed that the AO has passed the assessment order without carrying proper enquiries in respect of Bhilai unit of the assessee company. Accordingly Ld. Pr. CIT issued notice u/s 263 of the Act. In reply to the said notice, the assessee submitted that since the AO has passed the assessment order after conducting proper enquiry, the order is neither erroneous nor prejudicial to the interest of the revenue. However, the Ld. Pr. CIT passed the order u/s 263 holding that the assessee company has not included the financials of Bhilai in the audited financial statements prepared for the AY 2013-14. Since, the profit arising from the operation at Bhilai Unit of the assessee has not been included in the taxable income of the assessee, the assessment order is erroneous as well as prejudicial to the interest of the revenue.

4. The assessee has challenged the impugned order passed by the Ld. Pr. CIT on the following effective grounds of appeals:

1. *“On facts and circumstances of the case and in law, the learned Pr. CIT was not justified in passing order Under Section 263 of the Act, 1961.*

2. *The Pr. CIT failed to appreciate that:-*

a) *The AO had made the enquiry by sending notice u/s 133 (6) of the Act to the Bhilai unit for obtaining financials of the Bhilai Unit.*

b) *The AO out of his wisdom and judgment did not make any addition during the said Assessment year.*

c) *Thus it is apparent that AO has done a meaningful enquiry taken a decision not to make any addition on this account based on his judgment.*

d) *It is the judgment of the AO and not an omission, thus cannot be termed as erroneous or prejudicial to the interest of the revenue.”*

5. Before us, the Ld. counsel for the assessee submitted that the impugned order passed by the Ld. Pr. CIT is bad in law as the AO has passed the assessment order after carrying out enquiries. The Ld. counsel further submitted that the Bhilai unit of the assessee company was under control of Sh. Sunil Aggarwal, younger brother of Sh. Anil Aggarwal. Since, Sh. Sunil Aggarwal had obtained restrain order from CLB, the assessee company managed by Sh. Anil Aggarwal was not allowed to interfere with functioning of the Bhilai Unit. Therefore, the assessee company was not having financial details of the said unit. These facts were brought to the notice of the AO during assessment proceedings. AO made further enquiry by sending notice u/s 133 (6) of the Act to the Bhilai unit for obtaining financials of the Bhilai Unit and after due application of mind did not make any addition in respect of the said unit. The Ld. counsel relied on the following cases:

1. *CIT Vs. Gabriel India Ltd. (1993) 203 ITR 108 (Bom).*
2. *CIT Vs. Gnat Ram Bishnoi (2008) 296 ITR 292 (Raj)*
3. *Girdhari Lal B. Rohra vs. Commissioner of Income Tax (2004) 86 TTJ 0177.*
4. *Unilever PLC vs. Joint Commissioner of Income Tax (2007) 18 SOT 0136.*
5. *Mrs. Khatiza S. Omerbhoy vs. Income Tax Officer (2006) 101 TTJ 1095 (mum)*
6. *MOIL Limited vs. Commissioner of Income Tax (High Court of Bombay (20107) 396 ITR 0244 (Bom)*
7. *Commissioner of Income Tax vs. Fine Jewellery (India) Ltd. High Court of Bombay (2015) 372 ITR 0303 (Bom).*
8. *Commissioner of Income Tax vs. Max India Ltd. Supreme Court of India (2007) 295 ITR 0282.*

6. On the other hand, the Ld. Departmental Representative (DR) submitted that since the AO had not conducted any enquiry with regard to the Bhilai unit and the financial statements were not submitted by the assessee, the Ld. A O has wrongly passed the assessment order. Hence, the Ld. Pr. CIT has rightly revised the assessment order by exercising jurisdiction u/s 263 of

the Act. The Ld. DR invited our attention to para 4 of the order passed by the Ld. Pr. CIT, wherein the Ld. Pr. CIT has mentioned that even though AO had issued a notice u/s 133 (6) of the Act for obtaining financial statements of Bhilai unit from the other promoter of the assessee company no such details were received by the AO. The Ld. DR further pointed out that in the previous assessment year 2012-13 ad-hoc additions were made by the AO. The ITAT in the assessment year 2005-06 confirmed addition of 5% of the total turnover of the Bhilai unit. However, in the assessment year under consideration, the AO has not made any addition and no reason has mentioned in the assessment order for not making any addition. The Ld. DR relied on the judgment of the Hon'ble Supreme Court in the case of *Malabar Industries Company Ltd. vs. CIT 109 Taxman 66 (SC)* in which the Hon'ble Supreme Court has held that if due to an erroneous order of ITO, the revenue is losing tax lawfully payable by an assessee it will certainly be prejudicial to the interest of the revenue. The Ld. DR further relied on the judgment of the Hon'ble Supreme Court in the case of *Smt. Tara Devi Agarwal vs. CIT 88 ITR 323 (SC)* in which it has been held that even where an income has not been earned and is not assessable merely because assessee wants to be assessed in his or her hand in order to assist someone else who would have been assessed to a larger amount, an assessment so made can certainly be erroneous and prejudicial to the interest of the revenue.

7. We have heard the rival submissions and also gone through the material on record including cases relied upon by the parties. The Ld. Pr. CIT has issued notice u/s 263 of the Act contents of which are as under:-

"You have one of your units at Bhillai. There has been an estrangement between your two partner / promoter viz. Shri Anil Agarwal (Managing Director) and Shri Sunil Agarwal (Director), Shri Sunil Agarwal is in charge of the Bhilai unit. Due to dispute between the two, the accurate figures of the profit of the Bhilai unit have not been available. Hence, in view of the decision of the CIT (A)-13, Mumbai in A.Y. 2009-10, 5% of the turnover of the Bhilai unit had been adopted as the net profit of

that unit. This has been so held later during A.Yrs. 2010-11, 2011-12 and 2014-15 as well. In respect of A.Yrs 2012-13 and 2013-14 there have been no details available of even the turnover of the Bhilai unit. Admittedly, the Bhillai unit has continued to function even during the previous year relevant to A.Y. 2013-14. The assessing Officer had made lump sum addition on this count of Rs. 20 Lakhs for A.Y. 2012-13 and no addition whatsoever has been made by the assessing officer on this count for A.Y. 2013-14.”

Prima Facie the failure of the Assessing Officer to make relevant and meaningful inquiry as warranted by the facts of the present case and allowing without causing necessary enquiries the claim of the assessee in the regard, his omission to incorporate his own findings in the final order and the failure to take cognizance of the legal implication of this transaction would render the assessment order being erroneous and prejudicial to the interest of the revenue in terms of section 263 of the Act. I, therefore, intend to suitably modify the assessment order passed by the AO u/s 143 (3) r.w.s. 147 of the IT Act 1961, on 31/03/2016. If you have any objection to this proposed action, you are requested to send your objections within two weeks of receipt of this notice, failing which undersigned would go ahead and take appropriate action as per the provisions of law. If you intend to avail a personal hearing, then you may attend this office on 19/01/2018 at 11:00AM”

8. The assessee opposed the action of the Ld. Pr. CIT on the ground that AO has passed the assessment order after proper verification of the fact and since the AO has made a decision not to make addition after conducting enquiry the order should not be treated as erroneous and prejudicial to the interest of the revenue within the meaning of section 263 of the Act. Admittedly, the assessee has its unit in Bhillai and the assessee has not included the financials of its Bhilai unit in the audit financial statements prepared by it for the AY 2013-14 due to alleged dispute between the promoters. As pointed out by the Ld. Pr. CIT, the AO issued notice u/s 133 (6) of the Act for obtaining financial statements of Bhilai unit from the other promoter of the assessee company. However, no details were received by the AO. We further notice that the AO has

not mentioned any reason for not making any addition in respect of Bhilai unit. As pointed out by the Ld. counsel, addition of 5% of the turnover made from the AY 2004-05 to 2007-08 and 2010-11 to 2012-13, however in the assessment year under consideration, the AO has not made any addition whereas in the assessment year 2014-15 and 2015-16 the AO had made ad-hoc addition. Further, the AO has not given any reason in the assessment order or even not discussed about the financial statements of Bhilai unit which shows that the AO has failed to exercise due diligence to determine the income arising from the operations of assessee's company at its Bhilai unit. Since, the AO has passed the assessment order without conducting proper enquiry in respect of Bhilai Unit, the same is erroneous as well as prejudicial to the interest of the revenue. As has been laid down by the Hon'ble Supreme Court in the case of *Malabar Industries Company Ltd. vs. Commissioner of Income Tax* (supra), if due to an erroneous order of the AO revenue is losing tax lawfully payable by the assessee, the order passed by the AO is prejudicial to the interest of the revenue. Therefore, in our considered view, since the order passed by the AO is erroneous as well as prejudicial to the interest of the revenue, the Ld. Pr.CIT has rightly revised the assessment order passed by the AO. Hence, we do not find any legal infirmity in the order passed by the Ld. Pr. CIT to interfere with the same. Accordingly, we uphold the findings of the Ld. Pr. CIT and dismiss the appeal of the assessee.

In the result, appeal filed by the assessee for assessment year 2013-2014 is dismissed.

Order pronounced on 20th. April, 2020 under rule 34 (4) of the Income Tax Appellate Tribunal Rules, 1963.

Sd/-
(RAJESH KUMAR)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 20/04/2020

Alindra, PS

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**