

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'E' BENCH  
MUMBAI**

**BEFORE: SHRI C.N.PRASAD, JM  
&  
SHRI SHRI M.BALAGANESH, AM**

**ITA No.6481/Mum/2018  
(Assessment Year :2015-16)**

M/s. Tata Realty and Infrastructure Limited 2 <sup>nd</sup> Floor, Elphinstone Building, 10, Veer Nariman Road, Mumbai – 400 001	Vs.	Principal Commissioner of Income tax-2 Room No.344, 3 <sup>rd</sup> Floor Aayakar Bhavan, M.K.Road Mumbai – 400 020
<b>PAN/GIR No.AACCT6242L</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Assessee by	Ms. Arati Vissanji
Revenue by	Shri Alok Singh
<b>Date of Hearing</b>	<b>09/04/2021</b>
<b>Date of Pronouncement</b>	<b>22/04/2021</b>

**आदेश / ORDER**

**PER M. BALAGANESH (A.M):**

This appeal in ITA No.6481/Mum/2018 for A.Y.2015-16 preferred by the order against the revision order of the Id. Principal Commissioner of Income Tax-2, Mumbai u/s.263 of the Act dated 11/09/2018 for the A.Y.2009-10.

2. The ground Nos. 1 & 2 raised by the assessee are challenging the validity of revision jurisdiction u/s.263 of the Act exercised by the Id.

PCIT. The ground No.3 raised by the assessee is challenging the validity of action of the Id. PCIT in directing the Id. AO to disallow the interest paid on borrowed funds u/s.36(1)(iii) of the Act.

3. We have heard rival submissions and perused the materials available on record. We find that assessee is engaged in the business of real estate and infrastructure development, which is carried out either by itself or through Special Purpose Vehicle (SPV) in the form of subsidiary or joint venture (JV) company. The return of income for the A.Y.2015-16 was electronically filed by the assessee on 28/11/2015 declaring loss of Rs.15,99,62,735/- under normal provisions of the Act and book loss of Rs.562,19,784/- u/s.115JB of the Act. The assessment was completed u/s.143(3) of the Act on 28/12/2017 determining total income at Rs.22,50,66,210 under normal provisions of the Act and book profits of Rs.27,61,79,513/- u/s. 115JB of the Act. This assessment was sought to be revised by the Id. PCIT by treating the order passed by the Id. AO as erroneous and prejudicial to the interest of the Revenue on the ground that the Id. AO had not disallowed the interest paid on borrowed funds u/s.36(1)(iii) of the Act. The brief facts pertaining to this issue are as under:-

- Tamilnadu Industrial Development Corporation Limited (TIDCO) had released an offer inviting for a joint venture partner to develop Special Economic Zone (SEZ) for IT and ITES sector at Chennai ('the Project') and as per the terms of the bid document, it was essential for the assessee to set up a separate joint venture (JV) company in this project since TIDCO was supposed to hold 26% equity stake in such JV company firm for execution of the project. Thus, the JV was created in the name of TRIL Infopark Ltd.,

- The assessee formed consortium with Indian Hotel Company Ltd., (IHCL) for the said bid since development of luxury five star hotel was envisaged as part of the project. A Special Purpose Vehicle (SPV) named TRIL Inforpark Ltd., was formed wherein TIDCO was supposed to acquire 26% stake; IHCL to acquire 10% stake and assessee to hold 64% stake.
- However, the Board of Approvals refused to grant permission for construction of 5 star hotel as part of the project. Hence, IHCL wanted to exit consortium. Since, investment made in TRIL Infopark was of strategic nature for the assessee, it locked this opportunity to acquire 10% stake of IHCL by granting an advance of Rs.71.10 Crores to IHCL.
- In this regard, an arrangement was agreed between the assessee and IHCL wherein assessee had to advance interest free sum of Rs.71,10,00,000/- to IHCL in consideration of getting right to purchase equity investments of IHCL in TRIL Infopark. Accordingly, it was pleaded that advance of Rs.71.10 Crores was given by the assessee to IHCL purely from strategic purpose to lock IHCL to sell its entire stake in TRIL InfoPark to the assessee whenever the option of purchase was exercised by the assessee. The said advance of Rs.71.10 Crores was paid to IHCL in two trenches i.e.22 Crores in F.Y.2009-10 and Rs.49.10 Crores in F.Y.2011-12.

3.1. The Id. PCIT observed in para 5.2 of his order that assessee company is engaged in the business of investment advisory services, project management of consultancy, development management services and real estate development software services. Based on this nature of business, the Id. PCIT observed that it is not justifiable that assessee extended an interest free loan to IHCL using borrowed funds when the

assessee is in the business of investment, where the primary motive is to earn interest income on loans extended to the parties. Since, this matter was not examined by the Id. AO, the Id. PCIT held the order of the Id. AO is erroneous in so far as it is and prejudicial to the interest of the revenue and the Id. PCIT also observed that as per Explanation 2 to Section 263 of the Act which is brought into statute w.e.f 01/06/2015, the order passed by the Id. AO would become erroneous and prejudicial to the interest of the Revenue, if, in the opinion of the Id. PCIT, the order is passed without making enquiries or verification which should have been made, has not been made. He accordingly, held that the Id. AO did not examine the correctness of the claim in respect of claim paid by the assessee company on borrowed funds to advance interest free loans of Rs.41.15 Crores to IHCL.

3.2. The Id. PCIT further on merits had observed in his 263 order that within the total sum extended to IHCL as interest free advance of Rs.71.10 Crores, the assessee had used its own funds of Rs.29.95 Crores and borrowed funds of Rs.41.15 Crores. Accordingly, the Id. PCIT directed the Id. AO to disallow the interest on borrowed funds u/s.36(1)(iii) of the Act on the borrowings of Rs.41.15 Crores which was utilised for advancing interest free loans to IHCL.

3.3. At the outset, we find that there is a complete incorrect assumption of fact by the Id. PCIT on the actual nature of business of the assessee company. We find that the Id. PCIT is of the opinion that assessee company is an investment company engaged in the business of investment and hence, the main source of income is only to earn interest income on loans extended thereon. This in our considered opinion is factually incorrect in as much as assessee actually is a real estate

company and not a company engaged in the business of financing. Hence, it could be safely concluded that earning interest income on loans extended is not a primary activity of the assessee company. Accordingly, we hold that the entire basic premise of the Id. PCIT about the nature of business is factually incorrect and consequential decision making process thereon would also become incorrect.

3.4. We find that with regard to the claim of interest on borrowed funds, the Id. PCIT in para 5.2. of his order says that this aspect was not at all examined by the Id. AO in the course of assessment proceedings. Whereas, we find from the detailed paper book furnished by the assessee, that proper enquiries were indeed conducted by the Id. AO in the course of original assessment proceedings. We find that the Id. AO vide letter dated 30/10/2017 during the course of original assessment proceedings had specifically issued show-cause to the assessee vide point No.4 thereon asking about as to why interest should not be disallowed u/s.36(1)(iii) of the Act in respect of interest free advance given to IHCL. We find that assessee had filed a detailed written submission thereon together with all supporting documents vide his reply letter dated 29/11/2017 filed before the Id. AO. In the said reply, the assessee had given a complete detailed note on why there should not be any disallowance of interest explained u/s.36(1)(iii) which are enclosed in page 6-13 of the paper book. Admittedly, these detailed submissions were indeed filed before the Id. AO at the time of assessment proceedings which contains facts of the case, purpose of assessee advancing interest free loans to IHCL, reasoning given stating that advance was made on the basis of commercial expediency together with various case laws of Hon'ble High Courts and Hon'ble Supreme Court relied upon by the assessee. We find pursuant to further query raised by the Id. AO, the

assessee had furnished yet another reply before the Id.AO on 19/12/2017 as to why notional interest income on the advances given to IHCL should not be brought to tax both under normal provisions of the Act as well as in the computation of book profits u/s.115JB of the Act. The replies in this regard are enclosed in pages 15 to 18 of the paper book filed before us. The aforesaid facts would clearly reveal that adequate enquiries were indeed carried out by the Id. AO in the course of original assessment proceedings with regard to the impugned issue of borrowed funds being utilised for interest free advances to IHCL and consequential allowability of interest on borrowed funds u/s.36(1)(iii) of the Act. Infact, we also find that Id. PCIT himself states in para 6 page 6 of his order about the examination carried out by the Id. AO with regard to this impugned issue, which is totally contrary to his earlier stand taken in para 5.2 of his order wherein he says no enquiries were carried out by the Id. AO. For the sake of convenience, the relevant portion of order of Id. PCIT in para 6 page 6 is reproduced hereunder:-

**“6. Allowability of interest on borrowed funds:**

*The assessee has extended an interest free loan to Indian Hotel Co. Ltd. (IHCL) amounting to Rs 71,10,00,000/-. It is stated that for extending this loan the assessee has used its own funds of Rs 29,95,00,000/- and the balance amount of Rs 41,15,00,000/- was borrowed fund. **On a query by the assessing officer as to why** the interest expense corresponding to the interest free advance given to IHCL should not be disallowed u/s 36(1)(iii) of the Act, the assessee submitted that an arrangement was agreed between the assessee company and IHCL wherein the assessee company had to advance interest free sum of Rs.71,10,00,000/- to IHCL in consideration of getting right to purchase equity investments of IHCL in TRIL Infopark.*

*The assessing officer has failed to take into account that the assessee is in the business of investment advisory services, project management consultancy, development management services and real estate development software services. It is not justifiable that the assessee extended an interest free loan to IHCL using borrowed fund, when the*

*assessee is in the business of investment, where the primary motive is to earn interest income on loans extended to the parties. Therefore, the payment of interest on the borrowed funds of Rs 41,15,00,000/- should have been disallowed as the expense is not related to its business. It is also pertinent to note that building of a luxury 5 star hotel by forming consortium with IHCL was not essential in setting up Joint Venture with TIDCO and the same was not even allowed. The ultimate purpose claimed by the assessee is right to purchase shares of IHCL in TRIL. Even this would not have resulted in any business income and as such interest on capital borrowed for non-business purpose is disallowable u/s 36(1)(iii) of the I.T. Act. Therefore, the assessment order dated 28.12.2017 is erroneous in so far as it is prejudicial to the interest of revenue.”*

**(Underline provided by us)**

3.5. Hence, it could be safely concluded that sufficient enquiries were carried out by the Id. AO with regard to allowability of interest on borrowed funds u/s.36(1)(iii) of the Act; utilisation of borrowed funds for making interest free advances to IHCL; interest free advances to IHCL was also accepted to be for business purposes by the Id. AO and consequentially allowed the interest on borrowed funds u/s.36(1)(iii) of the Act. When sufficient enquiries were indeed carried out by the Id. AO in the course of original assessment proceedings, the same cannot be the subject matter of revision jurisdiction u/s.263 of the Act by the Id. PCIT. Reliance in this regard is placed on the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Nirav Modi reported in 390 ITR 292. The relevant operative portion of the said judgment is reproduced hereunder:-

*“7. Firstly, the Revenue contends that the exercise of powers under Section 263 of the Act is justified as in this case, as no inquiry in respect of the gifts received during the subject years was done by the Assessing Officer for the Assessment orders for Assessment Years 2007-08 and 2008-09. This according to the Revenue is evident from the Assessment Orders dated 31st December, 2009 and 30th December, 2010 which does not even make a mention of the gifts received much less discuss and/or deal with the same. This issue is no longer res integra as this Court in Idea Cellular Ltd. v. Dy. CIT [2008] 301 ITR 407 (Bom.) has held that if during Assessment*

proceedings queries were raised and the assessee responded to the same, then even if an Assessment order does not mention the same, it does not mean that the Assessing Officer has not applied his mind to the issues. It would be well-nigh impossible for an Assessing Officer to complete all assessments assigned to him under Section 143(3) of the Act if he is required to deal with all issues which arose during the Assessment Proceedings. Thus, the Assessment Order primarily deal with only those issues in respect of which the Assessee has not been able to satisfy him and give reasons for his conclusion. This would enable the Assessee to challenge the same, if aggrieved. In fact the Gujarat High Court in *CIT v. Nirma Chemical Works Ltd.* [[2009\] 309 ITR 67/182 Taxman 183](#)] has observed that if an assessment order were to incorporate the reasons for upholding the claim made by an assessee, the result would be an epitome and not an assessment order. In this case, during the assessment proceedings for both the Assessment Years, the Assessing Officer issued a query memos to the assessee, calling upon him to justify the genuineness of the gifts. The Respondent-Assessee responded to the same by giving evidence of the communications received from his father and his sister i.e. the donors of the gifts along with the statement of their Bank accounts. On perusal, the Assessing Officer was satisfied about the identities of the donors, the source from where these funds have come and also the creditworthiness/capacity of the donor. Once the Assessing Officer was satisfied with regard to the same, there was no further requirement on the part of the Assessing Officer to disclose his satisfaction in the Assessment Order passed thereon. Thus, this objection on the part of the Revenue, cannot be accepted.

9. It was next submitted that no enquiry was done by the Assessing Officer to find out whether the donor Mr Deepak Modi (father) had received money from M/s. Chang Jiang as claimed. Nor any inquiry was done to find out whether the sister had in fact earned amounts on account of Foreign Exchange Transactions as claimed by her. We find that this enquiry of a source of source is not the requirement of law. Once the Assessing Officer is satisfied with the explanation offered on inquiry, it is not open to the CIT in exercise of his revisional powers direct that further enquiry has to be done. At the very highest, the case of the Revenue is that this is a case of inadequate inquiry and not of "no enquiry." It is well settled that the jurisdiction under Section 263 of the Act can be exercised by the CIT only when it is a case of lack of enquiry and not one of inadequate enquiry. This view has been taken by this Court in the matter of *CIT v. Shreepati Holdings & Finance (P.) Ltd.* [ITA 1879 of 2013 dated 5th October, 2013], by the Delhi High Court in *CIT v. Vikas Polymers* [[2012\] 341 ITR 537/194 Taxman 57](#)] and in *D.G. Housing Projects (supra)*. In fact the Delhi High Court in *D.G. Housing Projects (supra)* while so holding placed reliance upon the decision of this Court in *Gabriel (India) Ltd. (supra)*. It is very important to note that the CIT in his order under Section 263 of the Act has recorded the fact that there has been no adequate inquiry. Thus, this is not a

*case of no inquiry, warranting order under Section 263 of the Act. Thus, this objection on the part of the Revenue, is also not sustainable.*

*10. The Revenue placed reliance upon the decision of the Delhi High Court in D.G. Housing Projects Ltd., (supra) that as the Assessing Officer had not enquired into the source of the source of the gifts received by the Assessee, the Assessment Order is erroneous. The aforesaid decision holds that the power of Revision under Section 263 of the Act would normally be exercised in case of no enquiry and not in cases of inadequate enquiry. However, even in case of inadequate enquiry by the Assessing Officer, the order of the Assessing Officer could be erroneous in two classes of situation. The first class would be where orders passed by the Assessing Officer are ex facie erroneous i.e. a decision rendered ignoring a binding decision in favour of the Revenue or where enquiry is per se mandated on the basis of the record available before the Assessing Officer and that is not done. In the second class of cases, where the order is not ex facie erroneous, then the CIT must himself conduct an enquiry and determine it to be so. The Court held that it is not permissible to the CIT while exercising power under Section 263 of the Act to remit the issue to the Assessing Officer to re-examine the same and find out whether earlier order of Assessment is erroneous. It is the CIT who must hold that the order is erroneous, duly supported by reasons. In the present facts, the CIT in exercise of its powers under Section 263 of the Act has merely restored the Assessment to the Assessing Officer to decide whether the gifts were genuine and, if not, then the Assessment could be completed on application of Section 68 of the Act. In this case, the order passed by the Assessing Officer is not per se erroneous and further the CIT has not given any reasons to conclude that the order is erroneous. In fact, he directs the Assessing Officer to find out whether the order is erroneous by making further enquiry. This the decision of the Delhi High Court in D.G. Housing Projects Ltd. (supra), clearly negates. In the above view, the decision of Delhi High Curt in D.G. Housing Projects Ltd. (supra) would not assist the Revenue in the present facts.*

3.6. We find that the Revenue preferred Special Leave Petition before the Hon'ble Supreme Court against this decision which was dismissed by the Hon'ble Supreme Court in 77 Taxmann.com 15.

3.7. In view of our aforesaid observations, it could be safely concluded that the Id. AO had made adequate enquiries in the original assessment proceedings itself with regard to the issue of interest on borrowed funds and respectfully following the aforesaid decision, we hold that the said

assessment completed after due enquiries, cannot be the subject matter of revision proceedings u/s 263 of the Act by the Id PCIT. Hence, we have no hesitation in holding that revision order passed by the Id. PCIT u/s.263 of the Act deserves to be quashed and is hereby quashed on this count itself.

3.8. It is not in dispute that the borrowings and interest free advances to IHCL were made in earlier years and not during the year under consideration. In earlier orders we find that the borrowings made by the assessee and its utilisation thereof by way of interest free advance to IHCL has been accepted by the Revenue in scrutiny assessment proceedings, as meant for business purposes. The details of various assessments completed in this regard are as under:-

Sr. No.	A.Y.	Assessment Particulars
a.	2010-11	u/s.143(3) dated 25/03/2013, wherein no disallowance of interest u/s.36(1)(iii) was made. Infact, in para 6 of this order, the Id. AO had specifically stated that lending of funds is not the business of the assessee
b.	2011-12	u/s.143(3) dated 18/03/2015, wherein no disallowance of interest u/s.36(1)(iii) was made.
c.	2012-13	u/s.143(3) dated 18/03/2016, wherein no disallowance of interest u/s.36(1)(iii) was made.
d.	2013-14	u/s.143(3) dated 23/03/2016, wherein no disallowance of interest u/s.36(1)(iii) was made.
e.	2014-15	u/s.143(3) dated 29/12/2016, wherein no disallowance of interest u/s.36(1)(iii) was made.

3.9. We also find that the Id. PCIT invoked revision jurisdiction u/s.263 of the Act for A.Y.2013-14 but did not initiate any action with reference to this issue of disallowance of interest u/s.36(1)(iii) of the Act though the borrowings and utilisation thereon by way of interest free advance to IHCL were made prior to A.Y.2013-14. All these assessment orders and

order of Id. PCIT u/s.263 of the Act were indeed available before the Id. AO while framing the assessment for A.Y.2015-16 which drives home the principle of consistency as well as the stand taken by the department in assessee's own case for various years. While this is so, the Id. AO taking a consistent view thereof in A.Y.2015-16 i.e. the year under consideration, cannot be categorised as passing erroneous order. On the contrary the Id. PCIT has passed an erroneous order in the instant case. Hence, revision jurisdiction u/s.263 of the Act invoked by the Id. PCIT deserves to be quashed even on this count both on technicality as well as on merits.

3.10. Since, we have already held that sufficient enquiries were indeed carried out by the Id. AO in the course of original assessment proceedings, the reliance placed by the Id. PCIT on the provisions of Explanation-2 to Section 263 of the Act would not be relevant at all for the purpose of adjudication. Accordingly, the grounds raised by the assessee are allowed.

**4. In the result, appeal of the assessee is allowed.**

Order pronounced on 22/04/2021 by way of proper mentioning in the notice board.

**Sd/-**  
**(C.N. PRASAD)**  
JUDICIAL MEMBER

**Sd/-**  
**(M.BALAGANESH)**  
ACCOUNTANT MEMBER

Mumbai; Dated 22/04/2021  
KARUNA, *sr.ps*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)  
**ITAT, Mumbai**