

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "B" MUMBAI**

**BEFORE SHRI MAHAVIR SINGH (VICE PRESIDENT) AND  
SHRI S. RIFAUR RAHMAN (ACCOUNTANT MEMBER)**

**ITA No. 375/MUM/2021  
Assessment Year: 2012-13**

**&**

**ITA No. 374/MUM/2021  
Assessment Year: 2013-14**

Sri Buddheshwar Estates Private  
Limited,  
Flat No. B-72, Saptrish Bldg.  
Srushti Complex, Sector-2, Mira  
Road, (E),  
Mumbai-401107.

**PAN No. AANCS 7978 M**

**Appellant**

**Vs.** Pr. Commissioner of Income Tax-3,  
Room No. 612, 6<sup>th</sup> floor, Aayakar  
Bhavan, Maharishi Karve Road,  
Mumbai-400020.

**Respondent**

Assessee by : Mr. Sunil Makhija, AR  
Revenue by : Mr. Rahul Raman, DR

Date of Hearing : 27/04/2021  
Date of pronouncement : 21/06/2021

**ORDER**

**PER S. RIFAUR RAHMAN, A.M.**

The captioned appeals filed by the assessee are directed against the order passed u/s 263 of the income Tax Act, 1961 (in short 'Act') passed by the Pr. Commissioner of Income Tax-3, Mumbai (in short Pr. CIT). Facts being identical, we begin with the assessment year (AY) 2012-13 (ITA No. 375/Mum/2021).

**ITA No. 375/MUM/2021**  
**Assessment Year: 2012-13**

2. Brief facts of the case are, the assessment was reopened on the basis of information reported in NMS Module. During the year under consideration, assessee had shown rental income of Rs.1.08 crores from land leased to M/s Ultratech Cement Ltd. Against the said income, assessee debited Rs.90,000/- towards wages and Rs.40,79,575/- on repairs and maintenance. Notices u/s 143(2) and 142(1) of the Income Tax Act, 1961 (in short 'Act') were issued and served on the assessee. In response, the AR of the assessee attended and filed the relevant information as called for. The assessment u/s 143(3) r.w.s. 147 was completed on 27.12.2017 by making addition/disallowance as under:

- i. Disallowed Rs.30,40,000/- on account of non-payment of TDS paid to Directors of Remuneration.
- ii. Ad-hoc disallowance @ 10% of the expenses on repairs and maintenance to the extent of Rs.40,79,575/-.

Ld. CIT(A) on verification of the records in assessee's case for assessment year 2014-15, he observed that assessee has leased out certain land situated Costal Regularities Zone (CRZ) where any construction activity is illegal as per CRZ norms. The assessee had claimed certain expenses incurred on repairs and maintenance in its profit and loss account in respect of the above said leased out land the expenses were disallowed on the following grounds :

- i. The Construction was illegal as per CRZ norms.
- ii. The property was leased out and not being used by the assessee for its own business.

- iii. The assessee has submitted only few bills for transport charges and few self-made vouchers for other expenses. He also observed that no leased agreement was furnished by the assessee.

The Ld. Pr. CIT-3, Mumbai had also observed that it was observed by the Assessing Officer in that year under consideration i.e. assessment year 2012-13 expenses related to leased out land (Rs.90,000/- on account of wages and Rs.40,79,575/- on maintenance and repairs) were allowed without proper enquiry and verification as there was no material change in facts vis-à-vis those of assessment year 2014-15. Therefore, he submitted a proposal for action u/s 263 vide letter dated 21.11.2019.

Further, he observed that in the assessment order under consideration, the Assessing Officer disallowed the Directors Remuneration of Rs.30,40,000/- on the basis of non-deduction of TDS but he failed to verify/examine the nature of service provided by the Director for earning the lease rental for business purposes. He observed that it appears, the assessee had diverted the lease rental in the hands of the Directors without paying of DDT in terms of provision u/s 115 'O' of the Act. He also failed to examine the return of income of the Directors.

Accordingly, the Pr. CIT issued notice u/s 263 dated 11.03.2020 issued to the assessee to show cause as to why the assessment order should not be considered as erroneous and prejudicial to the interests of the revenue and should not be set aside/cancelled. As none appeared on behalf of the assessee and not filed any written submission even though, the assessee was given several opportunities. Since, no response from the assessee, Ld. Pr. CIT observed that AO omitted to verify/examine the expenses incurred on the

leased of land. Therefore, the order becomes erroneous. Accordingly, by considering the issue, he invoked the premises u/s 263 of the Act. He set aside the assessment order passed u/s 143(3) r.w.s. 147 and gave the direction to the Assessing Officer to make detailed verification of the issues and complete the assessment after giving proper opportunity to the assessee of being heard and to complete the assessment as per law.

3. Aggrieved with the above order, the assessee is in appeal before us with the following grounds of appeal:

1. The Ld. Pr. CIT, has erred in passing an order u/s.263 of the I.T. Act, 1961, without offering a reasonable opportunity of being heard thereby violating the principles of natural justice.

Without prejudice to the above the appellant submits that:

2. The Ld. Principal CIT, has erred in having assumed jurisdiction u/s. 263 of the Act in order to substitute his view in place of judicious view taken by the A.O. on the same set of facts & evidences on record, by holding that the order passed u/s, 143(3) of the Act dated 27.12.2017 was erroneous and prejudicial to the interests of revenue.
3. The Ld. P.C.I.T. has erred in setting aside the assessment order passed us 143(3) of the IT Act, with the direction to re-verify the issues again without appreciating the fact that both the issues under consideration have been duly adjudicated upon by the Ld. Assessing Officer as is evident from the assessment order itself.
4. The Ld. P.CLT, has erred in passing an order u/s 263 of the I.T, Act, without appreciating the fact that though according to him the order passed by the Ld. Assessing Officer may be prejudicial to the interest of revenue in comparison to an assessment order passed for A.Y. 2014-15, but so far it is not erroneous, it does not falls within the purview of section 263 of the I.T. Act.

5. The Ld. P.C.I.T., has seriously failed to appreciate that since the twin conditions precedent to passing an order under the said section were not satisfied the Order passed u/s.263 of the Income-tax Act is ultra vires and void,
6. On the facts and in the circumstances of the case, the order passed by the learned Pr. C.I.T. u/s 263 of the I.T, Act being bad in law, is ab initio void.
7. The appellant craves, leave to add, amend, alter & or vary any of the grounds on or before the hearing of this appeal,
8. The appellant prays that the order passed u/s 263 of the I.T, Act, not being in accordance of the provision of law may please be quashed.

4. At the time of hearing, the Ld. AR brought to our notice page 3 of the assessment order in which the Assessing Officer has verified the payment of Director remuneration and disallowed the same due to non-payment of TDS. Further, he submitted that AO also verified the repairs and maintenance expenses and disallowed 10% of the above said expenses due to discrepancies found in the vouchers/bills submitted by the assessee. Further, he brought to our notice page 2 of 263 order and he submitted that while verifying the assessment records of assessment year 2014-15. Wherein 100% of the expenses were disallowed and referring to the above assessment records, Ld. Pr. CIT with the borrowed satisfaction from the Assessing Officer, he intends to treat this assessment order as erroneous and prejudicial to the interest of the revenue. He submitted that Assessing Officer has independently verified and completed the assessment. There is no mistake apparent on record.

5. On the other hand, the Ld. DR agreed that this order was passed *ex-parte* and since none appeared on behalf of the assessee, this order may be remitted back to Ld. Pr. CIT in first consideration.

6. Considered the rival submissions and material on record. We notice that Ld. Pr. CIT at the time of verification of the assessment records for assessment year 2014-15, he observed that assessee has leased out certain land situated in Costal Regularity Zone which is prohibited area, where construction activity is illegal. Assessee had incurred certain expenses on such leased out land and those expenses were disallowed on the basis of consideration was illegal, the property was leased out and not being used by the assessee for its own business and some discrepancies were found on the bill submitted by the assessee. We noticed that all this information was observed by Ld. Pr. CIT while verifying the records for assessment year 2014-15 and with the borrowed satisfaction from the Assessing Officer who had carried out and completed the assessment for assessment year 2012-13 and based on his advice and proposal, he proceeded to invoke provision of section 263, Ld. Pr. CIT set aside the assessment order. Our considered view, Ld. Pr. CIT can only verify the records for the assessment year under consideration alone and not for any other past or subsequent year assessment order. With regard to this assessment year, we notice that Assessing Officer has already verified the information and formed as opinion. Based on such opinion, he completed the assessment order. Now Ld. Pr. CIT cannot re-look the assessment order passed by such Assessing Officer and also based on the proposal of the Assessing Officer to set aside the order, which literally will mean that Assessing Officer would like to change this opinion now and revisit the order which he has passed earlier. Therefore, in our considered view, the order passed u/s 263 of the Act in fact *void ab initio* which is based on borrowed satisfaction. Moreover, we notice that Assessing Officer has verified the expenditure and now Ld. Pr. CIT cannot treat the same as no verification at all. Section 263 can be invoked only when there is no verification at all, in the

case, AO has clearly verified the issued involved in this case. However, we notice that the issue of expenditure disallowance, AO has applied his mind to disallow 10% of the expenditure. Whereas, the remuneration to directors, AO has disallowed the same due to non-compliance with TDS provisions. AO has not really verified the genuineness of the expenditure. On merit, we notice that assessee has earned the rental income on the area where the construction activities are not allowed. Ld. Pr. CIT has accepted the revenue declared by the assessee but wanted to only disallow the related expenses. We do not see any merit in this method. The assessee has earned the rental income that means the assessee can incur certain expenses, in that process, it has decided to pay director remuneration. What is necessary for the officers to see, whether it is within the norms prescribed under the Companies Act. If it is within norms, the expenses have to be applied. In case, it is found that it is excessive, only to that extent alone, remuneration can be disallowed.

Considering the overall situation, we set aside the order passed u/s 263 of the Act. Accordingly, grounds raised by the assessee are allowed.

7. Facts being identical, our decision for AY 2012-13 applies *mutatis mutandis* to AY 2013-14.

8. In the result, the appeals filed by the assessee are allowed.

**Order pronounced in the open Court on 26/06/2021.**

Sd/-  
(MAHAVIR SINGH)  
VICE PRESIDENT

Sd/-  
(S. RIFAUR RAHMAN)  
ACCOUNTANT MEMBER

Mumbai;

Dated: 21/06/2021

Rahul Sharma, Sr. P.S.

**Copy of the Order forwarded to :**

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

//True Copy//

BY ORDER,

(Dy./Assistant Registrar)  
**ITAT, Mumbai**