

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE

BEFORE HON'BLE RAJPAL YADAV, VICE PRESIDENT
AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER
VIRTUAL HEARING

ITA No.118/Ind/2020
Assessment Year:2015-16

Faith Builders & Realties, P. Ltd., Bhopal (Appellant)	बनाम/ Vs.	Pr. CIT-1, Bhopal (Respondent)
P.A. No. AABCF7558A		
Appellant by	Shri S.S. Deshpande, AR	
Revenue by	Shri S.B. Prasad, CIT-DR	
Date of Hearing:	08.07.2021	
Date of Pronouncement:	16.08.2021	

आदेश / O R D E R

PER MANISH BORAD, A.M:

By way of this appeal, the appellant has challenged the assumption of jurisdiction u/s 263 of the Income Tax Act 1961(hereinafter referred to as 'The Act' for short) by Ld. Pr. CIT-1 Bhopal vide order dated 31.01.2020.The assessee has raised following grounds of appeal:-

1. *On the facts and in the circumstances of the case of the assessee the Ld. Pr. CIT was not justified in holding that the assessment order passed u/s 143(3) was erroneous and/or prejudicial to the interest of the revenue.*
2. *On the facts and in the circumstances of the case of the assessee the Ld. Pr. CIT was not justified in setting aside the order passed u/s 143(3) by the assessing officer by invoking the provision of section 263.*

2. Brief facts of the case as culled out from the records are that the assessee company is engaged in the real estate business and recognizes revenue on real estate transactions under percentage completion method. It declared total loss at Rs.1,04,87,333/- in the return filed on 30.10.2015. The case was selected for scrutiny through CASS and the regular assessment was completed u/s 143(3) of the Act on 24.10.2017, assessed total loss at Rs.55,83,875/-.

3. Subsequently, Ld. Pr. CIT, Bhopal invoked the provisions of section 263 of the Act and issued following show cause notice to the assessee(relevant extract is reproduced below):

“Please refer to the order u/s 143(3) of the IT Act, 1961 dated 24.10.2017 passed by the DCIT-1(1), Bhopal for A.Y. 2015-16, On perusal for the assessment order and case record, it is noticed that the assessee company was engaged in the real estate business and revenue recognized as per the guidance note (A) 23 (revised 2012) on accounting for real estate transactions under percentage completion method. Further it is observed that assessee disclosed sale, closing stock and net loss for Rs.15,389,800/-,

Rs.17,15,47,774/- and Rs.1,04,87,334/- respectively. The assessee furnished details and method of revenue recognition of percentage completion method and resisted the sale, closing stock and calculated net loss of Rs.69,51,606/- and calculated the income from the project which should be recognized for Rs.1,36,48,310/- for the F.Y. 2014-15 relevant to ASSESSMENT YEAR 2015-16 against recast and assessment loss of Rs.69,51,606/- which was not in order. The difference amount of Rs.2,05,99,916/-(1,36,48,310/-+69,51,606/-) was required to be added back to the income of the assessee which was not done by the AO. This omission resulted in underassessment of income to the extent of Rs.2,05,99,916/- involving notional revenue effect to Rs.22,55,449/-.

Keeping in view of the above, the assessment order passed by the Assessing Officer is considered to be erroneous is so far as it is prejudicial to the interest of revenue, and therefore, I, propose to invoke powers vested u/s 263 of the Income Tax Act, 1961 in respect of the order referred to above. You are hereby given an opportunity of being heard as per section 263(1) of the Income Tax Act to present yourself in person or through an authorized representative on 20.01.2020 at 1:00PM to explain your case. In case no reply is received by stipulated date, it will be presumed that you have nothing to say in the matter and a decision will be taken on the basis of material available on record.

4. Now the assessee is in appeal before the Tribunal challenging the jurisdiction of Ld. PCIT assumed u/s 263 of the Act.
5. Ld. Counsel for the assessee apart from placing reliance on written submissions placed on record and relevant extract reproduced in the subsequent paras and also submitted that the issue of method adopted for ascertaining the profit by the assessee was specifically enquired by Ld. AO. The assessee has duly submitted the details that it is consistently following the project completion method which is a duly recognized method under the

provisions of law. Ld. AO has examined the details and applied his mind and after making due verification made the addition of Rs. 35,35,727/- and thus order passed by the Ld. AO is neither erroneous nor prejudicial to the interest of revenue. Ld. counsel for the assessee referred to the following arguments mentioned in the written submissions:

It is humbly submitted that since the assessment has been framed after due verification of the facts and material on record, the action u/s. 263 is bad in law. The Ld. A.O. has raised a specific query about the method of computation of income and made the addition. Once the claim of the assessee is considered after appreciation of all the facts, the order cannot be said to be erroneous. In this connection attention is drawn to the decision of the Hon'ble Tribunal in the case of Aditya Mundra Vs PCIT in ITA no. 632/IND/2019. (Page 37 of PB).

7a. The observations of the Ld. P. Commissioner are incorrect and contrary to the facts of the case and the information on record. The assessee had been following the completed contract method and not the percentage of completion method as mentioned in the notice. This fact is obvious from the order of the Ld. PCIT u/s 263 wherein in Page 4, first para the CIT has mentioned that "...During the assessment the assessee has submitted that it has followed project completion method". This fact is obvious from the letter dated 18/09/2017 wherein the assessee has specifically submitted that it is following the completed contract method since its inception. This letter has been discussed by the ld. AO in para 3 page 2 of the assessment order.

7b. It is further submitted that the income calculated at Rs. 1,36,48,310/- was the Gross Profit of the company from the inception of the business till 31.03.2015. The profit of the company would have been calculated only after reducing the indirect expenses. The same is obvious from the calculation on record wherein direct expenses incurred on the project till 31.03.2015 were calculated at Rs. 18,20,91,992/- out of which Rs. 10,31,99,121/- was related to the cost allocated to the portion on which sale of Rs. 11,68,47,432/- was to be recognized. Rs. 1,36,48,310/- (Rs. 11,68,47,432/- (-) Rs. 10,31,99,121/-) was thus sale price less direct expenses till

31.03.2015. Accordingly, the amount of Rs. 1,36,48,310/- did not represent the income for the year. In the written submission filed before the Ld. Commissioner the details were submitted.

7c. The Ld. PCIT further observed that no reference to DVO has been made for correct valuation of the project. It is submitted that there is no practice of getting unfinished projects valued by the DVO. Further the valuation of the DVO is only an estimate.

7d. The CIT has not held the order to be erroneous at any place in the order u/s 263. In absence of any finding regarding the assessment order being erroneous, provisions of section 263 could not have been applied.

7e. It is further submitted that the order is not prejudicial to the interest of the revenue. The only reference to possible loss was in the notice issued u/s 263 wherein it was alleged that the income from the project should have been recognized at Rs. 1,36,48,310/-. The assessee has filed detailed submission that the amount of RS. 1,36,48,310/- represented Gross Profit for the period 1.4.2012 to 31.03.2015 and to arrive at the net profit indirect expenses incurred are to be reduced. During F.Y 2014-15 itself the assessee had incurred indirect expenses of Rs. 1,59,31,769/- and have incurred total indirect expenses of Rs. 3,51,11,474/- in various years uptill 31.03.15. These submissions have not been found to be incorrect by the CIT.

6. Reliance was also placed on the decision of this Tribunal in the case of *Aditya Mundra vs. Pr. CIT in ITANo.632/Ind/2019* & others dated 13.01.2021.

7. Per contra Ld. Departmental Representative vehemently argued supporting the order of Ld. PCIT.

8. We have heard rival contentions and perused the records placed before us carefully gone through the decisions relied by the Ld. counsel for the assessee. We observe that the assessee company is engaged in the real estate business. It is recognizing the revenue

consistently on percentage completion method. The Ld. AO had made an addition of Rs.35,35,727/- on account of profit recomputed by applying the percentage completion method as against the project completion method adopted by the assessee. Subsequently, Ld. Pr. CIT on going through assessment records noticed that the Ld. AO has not calculated the correct income as per the percentage completion method and accordingly issued notice u/s 263 of the Act and after considering the submission of the assessee *set aside* the assessment order to be framed *de novo* in light of the observation made in the impugned order. This finding of Ld. Pr. CIT can stand only if it is found that the assessment order is erroneous so far as prejudicial to the interest of revenue and no enquiry has been conducted by the Ld. AO with regard to the issue raised in the show cause notice issued u/s 263 of the Act.

9. To examine this aspect whether Ld. PCIT was justified in holding the order of Ld. A.O as erroneous and prejudicial to the interest of revenue, we will first go through the relevant provision of Section 263 of the Act and settled judicial precedence:-

263. (1) *The Principal Commissioner or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so*

far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

Explanation 1.—For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,—

- (a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include—*
 - (i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;*
 - (ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Principal Chief Commissioner or Chief Commissioner or Principal Director General or Director General or Principal Commissioner or Commissioner authorised by the Board in this behalf under section 120;*
- (b) "record" shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Principal Commissioner or Commissioner;*
- (c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Principal Commissioner or] Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.*

Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—

- (a) the order is passed without making inquiries or verification which should have been made;*
- (b) the order is passed allowing any relief without inquiring into the claim;*
- (c) the order has not been made in accordance with any order, direction or instruction issued by the Board under [section 119](#); or*
- (d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.*

- (2) *No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.*
- (3) *Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.*

Explanation.—In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to [section 129](#) and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded.

10. On a bare perusal of the sub-section (1) would reveal that the powers of revision granted by section 263 to the learned Commissioner have four compartments. In the first place, the learned Commissioner may call for and examine the records of any proceedings under this Act. For calling of the record and examination, the learned Commissioner was not required to show any reason. It is a part of his administrative control to call for the records and examine them. The second feature would come when he will judge an order passed by an Assessing Officer on culmination of any proceedings or during the pendency of those proceedings. On an analysis of the record and of the order passed by the Assessing Officer, he formed an opinion that such an order is erroneous in so far as it is prejudicial to the interests of the

Revenue. By this stage the learned Commissioner was not required the assistance of the assessee. Thereafter the third stage would come. The learned Commissioner would issue a show-cause notice pointing out the reasons for the formation of his belief that action under section 263 is required on a particular order of the Assessing Officer. At this stage the opportunity to the assessee would be given. The learned Commissioner has to conduct an inquiry as he may deem fit. After hearing the assessee, he will pass the order. This is the fourth compartment of this section. The learned Commissioner may annul the order of the Assessing Officer. He may enhance the assessed income by modifying the order.

11. It is well settled law that for invoking the provisions of section 263 of the Act both the conditions that the order must be erroneous and prejudicial to the interest of revenue needs to be satisfied. This ratio stands laid down by various Hon'ble Courts.

12. Hon'ble Jurisdictional High Court of Madhya Pradesh in the case of *H.H. Maharaja Raja Power Dewas (1983) 15 Taxman 363* in para 10 of this order held that “*However, the first argument, viz., that an assessment order without compliance with*

the procedure laid down in section 144B is erroneous but not prejudicial to the interests of the revenue conferring revisional jurisdiction on the Commissioner under section 263(1), has force. Under section 263(1) two pre-requisites must be present before the Commissioner can exercise the revisional jurisdiction conferred on him. First is that the order passed by the ITO must be erroneous. Second is that the error must be such that it is prejudicial to the interests of the revenue. If the order is erroneous but it is not prejudicial to the interests of the revenue, the Commissioner can not exercise the revisional powers under section 263(1) of the Act. There cannot be any prejudice to the revenue on account of the ITO's failure to follow the procedure prescribed under section 144B, and unless the prejudice to the interests of the revenue is shown, the jurisdiction under section 263(1) cannot be exercised by the Commissioner, even though the order is erroneous. The argument that such an order may possibly be challenged in appeal by the assessee, and for this reason it is prejudicial to the interests of the revenue, has no merit. Section 263(1) clearly contemplates that the order of assessment itself should be prejudicial to the interests of the revenue and this prejudice has to be proved by reference to the assessment order only. It cannot be

argued that there is some possibility of the assessment order being challenged or revised in appeal and, therefore, on account of this contingency, the order becomes prejudicial to the interests of the revenue.” [emphasis supplied]

13. Hon’ble Apex Court in the case of *Malabar Industrial Co. Ltd.* – [2000] 243 ITR 83 – order pronounced on 10.02.2000 – HEAD NOTE – “Section 263 of the Income-tax Act, 1961 - Revision - Of orders prejudicial to interests of revenue - Assessment year 1983-84 - Whether in order to invoke section 263 Assessing Officer's order must be erroneous and also prejudicial to revenue and if one of them is absent, i.e., if order of Income-tax Officer is erroneous but is not prejudicial to revenue or if it is not erroneous but is prejudicial to revenue, recourse cannot be had to section 263(1) - Held, yes - Whether if due to an erroneous order of ITO, revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to interests of revenue - Held, yes - Assessee-company entered into agreement for sale of estate of rubber plantation - As purchaser could not pay installments as scheduled in agreement, extension of time for payment of installments was given on condition of vendee paying damages for loss of agricultural income and assessee passed

resolution to that effect - Assessee showed this receipt as agricultural income - Resolution passed by assessee was not placed before Assessing Officer - Assessing Officer accepted entry in statement of account filed by assessee and accepted same - Commissioner under section 263 held that said amount was not connected with agricultural activities and was liable to be taxed under head 'Income from other sources' - Whether, where Assessing Officer had accepted entry in statement of account filed by assessee, in absence of any supporting material without making any enquiry, exercise of jurisdiction by Commissioner under section 263(1) was justified - Held, yes

14. Hon'ble Gujarat High Court in the case of *Smt. Minalben S. Parikh* – [1995] 215 ITR 81 – order pronounced on 17.10.1994 – Para 12 – “From the aforesaid, it can well be said that the well-settled principle in considering the question as to whether an order is prejudicial to the interests of the revenue or not is to address oneself to the question whether the legitimate revenue due to the exchequer has been realised or not or can be realised or not if his orders under consideration are allowed to stand. For arriving at this conclusion, it becomes necessary and relevant to consider whether the income in

respect of which tax is to be realised, has been subjected to tax or not or if it is subjected to tax, whether it has been subjected to tax at a rate at which it could yield the maximum revenue in accordance with law or not. If income in question has been taxed and legitimate revenue due in respect of that income had been realised, though as a result of erroneous order having been made in that respect, in our opinion, the Commissioner cannot exercise powers for revising the order under section 263 merely on the basis that the order under consideration is erroneous. If the material in that regard is available on the record of the assessee concerned, the Commissioner cannot exercise his powers by ignoring that material which links the income concerned with the tax realization made thereon. The two questions are inter-linked and the authority exercising powers under section 263 is under an obligation to consider the entire material about the existence of income and the tax which is realizable in accordance with law and further what tax has in fact been realised under the alleged assessment orders.[emphasis supplied]

15. At this stage, before considering the multi-fold contentions of the learned representatives, we deem it pertinent to take note of the fundamental tests propounded in various judgments relevant for

judging the action of the Commissioner of Income-tax taken under section 263. The Income-tax Appellate Tribunal in the case of *Mrs. Khaiiza S. Oomerbhoy v. ITO [2006] 101 TLJ 1095 (Mum)*, analysed in detail various authoritative pronouncements including the decision of the Hon'ble Supreme Court in the case of *Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83 (SC)* and has propounded the following broader principle to judge the action of the Commissioner of Income-tax taken under section 263.

(i) The Commissioner of Income-tax must record satisfaction that the order of the Assessing Officer is erroneous and prejudicial to the interests of the Revenue. Both the conditions must be fulfilled.

(ii) Section 263 cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer and it was only when an order is erroneous that the section will be attracted.

(iii) An incorrect assumption of facts or an incorrect application of law will suffice the requirement of order being erroneous.

(iv) If the order is passed without application of mind, such order will fall under the category of erroneous order.

(v) Every loss of revenue cannot be treated as prejudicial to the interests of the Revenue and if the Assessing Officer has adopted one of the courses permissible under law or where two views are possible and the Assessing Officer has taken one view with which the Commissioner of Income-tax does not agree. It cannot be treated as erroneous order, unless the view taken by the Assessing Officer is unsustainable under law.

(vi) If while making the assessment, the Assessing Officer examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determine the income, the Commissioner of Income-tax, while exercising his power under section 263 is not permitted to substitute his estimate of income in place of the income estimated by the Assessing Officer.

(vii) The Assessing Officer exercises quasi-judicial power vested in him and if he exercises such power in accordance with law and arrive at a conclusion, such conclusion cannot be

termed to be erroneous simply because the Commissioner of Income-tax does not feel satisfied with the conclusion.

(viii) The Commissioner of Income-tax, before exercising his jurisdiction under section 263 must have material on record to arrive at a satisfaction.

(ix) If the Assessing Officer has made enquiries during the course assessment proceedings on the relevant issues and the assessee has detailed explanation by a letter in writing and the Assessing allows the claim on being satisfied with the explanation of the assessee, the decision of the Assessing Officer cannot be held to be simply because in his order he does not make an elaborate discussion in that regard.

16. After going through the settled judicial precedents and the principles laid down by the Hon'ble Courts and examining the facts of the case in light thereof, we find that during the course of the assessment proceeding, the Ld. AO specifically asked the assessee about the method adopted for ascertaining the profit. The assessee vide its reply dated 18/09/2017 (page 10A of the paper book) submitted that the assessee has been following the completed contract method since its inception and has been accounting its sales as and when the property is registered in favor of the buyer. Consequently the assessee has recognized the sales of Rs. 1,53,89,800/- during the year. It may be mentioned that the completed contract method is duly recognized method and has been accepted as one of the possible methods which can be adopted by the builders for determining their income for income tax purposes.

Even Institute of Chartered Accountant of Indore has also issued guidance note 23(Revised 2012) on accounting for real estate transaction and project completion method is also an accepted method. Reference in this regard was also made to various judgments of the Hon'ble Courts. The Ld. AO however asked the assessee to file the details as per percentage of completion method, which was filed.

17. Further while passing the order in para 3 at Page 2 discussed about the letter filed by assessee during the course the assessment proceedings and made following observation:-

During the course of assessment proceedings the assessee was asked to explain that why percentage of completion method has not been adopted for recognizing the revenue. The assessee vide his submission dated 18/09/2017 submitted that

Notwithstanding the above , the assessee is enclosing herewith a Chart containing the calculation of the revenue due for AY 2015-16 and is also enclosing herewith a recasted profit / loss A/c which the assessee would have earned had the assessee followed the percentage of completion method during the year in compliance to the direction issued by you.. As per these calculation had the assessee followed the percentage of completion method the additional sales would have been recognized at Rs. 9,61,90,632/- and the losses of the company would have been reduced by Rs. 35,35,727/-. It may be submitted that these figures of sales / profit are related to the sales / profit on the project up till 31/03/2015 and are not related to AY 2015-16 only.

The assessee himself has accepted that the loss of the company will reduced by Rs. 35,35,727/- by applying percentage of completion method for recognizing the revenue. Accordingly addition of Rs. 35,35,727/- is made to the total income.

18. On perusal of the above observation of the Ld. AO and various submissions filed by the assessee, it is very much clear that ld. AO has specifically enquired about the type of method adopted by the assessee to ascertain the profit for the projects carried on by the assessee. It is also on record that the assessee was consistently following the project completion method and offering the tax thereon and also before the Ld. AO complete details were filed to re-compute the profit as per the percentage completion method as asked by the Ld. AO. All these details of calculating the profit under the percentage completion method were before the Ld. AO and he after examining the same made an addition of Rs.35,35,727/-. Under these circumstances, where a detailed enquiry has been conducted on particular issue (as referred by Ld. Pr. CIT in the show cause notice) and the Ld. AO has made proper application of mind on the details filed by the assessee and certainly it is a case where sufficient enquiry has been conducted. So under these facts the assessment order cannot be held to be erroneous so far as prejudicial to the interest of revenue. We accordingly quash the

impugned order framed u/s 263 of the Act and restore the assessment order u/s 143(3) of the Act dated 24.10.2017.

19. In result, grounds raised by the assessee are allowed and appeal filed by the assessee in ITANo.118/Ind/2020 is allowed.

Order was pronounced as per Rule 34 of I.T.A.T. Rules 1963 on .16.08.2021.

Sd/-
(RAJPAL YADAV)
VICE PRESIDENT

Sd/-
(MANISH BORAD)
ACCOUNTANT MEMBER

Indore; दिनांक Dated : 16/08/2021
Patel/PS

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

Assistant Registrar, Indore