IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C" MUMBAI

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI S. RIFAUR RAHMAN (ACCOUNTANT MEMBER)

ITA No. 795/MUM/2021
Assessment Year: 2016-17

City and Industrial Development Corporation of Maharashtra Limited, "Nirmal" 2nd floor, Nariman Point, Mumbai-400 021. **PAN No. AACCC 3303 K** **Appellant**	**Vs.**	Income Tax Officer, Ward-15(1)(3), Ground floor, Aayakar Bhavan, Maharshi Karve Road, Mumbai-400 020. **Respondent**

Assessee by	:	Mr. Madhur Aggarwal, AR
Revenue by	:	Ms. Shreekala Pardeshi, DR
Date of Hearing	:	18/08/2021
Date of pronouncement	:	15/11/2021

ORDER

PER S. RIFAUR RAHMAN, A.M.

The present appeal is filed by the assessee against the order of the Pr. Commissioner of Income Tax -6, Mumbai [in short 'Pr. CIT'] for the assessment year 2016-17 dated 31.03.2021 and passed order u/s 263 of the Income Tax Act, 1961 (in short the Act).

2. Brief facts of the case are, the assessee has filed the return of income for assessment year 2016-17 on 20.03.2018 declaring total income of Rs.5,00,000/-. The case was selected for complete scrutiny under CASS. Subsequently, the assessment was completed u/s 143(3) of the Income Tax Act, 1961 (in short 'Act') on 29.12.2018 accepting the return of income at Rs.5,00,000/-

3. On perusal of the records, Pr. CIT-6, Mumbai observed that AO erred in accepting the return of income filed for assessment year 2016-17. He observed that the assessee claimed huge exemption under the garb of Article 289(1) of the Constitution of India by considering itself as an agent of the Government of Maharashtra. He observed that the assessee-company was claiming exemption u/s 10(20A) of the Act till assessment year 2002-03. With the deletion/amendment of the said section w.e.f. A.Y. 2003-04, no exemption remained available to the assessee company. It is only after withdrawal of exemption u/s 10(20A) of the Act and for A.Y 2003-04 onwards the assessee company has come out with a novel claim that receipts earned by it in business activities belonged to the Government of Maharashtra and it was only acting as an agent of the state government. In support of such claim the assessee relied upon Article 289(1) of the constitution of India and claimed that since it was an agent of the Govt. of Maharashtra, the excess of receipts over expenditure was not income liable to tax in its hand. From facts of case as mentioned above it is clear that the contention of the assessee being an agent is just an after-thought and a ruse to escape the tax liability under the provisions of the Income-tax Act, 1961 by the assessee w.e.f. A.Y. 2003-04 and onwards.

3.1 During 263 proceedings, the assessee brought to the notice of the Pr. CIT that in earlier years i.e. assessment year 2014-15 and 2015-16 the Department has cancelled the assessment order passed by the respective AO by invoking provision u/s 263 of the Act. It is also specifically brought to the notice of Pr. CIT that the orders passed u/s 263 in those assessment years were set aside by the ITAT. Even after the above information was brought to the notice of the present Pr. CIT, the Pr. CIT observed in his order at page 17 that the Department has filed appeal before Hon'ble High

Court and the matter is still pending. Still he preferred to cancel the order passed u/s 143(3) for this assessment year with the following observation :

> *"15. I have carefully considered the submissions of the assessee but I am of the view that the assessee is not an agent of the Government and, therefore, the tasks performed by the assessee cannot be equated with the tasks performed by the State Government. Further, Article 289(2) of the Constitution of India enables levy of Union Taxation on State Government owned companies and, therefore, any income accruing to the assessee must be subjected to the provisions of the Income Tax Act, 1961. The assessee is a company and there is not dispute that the company is a person as per the provisions of section 2(31) of the Income Tax Act, 1961. As per the provisions of section 4, the total income of the previous year of every person is chargeable to income tax. As per the provisions of section 5, the total income of any previous year of a person who is resident will include all income from whatever sources derived which is received or deemed to be received in India, accrues or arises or deemed to accrue or arise in India or accrues or arises to him outside India during the previous year. Taken these sections into consideration together, it can be said that any income of a person who is resident in India received, accrues or arises in India, or outside India during the previous year is taxable as per the provisions of the Income Tax Act, 1961. The assessee was incorporated as a Company on 19.03.1970 with a share capital which was wholly and exclusively subscribed by the Government of Maharashtra with the object of creation of New Town of Navi Mumbai, New Aurangabad, New Nasik etc. Therefore, the assessee is a company which is incorporated as a Company on 17.03.1970 with the entire share capital subscribed by the Government of Maharashtra. But this fact itself does not prove that the tasks performed by this company are the tasks of the State Government. Even if the company is fully owned by the State Government, it cannot be held that it is performing the tasks of the Government. Development of new towns during the contemporary India is not the exclusive task of the Government. It is the task which is also being performed by the private sector with equal efficiency and competence. As per provisions of the Competition Act, 2002, no favourable treatment could be given even if the company is owned by the Government. It is against the provisions of the Competition Act, 2002. Once the company is incorporated by the Government, it will have to compete with other players in the sector and the playground should be even and for this it is necessary that all the conditions including taxability of income should be same without any discrimination with the companies owned by the Government or in private sector.*
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> *15.1 Development of the township cannot be considered as the task of the State Government. It is not reserved for the State Government alone. There are various models for development of townships in India. Some companies are State owned, yet some others are owned by the non-Government entities and yet others are joint ventures of the Government*

and the private sectors which is in common parlance known as Private Public Partnerships (PPP). The various case laws which have been cited by the assessee or by the Hon'ble Tribunal in its order are not considered as supporting the view that the assessee company is the surrogate of the State Government and, therefore, tax cannot

16 With due respect to the Tribunal and other Courts, as the decision are not considered applicable in the case of the assessee, appeal has been filed by the Department against the order of Hon'ble IT AT in A. Y. 2006-07 and 2007-08 before the Hon'ble Bombay High Court.

17. It is also considered necessary to clarify here that wherever the order of the Assessing Officer or the Hon"ble Tribunal are against the stand taken by the Department in A.Y. 2006-07, remedial action if available is being taken in consonance to the stand of the Department in A.Y. 2006-07 which is that the income of the assessee after omission of section 10(20A) is taxable w.e.f. A.Y 2003-04. If in any such order, remedial action cannot be taken, then it is due to technical reasons that action cannot be taken but it does not represent the acceptance of such orders which are deviating from the stand taken by the Department in AY. 2006-07.

18 Other replies of the assessee in respect of certain components of income mentioned in show cause notice u/s 263 which are not considered relevant to take the decision as to whether the order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of revenue. In case the order passed by the Assessing Officer u/s.143(3) on is considered as erroneous, in so far as it is prejudicial to the interest of revenue, in response to the notice u/ s. 263 dated 12.12.2018, then, suitable directions will be given in respect of these aspects also.

19. At last on page 11, the assessee has cited the judgements of Hon'ble Supreme Court of India in the case of Malabar Industrial Company Ltd. V/s Commissioner of Income Tax 243 ITR 81 and CIT vs Max India Ltd. 295 I'TR 282. The judgements of the Hon'ble Supreme Court are taken into consideration and with full respect to the judgements, it is submitted that in the case of the assessee only one view is possible and that is the acts of the assessee company are not the acts of the State and, therefore, the income of the assessee company like any other company must be subject to the provisions of the Income Tax Act 1961 and Income Tax Rules 1962.

20. The assessee company is stated to be appointed as a New Town Development Authority for developing the Navi Mumbai Area ujs.113(3A) of the Maharashtra Regional and Town Planning Act of 1966 (i.e .MRTP Act) and as Special Planning Authority for other notified areas u/ s.40(1)(b) read with section 113(3A) of MRTP Act for carrying out its activities as New Town Development Authority and Special Planning Authority as per the provision of section 113(3A) and 40(1)b) r.w.s.113(3A) and various Government Resolutions (GRs) and Notification issued by the Government of Maharashtra. In assessment order for AY.

2007-08, it was mentioned that the Government Resolution dated 24.01.1972 and 11.01.1974 were passed appointing the assessee company as the New Town Development Authority for Navi Mumbai. However, the said Government Resolutions nowhere speak of appointing the assessee company as an agent of the Government of Maharashtra. In the instant case, the assessee company was claiming exemption u/s. 10(20A) of the Act till A.Y. 2002-03. With the deletion/ omission of the said section, no exemption remained available to the assessee company. Returns of income have been filed by the assessee company for A.Y. 2003-04 to 2006-07 either u/s.139 or in response to notice/ s.148 of the I.T.Act. It is only after withdrawal of exemption u/s. 10(20A) of the Act and further after declaring income in its own hands in its return filed for A.Y.2003-04 to A.Y2005-06, that assessee company has come out with a novel claim that its income belonged to the Government of Maharashtra and the assessee company was acting merely as an agent of the State Government. Thus it is clear that the contention of being an agent is just an after-thought and a

ruse to escape the tax liability as per the provisions of the Income Tax Act, 1961. The assessee company has gone ahead with a claim of TDS credit in the return filed for A.Y. 2016-17. This further confirms that the corresponding income belongs to the Assessee Company itself and is, therefore, taxable in its hands only. The assessee company was in appeal for the similar disallowance in earlier assessment years. Thus matter was subjudice.

21. The Apex Court in the case of APSRTC reported in (1964) 052 ITR 0524 (SC) holds that assessee is not an arm of the Government and, therefore, its income cannot be considered as the income of the Government and thus denied the claim of the assessee. In DCIT, Circle 1(1) Vs Andhra Pradesh Beverages (ITA No.360 & 41 7 /Hyd/ 2015 in December, 2016 held that privilege fee payable by the petitioner to the State Government would be taxable. Section 40(b) of the Income Tax Act has been amended to provide that any amount paid by way of fee, charges etc. shall not be allowed as deduction to such undertaking under the head profits and gains of the business.

22. The assessee company is taking a stand that it is an Agent of the Government and that the remuneration of Rs.5,00,000/-is the only taxable income in its hands. This proposition is totally wrong as there is no exemption available under the Income Tax Act for the assessee to claim any sort of exemption of the income out of its operations. In fact, the assessee was duty bound to cast the balance sheet and profit and loss account so as to reflect the exact and true account of the incomes arising out of such invitees being performed by the assessee. The assessee has not adhered to the accounting standards and instead chose to show the entire income accrued as transferred to the State. The taxability of such an income in the hands of the assessee before apportionment to the State

Government is the precise issue which is the subject matter of the revision under 263.

23. Therefore, I consider the order passed by the Assessing Officer u/ s.143(3) on 29-12.2018 as erroneous and in so far as it is prejudicial to the interest of revenue and, therefore, the order passed by the Assessing Officer is set aside with à direction to pass the order denovo after giving an opportunity of being heard before passing an order in determining the total income of the assessee under various heads of income. The Assessing Officer will not hold the task performed by the assessee as actions of the Government and, therefore, the provisions of Article 289(1) of the Constitution of India will not be applicable in this case."

4. At the time of hearing, the above facts on record were brought to our notice by Ld. AR and he brought to our notice that the detailed findings of the ITAT in assessment year 2014-15 and 2015-16 and submitted that the issue involved in all the three assessment years are exactly similar and there is no change in the business of the assessee during this assessment year. He submitted that ITAT has relied on various judicial decisions of various Courts and came to the conclusion. He prayed that similar facts are involved and technically the issue is covered in favour of the assessee.

5. On the other hand, the Ld. DR stated that the order of assessment is set aside by the Pr. CIT in order to keep the issue alive and he relied on the orders passed by the Pr. CIT.

6. Considered the rival submissions and material on record. We observed that exactly similar issues came up before the Co-ordinate Bench in the assessment year 2014-15 wherein (AM) is the party to it and by considering various case laws decided by the Hon'ble Jurisdictional High Court on the subject of whether the assessee is an agent of the State of Maharashtra or not, the issue was decided in favour of the assessee by the Co-ordinate Bench. For the sake of brevity it is reproduced below :

"23. Considering the rival submission and material placed on record as well as order passed by Pr. CIT u/s 263 of the Act, we observe that assessee is a statutory body and incorporated on 17.19.70 with the entire share capital subscribed by the Govt. of Maharashtra and Govt. of Maharashtra appointed the assessee as new town developer and spl. planning authority for the development of Mumbai City. In the resolution passed by the Govt. of Maharashtra, assessee was appointed in exercise of powers conferred u/s 113(3A) MRTP Act 1966 as an agent and to function on behalf of Govt. of Maharashtra. The Hon'ble High Court of Bombay in the case of Percival Joseph Pareira, both single bench as well as divisional bench has held that the assessee is an agent of Govt. of Maharashtra as per section 113(3A) of the MRTP Act. The question arose whether the assessee should be treated as agent by relying on the decision of the Hon'ble High Court of Mumbai in the several cases. Pr. CIT has rejected the contention of the assessee by relying on the several appeal filed before Hon'ble Bombay High Court as there is no decision from the Hon'ble High Court in the Income Tax Act. He acknowledged the Coordinate Bench of ITAT has held that the assesse is an agent of Govt. of Maharashtra in the AY 2006-07 and Pr. CIT has expressed his view not to follow the decision of the order of Jurisdictional ITAT. From the facts brought out by the Ld. Sr. Counsel that in the previous assessment years commencing from AY 2003-04 to 2013-14 except AY 2006-07 and 2007-08, in all the AYs, the revenue has accepted that assessee is an agent of the Govt. of Maharashtra and completed the assessments, that means in all AYs commencing from AY 2003-04 except AY 2006-07 and AY 2007-08 , the department has accepted the assessee is an agent and whatever income offered by the asessee as agent was accepted by the department. The addition in the previous AY 2013-14, the assessment was completed u/s 143(3) by accepting the assessee as agent and income offered by the assessee as income from the business.

24. From the order passed by Pr. CIT u/s 263, we noticed that he intends to correct the assessments made by the AO u/s 143(3) by observing that the case of the assessee fall under Article 289(1) and presumed that assessee is claiming the exemption under Article 289(1), whereas all these years, assessee has filed the return of income and declared income earned from the Govt. of Maharashtra as an agent. As per the resolution passed by the Govt. of Maharashtra, the remuneration fixed at Rs. 5 lakhs per annum and the same was declared by the assessee over the years and the department has accepted the stand taken by the assessee from AY 2003-04 to 2013-14 other than AY 2006-07 and 2007- 08 in which department is in appeal before High Court. When the AO accepted the assessee is an agent and completed the assessment u/s 143(3) over the years, it means that the AO completed the assessment with one particular view, whereas Pr. CIT intends to correct the above view and presumed that the case of assessee falls under Article 289(1) and come to a conclusion that assessee is not comes under Article 289 and subjected to tax under Income Tax Act, therefore, in our view, this is another view in the case of assessee. Therefore, Pr. CIT cannot invoke the provision of section 263 of the Act when two views are possible as held in the case of CIT vrs. Max India Ltd, wherein it was held as under:-

> *1. In our view at the relevant time two views were possible on the word "profits" in the proviso to Section 80HHC(3). It is true that vide the 2005 amendment the law has been clarified with retrospective effect by insertion of the word "loss" in the new proviso. We express no opinion on the scope of the said amendment of 2005. Suffice it to state that in this particular case when the order of the Commissioner was passed under Section 263 of the Income Tax Act, 1961, two views on the said word "profits" existed. In our view the matter is squarely covered by the judgment of this Court in the case of Malabar Industrial Co. Ltd. v. CIT reported in (2000) 243 ITR 83; as also by the judgment of the Calcutta High Court in the case of Russell Properties P. Ltd. v. A. Chowdhury, Addl. CIT.*
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> *2. At this stage we may clarify that under paragraph 10 of the judgment in the case of Malabar Industrial Co. Ltd. v. CIT (2000) 243 ITR 83 this Court has taken the view that the phrase "prejudicial to the interests of the revenue " under Section 263 has to be read in conjunction with the expression "erroneous" order passed by the assessing officer. Every loss of revenue as a consequence of an order of the assessing officer cannot be treated as prejudicial to the interests of the revenue. For example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue ; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue , unless the view taken by the Income Tax Officer is unsustainable in law…….*
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> *25. Respectfully, following the above decision, in our considered view that Pr. CIT has adopted one possible view in the present case and the order passed by Pr. CIT u/s 263 of the Act is accordingly dismissed as assessment order may be prejudicial but not erroneous. Further, the main dispute arouse due to whether assessee is an agent or not. In the civil appeal, Hon'ble high court held that assessee is an agent as per Section 113(3A) of MRTP Act. PCIT refused to consider this decision as it is not adjudicated under Income Tax Act. We cannot neglect the Hon'ble high court findings, we have to accept the definition/ meanings by higher court and most of the time, meanings and definitions are adopted from other law or from wisdoms of higher courts in Income Tax proceedings. PCIT has taken a strange stand not to follow the Judicial precedents in order to defend his proceedings u/s 263. Accordingly order u/s 263 is set aside."*

7. From the above decision of the Co-ordinate Bench it is clear that the issue raised by the Revenue are considered by the Bench and decided the issue in favour of the assessee. Even then, the Revenue set aside the order passed u/s 143(3) in subsequent assessment year i.e. 2015-16 and again in

impugned assessment year also Ld. Pr. CIT by invoking the provision of section 263 of the Act set aside the assessment order. It clearly shows and demonstrate that the respected officers do not want to respect the judicial precedents. It is apt to bring to the notice respective of the officers the decision of the Hon'ble Supreme Court in the case of UoI and Ors v. Kamlakshi Finance Corporation Ltd. Special Leave Petition (Civil) No. 7717 of 1990 wherein, it is held as under :

> *"6. Sri Reddy is perhaps right in saying that the officers were not actuated by any mala fides in passing the impugned orders. They perhaps genuinely felt that the claim of the assessee was not tenable and that, if it was accepted, the Revenue would suffer. But what Sri Reddy overlooks is that we are not concerned here with the correctness or otherwise of their conclusion or of any factual malafides but with the fact that the officers, in reaching in their conclusion,by-passed two appellate orders in regard to the same issue which were placed before them,one of the Collector (Appeals) and the other of the Tribunal. The High Court has, in our view,rightly criticised this conduct of the Assistant Collectors and the harassment to the assessee caused by the failure of these officers to give effect to the orders of authorities higher to them in the appellate heirarchy. It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities; The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws.*
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> *7. The impression or anxiety of the Assistant Collector that, if he accepted the assessee's contention, the department would lose revenue and would also have no remedy to have the matter rectified is also incorrect. Section 35-E confers adequate powers on the department in this regard. Under Sub-section (1), where the Central Board of Direct Taxes come across any order passed by the Collector of Central Excise with the legality or propriety of which it is not satisfied, it can direct the Collector to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Board in its order.Under Sub-section(2) the Collector of Central*

Excise, when he comes across any order passed by an authority subordinate to him, if not satisfied with this legality or propriety, may direct such authority to apply to the Collector (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Collector of Central Excise in his order and there is a further right of appeal to the department. The position now, therefore, is that,if any order passed by an Assistant Collector or Collector is adverse to the interests of the Revenue, the immediately higher administrative authority has the power to have the matter satisfactorily resolved by taking up the issue to the Appellate Collector or the Appellate Tribunal as the case may be. In the light of these amended provisions, there can be no justification for any Assistant Collector or Collector refusing to follow the order of the Appellate Collector or the Appellate Tribunal, as the case may be, even where he may have some reservations on its correctness. He has to follow the order of the higher appellate authority. This may instantly cause some prejudice to the Revenue but the remedy is also in the hands of the same officer. He has only to bring the matter to the notice of the Board or the Collector so as to enable appropriate proceedings being taken under Section.35-E (1) or (2) to keep the interests of the department alive. If the officer's view is the correct one, it will no doubt be finally upheld and the Revenue will get the duty, though after some delay which such procedure would entail.

8. We have dealt with this aspect at some length, because it has been suggested by the learned Additional Solicitor General that the observations made by the High Court, have been harsh on the officers. It is clear that the observations of the High Court, seemingly vehement, and apparently unpalatable to the Revenue, are only intended to curb a tendency in revenue matters which, if allowed to become widespread, could result in considerable harassment to the assesses-public without any benefit to the Revenue. We would like to say that the department should take these observations in the proper spirit. The observations of the High Court should be kept in mind in future and the utmost regard should be paid by the adjudicating authorities and the appellate authorities to the requirements of judicial discipline and the need for giving effect to the orders of the higher appellate authorities which are binding on them."

8. From the above, it is clear that Hon'ble Supreme Court urged the Department to take these observations in the proper spirit and it supported the stand taken by the High Court on the judicial discipline. It directed that appellant as well adjudicating authorities to follow the judicial discipline. Therefore, in the given case, the tax authorities are not intending to follow the order passed by the Co-ordinate Bench, not just one year but subsequent year also with the intention to keep the issue alive. They failed to differentiate that when they file the appeal before Hon'ble High Court, the

issue is automatically alive. It is not necessary to invoke the same provisions every year. Particularly, when the Co-ordinate Bench decided the issue relying on the Hon'ble Jurisdictional High Court decision, still they are not satisfied and raking up the same issue every year without giving proper respect to judicial discipline.

9. Therefore, we direct the tax authorities to follow the due process of law and take appropriate steps while dealing with the settled issues before them keeping in mind the judicial discipline. Since, the issue involved in this appeal filed by the assessee are already settled in favour of the assessee. Accordingly, we set aside the order passed u/s 263 and in the result, the grounds raised by the assessee are allowed.

10. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on 15/11/2021.

Sd/-	Sd/-
(SAKTIJIT DEY)	(S. RIFAUR RAHMAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 15/11/2021
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.

BY ORDER,

//True Copy//

(Dy./Assistant Registrar)
ITAT, Mumbai