

IN THE INCOME TAX APPELLATE TRIBUNAL
“F” BENCH, MUMBAI
BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 627/Mum/2021
(A.Y: 2016-17)

M/s. Veena Patil hospitality Pvt Ltd 701to 705, Neelkanth Corporate Park, kirol Road, Vidhyavihar West, Mumbai - 400086	Vs.	PCIT-8 Room No. 611, 6 th Floor, Aayakar Bhavan, MK Road, Mumbai - 400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAECV4768R		
Appellant	..	Respondent

Appellant by :	Shri. Yogesh Thar.C.A. AR
Respondent by :	Shri. Achal Sharma.DR

Date of Hearing	30.11.2021
Date of Pronouncement	14.02.2022

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

The assessee has filed the appeal against the order of the Pr.Commissioner of Income Tax (Pr.CIT)-8, Mumbai, passed u/s 263 of the Act. The assessee has raised the following grounds of appeal:

1. Ground No. 1: Ex-parte revision order passed u/s. 263 of the Act is bad in law:

1.1 On the facts and circumstances of the case and in law, the Id. PCIT erred in passing the impugned revision order ex-parte, without considering I dealing with the detailed written

submissions filed by the Appellant in reply to the show cause notice issued u/s. 263 of the Act.

1.2 Ld. P011 failed to appreciate and ought to have considered that in the absence of opportunity of personal hearing being granted to the Appellant admittedly due to spread of pandemic, the elaborate written submissions filed by the Appellant, both on jurisdiction as well as on merits of the issue raised in 263 notice, ought to have been dealt with while passing the impugned revision order and non-consideration of said submissions, resulted in violation of principles of natural justice.

1.3 The Appellant, therefore, prays that the ex-parte revision order passed u/s. 263 of the Act be held to be violative of principles of natural justice and therefore be annulled.

2. *Ground No. 2: Notice u/s. 263 of the Act is void-ab-initio and the consequent revision proceedings and the order passed u/s. 263 is bad in law:*

2.1 On the facts and circumstances of the case and in law, the Id. PCIT erred in issuing the notice invoking provisions of s. 263 of the Act and consequently passing the revision order u/s. 263 on the alleged ground that the original assessment order passed u/s. 143(3) of the Act was erroneous and prejudicial to the interest of the revenue.

2.2 The Appellant, therefore, prays that it be held that the order passed by the Id. AO is not erroneous and prejudicial to the interest of revenue and therefore the jurisdiction exercised u/s. 263 of the Act by the Id. PCIT was void-ab-initio and consequently, the revision proceedings and the revision order deserve to be quashed.

Without prejudice to Ground No. 1 and 2,

3. *Ground No. 3: Directing the assessing officer to frame the assessment order de-novo to examine afresh, the aspect of allowability of carry forward of earlier years' losses considering change in the shareholding pattern during the year*

and having regard to provisions of s. 79 of the Act:

On the facts and circumstances of the case and in law, the Id. PCIT erred in directing the Id. AO to frame the assessment order de-novo for verification afresh, the aspect of allowability of carry forward losses of earlier years considering change in the shareholding pattern during the year, having regard to provisions of s. 79 of the Act.

3.2 The Id. PUT failed to appreciate and ought to have held that since shares of the Appellant carrying more than fifty-one percent of the voting power continued to be held beneficially by the same set of shareholders, both, prior to and after the change in the shareholding pattern during the year, provisions of 79 were not attracted to deny the benefit of carry forward and set off of the earlier years losses.

3.3 The appellant prays that the said direction of the Ld. PCIT be held unwarranted and therefore, the same be deleted.

2. The brief facts of the case are that the assessee company is engaged in the business of hospitality services. The assessee has filed the return of income electronically for the A.Y 2016-17 on 29.11.2016 with a total loss of Rs.3,85,64,199/- and filed the revised return of income on 29.11.2017 with a total loss of Rs.4,05,13,443/-. Subsequently, the case was selected for scrutiny and notice u/s 143(2) and 142(1) of the Act was issued. The A.O. also issued the notice along with the detailed questionnaire on 08.01.2018, 25.04.2018, 25.09.2018 and 17.12.2018. In response to the notices, the assessee has filed the details

online and the A.O has examined the facts and details. Finally, the A.O. considering the submissions and clarifications filed has assessed the total loss of Rs.4,05,13,443/- and passed the order u/s 143(3) of the Act on 28.12.2018.

3. Subsequently, the Pr.CIT has issued notice u/s 263 of the Act treating the order passed by the A.O. is erroneous and prejudicial to the interest of the revenue. In compliance to notice, the assessee has filed its response on line and requested for time. But the Pr.CIT found that the assessee company has brought forward losses for the A.Y 2014-15 and A.Y. 2015-16 amounting to Rs.19,22,59,409/- and during the year under consideration the assessee has issued shares to M/s. Ralin Networks Pvt Ltd and M/s. Blue Cloud Hospitality pvt Ltd, where Ms.Veena Patil and Mr.Sudhir Patil hold shares equally @50% share holding. The observations of the Ld. Pr.CIT are that as per the provisions of Sec. 79 of the Act, where the change in share holding has taken place in a previous year, than no loss incurred in any year prior to previous year shall be carried forward and set off against the income of the previous year. The Pr.CIT

has observed that since the A.O. did not conduct adequate enquiry, the assessment order is held to be erroneous and prejudicial to the interest of the revenue. The Pr.CIT has observed at Para 4 of the order as under:

“4. During the previous year assessee company issued fresh shares to M/s. Ralin Networks Pvt Ltd and M/s. Blue Cloud Hospitality where Veena Patil and Sudhir Patil who are directors in assessee company hold shares equally i.e 50% in each entity.

Shareholding pattern of assessee company as on 31.03.2016 and as on 01.04.2015 was as follows.

Name of shareholder	No.	Percentage	No.	Percentage
Ralin Network Services Pvt Ltd	8,35,000	71.98	-	-
Blue Cloud Hospitality Pvt Ltd	2,50,000	21.55	-	-
Veena Patil	45,000	3.88	60,000	80
Sudhir Patil	9,000	0.78	9,000	12
Neil Sudhir Patil	5,249	0.45	5,249	7
Other Director	750	0.06	750	
Sunila Patil	15000	1.29	-	
Others	1		1	
Total shares	11,60,000		7500	

Ralin Network Pvt Ltd which is an associated concern of assessee company, its shareholder pattern as on 31.03.2015 and 31.03.2016 is as follow

Name of shareholder	Percentage	No of shares	Share capital
Veena Patil	50	3,75,000	37,50,000
Sudhir Patil	50	3,75,000	37,50,000
		7,50,000	75,00,000

Blue cloud Hospitality Services Pvt Ltd is also an associated concern of assessee company, its shareholder pattern as on 31.03.2015 and 31.03.2016 is as follow:

<i>Name of shareholder</i>	<i>Percentage</i>	<i>No of shares</i>	<i>Share capital</i>
<i>Veena Patil</i>	<i>50</i>	<i>3,75,000</i>	<i>37,50,000</i>
<i>Sudhir Patil</i>	<i>50</i>	<i>3,75,000</i>	<i>37,50,000</i>
		<i>7,50,000</i>	<i>75,00,000</i>

As per section 79 of the Income Tax Act, 1961:

[Carry forward and set off of losses in case of certain companies.

79. (1) Notwithstanding anything contained in this Chapter, where a change in shareholding has taken place during the previous year in the case of a company, not being a company in which the public are substantially interested, no loss incurred in any year prior to the previous year shall be carried forward and set off against the income of the previous year, unless on the last day of the previous year, the shares of the company carrying not less than fifty-one per cent of the voting power were beneficially held by persons who beneficially held shares of the company carrying not less than fifty-one per cent of the voting power on the last day of the year or years in which the loss was incurred:

(2) Nothing contained in sub-section (1) shall apply,—

(a) to a case where a change in the said voting power and shareholding takes place in a previous year consequent upon the death of a shareholder or on account of transfer of shares by way of gift to any relative of the shareholder making such gift;

(b) to any change in the shareholding of an Indian company which is a subsidiary of a foreign company as a result of amalgamation or demerger of a foreign company subject to the condition that fifty-one per cent shareholders of amalgamating or demerged foreign company continue to be the shareholders of the amalgamated or the resulting foreign company;

(c) to a company where a change in the shareholding takes place in a previous year pursuant to a resolution plan approved under the Insolvency and Bankruptcy Code, 2016 (31 of 2016), after affording a reasonable opportunity of being heard to the jurisdictional Principal Commissioner or Commissioner;

(d) to a company, and its subsidiary and the subsidiary of such subsidiary, where,—

(i) the Tribunal, on an application moved by the Central Government under section 241 of the Companies Act, 2013 (18 of 2013), has suspended the Board of Directors of such company and has appointed new directors nominated by the Central Government, under section 242 of the said Act; and

(ii) a change in shareholding of such company, and its subsidiary and the subsidiary of such subsidiary, has taken place in a previous year pursuant to a resolution plan approved by the Tribunal under section 242 of the Companies Act, 2013 (18 of 2013) after affording a reasonable opportunity of being heard to the jurisdictional Principal Commissioner or Commissioner.

As seen from the balance sheet submitted by the assessee, there has been change in shareholding pattern during previous year and fresh share have been issued to new persons and more than 51% of shareholding is transferred to M/s. Ralin Network Pvt Ltd and M/s Blue clud Hspitality Pvt ltd. Since, there is a change in shareholding pattern in previous year, the losses carried forward by assessee company for AY 2014-15 and AY 2015-16 could not be carried forward to AY 2016-17. Hence losses of Rs. 19,22,59,409/- carried from AY 2014-15 and AY 2015-16 should have been disallowed by the AO. AO has issued notices u/s 142(1) dated 25.09.2018, 6.12.2018 and 17.12.2018. In none of these notice AO has inquired about change in shareholding pattern or allowability of carry forward losses. Without inquiring in to this issue at all, AO passed the assessment order u/s 143(3) on 30.12.2018. In absence of any inquiry made by the AO or recording his reasons for accepting assessee's submission without any

appropriate evidence, it cannot be said that the documents submitted by the assessee were duly verified by the A.O.

The Pr.CIT is of the opinion that the A.O has not undertaken the examination of the facts and inquiry and relied on the judicial decisions and set aside the assessment order passed on 28.12.2018 and directed the A.O. to undertake de novo assesseeement . Aggrieved by the revision order, the assessee has filed an appeal before the Hon'ble Tribunal.

4. At the time of hearing, the Ld.AR submitted that the Pr.CIT has erred in set aside the order u/s 143(3) and direct the A.O to do afresh. The Ld. AR submitted that the explanation (2) to sec 263 of the Act ought to be considered only when the AO has not applied his mind, the facts are to be verified and no enquiry is conducted. Whereas, on the merits of the case the books of accounts are audited and the assessee has filed the explanations in compliance to notices issued by the A.O. The A.O. on verification of facts and information was satisfied and has passed the order. The Ld.AR supported the submissions with Legal decisions, paper book and prayed for allowing the assessee's appeal. Contra, the Ld.DR submitted that

the A.O has not conducted enquiry and relied on the order of the Pr.CIT.

5. We heard the rival submissions and perused the material available on record. The Ld.AR contentions are that the order passed by the A.O. does not satisfy the twin conditions that (i) erroneous and (ii) prejudicial to the interest of the revenue. The Ld. AR further submitted that the Pr.CIT only considered the fact that the AO has not conducted Inquiry but there are no specific reasons and findings are recorded. We find the A.O. has issued notice u/sec142(1) of the Act dated 6-12-2018. The Ld. AR demonstrated the notice issued by the A.O. at page 24 to 26 of the paper book, in particular at page 26 at Para 11, the A.O has called for the details of share capital transactions as under

11. "Please establish identity, creditworthiness of subscribers to share capital and also establish the genuineness of the transaction."

6. The A.O. has also issued annexure to the notice calling for clarifications, details and documents in respect of points from s.no 1 to 11. The observations

of the Pr.CIT on the provisions of Sec. 79 of the Act cannot be sole basis for holding the order as erroneous and prejudicial to the interest of the revenue. The assessee has uploaded the Bank account details and financial statements of M/s Ralin Network service providers Pvt Ltd and M/s Blue Cloud Hospitality Pvt Ltd on 20.12.2018 referred at page 27 to 36 of the paper book. Further the A.O. has issued notice u/s 142(1) of the Act dated 25.12.2018 referred at page 37 calling for additional information in respect two share holder company sources and investment details. The assessee has submitted the details on 27.12.2018 referred at page 40 to 43 of the paper book. The Ld. AR's contentions are that the assessee company has filed the details and the A.O. after verifying the facts has conducted the inquiry and passed the order. The provisions of Sec. 263 r.w.s explanation (1) can be applied only when there is lack of enquiry or no enquiry. The A.O has applied his mind and taken a possible view considering the facts of the assessee. The Ld.AR supported the submissions and relied on the following judicial decisions:

1. *CIT Vs. Nirav Modi [2016], 390 ITR 292 (Bom HC)*
2. *Narayan Tatu Rane Vs. ITO, 2016 (70 taxmann.com 227) (T Mum)*
3. *CLP Power India (P.) ltd Vs. DCIT, 2018, 170 ITD 744, (T AHD)*
4. *Sir Ratan Tata Trust Vs. DCIT(E), 2020, 188 ITD 151, (TMUM)*
5. *Sir Dorbji Tata Trus Vs. DCIT(E), 2020, 188 ITD 38, (T Mum)*
6. *JRD Tata Trust Vs. DCIT(E), 2020, 122 taxmann.com 275, (TMum)*

7. *CIT Vs. Amco Power Systems Ltd, 2015, 379 ITR 375 (Kar)*

8. *Wadhwa & Associates Realtors (P) Ltd Vs. ACIT, 2018, 92 taxmann.com 37 (TMum)*

9. *Lodha Land Development ltd. vs. ACIT (ITA No. 2819/M/2012,*

7. We find voluminous information was submitted by the assessee, in the assessee proceedings and at page I of the Assessee order, the A.O. has referred to notice u/sec142(1) of the Act issued along

with questionnaires on 8.01.2018, 24.04.2018, 25.09.2018 and 17.12.2018. We are of the opinion that the A.O. though has not mentioned the facts of share holders and share holding pattern in the assessment order but the fact of issuing the notice u/s 142(1) of the Act and the reply filed by the assessee diligently on queries will prove that the A.O. has applied his mind on the information.

8. We find that the A.O has considered one of the possible views based on the information and it is not necessary that the A.O should put all the discussions/observations in the assessment order, as per explanations (2) to sec 263 of the Act the authority has to invoke provisions only when there is no verification and enquiry conducted by the A.O. Whereas the A.O has applied his mind and verified the facts. The Ld. AR referred to the submissions, financial statements of share holders and explanations filed before the A.O. We find the Hon'ble High Court Bombay in CIT Vs. Gabriel India Ltd. 203 ITR 108.(Bom) has observed as under:

Section 263 of the Income-tax Act, 1961 - Revision - Of orders prejudicial to interests of revenue - Assessment year 1973-74 -

Assessee claimed a sum of Rs. 99,326 described 'as plant relay out expenses' as revenue expenditure and ITO, after making enquiries in regard to nature of said expenditure and considering explanation furnished by assessee in that regard, allowed assessee's claim - Subsequently, Commissioner, exercising powers under section 263, cancelled order of ITO observing that order of ITO did not contain discussion in regard to allow ability of claim for deduction which indicated non-application of mind and that claim of assessee required examination as to whether expenditure in question was a revenue or capital expenditure and directed ITO to make a fresh assessment on lines indicated by him - Whether under section 263 substitution of judgment of Commissioner for that of ITO is permissible - Held, no - Whether ITO's conclusion can be termed as erroneous simply because Commissioner does not agree with his conclusion - Held, no - Whether ITO's order could be held to be 'erroneous' simply because in his order he did not make an elaborate discussion - Held, no - Whether provisions of section 263 were applicable to instant case and Commissioner was justified in setting aside assessment order - Held, no

We Considering the overall facts, circumstances, ratio of the judicial decision and the details submitted in the course of hearing are of the view that the if any query is raised in the assesment proceedings and it was responded by the assessee, mere fact that it is not dealt within by the A.O. in the order cannot implied that there is no application of mind. Hence, the Pr.CIT action cannot be acceptable as the order passed by the A.O. does not satisfy the twin conditions of erroneous and prejudicial to the interest of the revenue. Accordingly we do not find any merits

in the order and we set aside the order u/s 263 passed by the Pr.CIT and allow the grounds of appeal of in favour of the assessee.

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

Order pronounced in the open court on 14.02.2022.

Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Sd/-

(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 14.02.2022

KRK, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

1.

(Asst. Registrar)
ITAT, Mumbai