

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

BEFORE SHRI AMARJIT SINGH (JUDICIAL MEMBER)  
AND  
S.RIFAUR RAHMAN (ACCOUNTANT MEMBER)

I.T.A No.679 /Mum/2021  
(Assessment year 2015-16)

Panch Tatva Reality 5 <sup>th</sup> Floor, B-Wing, Shrikant Chambers, Sion Trombay Road Near R.K. Studio, Chembur Mumbai-400 071 <b>PAN : AAAAP8500D</b>	vs	PCIT-27, Mumbai
<b>APPELLANT</b>		<b>RESPONDENT</b>

Assessee represented by	Shri Tanmay Phadke
Department represented by	Shri. Ashok Kumar Kardam, CIT DR

Date of hearing	24/03/2022
Date of pronouncement	18/04/2022

O R D E R

Per: S.Rifaur Rahman (JM):

This appeal filed by the assessee is directed against the order passed by the Principal Commissioner of Income-tax, Mumbai-27 (hereinafter referred to as PCIT) dated 26/03/2017 for the assessment year 2015-16.

2. Brief facts of the case are that assessee has filed its return of income on 29/09/2015 declaring total loss at Rs.2,92,42,986/-. Regular assessment under

section 143(3) of the Income-tax Act, 1961 (in short, 'the Act') was completed on 15/12/2017 thereby determining the total loss of the assessee at Rs2,53,61,537/-. The Ld.PCIT, while perusing the assessment order observed that assessing Officer has failed to observe the interest paid by the assessee of Rs.3.54 crores on the capital to one of its members, M/s Revathy Equipment Ltd. He observed that the assessee is an AOP and as per the provisions of section 40(ba) of the Act, any payment of any salary, interest, remuneration, etc. to its members is not allowable expenditure and the same should have been reduced from the closing work-in-progress of the assessee. He observed that the amount paid by the assessee to one of its members also does not come under the purview of language of Explanation to section 40(ba) of the Act, which might have enabled it to claim this amount as a business expenditure. Therefore, he observed that the sum of Rs.3.54 crores cannot be treated as allowable deduction.

3. The Ld.PCIT observed that the Assessing Officer has not verified the details which were gathered by him during the assessment proceedings. He considered the order passed under section 143(3) of the Act on 15/12/2017 as erroneous insofar as it is prejudicial to the interest of the Revenue within the meaning of section 263 of the Act. Accordingly, he issued a show caused notice under section 263 to the assessee and served on the assessee. In response, assessee filed its explanation dated 19/02/202, which is reproduced below:-

"1. Vide show cause notice issued on February 10, 2021, your good self has sought justification from the Assessee (Panch Tatva Realty) as to why a disallowance of Rs. 3.54 cr, pertaining to interest on capital paid to members, should not be made in accordance with section 40(ba) of the Act.

2. At the outset, it is pertinent to establish the facts of the case. During the year under consideration, the Assessee had paid an interest on capital amounting to Rs. 3.54 cr to Revathi Equipment Ltd., a member of the A OP, on account of interest on its capital. Your good self intends to disallow the same in the light of provisions of section 40(ba) of the Act. At this juncture, it is pertinent to reproduce the provisions of the aforesaid section:

"40. Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head 'Profits and gains of business and profession :-

.....

.....

(ba) in the case of an association of persons or body of individuals [other than a company or a co-operative society or a society registered under the Societies Registration Act, 1860(21 of 1860), or under any law corresponding to that Act in force in any part of India], any payment of interest, salary, bonus, commission or remuneration, by whatever name called, made by such association or body to a member of such association or body."

3. A plain reading of the above provision makes it abundantly clear that interest payments to a member is disallowance u/s. 40(ba) only if the first been claimed by an Assessee under any provisions from section 30 to 38 of the Act. Meaning, if a particular expense has not been claimed as a deduction then the same cannot be disallowed u/s. 40 as that would lead to an absurd reading of the law and lead to double disallowance, which is against the spirit of the law. The disallowance can be made only in a future year when the expenditure has been debited to the Profit and Loss a/c. In such a situation, the same would be required to be added back while computing the total income under the Act.

4. In the present case, the Assessee is involved in the real-estate business and hence follows the percentage completion method of accounting. During the year under reference, the interest payment of Rs. 3.54 cr, to Revathi Equipment Ltd. has been capitalised to the 'Capital Work in Progress' and has not been transferred to the 'Profit and Loss A/c'. The implication of the same is that while computing income as per the provisions of the Act, no deduction of the impugned Rs. 3.54 cr has been claimed (either u/s. 36(1)(iii) or u/s.37(1)). As no deduction has been claimed by the Assessee, the very question of disallowance on account of application of section 40(ba) becomes moot. No provision of the Act can be applied in a manner so as to result in a double disallowance in the hands of the Assessee.

5. It is further clarified that no amount of CWIP has been transferred to the Profit and Loss A/c. of the assessee thereby implying that there has been no reduction in the total income of the assessee on account of the impugned interest payments,

6. In respect of the above, it is submitted that the financial statements submitted to the Assessing Officer in the course of assessment proceedings make it evidently clear that the entire interest capital has been transferred to CWIP and the same appears in balance sheet, implying that nothing has been transferred to the Profit and Loss A/c. Additionally, we enclose herewith the following evidence as **Annexure-1** for your good self's ready reference:

- Interest on capital ledger
- Construction Work in Progress ledger

7. In light of the above, it becomes abundantly clear that the assessment order passed by the Assessing Officer u/s. 143(3) of the Act was neither erroneous nor prejudicial to the interest of the revenue. As per section 263 of the Act requires a cumulative satisfaction of both the conditions, i.e. the assessment order shall be erroneous as well as prejudicial to the interests of revenue, the present case does not fall within its purview.

8. Hence, it is prayed to your good self that proceedings u/s. 263 of the Act be dropped and no disallowance is made on account of payment of interest on capital to Revathi Equipment Ltd. It is hoped that your good self shall accede to our request."

4. After considering the submissions of the assessee, Ld.PCIT rejected the same and observed that the Hon'ble Supreme Court in the case of Malabar Industrial Co Ltd vs CIT (2000) 243 ITR 83 (SC) held that the pre-requisite to the exercise of jurisdiction of the Commissioner under section 263 of the Act is that

the order of the assessing officer is erroneous insofar as it is prejudicial to the interest of the Revenue. He observed that the Commissioner has to be satisfied on twin conditions, viz. the order sought to be revised is erroneous and also it is prejudicial to the interest of the Revenue. If one of them is absent, recourse cannot be had to section 263(1). He observed that there can be no doubt that provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer. It is only when an order is erroneous that the section will be attracted and incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. Further, by relying on the decision of Bismillah Trading Co. vs Intelligence Officer (2001) 248 ITR 292 (Ker) and other decisions, he held that the order passed by the Assessing Officer by not verifying the payments to the member of the AOP and no doubt, expenditure is not claimed by the assessee during the period relevant to this order; however, assessee has charged to the work in progress. Aggrieved, assessee is in appeal before us raising following grounds of appeal:-

*"1. On the facts and in the circumstances of the case and as per the law, the learned PCIT-27 Mumbai erred in directing revision of the assessment order dated 15.12.2017 u/s 263 of the Act on the erroneous conclusion that no enquiry in relation to the interest of Rs. 3,54,00,000/- paid to M/s. Revathy Equipment Limited was made during the course of the assessment proceedings. Thus, the order dated 26.03.2021 passed by the learned PCIT-27: Mumbai is without jurisdiction and bad in law and may be quashed*

*2. On the facts and in the circumstances of the case and as per the law, the learned PCIT-27 Mumbai erred in directing revision of the assessment order dated 15.12.2017 u/s 263 of the Act without specifically pointing out as to how the explanation 2 to Section 263 of the Act is applicable to the facts under consideration. Thus, the order dated 26.03.2021 passed by the learned PCIT-27, Mumbai is without jurisdiction and bad in law and may be quashed.*

3. *On the facts and in the circumstances of the case and as per the law, the learned PCIT-27 Mumbai failed to appreciate that the assessment order dated 15.12.2017 passed u/s 143(3) of the Act is neither erroneous nor prejudicial to the interest of the revenue. Thus, the order dated 26.03.2021 passed by the learned PCIT-27; Mumbai is without jurisdiction and bad in law and may be quashed.*

4. *On the facts and in the circumstances of the case and as per the law, the learned PCIT-27, Mumbai failed to appreciate that no interest of Rs. 3,54,00,000/- paid to M/s. Revathy Equipment Limited was claimed as a deduction under any of the provisions of Sec. 30 to 37 of the Act warranting any disallowance u/s 40(ba) of the Act. Revision of the assessment order dated 15.12.2017 on the conclusion of the applicability of Sec. 40(ba) of the Act is completely erroneous and lacks jurisdiction. Thus, the order dated 26.03.2021 passed by the learned PCIT-27, Mumbai is without jurisdiction and bad in law and may be quashed.”*

5. Basically assessee is aggrieved by the fact that Ld.PCIT has cancelled the assessment order merely because assessee has paid interest on capital to one of its members and charged the same to closing work in progress and assessee never claimed any expenditure relating to this project during this assessment year. The Ld.AR also made the same submission and prayed that no doubt, the assessee has paid the interest, but assessee has not claimed any expenditure during this year. Therefore, when assessee has not claimed any expenditure, the Ld.PCIT cannot invoke the section 40(ba) of the Income-tax Act. Further, he submitted that the Assessing Officer has examined the issue under consideration during assessment proceedings itself and he has allowed the same by taking one of the possible views and further, he thrust the point that assessee has not claimed any expenditure during this year relating to this project. Accordingly, PCIT cannot direct for separate disallowance and therefore no prejudice caused to the interest of the Revenue. In this regard, he relied upon the decision of ITAT, Chandigarh Bench in the case of Punjab Wool Syndicate vs ITO (2021) 27 taxmann.com 110

(Chd). He relied on the ratio of the above decision; therefore, for the sake of clarity, it is reproduced below:-

*“12. In the totality of the facts and circumstances of the case we find that the Assessing Officer had not raised any query in respect of the provisions of section 145A of the Act. After the amendment to the said section 145A of the Act certain adjustments on account of excise duty to opening stock, purchases, sales and closing stock have to be made. The claim of the assessee is that in view of Annexure-II to the audit report, the details in the account of Modvat were filed and the effect is nil. The powers under section 263 of the Act are to be invoked on satisfaction of twin conditions of the order being both erroneous or prejudicial to the interests of the Revenue. Where the tax effect because of an order passed by the Assessing Officer is nil, such order even if erroneous being not prejudicial to the interests of the Revenue, is not open to revision under section 263 of the Act. We vacate the directions of the Commissioner of Income-tax under section 263 on this issue.”*

6. On the other hand, Ld.DR relied upon the order passed by the PCIT.

7. Considered the rival submissions and material placed on record. We observe that Ld.PCIT held the order passed under section 143(3) as erroneous insofar as it is prejudicial to the interest of the Revenue by observing that assessee has paid interest on capital to one of its members and it is fact on record that assessee has not made any claim of expenditure during this assessment year. However, it charged the abovesaid payment to the closing work in progress of the project. During the hearing, Ld.AR vehemently argued that the assessee has not made any claim during the assessment year. However, the assessee may claim the expenditure in the subsequent assessment years, therefore, made a submission that the PCIT cannot give direction to the Assessing Officer for the disallowance of future expenditure during this assessment year since there is no impact to the income or prejudice to the interest of the Revenue.

8. We have considered the submissions carefully and we observe that no doubt, Assessing Officer has called for all the relevant information during the assessment proceedings and assessee was handling two projects during this assessment year and he has verified the expenditure relating to one project and he did not verify the other project expenditure which includes the interest payment to one of its members and assessee has capitalized the same in capital work in progress. It is fact on record that assessee has not claimed any expenditure during this year; however, even Assessing Officer is aware that assessee has charged the interest payment to capital work in progress. Prima facie, it is evident on record that assessee has made the payment to one of the members of the AOP and it is fact on record that it is not allowable expenditure, still, assessee has capitalized the same to capital work in progress. It clearly indicates an incorrect application of law and assessee may claim the work in progress as an expenditure in the future. The duty of the Assessing Officer is not just to see whether assessee has claimed expenditure or not for the relevant assessment year. It is the part of duty of the Assessing Officer to see that assessee makes a proper claim within the four corners of law. It is part of the duty of the Assessing Officer to assess the income as well as financial records submitted before him. It is apparent on record that assessee applies the provision incorrectly and when it is not supposed to claim deduction under section 40(ba), not just for the current assessment year but to any capital expenditure which may have an impact in the future. Therefore, in our considered view, the Ld.PCIT invoked the provisions of section 263 only in order to rectify the above said mistake. Therefore, we do not see any reason to interfere with the findings of the Ld. PCIT in this case. As such, there is no

prejudice cause to the assessee. Accordingly, the grounds raised by the assessee are dismissed.

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

Order pronounced in the open court on 18<sup>th</sup> April, 2022.

Sd/-

(AMARJIT SINGH )  
JUDICIAL MEMBER

Mumbai, Dt : 18<sup>th</sup> April, 2022

Pavanan

sd/-

(S.RIFAUR RAHMAN)  
ACCOUNTANT MEMBER

**प्रतिलिपि अग्रेषित Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त (अ) / The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR,  
ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

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