

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

BEFORE SHRI VIKAS AWASTHY, JM AND SHRI PRASHANT MAHARISHI, AM

ITA No. 601/Mum/2021
(Assessment Year 2016-17)

Malhaar Restaurant 2&4 Pearl Mansion, Station Avenue Road, Chembur, Mumbai-400 071	Vs.	Pr. Commissioner of Income Tax-27, Tower No.6, Vashi railway station commercial complex, Vashi, Navi Mumbai- 400703
(Appellant)		(Respondent)
PAN No. AAAFM5273F		

Assessee by	:	Shri A.L. Sharma, CA
Department by	:	Shri Sanjay Deshmukh, CIT DR

Date of hearing:	23.02.2022
Date of pronouncement :	13.5.2022

ORDER

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by the assessee/ Appellant Malhaar Restaurant against the order passed by Pr. Commissioner of Income-Tax, Mumbai-27, [the Id PCIT] under section 263 of the Income-tax Act, 1961 (hereinafter referred to as 'Act') dated 15th March, 2021 for Assessment Year 2016-17, wherein it has been held that the order passed under section 143(3) of the Act on 21.12.2018 by the Income-tax Officer, ward 27(2)(2), Mumbai[the Ld AO] is erroneous so far as it is prejudicial to the interest of the Revenue whereby Assessing Officer is directed to pass a fresh assessment order.
02. The assessee is aggrieved with that and has preferred the appeal raising solitary ground of appeal as under:-

"1. a) On the facts and circumstances of the case and in law the Id PR CIT erred in invoking the provisions of section 263 and arriving at the conclusion that order u/s 143(3) is erroneous in so far as it is prejudicial to the interest to revenue.

b) The Id PR CIT erred in invoking the provisions of section 263 on the grounds that the partners remuneration claimed by the appellant u/s 40b is not allowable on undisclosed income declared during survey proceedings not appreciating the fact that the appellant had disclosed additional business income during survey proceedings and that partners remuneration is allowable on business income.

c) The appellant therefore submits that the order u/s 263 needs to be cancelled.

2. The appellant craves leave to add, alter or amend any grounds of appeal at the time of hearing."

03. The brief fact of the case shows that assessee is a partnership firm engaged in the hotel business and catering.
04. It filed its return of income on 29.12.2016 at ₹2,11,250/- which is subsequently revised on 28th March, 2017 at ₹12,11,250/-.
05. A survey under section 133A of the Act was conducted on 27.09.2016 at premises of assessee. Statement of one of the partner Mr Vikram N Naik was recorded under section 131 of the Act. He made disclosure on account of unaccounted sales and consequent gross profit thereon for some years. In reply in response to question No. 10, 11 and 13, he disclosed the additional income of ₹25 lacs for Financial Year 2015-16[AY 2016-17]. The above disclosure was made on account of the gross profit at certain

percentage on unaccounted sales of the assessee. The above gross profit sum is included as the additional income in the profit and loss account. consequently, assessee disclosed net profit at ₹ 11,49,664 /- after debiting Remuneration to working partners of ₹ 2,041,875/-. In the computation of total income, assessee disclosed total business income of ₹ 1,211,250/- after claiming deduction u/s 40 (b) of the act of allowable remuneration amounting to ₹ 2,041,875/-. The above sum was paid to the partners in accordance with the partnership deed.

06. During the course of assessment proceedings the learned assessing officer issued notice u/s 142 (1) of the act wherein he asked the brief note on the business of the assessee, financials i.e. profit and loss account, balance sheets and audit report for assessment year 2016 – 17 along with copy of the partnership deed. In response to that assessee submitted the details of the business income stating assessee has disclosed total sales of ₹ 8,095,065/- and net profit of ₹ 1,149,664. During the year the assessee has disclosed a sum of ₹ 25 lakhs as additional business income (Under IDS scheme) which has been credited to the profit and loss account. Based on these examination , the learned assessing officer passed assessment order u/s 143 (3) of the Act on 21/12/2018 at ₹ 1,249,640/- making an addition/disallowance of several expenditure amounting to ₹ 38,364/-.
07. Thus the assessing officer allowed remuneration u/s 40 (b) of the act of ₹ 2,041,875/- in the original assessment proceedings.
08. Subsequently, the records were examined by the learned Principal Commissioner of income-tax and found that in the original return of income filed on 29.12.2016 of ₹2,11,247/-, assessee claimed partners remuneration of ₹5,41,875/-. Subsequently, the return was revised on 28th March, 2017 at ₹12,11,250/- and the claim of the

remuneration to the partners was ₹20,41,875/- and the assessment is passed under section 143(3) of the Act on 21.12.2018 at the total income of ₹12,49,610/-. As the survey was conducted on 27.09.2016, assessee disclosed ₹25 lacs for the impugned assessment year, which was credited to the profit and Loss account and then remuneration was claimed from the same. As the income of ₹25 lacs was kept outside the books detected during the course of survey and therefore, tax is required to be worked out on the total declaration amount without allowing any deduction from it. Therefore, a notice under section 263 of the Act was issued on 04.02.2021.

09. Assessee submitted its reply on 30th February, 2021 stating that the assessee has disclosed the above sum as a business income, and the claim of the deduction of partner's remuneration is allowable under section 40(b) of the Act which was allowed by the learned Assessing Officer after examining the return of income and partnership deed. It was further stated that while explaining details of business, assessee has specifically submitted in response 'note on business' that assessee has disclosed total sales of ₹80,95,065/- and earned a net profit of ₹11,49,664/-. Further, during the year sum of ₹25 lacs was also disclosed as a business income which is credited to the profit and loss account. Therefore, the assessee's submission was that assessee made a complete disclosure with respect to the income earned on account of gross profit credited in the profit and loss account as business income, claim of remuneration as allowable under section 40(b) of the Act, such remuneration is paid in accordance with the partnership deed. Based on this the learned assessing officer accepted the claim of the assessee. Therefore there is no error in the order of the learned assessing officer. It was stated that learned Assessing Officer has taken one of the plausible view, hence, there is no error in the order of the learned Assessing Officer and hence, the action under section 263 is not called for. The

assessee submitted several judicial precedence before the learned PCIT.

010. The learned PCIT held that it is clear that the Assessing Officer has not considered the fact that income is declared by the assessee during the course of survey under section 133A of the Act after filing of the return of income for the year under consideration. Therefore, the failure to verify the facts and reasons for revising the return filed by the assessee has rendered the assessment order erroneous and prejudicial to the interest of the Revenue. Therefore, he passed an order under section 263 of the Act on 15th March 2021 setting aside the assessment order passed and directing the Assessing Officer to pass a fresh assessment order considering the above issues.
011. The assessee is aggrieved with the above order and has preferred the appeal before us.
012. The learned Authorised Representative submitted the paper book containing 35 pages and another paper book containing seven pages. I he further relied on the decision of the coordinate bench in case of torrent pharmaceuticals Ltd versus DCIT 164//2018 for assessment year 2014 - 15 dated 8/8/2018 submitting that explanation 2 to Section 263 cannot be invoked casually.
013. The learned departmental representative vehemently supported the order of the learned PCIT.
014. We have carefully considered the rival contention and perused the order of the learned principal Commissioner of income tax as well as the order of the learned assessing officer. The facts shows that assessee filed return of income declaring a total income of ₹ 211,247/- . Subsequently survey proceedings were carried out on 27/9/2016, wherein the assessee disclosed an additional business income of ₹ 25 lakhs which was credited to the profit and loss

account as business income. From that assessee has claimed remuneration to the partners of ₹ 2,041,875/-. Consequently assessee filed revised return where the total income was disclosed at ₹ 1,211,250. The additional income was credited as business income in the profit and loss account and the remuneration to the partner was also debited to the profit and loss account. As per letter dated 2017/9/2018, the learned assessing officer asked the details of the business, copy of the partnership deed and complete details of the business income. In response to that letter the assessee has submitted that it has disclosed total sales of ₹ 8,095,065/- and net profit of ₹ 1,149,664/-. During the year the assessee has disclosed a sum of ₹ 25 lakhs as additional business income which has been credited to the profit and loss account. Assessee also submitted the copy of the partnership deed as per eProceedings response acknowledgement dated 25/9/2018. During survey, statement of Shri Vikram Nayak partner of the assessee was recorded on 27/9/2016 u/s 131 of the act. In response to question number 8 per day sales of the assessee was computed, in response to question number 9, gross profit ratio of assessee for three immediately preceding assessment years was computed and in response to question number 11 it was specifically asked that why the sale for financial year 2015 - 16 relevant to assessment year 2016 - 17 should not be considered as suppressed in view of the findings for financial year 2016 - 17, assessee disclosed a sum of ₹ 25 lakhs as additional income. Therefore on conjoint reading of statement, it is apparent that sum was disclosed as business income. If, the sum is disclosed as business income it would be chargeable to tax Under the head business income and consequently all the deductions which are otherwise allowable to the assessee and are fulfilling the conditions of those sections, should be allowed. This is verified by the learned AO and allowed the claim of remuneration u/s 40 (b) of the act. The learned PCIT in paragraph number 5 has categorically held that as

survey u/s 133A was conducted after filing of return of income and assessee has declared the income which was out of the books of accounts and therefore the income declared by the assessee only due to survey action and hence the action of the assessee to claim deduction of remuneration is not allowable. There is no allegation that any of the conditions mentioned u/s 40 (b) of the act is violated. As assessee has offered additional income detected during the survey as business income, the assessee is also entitled to any deduction allowable Under the head income from business and profession. Therefore, we do not find any error in the order of the learned assessing officer in allowing the enhanced remuneration to the partners of ₹ 2,041,875. The learned PCIT invoked the explanation 2 to Section 263 of the act stating that the AO did not make due enquiries. However the learned PCIT did not say which enquiry the learned assessing officer should have made and has failed to make. Merely setting aside the order back to the file of the learned assessing officer when AO has taken a view that a particular deduction is available to the assessee as claimed by the assessee, the learned PCIT could not have gone Under the shelter of explanation 2 for holding that the assessment order passed by the AO is erroneous so far as prejudicial to the interest of revenue. In the result, the order passed by the learned PCIT u/s 263 of the income tax act is quashed and ground number 1 of appeal is allowed.

015. Accordingly appeal of the assessee is allowed.

Order pronounced in the open court on 13.05.2022.

Sd/-
(VIKAS AWASTHY)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 13.05.2022



Sudip Sarkar, Sr.PS

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//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai