

.IN THE INCOME TAX APPELLATE TRIBUNAL
“E” BENCH, MUMBAI
BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 872/Mum/2022
(A.Y: 2017-18)

Matrabhav Trust 5 th Floor, Sunteck Centre, 37 40 Subhash Road, Vile Parle (East) Mumbai-400057.	Vs.	Pr. CIT – 17 Room No. 120, 1 st Floor, Kautilya Bhavan G Block, Bandra Kurla Complex, Bandra(E), Mumbai-400051.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AADTM5199F		
Appellant	..	Respondent

Appellant by :	Shri.Rakesh Joshi.AR
Respondent by :	Shri .A.B. Koli.DR

Date of Hearing	21.07.2022
Date of Pronouncement	27.07.2022

आदेश / O R D E R

PER PAVAN KUMAR GADALE, JM:

The assessee has filed the appeal against the order passed by the Pr. Commissioner of Income Tax 17, Mumbai u/s 263 of the Act. The assessee has raised the following grounds of appeal:

1. *On the fact and circumstances of the case as well as in Law, the Learned Principal Commissioner of Income Tax (PCIT) has erred in initiating proceedings U/s 263 of the Income Tax Act, 1961 (the Act) vide show cause notice*

dated 11.02.2022 and passing an order U/s 263 of the Act without considering facts & Circumstances of the case.

2. On the fact and circumstances of the case as well as in Law, the Learned Principal CIT has erred in passing Revision Order u/s.263 of the Income Tax Act, 1961 for the assessment order u/s. 143(3) of the Act passed by the Learned Assessing Officer after making adequate enquiries and application of mind without considering the facts and circumstances of the case.

3. On the fact and circumstances of the case as well as in Law, the Learned Principal CIT has erred in considering the order passed u/s. 143(3) of the Income Tax Act, 1961 by the Learned Assessing officer is erroneous and prejudicial to the interest of the revenue without appreciating the facts and circumstances of the case.

4. On the fact and circumstances of the case as well as in Law, the Learned Principal CIT has erred in setting aside Assessment order passed by the Learned Assessing Officer and directing him to carry out due verification in respect of under which status the assessee is required to be assessed and accordingly decide about the taxability of dividend income as per provisions of section 115BBDA and pass the assessment order de-novo after due verifications, without considering the facts and circumstances of the case.

5. The appellant craves leave to add, amend, alter or delete the said ground of appeal.

2. The brief facts of the case are that the assessee is a private trust and filed the return of income electronically for the A.Y 2017-18 on 31.07.2017

disclosing a total income of Rs.43,97,330/-. Subsequently, the case was selected for limited scrutiny under CASS for the purpose of verification of (i) Capital gain/Loss u/sec111A of the Act (ii) Dividend income and(iii) expense incurred for earning exempt income. Subsequently, notice u/s 143(2) and 142(1) of the Act along with the questionnaire are issued. In compliance to the notice, the Ld. AR of the assessee appeared from time to time and filed the documents on e-filing portal. The Assessing Officer (A.O) has examined the financial statements supporting the income disclosed. The assessee during the year has earned income from capital gains and income from other sources and was offered to tax under the respective heads of income. Finally the A.O has accepted the income as per the income tax return filed and passed the order u/s 143(3) of the Act on 28.06.2019.

3. Subsequently, the Pr.CIT on verification of the facts and assessment record observed that the Assessing Officer has not applied his mind and not conducted enquiry and not verified certain details, where the assessee trust was created for the benefit of certain

individuals. Whereas the assessee has claimed the dividend income of Rs. 5,14,60,785/- as exempt and the provisions of section 115BBDA of the Act are not applicable to the Trust. Whereas, the Pr. CIT is of the opinion that the A.O. has overlooked the factual aspects and not applied the mind. Hence the order passed by the A.O. is erroneous and prejudicial to the interest of the revenue and issued notice U/sec 263 of the Act read as under:

3. On perusal of the assessment records for the assessment year under consideration, it is observed that the one of the reasons for selection of your case for assessment was "excess claim of dividend income". In your case, it is seen that your trust was created for the benefit of certain individuals and you have claimed dividend of Rs. 5,14,60,785/- as exempt income stating that the section 115BBDA, which provided that dividend exceeding Rs. 10 lakhs was taxable at the rate of 10%, was not applicable to you being a trust. The Assessing Officer (hereinafter referred to as 'AO') allowed your claim. While examining the records, it was observed that the AO has failed to make due verifications warranted in the facts & circumstances of the case, and passed the order which is prima facie prejudicial to the revenue. The relevant facts are discussed as under:

1. It is seen that you have filed your Return of Income as AOP/BOI. The Assessing Office in his assessment order has mentioned your status as "Trust". As per Section 2(31) of the I.T. Act, which gives definition of the "Person", the

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Trust is not included in various categories of Persons. A Trust can be assessed in different status depending on the nature of the Trust, its constitution and beneficiaries. It is clear from the status mentioned in the assessment order by the Assessing Officer that he has not applied his mind on the status in which you are required to be assessed.)

1. A proper application of mind in determining your status was necessary because the 2017-18. The dividend exceeding R\$ 10 lakhs was made taxable at the rate of 10% in the case of individual but in the case of AOP, the same was made taxable from A.Y. 2018-19 Trust can be assessed as an individual too depending on the facts of the case. It has been held by various courts that "provide discretionary, trust with individuals. It has been held by various courts that provide discretionary trust with individuals as beneficiaries are required to be assessed as individual.

5. It therefore, appears to me that that AO has not applied his mind on this issue and has failed to make due verification which were expected to be made under the facts and circumstances of the case. These expected "due verifications were likely to result into enhancement of assessed income. Based on above facts, in the opinion of undersigned, the assessment order dated 28.06.2019 passed by the AO u/s 143(3) for A.Y.2017-18 is erroneous and prejudicial to the interest of revenue within the meaning of Explanation 2 to sub-section 1 of section 263 of the Act. You are, therefore, requested to show cause as to why the assessment u/s.143(3) of the Income-tax Act, 1961 for A.Y.2017-18 should not be revised or set aside u/s.263 of the Income-tax Act, 1961. You are hereby given an opportunity to make written submissions online on or before 22.02.2022. The online submissions will be considered as sufficient compliance to this notice.

However, if you want to avail opportunity of being personally heard, you may either personally or through your Authorized Representative attend the office of the undersigned on 22.02.2022 at 11:30AM at R.No.241 2nd floor, Kautilya Bhavan, Bandra Kurla Complex, Mumbai-400051.

4. In compliance to notice, the Ld. AR of the assessee appeared from time to time and has filed the detailed submissions referred at page 3 Para 4.1 to 4.5 of the revision order as under:

4.1 The assessee(the Private Discretionary Trust) falls under the definition of person as mentioned in sub clause vi to sub section 31 of section 2 of the Income Tax Act, 1961 i.e. Artificial Judicial Person. Section 115BBDA as it was inserted in the Income Tax Act w.e.f. 01.04.2007 reveals that the provision are applicable to individual, HUF or a firm only not on trust. This can be further verified from the amendment made in section 115BBDA later vide Finance Act, 2017 w.e.f. 01.04.2018 that the legislature intention was not to include the Trust in Section 115BBDA of the Income Tax Act, 1961. The amendment made in section 15BBDA of the Act, vide Finance Act 2017 w.e.f. 01.04.2018, the term "Specified Assessee" was inserted instead of individual, HUF or a firm resident in india. In the definition of the specified person which was given as explanation for the purpose of this section, excludes Trust. Thus this section is not applicable to the trust.

4.2 During the assessment proceedings, the Assessing Officer asked the assessee to furnish the details with documentary evidence of exempt income (dividend income) claimed for the year under consideration in response to the

said query, assessee submitted detailed note on dividend income claimed as exempt income. In the note, it is submitted that the provisions of 115BBDA are not applicable to the assessee as it is a trust and does not fall under the definition of an assessee as per Sec 115BBDA. Since the provisions of this section are not attracted to the assessee, it has claimed the entire dividend of Rs.5,14,60,785/ - as exempt."

In view of above, it is clear that the Learned Assessing Office verified from the point of view that dividend is taxable or exempt. During the course of assessment proceedings, it had come under the purview of the Learned Assessing Officer that the dividend is taxable only in the hands of an individual, Hindu undivided family or a firm, resident in India, includes any income in aggregate exceeding ten lakh rupees. the Learned Assessing Officer has not treated the same as taxable since it is a trust. The above discussion clearly prove the fact that the Ld. Assessing Officer had thoroughly verified the taxability of the dividend income in the hands of assessee trust. The process of examining taxability includes the status of the assessee trust. The fact available on record clearly indicate that the Ld. AO was of the view that the trust is to be assessed under the status of the AOP. The said view was supported by the followings reasons:

Return of income of the trust was filed in the status of AOP.

In assessment order the status was mentioned by the Learned Assessing Officer as Private Discretionary Trust The Intimation processed by the CPC, contains the status of trust as AOP The PAN of the assessee is AASTM5199F. he 4th letter of the PAN is "T" ie it represents it as a Trust. In the case of individual the 4th letter of the PAN is "P".

4.3 The Learned Assessing Officer, view is also supported by the Rajasthan High Court, in the case of *CIT v. Madan Parnami Family Trust* [2004] 269 ITR 16/140 Taxman 286. The Hon'ble Rajasthan High Court denied exemption to the respondent-trust under section 53 of the Income-tax Act in respect of the capital gain on the sale of residential house on the ground that the exemption is not admissible to AOPs. The relevant findings of the case are reproduced herewith:

"The plain language of provisions of section 53 left no doubt that the benefit is available to the assessee being an 'Individual', and in case an 'individual' sells his residential house and when he has no other residential house, capital gains is exempted on transfer of such house. An assessee under the Act is a 'person'. A 'person' has been defined in section 2(31) which includes an individual, a Hindu undivided family, a company, a firm, an association of persons or a body of individuals whether incorporated or not, a local authority, and every artificial juridical person not falling within any of the preceding sub-clauses. Thus, all these persons can be assessed independently in their separate status. [Para 5J

A perusal of record showed that the assessee-trust had been assessed in the status of 'Association arsons' and when only the assessee who is an individual is exempted from the tax of capital gains on transfer of a residential house, there is no justification to stretch intention of the Legislature to extend benefit of exemption under section 53 to any other assessee than individual. The mere fact that the income ultimately goes into the hands of individual beneficiaries, is immaterial. (Para 6]

Indisputably, the assessee was a 'trust' and the trust has been assessed in the status of 'AOPs', and the AOPs are

*not entitled to the benefit of exemption under section 53.
[Para 7]*

Therefore, the Tribunal had committed an error to extend the benefit of exemption under section 53 to the 'AOPs' like the assessee. [Para 8]

In the result, the reference was decided in favour of the revenue and against the assessee.

The plain reading of above leading case reveals that Private trust are to be assessed in the status of AOP. The AO was guided by this proposition and this view does not make the assessment order erroneous and prejudicial to the interest of the revenue. Thus, the allegation made that the trust is required to be assessed as individual and the Learned Assessing Officer has not applied his mind in determining the status in which the trust is required to be assessed is apparently not correct.

4.4 It is a settled proposition of law that powers under section 263 of the Act can be exercised by the Commissioner on satisfaction of twin conditions viz. the assessment order should be erroneous and prejudicial to the revenue. By erroneous is meant contrary to law. Thus, this power cannot be exercised unless the Commissioner is able to establish that the order of the Assessing Officer is erroneous and prejudicial to the revenue. Thus, where there are two possible views and the Assessing Officer has taken one of the possible views, no occasion to exercise powers of revision can arise nor can provisional power be exercised for directing a fuller inquiry to find out if the view taken is erroneous, when a view has already been taken after inquiry. This power of revision can be exercised only where no inquiry as required under the law is done. In the present case the Learned Assessing Officer

has made the enquiry for the purposes whether the dividend is taxable or not and adopted the view that it is not taxable. The Learned Assessing Officer was in the facts and circumstances of the case of the view that the said dividend income was not taxable in the hands of the trust, and accordingly not made the addition. Thus, it cannot be said that the Learned Assessing Officer hasnot made the enquiry. Considering one view by the Learned Assessing Officer does not make the assessment order erroneous and prejudicial to the interest of the revenue, and such order does not come under the review powers of Principal Commissioner of Income Tax as prescribed U/s 263 of the Income Tax act, 1961. The same view as held by the following judicial decisions on which reliance can be placed:

Commissioner of Income Tax Vs. Max India Ltd., 295 IT 282 Supreme Court of India

Principal Commissioner of Income Tax I v. V. Dhanna Reddy & Co,(SC)/[2019] 260 Taxman 111

Principal Commissioner of Income Tax, Surat-2 V. ShreejiPrints(P.) Ltd. (SC)/[2021] 282 Taxman 464

Principal Commissioner of Income Tax-8 Sumatichand Tolamal Gouti(SC)[2019] 267 Taxman 494

Principal Commissioner of Income -Tax 2 V. Shree Gayatri Associates (SC)/[2019] 263 Taxman 672

Commissioner of Income Tax v. Kamal Galani, (SC)/[2019] 267 Taxman 114

Commissioner of Income Tax, Central-Ill/ v. NiravModi, 77 taxman. com78(SC)

Commissioner of Income-tax-10, Mumbai v. Reliance Communication Ltd., 244 Taxman 55 (SC)

Principal Commissioner of Income Ltd, (Bombay)[2020] 268 Taxman 222 Tax-9 V. Cartier Leafin(P.)

Commission of Income Tax v. Future Corporate Resources Ltd,/[2020] 284 Taxman 122

Commissioner of Income Tax-8 v. Fine Jewellery (India) Ltd. [2015] 230 Taxman 641, Bombay HC

Commissioner of Income Tax-1, Pune V. Gera Developments(P.) Ltd. (Bombay)/[2016] 240 Taxman 467

4.5 Further, it is pertinent to note that the Ld. PCIT has not mentioned in the notice under which section of the Act it is mentioned that the trust is to be assessed as individual. In the notice it is simply mentioned that it was held by various court that trust are required to be assessed as individual. However, the Ld. PCIT has not mentioned any case law in support of his contention. In this regard, we submit that Hon'ble Rajasthan High Court had decided that the trust is to be assessed as AOP. Thus, proceedings initiated u/s.263 of the Income Tax Act, 1961 is not tenable, hence we request that the same may kindly be dropped.

5. Whereas the Pr.CIT was not satisfied with explanations and is of the opinion that the A.O has accepted the explanations on non applicability of the provisions and has not verified/examined the information pertaing to the exempt income. Accordingly passed the revision order set aside the order passed

U/sec143 (3) of the Act and gave directions to the Assessing Officer read as under:

6. *Therefore, The crux of the issue before the undersigned is that as the issue on which the case was selected for scrutiny was the taxability of dividend income u/s 115BBDA and a private discretionary Trust can be assessed both as an individual as well as AOP, the AO made no effort to go into this issue. He accepted the explanation of the assessee merely on the ground that section 115BBDA in the case of AOP is applicable from the next Assessment Year. Therefore, I am of the considered opinion that the assessment order dated 28/06/2019 passed by the AO u/s143(3) of the Act is erroneous insofar as it is prejudicial to the interest of Revenue, because the assessment has been made without proper verification and inquires on the issue which the AO was expected to make in view of facts and circumstances discussed above. Therefore the provisions of section 263 of IT Act, 1961 are hereby*

7. *Therefore, the provisions of Section 263 of the Act are invoked in respect of the assessment order u/s 143(3) of the IT Act, 1961 dated 28/06/2019 passed by the Assessing Officer is set aside. The AO is directed to carry out due verification in respect of under which status the assessee is required to be assessed and accordingly decide about the taxability of dividend income as per provisions of section 115BBDA and pass the assessment order de-novo after due verifications. Needless to say that the Assessing Officer shall give the assessee reasonable opportunity of being heard and pass a speaking order after taking into consideration the explanation and supporting evidence submitted by the assessee.*

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6. Aggrieved by the order of the Pr. CIT, the assessee has filed an appeal before the Hon'ble Tribunal

7. At the time of hearing the Ld. AR submitted that the Pr.CIT erred in passing the order irrespective of the fact that the assessee has explained the details in compliance to notice u/s 142(1) of the Act. The contentions of the Ld. AR that the provisions of Section 115BBDA of the Act are not applicable to the assessee being a trust for A.Y.2017-18. Further the assessee has responded to notices and supported the claims made in the return of income with the documentary evidences and the Ld.AR has substantiated the submissions with the judicial decisions and factual paper book and prayed for allowing the appeal.

8. Contra the Ld. DR submitted that the A.O. has not verified the disputed issue nor examined the facts pertaining to selection of case for scrutiny and the Assessing officer has not applied his mind on the status of the assessee and the Ld.DR supported the order of the Pr.CIT.

9. We heard the rival submissions and perused the material 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 has only considered the fact that the A.O. has not conducted enquiry but there are no specific reasons and findings are recorded. The Ld.AR emphasized that the Pr.CIT merely mentioned that the assessee should be assessed in the capacity of the individual status irrespective of the facts that the assessee is a private trust and assessed in the status of the A.O.P. The Ld.AR referred to page 31 of the paper book, where the ITR-5 Acknowledgement for A.Y.2017-18 was filed and highlighted the status Column- AOP/BOI. And at page 32, the schedule of Personal information part of ITR-5, the Sub Status disclosed as Private Discretionary Trust. The dividend income is to be determined as per section 115BBDA of the Act in the case of individuals and HUF up to A.Y.2017-18. Hence from the A.Y.2018-19, the dividend income of trust is covered under the purview of said section. The Ld.AR submitted that the A.O. has called for details with the supporting evidences in respect of

dividend income on shares from the companies and claimed exempt U/sec10 (38) of the Act.

10. The assessee has filed a detailed note on dividend income in compliance to notice issued u/s 143(2) & 142(1) of the Act and the Ld.AR demonstrated page 24 & 26 of the paper book were the letters filed with the assessing officer in the Assessement proceedings along with the note on dividend income claimed exempt u/sec10(34) of the Act are placed. We find the submissions of the Ld.AR are realistic, duly supported with the material information on the disputed issue and the A.O. is aware of the facts and applicability of provisions of Act for the assessment year and the A.O. has also examined the factual aspects of status of the assessee which cannot be over looked by the Pr.CIT. We Considering the overall facts, circumstances, and the details submitted in the course of hearing are of the view that the if any query is raised in the assessment proceedings and it was responded by the assessee and the A.O. has taken a possible view, further the mere fact that it is not dealt with by the A.O. in the order cannot implied that there is no application of mind. Hence, the Pr.CIT action/

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directions 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 set aside the order of the Pr.CIT and allow the grounds of appeal in favour of the assessee.

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

Order pronounced in the open Court on 27.07.2022.

Sd/-
(PRAMOD KUMAR)
VICE PRESIDENT

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 27.07.2022
KRK, PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. Concerned CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

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आदेशानुसार / BY ORDER,

(Asst. Registrar)
ITAT, Mumbai