

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

BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER AND
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.1136/Mum./2022
(Assessment Year : 2017-18)

Ravi Developments
76, Laxmi Palace, Mathuradas Road
Kandivali (W), Mumbai 400 067
PAN – AAAGR2516G

..... Appellant

v/s

Principal Commissioner of Income Tax
(Central), Pune

.....Respondent

Assessee by : Shri Mahaveer Jain
Revenue by : Smt. Riddhi Mishra

Date of Hearing – 12/01/2023

Date of Order – 31/01/2023

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned order dated 29/03/2022 passed under section 263 of the Income Tax Act, 1961 (*"the Act"*) by the learned Principal Commissioner of Income Tax (Central), Pune (*"learned PCIT"*), for the assessment year 2017-18.

2. In this appeal, the assessee has raised the following grounds:

"1. That on the facts and circumstances of the case and in law, the Ld. PCIT has erred in passing an order u/s. 263 of the Act without appreciating that the assessment order u/s. 143(3) of the Act was neither erroneous nor prejudicial to the interest of the revenue, and as such, no interference u/s. 263 of the Act is warranted.

2. *That on the facts and circumstances of the case and in law, the revisionary order u/s 263 of the IT Act, 1961 is bad in law in as much as it is contrary to the decision of the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. vs. CIT 2000 (2) TMI 10 which holds that revisionary power cannot be invoked in cases where two views are possible and the AO has adopted one of the said views.*

3. *That on the facts and circumstances of the case and in law, the Ld. PCIT has erred in invoking revisionary proceedings u/s. 263 of the Act by relying on the decision of CIT vs M/s. Ansal Housing Finance and Leasing Co. Ltd. [2013] 354 ITR 180 (Delhi) without appreciating the several judgements in favour of the assessee on the same issue passed by the Jurisdictional Tribunal as well as Hon'ble Gujarat High Court.*

4. *That on the facts and circumstances of the case and in law, the Ld. PCIT has erred in invoking revisionary proceedings u/s. 263 of the Act without appreciating that notional rent cannot be applied on Transferable Development Rights and as such, order u/s. 263 of the Act is misplaced and bad in law.*

5. *That on the facts and circumstances of the case and in law, the Ld. PCIT has erred in invoking revisionary proceedings u/s. 263 of the Act for raising the issue of adding notional rent u/s. 23 of the Act.*

6. *That on the facts and circumstances of the case and in law, the Ld. PCIT has erred in invoking revisionary proceedings u/s. 263 of the Act for disallowing loss sale of on amounting to Rs. 4,80,559/-.*

7. *That on the facts and circumstances of the case and in law, the Ld. PCIT has erred in invoking revisionary proceedings u/s. 263 of the Act for disallowing TDS interest and penalty amounting to Rs. 3,12,220/-."*

3. The brief facts of the case as emanating from the record are: The assessee is a company engaged in the business of real estate development. The assessee e-filed its return of income on 07/11/2017 declaring total income of Rs.7,48,51,580. The return of income filed by the assessee was selected for scrutiny and statutory notices under section 143(2) and section 142(1) were issued and duly served on the assessee. The Assessing Officer ("AO") vide order dated 17/12/2019 passed under section 143(3) of the Act computed the total income of the assessee at Rs.10,94,98,090, after making various additions.

4. Subsequently, vide notice dated 24/03/2022, issued under section 263 of the Act revisionary proceedings were initiated in the case of the assessee on the basis that the assessee is having closing stock of completed flats of Rs.6,79,45,641 and completed flats are held for more than a year. However,

despite the selection of assessee's case for scrutiny to examine the high closing stock appearing in the books of accounts of the assessee, the annual letting value of the completed stock was not added to the income of the assessee in the light of the decision of Hon'ble Delhi High Court in Ansal Housing Finance and Leasing Co Ltd 354 ITR 180. It was also alleged that no enquiries were carried out by the AO in the course of assessment proceedings on this issue. The learned PCIT also alleged that the assessee has debited the amount towards loss on the sale of car, and towards TDS interest and penalty in the profit and loss account during the year under consideration. However, these expenses were not brought to tax and the AO has not called for any details in this connection and allowed the same without examining and considering the allowability of the said expenditure. In response thereto, the assessee objected to the initiation of revision proceedings. The learned PCIT vide impugned order did not agree with the submissions of the assessee and held that all the issues have not been properly examined, verified, and enquired by the AO in the course of assessment proceedings. Accordingly, the learned PCIT, by referring to Explanation 2 to section 263 held that the assessment order is erroneous insofar as it is prejudicial to the interest of Revenue and set aside the assessment order to the file of AO limited to examine the above-stated issues in detail while framing assessment. Being aggrieved, the assessee is in appeal before us.

5. During the hearing, the learned Authorised Representative ("*learned AR*") submitted that during the assessment proceedings, the AO had called for the details regarding the inventory of opening and closing stock along with additions made and sales made during the year, which are duly provided by the assessee. The learned AR further submitted that the issue of taxing the annual letting value of the completed stock of flats as income from house property is a debatable issue and the AO has taken one of the plausible views, therefore, the same is out of the purview of revision proceedings under section 263 of the Act. The learned AR submitted that in its submission before the AO, the assessee had submitted that the car, in respect of which loss on sale has been incurred, was used by the partners for the smooth functioning of the

business and therefore the said loss has been incurred wholly and exclusively for the purpose of business. Further, as regards TDS interest and penalty debited to the profit and loss account, the learned AR by placing reliance on certain judicial pronouncements submitted that the interest on late payment of TDS is allowable under section 37 of the Act.

6. On the contrary, the learned Departmental Representative ("*learned DR*") submitted that there is no divergence of judicial opinion on the issue of taxability of the annual letting value of unsold stock of flats as income from house property. The learned DR by referring to the decision of the coordinate bench of the Tribunal in DCIT vs Inorbit Malls Private Limited, ITA No. 2220/Mum./2021, submitted that the coordinate bench after noting the difference in facts before the Hon'ble Gujarat High Court in CIT vs Neha builders, 296 ITR 661 and before the Hon'ble Delhi High Court in Ansal Housing Finance and Leasing Co Ltd (supra) held that annual letting value on unsold stock is taxable as income from house property. As regards the other 2 issues, the learned DR submitted that no details were called for by the AO during the assessment proceedings and thus the assessment order is erroneous insofar as it is prejudicial to the interest of the Revenue. In respect of interest on delayed payment of TDS and penalty, the learned DR placed reliance on certain decisions, wherein the said expenditure has been disallowed under section 37 of the Act.

7. We have considered the rival submissions and perused the material available on record. In the present case, as noted above, the revisionary proceeding under section 263 of the Act was initiated on three issues, namely, (i) taxability of annual letting value of unsold stock of flats as income from house property; (ii) claim of loss on sale of car; and (iii) claim of interest on delay payment of TDS and penalty.

8. As regards the first issue, the learned PCIT alleged that the assessee's case was selected for scrutiny to examine the high closing stock appearing in the books of the assessee company, however, the annual letting value of the completed stock has not been added to the total income of the assessee and

no enquiry was carried out by the AO during the assessment proceedings on this issue. In this regard, from the perusal of the notice dated 10/05/2019 issued under section 142(1) of the Act along with a questionnaire, we find that vide point no.8, the AO sought the following information from the assessee:

"8. On perusal of the ITR for the A.Y. under consideration it has been found that you are running real estate business and disclosing high closing stock. Please give the following details in this regard.

1. Please furnish detail of unit wise inventory of your stock in trade as on 01/04/2016 and 31/03/2017.

2. Please furnish method of accounting followed for valuation of closing stock along with details calculation of the same.

3. Please furnish reconciliation of opening and closing stock along with additions made and sales made during the year.

4. Please furnish detail of profit/loss recognized on sale of stock during the year along with the calculation thereof."

9. In reply to the said notice, the assessee vide letter dated 13/08/2019, forming part of the paper book from pages no.10-16, provided the details and statement of unit-wise inventory of opening stock as on 01/04/2019 and closing stock as on 31/03/2017. We further find that the assessee also provided the reconciliation of opening and closing stock with additions made and sales made during the year and details of profit/loss recognised on sale of stock, during the year, along with the calculation thereof. The assessee also submitted the details of flat/shop sales offered during the year under consideration. The AO vide assessment order passed under section 143(3) of the Act though made various additions and computed the total income of the assessee at Rs.10,94,98,090, however, made no addition on account of the annual letting value of the unsold stock of flats.

10. During the hearing, the learned AR placed reliance upon the decision of the coordinate bench of the Tribunal in S.D. Corporation Private Limited vs PCIT, [2019] 102 taxmann.com 226 (Mumbai-Trib.), wherein it has been held that the issue of taxability of annual letting value on unsold stock of flats is a debatable issue, and thus is outside the purview of section 263 of the Act. The

learned AR also refer to the decision of the coordinate bench of the Tribunal in Pegasus Properties Pvt. Ltd. vs DCIT, [2022] 135 Taxmann.com 294 (Mumbai Trib.) and Shree Sai Consultants vs DCIT, ITAs no. 2188/Mum./2021, etc., wherein this issue has been decided in favour of the assessee on merits. On the contrary, as per the learned DR, in view of the decision of the coordinate bench of the Tribunal in Inorbit Malls Private Ltd. (supra), there is no divergence of judicial opinion on this issue, and the only available judicial opinion directly on this issue is of the Hon'ble Delhi High Court in Ansal Housing Finance and Leasing Co Ltd (supra). Thus, from the above, it is sufficiently evident that the issue of whether the annual letting value on unsold stock of flats is taxable is a debatable issue and in view of the decision of Hon'ble Supreme Court in CIT vs Max India, (2007) 295 ITR 282, the revision proceedings under section 263 of the Act on this issue cannot be upheld. Further, as noted above, during the assessment proceedings, the AO called for details regarding the opening and closing stock, which was duly provided by the assessee and therefore it cannot be said that there was no enquiry by the AO on this issue. Accordingly, we set aside the impugned order passed under section 263 of the Act on this issue. As a result, grounds No. 2-5 raised in assessee's appeal are allowed.

11. As regards the claim of loss on sale of car, we find that vide notice dated 10/05/2019 issued under section 142(1) of the Act, the AO asked for claim of expenditure under the head of other expenses and subhead of miscellaneous expenses, vide point no.24. In reply to the said notice, the assessee vide letter dated 04/10/2019 filed before the AO, submitted that the loss has been incurred on sale of car, which was used by the partners for the smooth functioning of the business, and the same has been incurred wholly and exclusively for the purpose of business. We further find that vide aforesaid notice the AO also sought bills, vouchers with documentary proof, and justification for incurring the expenditure wholly and exclusively for business purposes. However, apart from making the aforesaid submission, no details as sought by the AO were furnished by the assessee in support of its claim that the car was used by the partners wholly and exclusively for the purpose of

business. We also find that there was no further enquiry on this issue by the AO and the claim of the assessee was accepted in absence of any documentary evidence. Further, as regards the issue of allowability of TDS interest and penalty, we find that the AO did not make any enquiry, whatsoever, on this issue and no notice/questionnaire was issued. Thus, we are of the considered view that the assessment order to the extent of these two issues is erroneous insofar as it is prejudicial to the interest of Revenue, in view of Explanation 2 to section 263 of the Act. Accordingly, the impugned order passed by the learned CIT to this extent is upheld. As a result, grounds no.6 and 7 raised in assessee's appeal are dismissed.

12. In view of our aforesaid findings, ground no.1, raised in assessee's appeal, is partially allowed.

13. In the result, the appeal by the assessee is partly allowed.
Order pronounced in the open Court on 31/01/2023

Sd/-
OM PRAKASH KANT
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 31/01/2023

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai