

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

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.1427/Mum./2022
(Assessment Year : 2012-13)

Dy. Commissioner of Income Tax
Central Circle-6(4), Mumbai

..... Appellant

v/s

Fornax Real Estate Ltd.
1st Floor, M-62, 63, Connaught Place
New Delhi 110 001 PAN – AABCF1259Q

.....Respondent

Assessee by : Shri K. Gopal
Revenue by : Shri Ankush Kapoor

Date of Hearing – 24/04/2023

Date of Order – 26/04/2023

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the Revenue challenging the impugned order dated 21/10/2021 passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax (Appeals)-54, Mumbai [*"learned CIT(A)"*], for the assessment year 2012-13.

2. The present appeal is delayed by 130 days. At the time of the hearing, the learned Departmental Representative (*"learned DR"*) by referring to the authorisation memo submitted that the copy of the impugned order was received on 18/11/2021, and the last date for filing of appeal, in this case, was 16/01/2022. By placing reliance upon the order dated 10/01/2022, passed by

the Hon'ble Supreme Court, in M.A. no.21 of 2022, in M.A. no.665 of 2021, in Suo-Motu Writ Petition (Civil) no.3 of 2020, the learned DR submitted that the limitation period for filing the appeal was extended upto 29/05/2022, and the Revenue filed the present appeal on 27/05/2022. Thus it was prayed that the present appeal be heard on merits. The learned Authorised Representative ("*learned AR*") did not raise any objection against the prayer for condonation of delay. In view of the above, since the present appeal has been filed within the extended time granted by the Hon'ble Supreme Court during the Covid period, therefore there is no delay in filing the present appeal and we proceed to decide the same on merits.

3. In this appeal, the Revenue has raised the following grounds:-

"(1) On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in allowing the interest expenditure of Rs.10,84,88,390, as business expenditure, without appreciating the fact that the stated business activity of the assessee company has not commenced, which is evident from the fact that the assessee has not disclosed any income from its stated business activity and has not shown any balance in its work-in-progress account in the balance sheet.

(2) On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in allowing the interest expenditure of Rs. 10.84.88.390/- as business expenditure, without appreciating the fact that the assessee had failed to establish that the expenditure were incurred wholly and exclusively for the purpose of business, which is evident from the fact that the Ld.CIT(A) had upheld the action of the AO to treat and tax the interest income as income from other sources and allowing the interest expenses to that extent under the head income from other sources.

(3) On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in allowing the interest expenditure of Rs.10,84,88,390/-, as business expenditure, though the assessee failed to explain that the loans and advances were given for business purposes, even during the appellate proceedings, which is noted by the Ld.CIT(A) in para 6.3 at page 18 of his order.

(4) On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in allowing the interest expenditure of Rs. 10,84,88,390/-, without considering that the books of accounts of the assessee were not audited

u/s.44AB of the Income tax Act, 1961. as the assessee was not carrying out any business during the year.

(5) The appellant craves to leave, to add, to amend and / or to alter any of the ground of appeal, if need be.

The appellant craves leave to amend or alter any grounds or add a new ground, which may be necessary."

4. During the hearing, at the outset, the learned AR wishes to press the petition dated 17/01/2023, filed under Rule 27 of ITAT Rules, 1963, whereby the assessee has raised jurisdictional ground challenging the validity of reassessment proceedings under section 147 of the Act. The aforesaid petition was taken on record and the present appeal was heard on same.

5. The brief facts of the case as emanating from the record are: The assessee is engaged in the business of development of real estate projects. For the year under consideration, the assessee filed its return of income under section 139(1) of the Act on 27/09/2012, declaring a net loss of Rs.35,66,74,501. The return filed by the assessee was selected for scrutiny and vide assessment order dated 20/02/2015 passed under section 143(3) of the Act, the Assessing Officer ("AO") assessed the income of the assessee at loss of Rs. 35,66,74,501. Subsequently, vide notice dated 29/03/2019 issued under section 148 of the Act reassessment proceedings were initiated in the case of the assessee. In response to the aforesaid notice under section 148, the assessee e-filed its return of income on 23/04/2019, declaring a net loss of Rs.35,66,74,501. The assessee sought the reasons recorded by the AO while reopening the assessment. Accordingly, the reasons are provided to the assessee vide letter dated 21/09/2019. Vide its submissions dated 27/09/2019, the assessee filed its objections against the reopening of

assessment under section 147 of the Act, which was disposed off by the AO vide order dated 25/11/2019. Pursuant thereto statutory notice under section 142(1) of the Act was issued and various details were sought from the assessee, which was duly responded to by the assessee. The AO vide order dated 30/12/2019, passed under section 143(3) r/w section 147 of the Act held that the assessee has failed to substantiate that the income shown by the assessee in its profit and loss account pertains to its business activity of development of real estate. The AO disallowed the business expenditure claimed by the assessee in the absence of any business income. The AO further held that the assessee has failed to substantiate with documentary evidence that the expenses were incurred wholly and exclusively for its stated business activity. Accordingly, the AO disallowed expenditure of Rs.17,94,87,604, under section 37(1) of the Act.

6. In appeal before the learned CIT(A), the assessee raised additional ground challenging the invocation of jurisdiction under section 147 of the Act. The learned CIT(A) vide impugned order, inter-alia, dismissed the additional ground so raised by the assessee. On merits, the learned CIT(A) granted partial relief to the assessee. Being aggrieved, the Revenue is in appeal before us challenging the relief so granted by the learned CIT(A) on merits. Further, the assessee by way of the petition under Rule 27 of ITAT Rules, 1963, while supporting the impugned order has raised ground pertaining to reassessment proceedings, which was dismissed by the learned CIT(A).

7. During the hearing, the learned AR submitted that the reassessment proceedings in the present case were initiated after the expiry of 4 years from

the end of the relevant assessment year and therefore, the conditions laid down in 1st proviso to section 147 of the Act need to be satisfied. The learned AR submitted that all the details were furnished by the assessee during the course of original assessment proceedings and thus, there is no failure to disclose truly and fully all material facts. The learned AR also submitted that part of the receipt, which has been doubted by the AO in the present case, was also received in the preceding assessment years and the same has been accepted to be the business income of the assessee.

8. On the contrary, the learned DR by vehemently relying upon the orders passed by the lower authorities submitted that the assessee has failed to bring on record the relevant material that expenses/loss claim by the assessee were not having any nexus with the income offered in its return of income and in the year under consideration, the assessee earned no business income.

9. We have considered the rival submissions and perused the material available on record. In the present case, the assessee challenged the validity of reassessment proceedings under section 147 of the Act before the learned CIT(A) and vide impugned order (at page 18) said additional ground raised by the assessee was dismissed. Thus, it is not a case wherein the jurisdictional issue has been raised for the first time before us vide petition filed under Rule 27 of ITAT Rules, 1963. Therefore, the petition filed by the assessee under Rule 27 of ITAT Rules, 1963 is admitted for adjudication.

10. In the present case, vide order dated 20/02/2015 passed under section 143(3) of the Act, the AO accepted the returned income of the assessee and

assessed the loss at Rs.35,66,74,501. However, after the expiry of 4 years from the end of the relevant assessment year, the AO vide notice dated 29/03/2019 issued under section 148 of the Act initiated reassessment proceedings in the case of the assessee. While initiating the reassessment proceedings, the AO recorded the following reasons for reopening the assessment:

"As per the PAN database, the jurisdiction over the present assessee is lying with this charge. The assessee had filed its return of income on 27.09.2012, declaring net loss at Rs.35,66,74,501/-. The assessment was completed u/s.143(3), assessing the net loss at Rs.35,66,74,501/-. Thereafter, a search action was carried out in the case of Indiabulls Group on 13.07.2016. Consequent thereto, the case was centralized in this charge.

1.1 The assessee is engaged into the business of development of real estate projects.

2. On perusal of the Profit and Loss Account for the year, it is observed that the credit of Rs. 19,52,87,176/- appears (consisting of dividend Income on units of mutual funds of Rs.92,34,485/-, interest income on loans and advances of Rs.7,28,10,217/- and profit on sale of investments of Rs.11,32,42,474/-). The above credit amount clearly reveals that none of the credits can be attributed to the assessee's business. Hence, it may be inferred that the assessee has not carried out any business activity during the year. Further, the Assets side of the Balance Sheet does not show any amount or asset in the form of work-in-progress to indicate or to prove the assessee's engagement in business. Therefore, neither the Balance Sheet nor Profit & Loss Account for the year provides any corroborative evidences to show that the assessee has carried out any business activity during the year. Hence, the assessee's claim of expenses under the head business income and the consequent claim of loss are not admissible.

3. The assessee has claimed business loss of Rs.10,67,59,804/- and filed a return showing net loss at Rs.35,66,74,501/- (including Long Term Capital Loss of Rs.24,99,14,697/-). Section 37 of the Act clearly stipulates that the expenditure of business should be allowed only if the said expenditure has been incurred wholly and exclusively for the purpose of business or profession. In view of the above, I have reason to believe that the income of Rs.10,67,59,804/- being the business loss claimed by the assessee chargeable to tax has escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961. Though the assessment had taken place in the instant case but the assessee had failed to disclose true and full particulars of income for the year under consideration.

4. Applicability of the provisions of Section 147/151 to the facts of the case :-

In view of the above, the provisions of clause (c) of Explanation [2] to Section 147 are applicable to the facts of this case and the assessment year under consideration is deemed to be a case where income chargeable to tax has escaped assessment.

In this case, more than four years have lapsed from the end of the assessment year under consideration. Hence, necessary sanction to issue notice u/s.148 is being obtained separately from the Principal Commissioner of Income Tax (Central)-3, Mumbai as per the provisions of Section 151(1) of the Act.

11. Thus, from the perusal of the profit and loss account, the AO alleged that the credit of Rs.19,52,87,176 reveals that the same cannot be attributed to assessee's business. Therefore, the AO inferred that the assessee has not carried out any business activity during the year. Further, the AO alleged that the assets side of the balance sheet does not show any amount or asset in the form of work in progress to indicate or to prove the assessee's engagement in business. Accordingly, the AO came to the conclusion that the business loss claimed by the assessee, which is chargeable to tax has escaped assessment and the assessee has failed to disclose true and full particulars of income for the year under consideration.

12. Before proceeding further, it is relevant to analyse the provisions of 1st proviso to section 147 of the Act, as it stood prior to its substitution by Finance Act 2021, which reads as under:

"Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:"

13. Thus, as per 1st proviso to section 147 of the Act, in a case where the assessment was completed under section 143(3), reassessment under section 147 can be done after the expiry of 4 years from the end of the relevant assessment year only if income has escaped assessment (i) due to failure on the part of the assessee to make a return under section 139 or in response to notice issued under section 142(1) or section 148; or (ii) due to failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment. In the present case, from the facts, it is evident that assessment was completed in the case of the assessee under section 143(3) of the Act. Further, notice under section 148 of the Act was issued on 29/03/2019 i.e. beyond a period of 4 years from the end of the relevant assessment year i.e. 2012-13. Therefore, it needs to be examined whether the conditions prescribed in 1st proviso to section 147 of the Act are satisfied in the present case. There is no dispute that return of income was filed by the assessee under section 139(1) of the Act. Thus, in order to determine the validity of the impugned reassessment proceedings, in the present case, now it needs to be examined whether there is any failure on the part of the assessee to disclose fully and truly all material facts.

14. In the present case, the original return filed by the assessee was selected for scrutiny, and statutory notices under section 143(2) as well as section 142(1) of the Act were issued and served on the assessee. We find that vide notice dated 20/08/2014 issued under section 142(1) of the Act, forming part of the paper book from pages 32-37, the assessee was asked to furnish the copy of the return of income, computation of income, audited profit

and loss account, balance sheet, Tax Audit Report under section 44AB, auditor's report, Form 3CB, etc. The assessee vide its submission dated 10/10/2014 complied with the aforesaid notice and furnished a copy of the audited financial statement, and return of income with annexures. Vide another submission dated 16/02/2015, the assessee, inter-alia, provided a copy of the computation of income, detail of bank account, details of unsecured loans, details of loans and advances, etc.

15. Thus, from the above, it is evident that all the details sought by the AO were provided by the assessee during the course of scrutiny assessment proceedings, and the said details were accepted by the AO under section 143(3) of the Act. Further, from the perusal of reasons recorded for reopening the assessment, it is evident that the only basis available with the AO for initiating the impugned reassessment proceedings was the perusal of the profit and loss account and balance sheet i.e. the information which was already considered and examined during the course of original scrutiny assessment proceedings. Further, the reference to search action, in the reasons recorded, carried out in the case of Indiabulls Group is also of no avail to the Revenue, since no material found during such search has been mentioned in the reasons recorded to prove that the assessee has failed to provide fully and truly all material facts. Therefore, in view of the details available on record it cannot be said that the assessee has failed to provide fully and truly all material facts necessary for its assessment in the present case. Hence, we are of the considered view that conditions laid down in 1st proviso to section 147 of the Act are not satisfied in the present case. As regards the decision of the Hon'ble

jurisdictional High Court in Export Credit Guarantee Corporation of India Ltd vs ACIT, [2013] 30 taxmann.com 211 (Bombay), relied upon by the learned DR, we find that in the said case the reassessment proceedings were initiated within a period of 4 years from the end of the relevant assessment year and thus the restrictions as laid down in 1st proviso to section 147 were not applicable. It is in these circumstances, the Hon'ble jurisdictional High Court decided upon the validity of reassessment proceedings in the aforesaid decision. Therefore, we are of the considered opinion that the said decision is distinguishable on facts. In view of the aforesaid findings, the reassessment proceedings under section 147 of the Act, in the present case, are set aside being bad in law. Accordingly, the impugned order passed by the learned CIT(A) upholding reassessment proceedings, which resulted in the passing of order under section 143(3) r/w section 147 of the Act is set aside. As a result, the petition dated 17/01/2023 filed by the assessee under Rule 27 of ITAT Rules, 1963 is allowed.

16. In view of the above, the grounds raised by the Revenue on merits are rendered academic and therefore, are dismissed.

17. In the result, the appeal by the Revenue is dismissed, while the petition under Rule 27 of ITAT Rules, 1963, as filed by the assessee, is allowed.

Order pronounced in the open Court on 26/04/2023

Sd/-
PRASHANT MAHARISHI
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 26/04/2023

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The PCIT / CIT (Judicial);*
- (4) *The DR, ITAT, Mumbai; and*
- (5) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai