IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH: COCHIN

BEFORE SMT. BEENA PILLAI, JUDICIAL MEMBER
AND
SMT. PADMAVATHY S., ACCOUNTANT MEMBER

ITA No.262/Coch/2018
Assessment Year: 2013-14

M/s. Smart City (Kochi) Infrastructure P. Ltd. Smarcity Pavilion Brahmapuram PO Kochi 682 034 **PAN NO : AAJCS7668G**	**Vs.**	The Income Tax Officer, Corporate Ward-2(4), Kochi.
APPELLANT		**RESPONDENT**

Appellant by	:	Shri Raja Kannan, A.R.
Respondent by	:	Shri M. Rajasekhar, D.R.

Date of Hearing	:	11.01.2023
Date of Pronouncement	:	30.03.2023

O R D E R

PER BEENA PILLAI, JUDICIAL MEMBER:
The present appeal is filed by the assessee against order dated 28.3.2018 by the ld. Principal CIT Kochi for the assessment year 2013-14 on following grounds of appeal:-

> ***"GROUNDS OF APPEAL***
> *The grounds stated hereunder are independent of, and without prejudice to one another. The Appellant submits as under:*
> ***Ground No.!- The impugned order issued by the learned Principal Commissioner of Income Tax — 1 (`PCIT') under Section 263 of the Income Tax Act, 1961 (`the Act') is erroneous***
> ***1.1*** *On facts and in the circumstances of the case, the learned PCIT has erred in assuming jurisdiction under*

Section 263 of the Act and the impugned order passed thereon being bad in law is liable to be set-aside.

1.2 *The learned PCIT has erred in initiating the revision proceedings under Section 263 without taking into consideration the settled position of law that such proceedings can be invoked only if the order passed by the AO is both erroneous and prejudicial to the interests of revenue.*

1.3 *The learned PCIT has erred in not considering the provisions of clause (a) and (b) of Explanation 2 to Section 263 of the Act whereby an order passed by the, A0 will be deemed to be erroneous in so far as it is prejudicial to the interest of revenue for the purpose of section 263, if in the opinion of the Commissioner or Principal Commissioner, the order is passed without making enquiries or verification which should have been made or the order is passed allowing any relief without enquiring into the claim. The learned PCIT has erred in not appreciating the fact that neither of the above conditions are satisfied in the Appellant's case as the matters which are the subject matter of revision were already enquired into and verified by the AO during the course of the assessment proceedings.*

1.4 The learned PCIT has erred in stating that the AO has not applied his mind while framing the assessment order by reason of the fact that the AO has not discussed the subject matters in the assessment order, which formed the basis of initiating the revision proceedings. The PCIT has also erred in stating that the AO has not made any inquiries during the course of assessment proceedings, on the issues which has formed the basis for initiating the revision proceedings, since there is no record of any discussions on these matters. The learned PCIT ought to have appreciated that the issues which now forms the subject matter of revision proceedings were already furnished through various submissions during the course of regular assessment proceedings. Merely for the reason that the AO has not mentioned about the tax adjustments in the assessment order, it cannot be concluded that the AO has not applied his mind while framing the assessment order; especially when evidence shows otherwise.

1.5 The PCIT erred in not considering the settled position that when two views are possible and the assessing authority had adopted one of the views, revision proceedings cannot be initiated merely on the ground that the PCIT does not agree to the view taken by the AO.

Ground No 2- Without prejudice to the above, the learned PCIT initiated revision proceedings on the following claims of the

Appellant without appreciating the fact that the said claims are in accordance with the provisions of the Act

2.1. The learned PCIT ought to have appreciated that the deduction claimed by the Appellant amounting to INR 40,00,000 is allowable under Section 35D of the Act. Though the Appellant was incorporated on 27 January 2006, the business commenced only during FY 2011-12. Therefore, the PCIT ought to have considered that the fees paid to the Registrar of Companies which was incurred in FY 2007-08, was incurred prior to the commencement of business and hence is eligible to be claimed under Section 35D(2)(d) of the Act.

2.2. The learned PCIT erred in stating that the liability incurred by the Appellant in foreign currency was for acquisition of capital asset and hence the related foreign exchange loss amounting to INR 33,31,792 cannot be allowed as deduction. The learned PCIT ought to have considered the fact that the foreign exchange loss has arisen on account of restatement of foreign currency trade payables and hence the same has been claimed by the Appellant following the decision of the Supreme Court in the case of CIT, Delhi, Vs Woodward Governor India Private Limited 312 ITR 254.

2.3. The learned PCIT erred in concluding that the business of the Appellant is in the course of setting up and has not commenced in AY 2013-14 since no revenue was earned by the Appellant in the said year and since the official inauguration of Phase-I of the Appellant's business was held only in FY 2015-16. The learned PCIT has erred in not understanding the nature of business of the Appellant, particularly that of an SEZ Developer.

2.4. The learned PCIT ought to have considered that the Appellant, being an SEZ Developer, is a company eligible for deduction under section 80-IAB of the Act, whereby the profits and gains from the business of developing SEZ shall be allowed as deduction for ten consecutive assessment years out of fifteen years beginning from the year in which the SEZ has been notified by the Central Government. To claim Profit Linked deductions under Chapter VIA of the Act, the business of the assessee should have commenced. The Act provides the 'date of SEZ Notification' as 'date of business commencement' for claiming a tax deduction under Section 80-LAB of the Act and it also provides an option to the assessee to claim the deduction out of 15 years of block period, considering a mere fact that the significant delay in earning revenue from a business of a Developer. Given that the Appellant has obtained the SEZ notification in AY 2012-13, the eligibility for claiming the tax deduction under Section

80-IAB commence from the AY 2012-13 itself, and . Hence, where the SEZ has already been notified by the Central Government in AY 2012-13, the learned PCIT erred in concluding that the business of the Appellant has not commenced and thereby, denying the set off of business expense incurred for the year AY 2013-14 against interest income is bad in law.

2.5. *The learned PCIT erred in not differentiating between setting up and commencements of business considering the provisions of section 3 of the Act.*

The Appellant craves leave to add to or alter, by deletion, substitution, modification or otherwise, the above grounds of appeal, either before or during the hearing of the appeal."

2. **The brief facts of the case are as under:**

The assessee is a Public Limited Company engaged in the business of providing infrastructure facilities for setting up knowledge based information technology township and park. It filed its original return of income for assessment year 2013-14 on 28.9.2013 declaring total income of Rs.33,98,170/-. The assessee filed revised return subsequently on 30.3.2015 declaring a total income of Rs.42,12,510/-. The case was selected for scrutiny and statutory notices were issued to the assessee. In response to which, the representative of assessee filed details and supporting evidences in respect of the claims.

2.1 The ld. AO passed the assessment order accepting the revised return of income u/s 143(3) of the Act vide order dated 23.3.2016. Subsequently, the Ld.PCIT issued notice on 2.3.2018 u/s 263 of the act for following reasons:-

ANNEXURE – 7
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भारत सरकार
GOVERNMENT OF INDIA
आयकर विभाग
INCOMETAX DEPARTMENT
आयकर आयुक्त-1, कोच्ची कार्यालय
OFFICE OF THE PRINCIPAL COMMISSIONER OF INCOME TAX, KOCHI
केन्द्रीय राजस्व भवन, आई.एस.प्रेस रोड, कोच्ची - 682 018
CENTRAL REVENUE BUILDING, I.S.PRESS ROAD, KOCHI – 682 018

F.No : PCIT-1/CHN/R-263-29/2017-18 02.03.2018

To

The Principal Officer,
M/s. Smart City (Kochi) Infrastructure Pvt. Ltd.,
Smart City Pavilion, Brahmapuram P.O.,
Kochi – 682303

Sir,

Sub:- M/s. Smart City (Kochi) Infrastructure Pvt. Ltd., A.Y 2013-14
(PAN: AAJCS7888G) - Revision u/s 263 of the
Income Tax Act 1961 – Show Cause Notice – Regarding

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Having called for and examined the assessment records in your case, it appears to me that the order under section 143(3) of the Income Tax Act 1961 dated 24.03.2016 for the Assessment Year 2013-14 passed by the Income Tax Officer, Corporate Ward 2(4), Kochi is erroneous in so far as it is prejudicial to the interest of revenue for the reasons mentioned below :-

(1) (a)While computing the total income, the assessee has claimed deduction u/s 35D of Rs.40,00,000/- which was 1/5th of RS.200,00,000/- being ROC fee paid for increase of authorized share capital in FY 2007-08. ROC fee paid for registering the company was only eligible for amortization u/s. 35D(2). Hence no deduction can be allowed u/s. 35D(1) in respect of ROC fee for increase in authorized share capital which is a capital expenditure.

(b) The expenditure claimed for deduction in the P&L A/c include foreign exchange loss of Rs.33,31 ,792/- which is explained to be loss on account of re-statement of intercompany payables to the group companies vide letter dated 4-2-2016. As such it is only a notional loss.

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Further, the payables to group companies represent credits availed for acquisition of fixed asset. Hence loss, if any, incurred on this account is a capital loss which can be added to the cost of asset u/s. 43A of the Act.

(2) The main object of the company is to develop and provide infrastructural facilities on land acquired for setting up knowledge based IT Township, Information Technology Parks ... etc. The setting up of these facilities are going on and no revenue was generated from the business during the year. The expenses claimed as deductions represent expenses incurred in the course of setting up of business which is yet to be commenced. The official inauguration of phase-I of smart city was held only in FY 2015-16. The only income derived is the interest received on fixed deposit made in bank out of share capital which was offered under the head income from other sources.

Hence computation of business loss of Rs.4,42,81,730/- and setting off of this loss against income from other sources of Rs.4,90,34,571/- is not in order.

2. I, therefore, propose to revise the aforesaid order of the Assessing Officer and to pass such orders as the circumstances require. Your objections, if any, in the matter will be heard by me in my office at Kochi on **14.03.2018** at **03.00 P.M** to which date the case is posted for hearing.

3. If you do not wish to avail of the opportunity of being heard in person, your objections, if any, in writing may be filed on or before the date of hearing and the same will be duly considered by me before passing an order under 263 of the Income Tax Act, 1961.

4. Please take notice accordingly.

Yours faithfully

(Tripti Biswas)
Principal Commissioner of Income Tax, Kochi – 1

True Copy

SMART CITY (KOCHI) INFRASTRUCTURE P. LTD. KOCHI

3. The Ld.Pr.CIT was of the opinion that, there is a non-enquiry and a complete non-application of amount by the Ld.AO on the issues raised in the notice u/s 263 of the Act, and therefore, the assessment order passed by the Ld.AO dated 24.3.2016 is erroneous, in so far as prejudicial to the interest of the revenue. The assessee filed various details in response to notice issued u/s. 263. However, the Ld.Pr.CIT directed the Ld.AO to conduct a *de-novo* examination, and to pass a speaking order in accordance with law as per time limit specified u/s 153 of the Act.

Aggrieved by the order of the Ld.Pr.CIT, the assessee is in appeal before this *Tribunal*.

4. The Ld.AR submitted that notice u/s 142(1) of the Act was issued to the assessee during the assessment proceedings on 30.7.2015 which is placed at page 47 of the paper book. It is submitted that, question no.1, 5, 15 & 22 there in, is exactly on the issue that has been considered by the Ld.Pr.CIT in the notice issued u/s 263 of the Act. The Ld.AR submitted that, reply for query were filed by assessee on 4.9.2015, placed at page 76 of the paper book. The specific query was responded by the assessee at page 78, 80 & 82 to 84 of the paper book.

4.1 The Ld.AR submitted that, on the first issue raised in the notice u/s 263 of the Act, regarding the claim of deduction u/s 35D of the Act by the assessee amounting to Rs.40 lakhs, details are submitted at page 81 of the paper book filed by the assessee. In respect of the issue regarding the foreign exchange loans claimed as deduction amounting to Rs.33,31,792/-, the ld. A.R.

submitted that the details are at pages 80 & 83 of the paper book. He thus submitted that it is after verifying the above details the Ld.AO accepted the revised return filed by the assessee and therefore, the allegation of Ld.Pr.CIT regarding non-application of amount by the ld. AO is incorrect. He thus prayed that proceedings u/s 263 of the Act to be quashed. He also referred to the decision of *Hon'ble Supreme Court* in the case of *Malabar Industries reported in (2000) 243 ITR 83.*

4.2 On the contrary, the ld. D.R. relied on the order passed by the authorities below.

5. We have heard the rival submissions and perused the materials available on record.

5.1 In respect of the issues pertaining to the brought forward losses being set off and the MTM loss claimed by assessee, we do not find any reason to interfere as the claim of the assessee is eligible in accordance with law. There are specific query raised by the Ld.AO as is observed from pages 49 to 50 in the notice issued u/s. 142(1). The assessee has also filed necessary replies. However, in respect of the ROC fees claimed proportionately towards the increase in the authorized share capital, we are of the considered view that this amount deserves to be capitalized in the hands of the assessee which has definitely not been looked into by the Ld.AO. To that extent, there is a non-application of mind by the Ld.AO and therefore, section 263 of the Act deserves to be upheld only in respect of the first issue raised by the Ld.Pr.CIT in its notice.

Accordingly, the ground no. 2.1 raised by the assessee stands dismissed and ground nos. 2.2 to 2.4 stands allowed.

In the result, the appeal filed by the assessee stands partly allowed.

Order pronounced in the open court on 30th March, 2023.

Sd/-	**Sd/-**
(Padmavathy S.)	**(Beena Pillai)**
Accountant Member	**Judicial Member**

Bangalore,
Dated 30th March, 2023.
VG/SPS

Copy to:
1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(Judicial)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar,
ITAT, Bangalore.