

आयकर अपीलीय अधिकरण, कोलकाता पीठ “ए”, कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA
श्री राजेश कुमार, लेखा सदस्य एवं श्री संजय शर्मा न्यायिक सदस्य के समक्ष
[Before Shri Rajesh Kumar, Accountant Member & Shri Sonjoy Sarma, Judicial Member]

I.T.A. No. 54/Kol/2021
Assessment Year: 2015-16

Abhishek Entertainment and Foods Pvt. Ltd. (PAN: AAECA 7548 N)	Vs.	PCIT-3, Kolkata
Appellant / (अपीलार्थी)		Respondent / (प्रत्यर्थी)

Date of Hearing / सुनवाई की तिथि	23.05.2023
Date of Pronouncement/ आदेश उद्घोषणा की तिथि	16.06.2023
For the Appellant/ निर्धारिती की ओर से	Shri K. M. Roy, A.R
For the Respondent/ राजस्व की ओर से	Shri Subhrajyoti Bhattacharjee, CITDR

ORDER / आदेश

Per Rajesh Kumar, AM:

This is an appeal preferred by the assessee against the order of the Ld. Principal Commissioner of Income Tax -3, Kolkata (hereinafter referred to as the Ld. Pr. CIT”) passed u/s 263 of the Income Tax Act, 1961 (hereinafter referred to as the Act) dated 10.06.2020 for the AY 2015-16.

2. Though the Registry has pointed out that the appeal is time barred, however, in view of the decision of the Hon’ble Supreme Court in the case of Miscellaneous Application No. 665 of 2021 in SMW(C) No. 3 of 2020, the period of filing appeal during the COVID-19 pandemic is to be excluded for the purpose of counting the limitation period. In view of this, the appeal is treated as filed within the limitation period.

3. The only issue raised by the assessee is against the invalid exercise of jurisdiction by the PCIT u/s 263 of the Act in respect of certain eight issues and thereby setting aside the assessment order of AO dated 29.12.2017 passed u/s 143(3) of the Act and to frame the assessment afresh after going into those issues.

4. The assessment in this case was framed u/s 143(3) vide order dated 29.12.2017 assessing total loss at Rs. 1,49,61,751/- under the normal provision of Act and under MAT Loss of Rs. 2,32,36,707/- was assessed. The Ld. PCIT, on perusal of assessment records, observed that the AO has not made any enquiry with respect to certain issues in the balance sheet and profit and loss account which has rendered the assessment order erroneous insofar as prejudicial to the interest of the revenue. Accordingly a show cause notice u/s 263 of the Act dated 16.01.2020 was issued electronically in respect of following issues as per details below:

i) That the AO has neither verified the identity and the creditworthiness of the four (4) directors i.e. Shri Abhishek Kajaria, Shri Vikram H Metharamani, Smt. Malti P Bhambani and Shri Prem L Bhambani to advance huge loans aggregating of Rs. 3.17 crores to the assessee during the FY 2014-15 nor the genuineness of such loans during the course of assessment proceedings and passed the order u/s 143(3) of the Act dated 29.12.2017.

ii) That the AO has not verified the identity, creditworthiness of M/s Original Dealcom Pvt. Ltd. from which the assessee has again received a loan of Rs. 10,00,000/- during the year and the genuineness of the transaction.

iii) That the AO has also not verified the identity, creditworthiness of M/s Kalyan Securities Pvt. Ltd. from which the assessee has received another loan of Rs.14,95,397.82 during the year and the genuineness of the transaction.

iii) That the assessee has earned a profit of Rs. 1,49,88,621.26 from Commodity Trading in Foreign Currency US\$ as found on perusal of the documents instead of share trading as claimed by the it through the broker M/s Kayan Securities Pvt. Ltd. has not been verified by the AO by conducting any enquiry whatsoever from the concerned Commodity Exchange to find out as to whether any such transactions took place in the Exchange during the course of assessment proceedings.

iv) That the assessee has again claimed to have earned a profit of Rs.50,78,728.92 from Commodity Trading in cotton through the share broker M/s Kali Commodities Pvt. Ltd. has not been verified by the AO by conducting any enquiry whatsoever from the concerned Commodity Exchange to find out the genuineness of such transactions or from the broker as no margin money has been given to it for entering such huge volume of commodity resulting in the said profit during the course of assessment proceedings.

v) That the assessee has apparently realized an amount of Rs.21,72,315/- from sale of scrap of fixed assets (capital assets) being redundant or unfit for use. However, it has not furnished the details of the

party or parties to whom the said scrap was sold. The AO has also not made any natural enquiry in this regard before passing the order.

vi) That the AO has made a disallowance of Rs.24,74,000/- only instead of disallowing the entire write-off of capital assets to the extent of Rs.1,13,39,000/- in the said assessment order.

vii) That the Tax Audit Report mentions that the TDS has been made on the expenses of Rs.93,83,302/- under various sections of the Act whereas according to the ledger details the TDS on expenditure should have been made on Rs.1,32,89,591/-. The AO has not considered the non-deduction of TDS on the difference of expenses amounting to Rs. 39,06,289/- and consequential disallowance u/s 40(a)(ia) of the Act.

5. The assessee responded to the said show cause notice and the Id. PCIT, after taking into consideration the reply of the assessee, concluded that the assessment framed by the AO is erroneous and prejudicial to the interest of the revenue in terms of Section 263 of the Act and accordingly set aside the order by directing the AO to frame the assessment de novo with the direction to carry necessary enquiry and verification vide order dated 10.06.2020 passed u/s 263 of the Act.

5. The Ld. A.R submitted before the Bench that first issue in para (i) relates to non-verification of loans aggregating to Rs.3.17 crores taken from four directors namely Shri Abhishek Kajaria, Shri Vikram H Metharamani, Smt. Malti P Bhambani and Shri Prem L Bhambani during FY 2014-15. The Ld. A.R submitted that these loans were taken from directors of the assessee company during the year and the Ld. A.R submitted that in the earlier also the opening balance of loans from Directors was Rs. 4,81,81,000/-. It was also submitted that during the course of assessment proceedings, the counsel of the assessee appeared on 21.12.2017 and submitted all the copies of financial statements, ITRs, bank statements and confirmations from the directors before the AO who has examined the same and accepted accordingly. The Ld. Counsel also placed before us the statement, documents pertinent to these four directors which are attached in PB-2 from page 1 to 47 to corroborate to corroborate the fact that the issue was examined by the AO during the assessment proceedings. It is only after examination of these documents these loans were accepted. The Ld. A.R submitted that the observation of the Ld. PCIT that AO has failed to examine the identity and creditworthiness of the investors and genuineness of the transactions is against the facts on record as these are the directors of the assessee company who have

sufficient sources which have been verified by the AO. The Ld. A.R. therefore submitted that the so far as this issues in para (ii) & (iii) are concerned, the assessment order is neither erroneous nor prejudicial to the interest of the revenue and therefore revisionary jurisdiction exercised by the PCIT u/s 263 of the Act may be cancelled and set aside. On the second issue of non-verification of loans of Rs. 10,00,000/- from M/s Original Dealcom pvt. Ltd. and Rs. 14,95,397.82 from M/s Kalyan Securities Pvt. Ltd. The Ld. A.R candidly submitted that the AO has not examined the issue and left the issue to the wisdom of the Bench. The Id AR stated that so far as the issue in para (iv) is concerned, the Id. PCIT observed that the profit of Rs. 1,49,88,621.26 from Commodity Trading in Foreign Currency US dollar, has not been verified by the AO by conducting necessary enquiry from the concerned commodity exchange to find out whether the transactions were actually carried out. The Ld. A.R submitted that the said income has been shown under the head other nonoperating income the details whereof are given as under:

Other Non-Operating Income	Amount (Rs.)
Scrap Sale	21,72,315.00
Commodity Trading Derivative	50,78,728.92
Foreign Currency Trading Derivative	1,49,88,621.26
Total	2,22,39,665.18

The Ld. A.R. submitted that foreign currency trading derivative profit of Rs. 1,49,88,621.26/- is comprised in the other non-operating income and stands included in the net profit of the assessee shown during the year. The Id Ar submitted that therefore there is no prejudice caused to the revenue as the income fully assessed to tax. The Ld. A.R submitted that in order to invoke jurisdiction u/s 263 that twin condition has to be satisfied i.e. order has to be erroneous and similarly it has to be prejudicial to the interest of the revenue. The Ld. A.R submitted that there is no mistake in the order of AO and therefore he relied on the decision of Hon'ble

Supreme Court in the case of CIT vs. Malabar Industries Co. Ltd. in 243 ITR 83(SC). Similarly the same argument was forwarded by the Ld. A.R in respect of issue in para (v) i.e. profit of Rs. 50,78,728.92 from Commodity Trading in cotton through the share brokers M/s Kali Commodities Pvt. Ltd. which has been stated by the Id PCIT to be not verified by the AO by conducting adequate enquiry from Commodity Exchange. The Ld. A.R submitted that the same has been shown as income under the head other non-operating income as stated hereinabove. Therefore the exercise of jurisdiction u/s 263 is invalid and liable to be set aside on the same analogy. Qua the issue in para no. (vi) of Rs. 21,72,315/- , the Id AR stated that the same represented sale of scrap of fixed assets being redundant or unfit for use. The Ld. PCIT observed that the details of the party or parties ,to whom the said scrap was sold, has not furnished however income from the said scrap sale stands disclosed under the head other non-operating income and no prejudice in the order of AO and therefore revisionary jurisdiction has been invalidly exercised. In para no.(vii) above, the PCIT observed that the AO has made disallowance of Rs. 24,74,000/- only instead of disallowing the entire write-off of capital assets to the extent of Rs. 1,13,39,000/- which was strongly controverted by Ld. A.R by submitting that the issue has been discussed in the order itself in para 3 of the assessment order wherein it has been stated that the assessee has written off an amount of Rs. 1,13,38,936.16 consequent to demolition, renovation and write off account. The AO stated that the assessee was asked to furnished details in response to the copy of valuer's report and explained that there was a restaurant run there under the name of 'Saurav' after transformation of which the restaurant-bar-night club business turned into the present one a lot of changes have to be made by writing off as the old name was scripted there. However the same when certified by a valuer which comes at Rs. 88,65,000/-. Thus the difference was disallowed and added to the income of the assessee. The Ld. A.R therefore prayed that the order is neither erroneous nor prejudice to the interest of the revenue as the AO has examined the issue and taken a possible view. The AO has taken a plausible view by relying on the decision of Hon'ble Bombay High Court in the case of CIT vs. Gabreal India Ltd. in [1983]203 ITR 108 (Bom-HC). In para (viii)

the PCIT observed that the tax audit report mentions that the TDS has been deducted on the expenses of Rs. 93,83,302/- under various sections of the Act whereas according to the ledger details the TDS on expenditure should have been made on Rs. 1,32,89,591/-. Thus the AO has not considered the non-deduction of TDS on the difference of expenses amounting to Rs. 39,06,289/- which also liable to be disallowed u/s 40(a)(ia) of the Act. The Ld. A.R submitted that the AO has not verified the issue during the assessment proceedings and prayed before the bench that the disallowance under 30% u/s 40(a)(ia) i.e. Rs. 11,71,886/- may be made and added to the income by giving necessary direction to the assessee.

6. The Ld. D.R on the other hand argued that by exercise of jurisdiction u/s 263 by PCIT no prejudice is going to be caused to the assessee as the assessee would be given sufficient opportunity in the set aside proceedings to respond to this issue and therefore the objection by the Ld. A.R are devoid of merit and may kindly be dismissed.

7. After hearing the rival contentions and perusing the material on record, we find that so far as the first issue in para no. (i) of the show cause notice (loan from directors of Rs. 3.17 crores), issue no. (iv) profit of Rs. 1,49,88,621.26 from Commodity Trading in Foreign Currency US\$, issue no.(v) profit of Rs. 50,78,728.92 from Commodity Trading in cotton through the share broker M/s Kali Commodities Pvt. Ltd. and issue no. (vii) in respect of write off of fixed asset of Rs. 88,65,000/-, we observe that the PCIT has not exercised the jurisdiction in accordance with the provisions of Section 263 of the Act. We find that the loans from four directors of Rs. 3.17 crores were verified during the assessment proceedings by the AO by calling for information/details from the assessee. We note that the opening balance coming from the earlier years from these directors was Rs. 4,81,81,000/- whereas a sum of Rs. 3,17,00,000/- was taken from the four directors during the year. The assessee has filed before the AO all the evidences such as copy of financial statements, ITRs, bank statements and confirmations from the directors which were examined by the AO and these loans were accepted. We have also perused the copies/evidences filed before us

as contained in page no. 1 to 48 and based on our examination and analysis, we are of the considered view that the revisionary jurisdiction and order passed u/s 263 of the Act in respect of this is not correct and can not be sustained. Similarly a profit from Commodity Trading in Foreign currency US\$ of Rs. 1,49,88,621.26 as stated in para(iv) has been disclosed under the head non-operating income and thus no prejudice is caused to the revenue. On this count also the jurisdiction of PCIT is not valid. Issue no. (v) i.e. profit of Rs. 50,78,728.92 from Commodity Trading in cotton and scrap sale of Rs. 21,72,315/- which have also been duly discussed in the other non-operating income and thus no prejudice is caused to the revenue and thus jurisdiction has been invalidly exercised. In respect of issue no.(vii) which is write off of fixed asset to the tune of Rs. 88,65,000/- , the same has been discussed in detail by the AO in para 3 of the assessment order on the basis of a report from the valuer and assessee's contentions , the write off has been allowed by the AO. In our view, a plausible view has been taken by the AO which cannot be questioned by PCIT by exercising the power u/s 263 of the Act. So, in respect of issue no. (i , iv,v ,vi, and vii) in the show cause notice are concerned , the order of PCIT is incorrect and cannot be sustained. The case of the assessee finds support from the decision of Hon'ble Supreme Court in the case of Malabar Industrial Company Ltd. vs. CIT reported in [2000] 243 ITR 83 (SC) wherein the Apex court has held that satisfaction of twin conditions as provided in section 263 of the Act is pre-requisite for assumption of jurisdiction u/s 263 of the Act. Considering the facts of the case in the light of the various judicial precedents laid down by the Apex Court and various other judicial forms on the various propositions as discussed hereinabove , we hold that the revisionary jurisdiction has not been validly exercised by the Id PCIT. Whereas in respect of remaining item no. (ii) loans from M/s Original Dealcom Pvt. Ltd. Rs. 10,00,000/- were taken and item no.(iii) Rs. 14,95,397.82 from M/s Kalyan Securities Pvt. Ltd. and item no. viii qua non-deduction of TDS on the difference of expenses amounting to Rs. 30,06,289/- , we find this issue is not verified by the AO and the assessment order can be said to be erroneous and prejudicial to the interest of the revenue to this extent only. Accordingly we are inclined to modify the revisionary

order passed u/s 263 of the Act by relying on the decision of Hon'ble Calcutta High Court in the case of Commissioner of Income-tax v.Polar Fan Industries Ltd. in [1992] 197ITR718 (Cal). Accordingly the revisionary order u/s 263 is modified and only treated as valid in respect of item no. (ii), (iii)&(viii).

8. In the result, the appeal of the assessee is partly allowed.

Order is pronounced in the open court on 16th June, 2023

Sd/-

(Sonjoy Sarma /संजय शर्मा)
Judicial Member/न्यायिक सदस्य

Sd/-

(Rajesh Kumar/राजेश कुमार)
Accountant Member/लेखा सदस्य

Dated: 16th June, 2023

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- Abhishek Entertainment and Foods Pvt. Ltd., 20G, Park Street, Kolkata-700016.
2. Respondent – PCIT-3, Kolkata
3. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata