

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

**BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER AND
MS. KAVITHA RAJAGOPAL, JUDICIAL MEMBER**

ITA NO. 208/MUM/2024 : **A.Y : 2018-19**

Urmila Uttam Jhavar
2 Homestead,
16, Dattatraya Road, Santa Cruz,
Mumbai 400 054.

PAN : AAAPJ8879N (Appellant)

Vs Principal Commissioner of
Income Tax Officer, Mumbai.
(Respondent)

Appellant by : Shri Prakash Jotwani
Respondent by : Ms. Rajeshwari Menon

Date of Hearing : 06/05/2024

Date of Pronouncement : 10/05/2024

ORDER

PER B.R. BASKARAN, ACCOUNTANT MEMBER :

The assessee has filed this appeal challenging the revision order dated 12-12-2023 passed by Ld PCIT-5, Mumbai and it relates to the assessment year 2018-19. The assessee is challenging the validity of revision order so passed by Ld PCIT.

2. The assessee herein is an individual and has declared income from salary, house property, income from partnership firm, long term capital gains on sale of property. The assessment was completed by the AO u/s 143(3) of the Act on 30-04-2021. Upon examination of record, the Ld PCIT took the view that the above assessment order is erroneous in so far as it is prejudicial to the interests of revenue, since the AO did not examine properly following issues:-

(a) The assessing officer has worked out capital gains at Rs.16,93,929/- instead of Rs.19,74,790/-.

(b) The Schedule C to Fixed assets shows that the assessee has owned four flats. However, deduction u/s 54F of the Act has been allowed without noticing this fact.

(c) The assessee was a partner in a partnership firm named M/s Skoda Construction. The assessee has retired from the above said firm and has received a sum of Rs.1,95,00,000/- from it. It could not be verified as to whether consideration paid to the retiring partner exceeds the balance in the capital account which could have been brought to tax.

Accordingly, he initiated revision proceedings u/s 263 of the Act. After hearing the assessee, the Ld PCIT held that the assessment order is erroneous and prejudicial to the interests of revenue on the following two issues:-

(a) Deduction allowed u/s 54F of the Act

(b) Non-verification of taxability of amount received from the partnership firm named M/s Skoda Construction.

3. We heard rival contentions and perused the record. The scope of revision proceedings initiated under section 263 of the Act was considered by Hon'ble Bombay High Court, in the case of Grasim Industries Ltd. V CIT (321 ITR 92) by taking into account the law laid down by the Hon'ble Supreme Court. The relevant observations are extracted below:

“Section 263 of the Income-tax Act, 1961 empowers the Commissioner to call for and examine the record of any proceedings under the Act and, if he considers that any order passed therein, by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, to pass an order upon hearing the assessee and after an enquiry as is necessary, enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment. The key words that are used by section 263 are that the order must be considered by the Commissioner to be “erroneous in so far as it is prejudicial to the interests of the Revenue”. This provision has been interpreted by the Supreme Court in several judgments to which it is now necessary to turn. In Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83, the Supreme Court held that the provision “cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer” and “it is only when an order

is erroneous that the section will be attracted". The Supreme Court held that an incorrect assumption of fact or an incorrect application of law, will satisfy the requirement of the order being erroneous. An order passed in violation of the principles of natural justice or without application of mind, would be an order falling in that category. The expression "prejudicial to the interests of the Revenue", the Supreme Court held, it is of wide import and is not confined to a loss of tax. What is prejudicial to the interest of the Revenue is explained in the judgment of the Supreme Court (headnote) :

"The phrase 'prejudicial to the interests of the Revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer, cannot be treated as prejudicial to the interests of the Revenue, for example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the Income-tax Officer is unsustainable in law."

The principle which has been laid down in Malabar Industrial Co. Ltd. [2000] 243 ITR 83 (SC) has been followed and explained in a subsequent judgment of the Supreme Court in CIT v. Max India Ltd. [2007] 295 ITR 282."

4. The first issue considered by Ld PCIT is that the AO has allowed deduction u/s 54F of the Act without noticing the fact that the assessee has already owned four flats. It is pertinent to note that the deduction u/s 54F of the Act could not be allowed if the assessee had already owned two residential houses, other than the new residential house purchased/constructed. With regard to the four flats owned by the assessee, the Ld A.R submitted the details of four flats as under:-

(a) Flat at Mon Ami Co-op Hsg Society - It is not habitable. Letter from society is attached.

(b) Flat – Chakravorty Ashok CHSL - It is not habitable (Under redevelopment).

(c) Nisarg Flat – Jointly owned along with Mr Uttam Jhavar (Husband

(d) Morya House – Indore - Commercial premises

He submitted that a property can be considered as “house property” only if it is habitable. Accordingly, he submitted that the first two properties cannot be considered as “house properties”, since they are not habitable. The third one is jointly owned and the fourth one is a commercial premises. Accordingly he submitted that the assessee has not violated any of the provisions of sec.54F of the Act. He further submitted that the AO had examined these factual aspects in AY 2017-18 and accordingly did not make any addition towards “deemed rent”. Accordingly, he submitted that there is no error in the order passed by the AO in allowing deduction u/s 54F of the Act. Accordingly, he contended that Ld PCIT was not justified in holding that the deduction u/s 54F of the Act has been allowed erroneously by the AO.

5. However, we notice that the AO did not verify these factual aspects during the current year while allowing deduction u/s 54F of the Act. Non-verification of vital details would render the assessment order erroneous and prejudicial as per clause (b) of Explanation 2 to sec.263 of the Act. Accordingly, we are of the view that the Ld PCIT was justified in invoking the revisional powers with regard to this issue. Accordingly, we uphold the order passed by Ld PCIT on this issue.

6. With regard to the taxability of the money received from the partnership firm, we notice that the assessee has retired from the firm in the year relevant to AY 2017-18. Hence the question of taxability of the same can be considered in Assessment year 2017-18 only and not in the current year. Further, the Ld A.R submitted that the taxability u/s 45(4) of the Act is required to be examined in the hands of the partnership firm only and not in the hands of the partner. In this regard, he placed reliance on the decision rendered by Hon’ble Supreme Court in the case of Mansukh Dyeing and Printing Mills vs. CIT (2023)(151 taxmann.com 306)(SC). Accordingly, the Ld A R contended that the Ld PCIT has fell into error in restoring this issue to the file of the AO for examining the same.

7. We heard Ld D.R on this issue and perused the record. Under sec.45(4) of the Act, the taxability arises in the hands of the partnership firm only when the assets are transferred. Further, the assessee has retired from the partnership firm in the year relevant to AY 2017-18. Hence, if at all there is any tax liability, the same would arise in assessment year 2017-18 and not in AY 2018-19. Accordingly, we are of the view that the Ld PCIT was not justified in invoking revisional powers on this issue. Accordingly, we set aside the order passed by Ld PCIT on this issue.

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

Order pronounced in the open court on 10th May, 2024.

Sd/-
(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Sd/-
(B.R. BASKARAN)
ACCOUNTANT MEMBER

Mumbai, Date : 10th May, 2024

SSL

Copy to :

- 1) The Applicant
- 2) The Respondent
- 3) The CIT concerned
- 4) The D.R, "F" Bench, Mumbai
- 5) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai