

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES 'A': NEW DELHI**

**BEFORE MS. MADHUMITA ROY, JUDICIAL MEMBER
AND
SHRI AVDHESH KUMAR MISHRA, ACCOUNTANT MEMBER**

ITA No.3631/Del/2023, A.Y. 2016-17

M/s. Apace Developers Pvt. Ltd. A-621, New Ashok Nagar New Delhi 110096 PAN: AAHCA5732D	Vs.	PR.CIT-1, Delhi
(Appellant)		(Respondent)
Appellant by		Sh. Akhelesh Kumar, Advocate and Sh. Govind Agarwal, CA
Respondent by		Ms. Sapna Bhatia, CIT DR
Date of Hearing		16/05/2024
Date of Pronouncement		28/05/2024

ORDER

PER AVDHESH KUMAR MISHRA, AM

The instant appeal of the Assessment Year [In short, the 'AY'] 2016-17, preferred by the appellant/assessee, is against the order, dated 17.11.2023, passed under section 263 of the Income Tax Act, 1961 [In short, the 'Act'] by the Principal Commissioner of Income Tax-1, Delhi [In short, the 'PCIT']. The impugned order of the PCIT, under challenge, was passed in consequence to the order dated 22.09.2022 of the ITAT, in this case, in the ITA No. 643/Del/2022.

2. Following grounds of appeal have been raised in the present appeal:-

“1. That, the order of learned Pr. Commissioner of Income Tax u/s 263 of the I.T. Act is bad in law and is against the facts and circumstances of the case.

2. That on the facts and circumstances of the case and in law, Id. Pr. CIT is completely wrong and incorrect in alleging that assessee had not filed any reply/enclosures without verifying the portal as assessee filed submissions along with documents various times and also requested many times to consider the same, even after that Id. Pr.CIT not considered any response of assessee, therefore notice/order u/s. 263 is against all the cannons of law.

3. Because, Id. Pr. CIT erred in dismissing the appeal ex-parte without providing proper opportunity of being heard, though no response of assessee is considered.

4. That, Id. PCIT has erred in assuming the jurisdiction u/s 263 on the basis that Id. AO failed to conduct enquiries and verification on the issue, though detailed enquiries are conducted on the issue and additions have already been made, which are pending before ld. CIT(A).

5. That, Id. PCIT erred on merits in directing to make an addition of Rs.94,52,860 (2,61,23,620-1,66,70,700) which is only on a/c of a clerical mistake by not considering the correct figure of Rs.1,37,38,732 instead of Rs.2,61,23,620 as is erroneously mentioned by ld AO in reproducing the figures given by the assessee, which is apparent on the record and even duly explained before ld. PCIT.

6. That, ld. PCIT erred in calculating a deficit of Rs.94,52,860/- on the project of Royal home Town which is disallowed though assessee himself has declared surplus of Rs.29,32,028/-. As such after considering correct figure there is no loss to revenue.”

2.1 The core issue for consideration before us is that whether the assessment order was erroneous & prejudicial to revenue warranting assumption of jurisdiction by the PCIT over the case under section 263 of the Act.

3. The relevant and limited facts for deciding this appeal, in brief, are that the appellant/assessee, a civil contractor, filed its Income Tax Return (In short, the 'ITR') on 12.05.2017 declaring income of Rs.12,73,060/-. The case was picked up for scrutiny and the consequential assessment was completed under section 143(3) of the Act at income of Rs.15,05,69,690/- by the Assessing Officer [In short, the 'AO']. The PCIT, on examination of the assessment record of the relevant year, noticed that the appellant/assessee, who worked on 4 projects; namely, Royal Home, Park Escape, Arien Metal, Ellora Infratech had debited/claimed expenses related to the above mentioned 4 projects in its Profit & Loss account of the relevant year, had not credited/disclosed the corresponding income thereof in its Profit & Loss account though the appellant/assessee maintained its books of accounts on mercantile system of accounting. The aggregate gross receipts of Rs. 2,76,20,027/- from these projects other than Ellora Infratech had been disclosed by the appellant/assessee in its Profit & Loss account. Against these receipts, expenses under the following heads; i) material cost of Rs.

2,88,30,170/- and (ii) labour charges of Rs.48,86,855/- (iii) employee expenses of Rs.15,76,717/-, iv) finance cost of Rs.1,39,649/- and (v) other expenses of Rs. 67,47,934/-had been claimed by the appellant/assessee. The AO disallowed the material cost and labour charges aggregating to Rs.1,32,34,888/- of Ellora Infratech project on the reasoning that the corresponding receipts of this project had not been disclosed as income by the appellant/assessee. To which, the appellant/assessee, as per its written submission, had conceded before the CIT(A).

4. It was argued by the Ld. Counsel that the PCIT, taking cognizance of the tabular details of receipts & expenses of the above mentioned 4 projects (As referred in the table mentioned in para 2 of the order, dated 28.03.2021, under section 263 of the Act.), inferred that the appellant/assessee had claimed excess expenses over the corresponding revenue of Royal Home project under the heads (i) material cost and (ii) labour charges aggregating to Rs.94,52,860/- on the reasoning that the receipts of Rs.1,66,70,760/- only of Royal Home project had been disclosed in the Profit & Loss account as against the corresponding expenses ofRs.2,61,23,620/- of Royal Home project under the heads material cost and labour charges. Accordingly, the PCIT held that the AO had done under-assessment by income of Rs.94,52,860/-. Thus, the

PCIT, vide order dated 28.03.2021, passed under section 263 of the Act, held that the assessment order is erroneous and prejudicial to the interest of revenue and therefore, set aside the order of the AO with specific directions for enhancing the income of the appellant/assessee by Rs.94,52,860/-. The order dated 28.03.2021 passed under section 263 of the Act was challenged by the appellant/assessee before the Tribunal, who vide order dated 22.09.2022 in ITA No. 643/Del/2021 remanded the matter back to the PCIT for revision/rectification of the computational mistake taken place in the said order dated 22.09.2022. In pursuance of the ITAT order dated 22.09.2022, the PCIT had given sufficient opportunities of being heard to the appellant/assessee as detailed in para 5 and 6 of the impugned order but in vain. Since the appellant/assessee did not bring any material on the record during the set-aside proceedings to contradict the finding of the PCIT and to demonstrate any computational error in the original order passed under section 263 of the Act, therefore, the PCIT, vide impugned order, declined to interfere/rectify/revise with any of the findings mentioned in the order dated 28.03.2021 passed under section 263 of the Act.

5. The Ld. Counsel arguments revolved around his contention that the appellant/assessee, mistakenly, submitted tabular details (Table-1) as mentioned in the assessment order wherein it showed (i) material cost

of Rs.2,88,30,170/- and (ii) labour charges of Rs.48,86,855/- relating to three projects (other than Ellora Infratech) instead of four projects. The correct details of expenses under (i) material cost and (ii) labour charges heads of all four projects were also filed (Table-2) during the assessment proceedings as referred on page 5 of the assessment order. The tabular details of these expenses filed during the assessment proceedings are worth mentioning here for proper appreciation of the facts of the case:

Table-1

S. No.	Name of the Party	Contract Value (in Rs.)	Work Complete (in Rs.)	Material Consumed (in Rs.)	Labour Charges (in Rs.)	% of Work Completed (in Rs.)
1.	Royal Home Town Palners Pvt. Ltd.	15,44,47,228/-	1,66,70,760/-	2,30,64,136/-	39,09,484/-	10.79
2.	Park Escape	55,00,000/-	56,60,378/-	28,83,017/-	4,88,685/-	100
3.	Arien Metals Pvt. Ltd.	1,85,00,000/-	52,88,889/-	28,83,017/-	4,88,686/-	28.85
	Total	17,84,47,228/-	2,76,20,027/-	2,88,30,170/-	48,86,855/-	

Table-2

S. No.	Name of the Party	Contract Value (in Rs.)	Work Complete (in Rs.)	Material Consumed (in Rs.)	Labour Charges (in Rs.)	% of Work Completed (in Rs.)
1.	Royal Home Town Palners Pvt. Ltd.	15,44,47,228/-	1,66,70,760/-	1,06,79,248/-	30,59,484/-	10.79
2.	Park Escape	55,00,000/-	56,60,378/-	28,83,017/-	4,88,685/-	100
3.	Arien Metals Pvt. Ltd.	1,85,00,000/-	52,88,889/-	28,83,017/-	4,88,685/-	28.85
4.	Ellora Infratech Pvt. Ltd.	38,72,30,560/-		1,23,84,888/-	8,50,000/-	
		17,84,47,228/-	2,76,20,027/-	2,88,30,170/-	48,86,855/-	

5.1 It was further submitted by the Ld. Counsel that there is no dispute on the aggregate quantum of expenses under the heads (i) material cost of Rs.2,88,30,170/- and (ii) labour charges of Rs.48,86,855/-. The issue in dispute here is only with respect to the apportionment of these expenses [(i) material cost of Rs.2,88,30,170/- and (ii) labour charges of Rs.48,86,855/-] amongst Royal Home project and Ellora Infratech. In other words, the claim of the appellant/assessee is that the expenses of Royal Home project under the heads (i) material cost and (ii) labour charges are Rs.1,06,79,248/- and Rs.30,59,484/- as against the Revenue's claim of Rs.2,30,64,136/- and Rs.39,09,484/- respectively. The Ld. Counsel further demonstrated with the help of the above tabular details that if the expenses under the heads (i) material cost and (ii) labour charges as per the order dated 28.03.2021 passed

under section 263 of the Act are considered then the expenses in aggregate will be more than the expenses debited in the Profit & Loss account by Rs.94,52,860/-. To buttress his arguments, the Ld. Counsel contended that if the figures of (i) material cost of Rs.1,06,79,248/- and (ii) labour charges of Rs.30,59,484/- of Royal Home in the Table-2 above are replaced by the corresponding figure of Table-1 by Rs.2,30,64,136/- and Rs.39,09,484/-, the aggregate expenses under the heads (i) material cost and (ii) labour charges come to Rs.4,12,15,058/- and Rs.57,36,855/- as against the claimed expenses of Rs.2,88,30,170/- and Rs.48,86,855/- respectively in the Profit & Loss account.

5.2 The Ld. Counsel argued that the PCIT was not consistent in his approach as it had taken some suitable figures from the Table-1 and some from the Table-2. He contended that if the PCIT should have taken figures from one table, then such anomaly should have not arisen. The PCIT, by passing the original order under section 263 of the Act, had erred in quantifying that income or disallow those expenses which had not been credited or debited in the Profit & Loss account.

4.3 On legality of the assumption of jurisdiction under section 263 of the Act, the Ld. Counsel, besides above details, placed reliance on various judicial pronouncements and contended that the impugned order is ab-initio void.

5. The Ld. DR placing emphasis, on the finding in the original order dated 28.03.2021 passed under section u/s 263 of the Act as under: -

“8. I have gone through the assessment record, issue raised and the reply submitted. The following pertinent observations are made:

i. The assessee has not maintained any project wise details of expenditure although his contracts are all different.

ii. However, the final accounts were not declared showing the figures of each project separately, and the expenses were not verifiable, no details were kept project-wise even of labour payments.

iii. The assessee itself accepts that when asked to give project wise breakup of contract value and expenses made it gave wrong figures. The figures are not only a) claimed wrongly given but (b) there was no basis or primary record showing the expenses project wise. This was noted in the assessment order at page 5.

iv. There is no reason to accept the figures given on 27.12.2018 to be correct, because (a) these have been given afresh only because the figures given earlier were resulting in adverse conclusions to the assessee. As stated earlier there was no basis or primary record showing the expenses project wise. Not only this the new figures are clearly manipulated because the expenses debited to two projects namely, Park Escape & Arien Metal Private Limited, now match exactly (to the last odd rupee) both vis-a-vis 1. Material consumed. 2. Labour Charges.

9. To sum up the story the assessee has brought up claiming that the earlier figures given by itself were typing mistake is rejected. The new figures are not reliable, are not backed by primary record or evidence in support and the above fact show that these are manipulated.”

contended that the appellant/assessee did not bring any material on the record during the set aside proceedings before the PCIT; therefore, he, vide impugned order, had rightly rejected the claim of the appellant/assessee. The Ld. DR further contended that the project wise details of expenses were not maintained by the appellant/assessee and therefore, it showed same amount of (i) material cost of Rs.28,83,017/- and (ii) labour charges of Rs.4,88,685/ for Park Escape and Arian Metal Projects though the corresponding income therefrom disclosed in the Profit & Loss account were Rs.56,60,378 and Rs.52,88,889/- respectively. Thus, she prayed for dismissal of the appeal.

6. We have heard both the parties at length and perused the material available in the case record.

7. We have limited issue to decide here that whether the PCIT, vide impugned order, did justice in pursuance of the Tribunal's order, dated 22.09.2022, in ITA No. 643/Del/2021. It is evident from the impugned order that the PCIT, who was required to do needful after rectifying the computational error pointed out in the above-mentioned Tribunal's order, has given sufficient opportunities of being heard to the appellant/assessee as detailed in para 5 and 6 of the impugned order but the same were not availed by the appellant/assessee. The PCIT was not required to review the original order dated 28.03.2021 but to act as

per the Tribunal's order (supra). Since the appellant/assessee did not bring any material on the record during the set-aside proceedings to contradict the finding of the PCIT and to demonstrate any computational error in the original order passed under section 263 of the Act, therefore, it is held that the PCIT, vide impugned order, has rightly declined to interfere/rectify/revise with any of the findings mentioned in the order dated 28.03.2021 passed under section 263 of the Act. Thus, we are of the considered opinion that the impugned order was not passed ex-parte as mentioned in one of the grounds of appeal. Accordingly, in view of the above, grounds of appeal, numbered 1 to 4 are dismissed herewith.

8. We are also of the firm view that the issues of assumption of jurisdiction by the PCIT under section 263 of the Act and legality of the order dated 28.03.2021 passed under section 263 of the Act is not in dispute here. Hence, we are not going to give any finding thereon. At most it could be said that unless the Tribunal had not found the original order passed under section 263 of the Act legally valid, it would have not set aside and restore the matter back to the PCIT vide its order dated 22.09.2022 in ITA No. 643/Del/2021. Thus, the one and only one inference emerged from the order dated 22.09.2022 in ITA No. 643/Del/2021 is that the original order passed under section 263 of the Act is in accordance with the law and that is why the matter was

reverted back to the PCIT for revision/rectification as per the law. Such finding in the order dated 22.09.2022 in ITA No. 643/Del/2021 lead to the inference that the PCIT has rightly assumed the jurisdiction under section 263 of the Act. Hence, those grounds of appeal which question the legality of the original order passed under section 263 of the Act also stand dismissed.

9. As far as the last two grounds are concerned, we find merit in the arguments and contentions of the Ld. AR on the simple reasoning that the AO cannot disallow that expenditure or work out income relatable to such expenditure, on accrual basis, which had not been claimed in the Profit & Loss account. Undisputedly, the aggregate quantum of expenditure under the heads material cost and labour charges are Rs.2,88,30,170/- and Rs.48,86,855/- respectively. The apportionment of these expenses has to be done amongst all four projects. There is dispute on quantum of expenditure amongst Royal Home and Ellora Infratech. We find merit in the argument that if the expenditure of all four projects under the heads (i) material cost and (ii) labour charges, as per the PCIT, were taken at Rs.2,30,64,136/- & Rs.39,09,484/- for Royal Home, Rs.28,83,017/- & Rs.4,88,685/- for Park Escape, Rs.28,83,017/- & Rs.4,88,685/- for Arien Metal and Rs.1,23,84,888/- & Rs.8,50,000/- for Ellora Infratech, then the aggregate expenditure under

these heads work out to Rs. 4,12,15,058/- and Rs. 57,36,855/- respectively, which is Rs.1,32,34,888/- more than the aggregate expenditure claimed by the appellant/assessee.

10. We are of the considered opinion that the PCIT should have held one of the Tables mentioned above in para 4 as authentic as there is no dispute on aggregate expenditure mentioned in these tables and claimed in the Profit & Loss account. In case of dispute about the apportionment of expenses at micro levels (amongst projects), the same would have been sorted out with the help of original bills & vouchers of expenditure. Therefore, in the interest of justice and considering all the afore-stated observations & finding in the order dated 22.09.2022 in ITA No. 643/Del/2021, we are of the considered opinion that the appellant/assessee deserves reasonable opportunity of being heard to make shortcomings. In view thereof, without offering any comment on merit of the case we deem it fit to set aside the impugned order and remit the issue of the computational mistake/error referred in the order dated 22.09.2022 in ITA No. 643/Del/2021 back to the file of the PCIT to decide the case afresh. The appellant/assessee should ensure compliances during the set-aside proceeding before the PCIT. The PCIT is also required to provide reasonable opportunities of being heard to the appellant/assessee before deciding the case on merit.

11. In the result, appeal is partly allowed as above.

Order pronounced in open Court on 28th May, 2024.

Sd/-

**(MADHUMITA ROY)
JUDICIAL MEMBER**

Sd/-

**(AVDHESH KUMARMISHRA)
ACCOUNTANT MEMBER**

Dated: 28/05/2024

Binita, Sr. PS

Copy forwarded to:

1.Appellant

2.Respondent

3.PCIT

4.CIT(Appeals)

5.DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI