

| आयकर अपीलिय अधिकरण न्यायपीठ, मुंबई |
IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, MUMBAI

BEFORE SHRI NARENDRA KUMAR BILLAIYA, HON'BLE ACCOUNTANT MEMBER
&
SHRI RAJ KUMAR CHAUHAN, HON'BLE JUDICIAL MEMBER

I.T.A. No. 1926/Mum/2024
Assessment Year: 2018-19

Impresario Entertainment & Hospitality Pvt. Ltd., Mumbai 66A, American Express Bakery House, Clare Road Byculla West Mumbai - 400008 [PAN: AAACI7871E]	Vs	The Principal Commissioner of Income Tax PCIT, Mumbai -5, Mumbai
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)

Assessee by :	Shri Rahul Hakani, A/R
Revenue by :	Ms. Madhu Malati Ghosh, CIT, D/R

सुनवाई की तारीख/Date of Hearing : 24/07/2024
घोषणा की तारीख /Date of Pronouncement: 29/07/2024

आदेश/ORDER

PER NARENDRA KUMAR BILLAIYA, AM:

This appeal by the assessee is preferred against the order dt. 21/02/2024 by PCIT, Mumbai-5, framed u/s 263 of the Income Tax Act, 1961 ('the Act') pertaining to AY 2018-19.

2. The sum and substance of the grievance of the assessee is that the PCIT erred in assuming jurisdiction u/s 263 of the Act and further erred in holding that the order dt. 30/04/2021, framed u/s 143(3) of the Act is not only erroneous but prejudicial to the interest of the revenue.

3. Having heard the rival submissions, we have carefully perused the orders of the authorities below and have considered the relevant documentary evidences brought on record in light of Rule 18(6) of the ITAT Rules, 1963.

4. Briefly stated the facts of the case are that the return of income was selected for complete scrutiny under E-assessment Scheme, 2019, the following issues:-

S. No. Issues

- i. Expenditure of Personal Nature*
- ii. Investments/Advances/Loans*
- iii. Income from Liquor Business*
- iv. Refund Claim*
- v. Share Premium*
- vi. Sales Turnover/Receipts*
- vii. Expenditure by Way of Penalty or Fine for Violation of any Law*

5. The assessment was framed u/s 143(3) r.w.s. 144B of the Act vide order dt. 30/04/2021. Assuming jurisdiction conferred upon him by the provisions of Section 263 of the Act, the PCIT-5, Mumbai, issued the following show cause notice:-

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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
OFFICE OF THE PRINCIPAL COMMISSIONER OF INCOME TAX
PCIT, Mumbai-5

To, IMPRESARIO ENTERTAINMENT & HOSPITALITY PVT LTD 66A AMERICAN EXPRESS BAKERY HOUSE , CLARE ROAD, BYCULLA WEST MUMBAI MUMBAI CENTRAL H.O 400008 , Maharashtra India	
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PAN/TAN: AAACI7871E	AY: 2018-19	DIN & Notice No : ITBA/REV/F/REV1/2023- 24/1059944011(1)	Dated: 19/01/2024
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NOTICE FOR THE HEARING

M/s/Mr/Ms

Subject: Notice for Hearing in respect of Revision proceedings u/s 263 of the **THE INCOME TAX ACT, 1961** – Assessment Year **2018-19**.

In this regard, a hearing in the matter is fixed on **31/01/2024 at 11:30 AM**. You are requested to attend in person or through an authorized representative to submit your representation, if any alongwith supporting documents/information in support of the issues involved (as mentioned below). If you wish that the Revision proceeding be concluded on the basis of your written submissions/representations filed in this office, on or before the said due date, then your personal attendance is not required. You also have the option to file your submission from the e-filing portal using the link: incometaxindiaefiling.gov.in

Sub: Show-cause Notice under section.263 of the Income-tax Act, for A.Y. 2018-19

In this case the assessee has filed its return of income for A.Y. 2018-19 on 27/09/2018 declaring total income at Rs. Nil/-. The case was selected for scrutiny and Assessment was completed u/s. 143(3) r.w.s. 144B of the income tax Act, 1961 on 30.04.2021 determining total income at Rs. 1,18,30,380/-.

- (2. On perusal of the assessment records, it is observed that the assessee company has debited a sum of Rs. 1,16,02,879/- under sub head "Delayed Payment of Statutory Dues" under the main head Finance charges. No details of payments/evidences are available on record regarding the nature of delayed payment of statutory dues claimed as finance cost amounting to Rs. 1,16,02,879/-. Also from the details of interest payments, the assessee has claimed interest expenditure of Rs. 2,25,06,576/- on secured and unsecured loans and interest on term loan of Rs. 1,05,72,362/-. Thus, total finance cost

on account of secured, unsecured and term loan comes to Rs. 3,30,79,938/- whereas assessee has debited under the head finance cost amounting to Rs. 5,08,30,102/- which includes the payment debited in respect of delayed payment of statutory dues of Rs. 1,16,02,879/-. Considering the nature of payment being delayed payment of statutory dues debited as finance cost, the same are not allowable as business expenditure, thus, leading to under assessment of income to the extent of Rs.1,16,02,879/- and the loss of revenue effect to the extent of Rs.34,80,863/-.

3. Therefore, it appears that the assessment order passed under section 143(3) r.w.s. 144B of the Income Tax Act dated 30.04.2021, is erroneous in so far as it is prejudicial to the interest of revenue within the meaning of Section 263 of the Income Tax Act. In view of this, you are required to show cause as to why said assessment order should not be revised under section 263 of the Income Tax Act.

4. In this connection, you are hereby given an opportunity to file submission/explanation on or before 31.01.2024 through e-proceedings, along-with all supporting documents and evidences. If you wish to avail personal hearing, you are requested to attend the hearing on 31.01.2024 at 11.30 a.m. at Room No. 515, 5th Floor, Aayakar Bhavan, Mumbai either in person or through an authorized representative. In case of non-compliance on the stipulated date and time, it will be presumed that you have no objection to the proposed revision of the assessment order passed by the Assessing Officer under section. 143(3) r.w.s. 144B of the Income Tax Act dated 30.04.2021.



DEVINDER KUMAR GUPTA
PCIT, Mumbai-5

6. The provisions of Section 263 of the Act reads as under:-

“263. Revision of orders prejudicial to revenue.

(1) The [Principal Chief Commissioner or Chief Commissioner or Principal Commissioner] or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer [or the Transfer Pricing Officer, as the case may be,] is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, [including, –

(i) an order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment; or

(ii) an order modifying the order under section 92CA; or

(iii) an order cancelling the order under section 92CA and directing a fresh order under the said section].

Explanation 1. – For the removal of doubts, it is hereby declared that, for the purposes of this sub-section, –

(a) an order passed on or before or after the 1st day of June, 1988] by the Assessing Officer [or the Transfer Pricing Officer, as the case may be,] shall include – (i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A; (ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer [or the Transfer Pricing Officer, as the case may be,] conferred on, or assigned to, him under the orders or directions issued by the Board or by the Principal Chief Commissioner or Chief Commissioner or Principal Director General or Director General or Principal Commissioner or Commissioner authorised by the Board in this behalf under section 120; (iii) an order under section 92CA by the Transfer Pricing Officer;]

(b) "record" shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Principal [Chief

Commissioner or Chief Commissioner or Principal] Commissioner or Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer 92 [or the Transfer Pricing Officer, as the case may be,] had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the* Principal Commissioner or Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

Explanation 2. – For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer [or the Transfer Pricing Officer, as the case may be,] shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal [Chief Commissioner or Chief Commissioner or Principal] Commissioner or Commissioner, – (a) the order is passed without making inquiries or verification which should have been made; (b) the order is passed allowing any relief without inquiring into the claim; (c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or (d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.

[Explanation 3. – For the purposes of this section, "Transfer Pricing Officer" shall have the same meaning as assigned to it in the Explanation to section 92CA.]

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.

Explanation. – In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded."

7. A perusal of the aforesaid provisions show that the PCIT can assume jurisdiction if the assessment order is passed allowing any relief without inquiring into the claim or the order has not been made in accordance with any order, direction or instruction issued by the Board or the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee.

8. All that we have to see is whether the AO has made any inquiry/investigation. Before proceeding further, let us see how the income was computed by the assessee. The relevant part of the computation of income reads as under:-

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Pg 2	IMPRESARIO ENTERTAINMENT & HOSPITALITY PVT LTD.	A-Yr: 2018-19
PAN # AAACI7871E	Annexures	

BUSINESS & PROFESSION

1	Impresario Entertainment and Hospitality Private		(686,95,659)
	LOSS As per Profit & Loss A/c		
	<u>Less : Income Considered Separately</u>		
	a. Profit on sale of current investment	5333,770	
	b. Profit on Sale of Fixed Assets	2279,288	
	c. Interest on FD & ICD	7720,924	
	d. Rental Income from sublease of property	6235,000	
			215,68,982
			-902,64,641
	<u>Add : Expenses debited to P&L A/c relate to Exempt Income</u>		
	a. 14A disallowance	2722,627	
			27,22,627
			-875,42,014
	<u>Add : Depreciation debited to P & L A/c included above</u>		1089,96,450
			214,54,436
	<u>Less :- Depreciation as per Annex - u/s 32(1)(ii)</u>		608,62,519
			-394,08,083
	<u>Add : Disallowable amount debited to P&L A/c u/s 36</u>		
	a. Provision for Bad & Doubtful Debts	7535,338	
			75,35,338
			-318,72,745
	<u>Add : Disallowable amount debited to P&L A/c u/s 37</u>		
	a. Any other Penalty/Fine	9116,155	
			91,16,155
			-227,56,590
	<u>Add : Disallowable amount debited to P&L A/c u/s 40</u>		
	a. Amount disallowable under section 40(a)(ia)	1062,271	
			10,62,271
			-216,94,319
	<u>Add : Disallowable amount debited to P&L A/c u/s 43B</u>		
	a. Dr. P&L u/s 43B-Sum in the nature of Tax, duty et	3,136	
	b. Sum to an employee as Bonus/Commission	13504,040	
	c. Sum towards Leave encashment	4682,259	
			181,89,435
			-35,04,884
	<u>Add : Disallowable / Considered Separately</u>		
	a. Donation	138,440	
	b. Provision for Gratuity	8050,757	
	c. Breakages	5162,095	
	d. Deposits & Advances w/off	1796,203	
	e. Net Provision for Rent (As per AS19)	4524,694	
			196,72,189
			161,67,305
	<u>Less : Disallowed amount u/s 43B allowable during prvs.yr.</u>		
	a. Sum to an employee as Bonus/Commission	12186,749	
	b. Sum towards Leave encashment	1819,444	
			140,06,193
	Book Profits as per Companies Act		21,61,112
	<u>Add : Additions in BOOK PROFIT</u>		-765,95,659

8.1. It can be seen that the assessee had *suo moto* disallowed Rs. 91,16,155/-.

9. The first notice dt. 11/01/2021 , issued u/s 142(1) of the Act, was issued along with the following questionnaire:-

“

ANNEXURE

ANNEXURE-AAAC17871E IMPRESARIO ENTERTAINMENT & HOSPITALITY PVT LTD AY 2018-19

Notice u/s 142(1) of the Income-tax Act

Please refer to the notice u/s 143(2)/142(1) issued earlier and submissions made by you. In this regard, You are requested to provide the following information with regard to the scrutiny assessment proceedings pending for the A.Y. 2018-19 in your case:

2.) On perusal of your ITR for AY 2018-19, certain issues are identified for clarification on which you are requested to furnish the following information:

2A) On perusal of the information available on record, it is seen that there is increase of share capital from Rs. 67612090/- to Rs. 120522590/- of the company and huge increase in share premium from Rs. 481364860/- to Rs. 1578297802 during the year FY 2017-18 of the company. In this regard, you are required to submit the following information:

(i). Email id of the company who has invested in the company during the year. M/s Sensational Eatery P Ltd. (AAZCS4225P), Singapore details of shareholders of the company, email id of representative assessee in Mumbai etc., (as per information available Price water House Coopers Pvt Ltd, Bandra, west Mumbai), details of ITR and financial statements of the above company for AY 2018-19.

(ii) It is seen that the share investors of the company have sold their share holding to above company M/s Sensational Eatery P Ltd. (AAZCS4225P) during the year (from earlier share holders namely, Sri Riyaz Nasruddin Amlani, Mirah Hospitality and Food Solution Ltd, Beacon India Investors Ltd, Kiran Arshad Chaudry, Arshay Mangani etc., during the year 2017-18) at a premium rate. In this regard, you are requested to provide the details of calculation of share premium at the calculated rate and formula/method for calculation /arriving at premium price.

Please provide the method of calculation of share premium done by the company and methods prescribed under Rule 11UA are Book value Method

(NAV) and Discounted Cash flow method); or You are requested to explain why the share premium arrived by the company issue can not be considered for taxation u/s 56(2)(viib) of IT Act.

iii) Copy of share subscription cum share purchase agreement dated 3-11-2017 between Sri Riyaz Nasruddin Amlani, M/s Sensational Eatery P Ltd. (AAZCS4225P), minority share holders of company, details of company issued 1201 CCPs at premium of Rs 12 lakh per share to M/s Sensational Eatery Pte Ltd. (AAZCS4225P).

iv) Please provide the details of ITR, computation of income, email id, PAN of the above sellers namely Sri Riyaz Nasruddin Amlani, Mirah Hospitality and Food Solution Ltd, Beacon India Investors Ltd, Kiran Arshad Chaudry, Arshay Mangani etc., during the year 2017-18)

2B) As per the information available, you have invested in ICICI Prudential Money Market Fund more than Rs. 75 crores during the year. You are requested to submit account statement of above in your books of account and from fund house, sources for above investment, details of gains from above investment and status of disclosing the same in ROI for AY 2018-19, Bank account statement evidencing the above transaction,

2C) You have not filed the details of unsecured loan taken during the year as called for vide notice u/s 142(1) dated vide para 3A, depreciation details (with bills in support of major additions TOP 10) as called for vide para 3C and details as called for in para 3D of the above letters are not furnished. You are requested to submit above details. Please refer the date of submission if any of the information is submitted earlier.

2D) Further, you are requested to submit the details with explanation on these issues:

(i) Reasons for disclosing substantial amount of investments in the balance sheet as per ITR whereas the total income (including exempt income) as per the ITR is significantly low.

(ii) Reasons for claiming substantial amount of refund

(iii) Large expenditure by way of penalty or fine for violation of any law for the time being in force of Rs.9116155/-

(iv) reason for disclosing low income from receipts (liquor) on which TCS has been deducted.

3.) Please note that all details/called for information has to be submitted on or before 19/01/2021

4.) The above information is called for u/s 142(1) of IT Act and Non-compliance/ Part compliance may lead to penalty proceedings u/s 272A(1)(d) of the Act.

*Yours faithfully,
Additional / Joint/ Deputy / Assistant Commissioner of Income Tax/
Income-tax Officer,
INCOME TAX DEPARTMENT
National e-Assessment Centre,
Delhi"*

10. The relevant query is at point 2D) (iii) wherein the AO has specifically asked about large expenditure by way of penalty or fine for violation of any law for the time being in force of Rs.91,16,155/-. It should be borne in mind that this amount has already been disallowed by the assessee in its computation of income are exhibited elsewhere. The assessee filed a detailed reply and explained that it mainly represents interest and late payment of TDS of Rs.51,59,188/-per on octroi penal on carbon purchased amounting to Rs.33,62,040/-. It was pointed out that the assessee has fully disallowed the expenses in its computation of income. The auditor in its report has also mentioned in column 21A, under the head expenditure by way of penalty or fine for violation of any law for the time being in force.

11. In light of the aforementioned demonstrative facts, the observation of the PCIT that "*...I hold that the Assessing Officer passed the assessment order dated 30.04.2021 without making inquiries or verification which should have been made, which rendered the assessment order is erroneous in so far as it is prejudicial to the interest of the revenue within the meaning of section 263 of the IT Act, 1961...*", is baseless and without application of mind. Specific queries were raised by the AO to which, the assessee gave specific replies supported by evidence and demonstrating that the same has been *suo moto* disallowed in the

computation of income and only the allowable part was allowed by the AO while framing the assessment order.

12. While coming to the aforementioned conclusion, we draw support from the decision of the Hon'ble Supreme Court in the case of *Malabar Industrial Co. Ltd.*, 243 ITR 83 (SC), where the Hon'ble Supreme Court has laid down the following ratio:-

"A bare reading of [section 263](#) of the Income-tax Act, 1961, makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suo moto under it, is that the order of the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent--if the order of the Income-tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue-- recourse cannot be had to [section 263\(1\)](#) of the Act. The provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order 7 is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous ".

13. Respectfully following the ratio laid down by the Hon'ble Supreme Court, we set aside the order of the PCIT dt. 21/02/2024 and restore that of the AO dt. 30/04/2021.

14. In the result, appeal of the assessee is allowed.

Order pronounced in the Court on 29th July, 2024 at Mumbai.

Sd/-
(RAJ KUMAR CHAUHAN)
JUDICIAL MEMBER

Sd/-
(NARENDRA KUMAR BILLAIYA)
ACCOUNTANT MEMBER

Mumbai, Dated 29/07/2024

**S.C.S.P.*

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आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि ,आयकर अपीलीय अधिकरण, मुंबई /DR,ITAT, Mumbai,
6. गार्ड फाई/ Guard file.

आदेशानुसार/ BY ORDER,
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Mumbai