

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: 'C' NEW DELHI**

**BEFORE MS SUCHITRA KAMBLE, JUDICIAL MEMBER  
AND  
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER  
I.T.A. No. 4432/DEL/2005 (A.Y. 2000-01)  
I.T.A. No. 4433/DEL/2005 (A.Y. 2001-02)**

Dy. Commissioner of Income Tax, Cir.10(1), Room No. 406, C.R.Building, IP Estate, New Delhi <b>(APPELLANT)</b>	Vs.	M/s. Delhi Metro Rail Corpn. Limited, NBCC Place, Bhishma Pitamah Marg, Pragati Vihar, New Delhi  <b>(RESPONDENT)</b>
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**I.T.A. No. 1153/DEL/2009 (A.Y. 2003-04)**

M/s. Delhi Metro Rail Corpn. Limited, Metro Bhawan, 13 Fire Brigade Lane Barakhamba Road New Delhi-110001 <b>(APPELLANT)</b>	Vs.	Commissioner of Income Tax, Delhi-IV , New Delhi  <b>(RESPONDENT)</b>
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<b>Appellant by</b>	<b>Sh. C.S.Aggarwal, Sr. Adv., Sh. Ravi Pratap Mal, Adv.</b>
<b>Respondent by</b>	<b>Sh. Sameer Bhadra, CIT- DR</b>

<b>Date of Hearing</b>	<b>06.08.2019</b>
<b>Date of Pronouncement</b>	<b>26.09.2019</b>

**ORDER**

**PER SUCHITRA KAMBLE, JM**

The two appeals which are filed by the Revenue are against the order dated 12.09.2005 passed by the CIT(A) – XIII, New Delhi for A.Ys. 2000-01 & 2001-02 and one appeal filed by the assessee is against the order dated

28.03.2008 passed by the Commissioner of Income Tax, Delhi –IV, New Delhi under Section 263 of the Income Tax Act, 1961 for A.Y. 2003-04.

2. The grounds of appeal are as under:

**ITA No. 4432/Del/2005 (A.Y. 2000-01)**

*“1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting penalty under section 271(1)(c) of the IT Act, 1961 of Rs. 22.86 crores levied by the Assessing Officer.*

*(i) The CIT(A) failed to appreciate that assessee company had made false claim of deduction under section 10(20A) being fully aware that it was not an “Authority” constituted under any law and merely a company registered under “The Companies Act.”*

*(ii) The CIT(A) failed to appreciate that inaccurate particulars had been shown by the assessee company by claiming expenses which were disallowed by Assessing Officer, addition made has been sustained by the CIT(A) and had the same not been detected in assessment this income would have escaped assessment.*

*(iii) The CIT(A) failed to appreciate that inaccurate particulars have been shown by the assessee company to the extent of disallowance of interest expenses at Rs. 18,27,449 by the Assessing Officer and addition has been sustained in the quantum appeal by the CIT(A) because had the case not been selected for scrutiny, this amount would have escaped assessment.”*

*The appellant craves to be allowed to amend, delete or add any other ground of appeals during the course of hearing of this appeal.”*

**ITA No. 4433/Del/2005 (A.Y. 2001-02)**

*“1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting penalty under section 271(1)(c) of the IT Act, 1961 of Rs. 39.15 crores levied by the Assessing Officer.*

*“ The CIT(A) failed to appreciate that assessee company had made false claim of deduction under section 10(20A) being fully aware that it was not an “Authority” constituted under any law and on the other hand it was a company registered under “The Companies Act.”*

*The appellant craves to be allowed to amend, delete or add any other ground of appeals during the course of hearing of this appeal.”*

**ITA No. 1153/Del/2009 (A.Y. 2003-04)**

*1) The Ld. CIT, Delhi - IV has erred in law and on facts in setting aside the Order passed by the Assessing Officer u/s 143(3) dated 27-03-2006 for the Asstt. Year 2003-04 assessing the income (loss) at Rs. 14,64,85,780, as there was no underassessment of income to the extent of Rs. 603.18 Lakhs.*

*2) The Ld. CIT, Delhi - IV has erred in law and on facts in coming to the conclusion that the Order passed by the Assessing Officer for the Assessment Year 2003-04 was erroneous and prejudicial to the interest of revenue, as the Assessing Officer passed the order after scrutinizing the sum of Rs. 603.18 Lakhs and consider it a capital receipt reducing the cost of Project.*

*3) The Ld. CIT, Delhi -IV has erred in law and on facts by passing the Order U/s 263 of Income Tax Act, 1961 considering the income earned during the construction period which reduces the cost of project as the miscellaneous income subject to tax u/s 56 of the Income Tax Act, 1961 as it was held in the case of **Bongaigaon Refinery and Petrochemicals Ltd. Vs. Commissioner of Income Tax (251 ITR 329 SC)** that receipts / items of income received during the construction period are not taxable income but was to be adjusted against the project cost.*

*Same view was taken in the case of CIT Vs. Bokaro Steel Limited [1999] 236 ITR 315 (SC)*

*4) The Ld. CIT, Delhi -IV issued notice u/s 263 on the basis of suggestion made by the audit party which cannot be the basis as was held in the case of *jeewanlal (1929) Ltd. Vs. Addl. CIT [1977] 108 ITR 407 (Cal.)*.*

5) *The assessee prays for deletion of the Order of Ld. CIT, Delhi - IV under section 263 of the Income Tax Act, 1961 for assessment year 2003-04 and restoring the Order of Assessing Officer (DCIT, Circle 10(1)) dated 27-03-2006 assessing the total loss of Rs. 14,64,85,780/-.*

6) *The appellant craves leave to add, alter or modify any grounds of appeal either before or at the time of hearing of the appeal.”*

3. The facts of A.Y. 2000-01 and 2001-02 are identical therefore, we are taking up the facts of A.Y. 2000-01. The assessee company is a joint venture undertaking of the Government of India and Government of Delhi, engaged, inter alia, in the business of planning, designing, development, construction, maintenance, operation and financing of mass rapid transport and other urban transport and people mover system of all types in the National Capital Region of Delhi. In the I. T. Return, for this Assessment Year 2000-01 interest income on bank deposits at Rs. 59,57,94,430/- was declared. Subsequently, a revised return was filed showing nil income. In the revised return after claiming deduction of expenses for earning of interest income, the income was worked out at Rs. 45,10,06,672/-, which was claimed exempt u/s 10(20A). While completing the assessment, the Assessing Officer did not allowed any deduction of expenses for earning of interest income. Claim for exemption u/s 10(20A) was also rejected and the assessment was completed at an income of Rs. 59,57,94,426/-. In first appeal, the CIT(A) allowed claim for deduction of Rs.37,94,354/- as expenses for earning of interest income. The claim for exemption u/s 10(20A) was rejected. Against the order of CIT(A) the assessee company filed a second appeal which is pending before the ITAT. In the assessment order penalty proceedings u/s 271(1)(c) were initiated. In the order dated 31.03.2005 imposing penalty u/s 271(1)(c) it is mentioned by the Assessing Officer that penalty proceedings u/s 271(1)(c) were initiated. Notice dated 21.03.2003 u/s 274 read with Section 271 of the Income Tax Act was issued calling for submissions on 15.04.2003. In reply to the Show Cause Notice u/s 271(1)(c) issued on 21.08.2003 calling for a reply by 03.09.2003, a

reply was filed on 16.09.2003. In reply to another show cause notice dated 09.03.2005, the assessee made further submissions. The contentions of the assessee was rejected by the Assessing Officer, and penalty of Rs. 22,86,90,027/- was imposed u/s 271(1)(c) of the Income-tax Act.

4. Being aggrieved by the Penalty Order, the assessee filed appeal before the CIT(A). The CIT(A) allowed the appeal of the assessee.

5. The Ld. DR submitted that the Ld. CIT(A) erred in deleting penalty under section 271(1)(c) of the IT Act, 1961 of Rs. 22.86 crores levied by the Assessing Officer. The Ld. DR submitted that the CIT(A) failed to appreciate that assessee company had made false claim of deduction under section 10(20A) being fully aware that it was not an "Authority" constituted under any law and merely a company registered under 'The Companies Act.' The Ld. DR further submitted that the CIT(A) failed to appreciate that inaccurate particulars had been shown by the assessee company by claiming expenses which were disallowed by Assessing Officer, addition made has been sustained by the CIT(A) and had the same not been detected in assessment this income would have escaped assessment. The Ld. DR submitted that the CIT(A) failed to appreciate that inaccurate particulars have been shown by the assessee company to the extent of disallowance of interest expenses at Rs. 18,27,449 by the Assessing Officer and addition has been sustained in the quantum appeal by the CIT(A) because had the case not been selected for scrutiny, this amount would have escaped assessment.

6. The Ld. AR relied upon the order of the CIT(A).

7. We have heard both the parties and perused all the relevant material available on record. It has been held in a number of cases that "in the absence of non-recording of satisfaction note by the Assessing Officer during the course of assessment proceedings regarding concealment or furnishing of inaccurate particulars of income, penalty u/s 271(1)(c) is not impossible. It can be seen

from the records that since Assessment Year 1996-97 (first year for which Income-Tax return was filed by the assessee company) exemption u/s 10(20A) was being claimed which was denied at the level of Assessing Officer and CIT(A). Against this decision, the assessee company has filed second appeals before the ITAT, right from Assessment Year 1996-97 onwards which are pending for adjudication before the ITAT. Since it is a matter of legal opinion whether exemption u/s 10(20A) is allowable or not, it cannot be said that the assessee company concealed its income or furnishing inaccurate particulars of its income. Hence Penalty u/s 271(1)(c) was not leviable. The Ld. AR also pointed out that there is no satisfaction note regarding concealment or furnishing of inaccurate particulars of income was recorded by the Assessing Officer during the course of assessment proceedings. The question whether exemption u/s 10(20A) is allowable or not, is a question of law which is pending for adjudication before the ITAT. This issue, thus is debatable on which two opinions are possible and hence penalty u/s 271(1)(c) is not leviable. While imposing penalty u/s 271(1)(c), the Assessing Officer lost sight of the fact that claim for deduction of expenses of Rs. 37,94,354/- which was disallowed by the Assessing Officer at the time of assessment, was subsequently allowed as deduction by the CIT(A). While imposing the penalty the Assessing Officer was more concerned about escapement of income from being assessed than concealment of income or furnishing of inaccurate particulars of income, which is the main ingredient for imposing penalty u/s 271(1)(c). Under the penalty u/s 271(1)(c) is required to be imposed with reference to tax sought to be evaded. In the order imposing penalty, this requirement of law has not been fulfilled in as much as tax sought to be evaded has not been worked out. There is no tax which is sought to be evaded. The assessee company had paid full tax on income declared in the return without taking into consideration its claim for exemption u/s 10(20A). These facts were properly adjudicated by the CIT(A) and thus, there is no need to interfere with the findings of the CIT(A). Hence, ITA No. 4432/Del/2005 appeal of the Revenue for A.Y. 2000-01 is dismissed.

ITA No. 4433/Del/2005 appeal of the Revenue for A.Y. 2001-02 is identical therefore, the same is dismissed.

**A.Y. 2003-04**

8. Now we are taking up ITA No.1153/Del/2009 for A.Y. 2003-04. The Assessee (DMRC) was assessed at a total loss of Rs. 14,64,85,780/- on 27.03.2006. The assessment was made by the Assessing Officer with detailed scrutiny under Section 143(3) of the Income Tax Act, 1961. The CIT-IV, Delhi issued a notice under Section 263 dated 28.03.2008 stating that assessment is erroneous as the Assessing Officer has made underassessment of income to the extent of Rs. 603.18 Lakhs. The assessee submitted reply dated 12.03.2008 contesting that there is no underassessment of income to the extent of Rs. 603.18 Lakhs and therefore the order passed by the Assessing Officer u/s 143(3) is not erroneous and prejudicial to the interest of the revenue and proceedings u/s 263 of the Income Tax Act, 1961 may be dropped. However, the CIT-IV, Delhi passed an order dated 28.03.2008 for A.Y. 2003-04 and ordered for fresh adjudication and decision as per the law. The assessee could not appeal against the order passed u/s 263 by the CIT, Delhi – IV because of oversight by the consultant to whom the order u/s 263 of the Act was given for filing in appeal. Therefore, the assessee filed application for condonation of delay of 301 days. The Ld. DR opposed the condonation of delay.

9. We are of the opinion that the assessee and its consultant through the affidavit explained the delay and it appears to be genuine reason for the delay in filing the appeal before the Tribunal. Hence we are condoning the delay. Now we are taking up the contentions of both the parties in respect of merits of the case.

10. The Ld. AR submitted that the assessee came to be constituted on 03.05.1995 as a Joint Venture Company having two shareholders namely 'Government of India' and 'Government of Delhi' each having 50% of

shareholding. It had been incorporated with the objective of planning, development, construction, maintenance, operation and financing of mass transit and urban transport system in the National Capital Territory for the purpose of development and improvement of the city of Delhi. The Ld. AR submitted that it is an admitted fact that during the instant assessment year it had not merely been set up but also had carried commercial run of Metro rail. For the instant assessment year, on 27.11.2003, it had furnished the return of total income disclosing a loss of Rs. 14,64,85,780/-. In doing so it proceeded to compute its income on the basis of profit and loss account which showed a loss of Rs. 8,33,34, 447/-. The Ld. AR submitted that on 27.03.2006, the Assessing Officer framed the assessment by accepting the income returned, however he fully examined the various claims made in the return of income, and brought to tax an amount of Rs.71,24,21,892/-, as was reflected in Schedule 8 which included interest income on FDRs of Rs. 603.81 lacs. The Ld. AR submitted that on 27.03.2009, the CIT initiated the proceedings u/s 263 of the Act and made an order on 28.03.2009 when he held that the Assessing Officer ought to have brought to tax out of the said sum as has been assessed by the Assessing Officer under the head "other sources" and not 'business income'. The Ld. AR submitted that the said findings of the CIT u/s 263 of the Act is erroneous and in any case there are two views possible having regard to the facts of the instant case. It is also well settled that where two views are possible and if the Assessing Officer has taken one view, the CIT cannot exercise his powers under Section 263 to differ with view of the Assessing Officer even if there has been a loss of revenue. The Ld. AR relied upon the following decisions:

- a) Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83
- b) DIT vs. Jyoti Foundation 357 ITR 388 (Del)
- c) ITO vs. D.G. Housing Projects Ltd. 343 ITR 329 (Del)
- d) CIT vs. New Delhi Television Ltd. 360 ITR 44 (Del)

- e) CIT vs. Max India Ltd. (2007) 295 ITR 282 (SC)
- f) CIT vs. Honda Siel Power Products Ltd. 333 ITR 547 HC (Del)
- g) CIT vs. Saluja Exim Ltd. 329 ITR 603 (P&H HC)
- h) Grasim Industries Ltd. vs. CIT 32 ITR 92 (Bom HC)
- i) CIT vs. Sunbeam Auto Ltd. 227 CTR 133 (Del HC)

The Ld. AR further submitted that without prejudice to the earlier contentions, once the business had commenced and even if the aforesaid income is held assessable under the head 'income from other sources' that will make no difference in as much as business loss will go up and the same has to be set off from the purported income from other sources. The Ld. AR relied upon CIT vs. Rajendra Prasad Moody 115 ITR 519 (SC).

11. The Ld. DR submitted that the assessee has earned huge amount of interest income in years under consideration. The surplus funds have been deposit as fixed deposit/flexi deposit. The business of the assessee is planning, development, construction, maintenance, operation and financing of mass transit and urban transport system in national capital territory. The receipts & expenses of the assessee are as follows:

A.Y.	Total Receipts	Receipts from Interest Earned	Expenses
1997-98	38,16,684	38,02,921	74,19,134
1998-99	15,44,65,452	15,26,70,209	5,95,61,700
1999-00	36,58,38,682	36,58,38,183	9,18,25,170
2000-01	59,67,94,426	59,67,94,426	14,67,87,754

2001-02	88,11,43,805	88,11,43,805	21,47,87,281
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The Ld. DR submitted that from the perusal of above receipts & expenses, it is evident that there were hardly any business receipts apart from interest earned. Thus, the business had neither been set up nor commenced. The assessee commenced operations on 24.12.2002. In earlier years, it was in the process of setting up the Metro network in NCR. During these years, the assessee claimed expenses on account of consultancy charges. These expenses have primarily been incurred for consultancy charges paid for setting up the business. The assessee invested in FDRs out of its own funds. In view of the above facts, the Ld. DR submitted that interest income is chargeable as 'Income from other sources'. Against this head of income, assessee can claim only expenses incurred for earning this income which the assessee has not done. The Ld. DR relied upon the following decisions with regard to Section 56 of the Income Tax Act, 1961:

1. *Tuticorin Alkali Chemicals & Fertilizers Ltd. vs. CIT* [1997] 141 CTR 387 (SC)
2. *CIT vs. Coromandal Cements Ltd.* [1998] 234 ITR 412 (SC)
3. *CIT vs. Indian Vaccines Corporation Ltd.* [2014] 363 ITR 295 (Del)
4. *Bharat Oman Refineries Ltd.* [2013] 356 ITR 399 (MP)
5. *CIT vs. Bhawal Synthetics (India), Udaipur* [2017] 297 CTR 104 (Raj.)
6. *Thermal Powertech Corporation India Ltd. vs. DCIT* [2017] 164 ITD 449 (Hyd. Tri.)
7. *Shree Maheshwar Hydrel Power Corporation Ltd. vs. CIT* [2018] 96 taxmann. Com 167 (Bom)
8. *Kakinada SEZ (P.) Ltd.* [2013] 31 taxmann.com 165 (Hyd. Tri.)

9. *Hotel Queen Road (P.) Ltd. vs. ITO* [2012] 14 ITR (T) 124 (Del. Tri.)

10. *MKR Frozen Food Exports Ltd. vs. ITO* [2010] 126 ITD 1 (Del.)

11. *Conventional Fastners vs. CIT* 2018-TIOL-202-SC-IT

12. *CIT vs. Jyoti Apparels* [2007] 209 CTR 288 (Del.)

13. *CIT vs. Mereena Creations* [2011] 330 ITR 199 (Del.)

14. *CIT vs. Rassi Cement Ltd.* [1998] 232 ITR 554 (AP)

12. We have heard both the parties and perused all the relevant material available on record. The CIT, Delhi – IV, New Delhi held u/s 263 as under:

*“4. I have carefully considered the submission of the assessee and I have also perused the assessment record. From the perusal of assessment record it has been found that the assessing officer has failed to brought the income from other sources to the extent of Rs.608.81 Lakhs on account of interest on refund and miscellaneous income which is as per provisions of Section 56 is to be assessed under head “Income from Other Sources”. The assessee’s argument that the income relate to Project and transferred to Incidental Expenditure during Construction is not in accordance with the provisions of I.T. Act. The AO has thus, committed a serious error of law by ignoring the mandatory provisions of section 56 in respect of income to the extent of Rs. 603.81 Lakhs in the A.Y. 2003-04. In view of these facts the assessment order dated 27/3/2006 u/s 143(3) for the A.Y. 2003-04 is held to be erroneous and prejudicial to the interest of revenue.”*

In assessee’s own case for A.Y. 1996-97 to 2002-03 (ITA Nos. 1346/DEL/2018, 2398/DEL/2001, 1144/DEL/2002, 3356/DEL/2002, 1874/DEL/2004, 4553/DEL/2003, 5095/DEL/2004, 2081/DEL/2003, 2082/DEL/2003) order dated 28.06.2019 held as under:

*“25. We have considered rival submission of the parties on the issue in dispute and perused the material on record.*

*25.1 We are of the considered view that under the provisions of section 57(iii) of the Act, any expenditure (not being in the nature of capital expenditure) laid out or expended wholly and exclusively for the purpose of making or earning such income is deductible against the said income assessed under section 56 of the Act i.e under the head "Income from other sources". The Assessing Officer estimated the expenditure incurred on the basis of number of employees. The Ld. CIT(A) however has followed the estimation made by the Ld. CIT while passing order under section 263 for assessment year 1998-99 and 99-2000. The assessee is claiming that the entire expenditure debited in profit and loss account might be allowed against the interest income earned from fixed deposit, which according to the assessee is in the nature of the business income. We do not agree with the contention of the assessee. It is for the assessee to demonstrate as how the expenditure incurred is wholly and exclusively for the purpose of earning interest income on fixed deposit. Before the Ld. CIT during proceeding under section 263 of the Act for assessment year 1998-99 and 99-2000 also the assessee expressed its inability to provide break-up of the expenses relating to the interest income and under those circumstances the Ld. CIT estimated expenditure of Rs.34,49,413/- for assessment year 1998-99. The Ld. CIT(A) has further progressively increased the expenses which could be allowable, by 10% for the year 2000-01, 2001-02 and 2002-03. In the assessment year 2001-02, the claim of the assessee was only of Rs.7,76,600/- and therefore he restricted the claim of expenses to that extent. In absence of a specific demonstration by the assessee that particular expenses relates to the interest income and in absence of any documentary evidence in support of such a claim, we may not like to disturb the expenses already allowed by the Ld. CIT(A), in view of the fact that there is no appeal of the Revenue before us in which the quantum of expenses allowed under the head "Income from other sources" has been contested by the Revenue. In view of the above discussion, the relevant ground number 5(a) and 5(b) of ITA No. 1874/del/2004 for assessment year 2000-01, ground No. 5 and 6 of ITA No. 4553/del/2003 for assessment year 2001-02 and grounds No. 5 and 6 of ITA No. 5095/del/2004 for assessment year 2002-03 are accordingly dismissed.”*

Thus, from the perusal of the said order it can be seen that in the earlier years, the order u/s 263 has been sustained by the Tribunal on the similar issue. In

the present year as well the assessee has not demonstrate before the Assessing Officer whether actual business was commenced or not and at the same time whether investment has inextricable link in respect of the project and not that of pre-operative expenses. As per the Hon'ble Delhi High Court decision in case of Indian Vaccination Corporation Ltd. (supra), when there is no inextricable link between investment and project, interest income on said investment could not be permitted to be adjusted against pre-operative expenses in respect of said project. The case laws referred by the assessee are not applicable in the present case as the provisions under Section 263 are properly invoked by the Commissioner of Income Tax. Therefore, the order under Section 263 of the Act passed by the Commissioner of Income Tax is just and proper. There are no two views expressed but there is a failure on part of the Assessing Officer because of which there is escapement of income. Thus, the appeal of the assessee is dismissed.

13. In result, both the appeals of the Revenue being ITA No. 4432 & 4433/Del/2005 and the appeal of the assessee being ITA No. 1153/Del/2009 are dismissed.

**Order pronounced in the Open Court on 26<sup>th</sup> September, 2019.**

Sd/-

**(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER**

Sd/-

**(SUCHITRA KAMBLE)  
JUDICIAL MEMBER**

Dated: 26/09/2019

*\*Binita\**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI

Date of dictation	.09.2019
Date on which the typed draft is placed before the dictating Member	.09.2019
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	