

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT

BEFORE SHRI PAWAN SINGH, JM & DR. A.L.SAINI, AM

आयकर अपीलसं./ITA No.100/SRT/2022

(निर्धारणवर्ष / Assessment Year: (2017-18)

(Virtual Court Hearing)

S.U. Enterprise Crimson Place, Opp. Bhatarkar School, FP 59, Althan, Surat-395007	Vs.	Principal Commissioner of Income- tax-I, Surat Room No.123, Aayakar Bhawan, Majura Gate, Surat-395001
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: ACBFS 3485 J		
(Appellant)		(Respondent)

Assessee by : Shri P.M. Jagasheth, CA

Respondent by : Shri H.P.Meena– CIT-DR

सुनवाई की तारीख/ **Date of Hearing** : 20/09/2022

घोषणा की तारीख/**Date of Pronouncement** : 11/11/2022

आदेश / ORDER

PER DR. A. L. SAINI, ACCOUNTANT MEMBER:

By way of this appeal, the assessee has challenged the correctness of the order passed by the Learned Principal Commissioner of Income Tax-1 (in short "ld. PCIT"), under section 263 of the Income Tax Act, 1961 [hereinafter referred to as the "Act"] dated 27.03.2021, for the assessment year 2017-18.

2. The grievances raised by the assessee are as follows:

"1) The Learned Principal Commissioner of Income Tax-1, Surat (hereinafter referred to as "the ld. PCIT") has erred in law and on facts in assuming jurisdiction u/s 263 of the Act.

2) The ld. PCIT has erred in law and facts in setting aside the original assessment made by the ld A.O. and directing him to frame assessment de novo after considering eligibility of deduction of construction expenses claimed u/s 37(1) and allowed in assessment u/s 143(3). The order was passed after taking into consideration all relevant data, legality and arguments on the issue for the allowability of such expense.

3) The appellant prays for granting such other relief as may be deemed just and proper by your Honours considering the factual and legal aspects of the case of the appellant."

3. Succinct facts are that assessee is engaged in business of construction activity during the year under consideration for the assessment year 2017-18 and filed its return of income on 17.10.2017, declaring loss to the tune of Rs.26,27,153/-. Thereafter, assessee's case was selected for scrutiny under CASS and scrutiny assessment u/s 143(3) of the Act was framed on 16.12.2019 by accepting the returned income.

4. Later on, Learned Principal Commissioner of Income Tax-1 (in short "ld. PCIT"), has exercised his jurisdiction under section 263 of the Income Tax Act, 1961. The ld PCIT, on perusal of records, noticed that assessee-firm had claimed provision for construction expenses of Rs.45,22,435/- under the head direct expenses in the profit and loss account as well as in Income Tax Return. The ld PCIT was of the view that such provision for construction expenses of Rs.45,22,435/- is not allowable under section 37 of the Act, as such expenses have not been laid out or expended for the purpose of the business or profession. The ld PCIT also observed that provision for construction expenditure is an unascertainable liability and is not allowable u/s 37(1) of the Act. Therefore, ld PCIT issued a show-cause notice under section 263 of the Act, vide show- cause notice bearing No.ITBA/Revenue/F/REV1/2021-22/1040653782(1), dated 12.03.2022 and duly served on the assessee through e-proceedings.

5. In response to the above show cause notice, the assessee-firm submitted its reply through e-mail on 25.03.2022. The assessee stated in its reply that provisions for construction expenditures of Rs.45,22,435/- represents the proportionate estimated expenditures apportioned to the unit sold. The assessee also stated in its reply that said amount claimed as expenditure during the year under consideration has been reversed and reduced from the expenditure incurred on account of construction expenditure during the subsequent year i.e. in financial year 2017-18. That is, the liability to pay such expenses has accrued in financial year 2016-17 which has reversed in subsequent financial year 2017-18 relevant to assessment

year 2018-19. The assessee, thus submitted before Id PCIT that such provision was made with 100% accuracy as per accrual system of accounting.

6. However, Id PCIT rejected the contention of the assessee and held that while finalizing the assessment proceedings, the Assessing Officer has not made further verification, as to how the estimation of provisions of construction expenditures was made and what was the method of recognizing income from the project, adopted by the assessee-firm. The Id PCIT also held that Assessing Officer has not verified the correctness of the provisions of construction expenditures claimed by the assessee and has failed to inquiry properly into the issue of provision for construction expenditure of Rs.45,22,435/- debited in Profit and Loss account. Therefore, Id PCIT held that assessment order passed by the assessing officer is erroneous in so far as it is prejudicial to the interest of Revenue.

7. Aggrieved by the order of Ld. PCIT, the assessee is in appeal before us.

8. Shri P.M Jagasheth, Ld. Counsel for the assessee, pleads that during the assessment proceedings, notice u/s 142(1) of the Act was issued upon assessee, which is placed at Paper Book pages 12-14. In response to the said notice, the assessee submitted its reply during the assessment proceedings along with working of closing working-in-progress, which is placed at Paper Book pages 15-19. The assessee also submitted before assessing officer, the copy of Tax audit report for A.Y. 17-18, which is placed at Paper Book pages 20-54. The assessee also submitted copy of ledger account pertaining to provision for construction expenses for A.Y 2017-18, which is placed at Paper Book page no. 55. Therefore, Id Counsel contended that assessing officer made adequate inquiry in respect of the issue raised by Id PCIT in the revision order under section 263 of the Act.

9. The Ld. Counsel, further argues that it is not the provision for construction expenses rather it is actual expenses, which is incurred by assessee, and for such expenses the assessee had received the bills and these expenses were paid at the

beginning of subsequent year, thus it is actual liability. Therefore, these expenses cannot be considered under the head '**provision**', although the assessee has used the word '**provision**' by mistake. These expenses are estimated based on the actual bills received and these are kind of a definite liability. Therefore, these were actual expenses incurred by the assessee and '**provision**' was made with 100% certainty, as per accrual accounting system and that is why these expenses were paid by the assessee, at the beginning of the subsequent year. Therefore, Id Counsel pleaded that Assessing Officer has examined the issue and applied his mind, hence assessment order passed by the Assessing Officer is neither erroneous nor prejudicial to the interest of revenue therefore order of Id PCIT may be quashed.

10. On the other hand, Shri H.P. Meena, Ld. CIT-DR for the Revenue, submitted that Assessing Officer has not examined the details submitted by assessee and has not applied his mind. The Assessing Officer has not examined the fact that these impugned construction expenses were merely '**provision**' made by the assessee to reduce the net taxable profit. Moreover, the Assessing Officer has not conducted further inquiry to find out the authenticity of the claim of the assessee about these provision for construction expenses, hence there is a loss of revenue, therefore order passed by the Assessing Officer is erroneous as well as prejudicial to the interest of Revenue. This way, Id DR stated that order passed by Id PCIT may be upheld.

11. After giving our thoughtful consideration to the submission of the parties and perusing the judicial decisions relied upon by the Ld. AR, we find that the issue involved in the present appeal is no longer *res integra*. The solitary issue before us is that whether real provision for construction expenses, made with reliable estimate and as per accrual system of accounting, should be allowed or not? We note that as per accrual system of accounting, the assessee makes various provisions for expenses/incomes at the end of the financial year. In Indian Accounting system, the financial year starts from 1st April and ends on 31st March

every year. For example salary expenses accrue on monthly basis which is normally paid in the first week of next Month. Say, March Month salary of Rs.1,00,000/- is paid by the assessee in first week of April Month, which falls in next year. As per accrual system of accounting the said Rs.1,00,000/- salary expenses has accrued in March month and there is definite liability to pay such salary expenses, which is actually paid in first week of April month, which falls in next accounting year, therefore assessee makes the provision for salary expenses of Rs.1,00,000/- in March month and debits these expenses in its profit and loss account. Hence such type of provisions are allowed in accounting system as well as in taxation law. However, we are aware that certain expenses are not allowed based on '**provisions**' which are mentioned under section 43B of the Act. However, the example which we have mentioned above does not fall in the ambit of the items mentioned in section 43B of the Act. Therefore, the provision for expenses which are made by the assessee with 100% reliability should be allowed under taxation law also. For example, electricity expenses incurred by the assessee for the March month, however due date for payment of electricity bill is in April month, and it is really paid by the assessee in April month, which falls in next financial year, the provision for electricity expenses should be allowed, as these type of '**provisions**', are made with reliable estimate and actual payments of these expenses are made at the beginning of the next financial year.

12. With help of the above cited examples, now we have to examine, whether assessee's claim under consideration, is correct or not. It is undisputed fact that assessee made provision for construction expenses to the tune of Rs.45,22,435/- and these expenses were debited in profit and loss account. The assessee made payment of these expenses at Rs.45,22,435/- in the next financial year. The provision for construction expenses so made by the assessee has been reversed in next financial year, that is, the assessee has not claimed these expenses in next financial year. Hence, we note that assessee has made provision for construction expenses of Rs.45,22,435/- with reliable estimate, and the same were paid in the next financial year, such provision should be allowed. We note that Assessing

Officer has properly examined the provision for construction expenses to the tune of Rs.45,22,435/- and allowed the claim of the assessee, therefore order passed by the Assessing Officer under section 143(3) of the Act, should not be erroneous.

13. We note that during the assessment proceedings, the Assessing Officer conducted enquiry by issuing notice u/s 142(1) of the Act on 23.10.2019, which is placed at Paper Book pages 12-14, wherein the Assessing Officer has asked the question pertaining to provision for construction expenses, which is reproduced below:

“(iii) provision for construction expenses (Flat Sale) of Rs.45,22,435/- and project management service expenses of Rs.36,00,000/-. In this regard, please submit documentary evidence to substantiate your claims and allowability of said expenses for the year under reference.”

Therefore, we note that by issuing notice u/s 142(1) of the Act, the Assessing Officer conducted enquiry on the issue raised by Id PCIT in his order under section 263 of the Act.

14. In response to the notice u/s 142(1) of the Act, as noted above, the assessee submitted its reply during the assessment proceedings about the work-in-progress (Construction expenses) which is placed at Paper Book pages nos. 15-19 and the same is reproduced below:

“3.(iii) Provision for construction expenditures (Flat Sale) of Rs.45,22,435/-; this amount represents the proportionate estimated expenditure apportioned to the units sold, which represents the cost of construction estimated to be incurred after the end of the year under consideration, for the sales recognized during the year. However, it is pertinent to take a note here that the said amount claimed as expenditures during the year under consideration, which is exactly the same as has been reversed and reduced from the expenditures incurred on account of construction expenditures during the subsequent year i.e.F.Y 2017-18.

Project Management Service Expenses of Rs.36,00,000'- The said amount was paid to M/s Swastik Infrastructures for rendering the project management services for the project undertaken by us. Copy of bills of the same are enclosed herewith under annexure-3.iii.”

15. Thus, during the assessment proceedings, these expenses have been examined and scrutinized and question was asked by the Assessing Officer and the assessee has replied to the Assessing Officer. Therefore, we note that during the assessment proceedings, the assessee has submitted its reply stating that provision for construction expenditures (Flat Sale) of Rs.45,22,435/-, represent the proportionate expenditure apportioned to the units sold and this expenditure has been really paid in the subsequent financial year 2017-18. Therefore, these are the real expenses for which the assessee has made the provision and Assessing Officer examined the issue and took a possible view and completed the assessment. Therefore, such assessment order should not be considered as erroneous and prejudicial to the interest of revenue.

16. We note that in the landmark judgment of Hon'ble Apex Court in Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83(SC) wherein their Lordship have held that twin conditions needs to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the Ld.PCIT. The twin conditions are that the order of the Assessing Officer must be erroneous and so far as prejudicial to the interest of the Revenue. In the following circumstances, the order of the Assessing Officer can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed on incorrect assumption of fact; or (ii) incorrect application of law; or (iii) Assessing Officer's order is in violation of the principle of natural justice; or (iv) if the order is passed by the Assessing Officer without application of mind; (v) if the Assessing Officer has not investigated the issue before him; then the order passed by the Assessing Officer can be termed as erroneous order. Coming next to the second limb, which is required to be examined as to whether the actions of the Assessing Officer can be termed as prejudicial to the interest of Revenue. When this aspect is examined one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industries (supra) held that this phrase i.e. "*prejudicial to the interest of the revenue*" has to be read in conjunction with an *erroneous order* passed by the Assessing Officer. Their Lordship held that it has to be remembered that every loss of revenue as a

consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the Ld.PCIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue **“unless the view taken by the Assessing Officer is unsustainable in law”**.

17. Since in the present case, ld PCIT has exercised jurisdiction u/s 263 of the Act on the ground that the Assessing Officer while completing the assessment proceeding did not make enquiries which he ought to have been made. We note that Assessing Officer has conducted sufficient inquiry, as noted above. Besides, the ld PCIT has not set out as to why this item of provision for expenditure need to be investigated and as to what type of inquiry ought to have conducted by the Assessing Officer. A mere observation that no proper details have been obtained, cannot be sufficient to come to a conclusion that the Assessing Officer did not make proper and adequate inquiries which he ought to have made in the given facts and circumstances of this case. In the conclusion we are of the view that none of the reasons set out by the ld PCIT for invoking the jurisdiction u/s 263 of the Act are sustainable. The impugned order of the ld PCIT has to be quashed for the reason that order of the Assessing Officer sought to be revised in the impugned order was neither erroneous nor prejudicial to the interest of the revenue for the reason of any lack of inquiry that the Assessing Officer ought to have made in the given facts and circumstances of the case. We accordingly quash the order passed by Ld. PCIT u/s 263 of the Act and allow the appeal of the assessee.

18. In the result, the appeal filed by the assessee is allowed.

Order pronounced on 11/11/2022 by placing the result on the notice board.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Surat/दिनांक/ Date: 11/11/2022
Dkp Outsourcing Sr.P.S

Sd/-
(Dr. A.L. SAINI)
ACCOUNTANT MEMBER

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. Pr.CIT
5. DR/AR, ITAT, Surat
6. Guard File

By Order

// True Copy //

Assistant Registrar/Sr. PS/PS
ITAT, Surat