

IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI PAVAN KUMAR GADALE, JM

ITA No. 1026/Mum/2022

(Assessment Year 2017-18)

M/s The Bombay Transport Co-
operative Consumer Society Ltd.
Plot No.F-1, APMC Truck
Terminal,
Sector-19, Vashi,
Mumbai-400 705

(Appellant)

Vs.

The Income Tax Officer
Circle 28(3)(1)
Navi Mubai 400703

(Respondent)

PAN No. AAAAT2420N

Assessee by : Shri M. Subramanian, AR

Revenue by : Shri H.N. Singh, CIT DR

Date of hearing: 19.10.2022

Date of pronouncement : 16.01.2023

ORDER

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by the assessee against the revisionary order passed by the Principal Commissioner Of Income Tax Mumbai – 27 (the learned PCIT) for assessment year 2017 – 18 under section 263 of The Income Tax Act, 1961 (the act) dated 11/3/2022 wherein it has been held that the assessment order passed under section 143 (3) of the act dated 23/12/2019 assessing the total income of the assessee at ₹ 2,699,690 by The income tax officer Ward 28 (3) (1), Mumbai (the learned AO) is erroneous and prejudicial to the interest of revenue to the extent it did not make enquiry/ verification which should have been



made by him with respect to capital loss of Rs. 254,954/- allowed as revenue expenditure and verification of other expenditure, therefore directed the learned AO to make a **fresh assessment disallowing the capital loss of ₹ 254,954** and to make other enquiry verification with regard to purchases and other expenses claimed by the assessee as deduction.

02. Assessee has raised following grounds of appeal: –

"1. On the facts and circumstances of the case and in law, the order passed under Section 263 of the I.T. Act, 1961 is invalid and bad in law.

2. On the facts and in the circumstances of the case and in law, learned CIT erred in passing an order under Section 263 of the I.T. Act, 1961 and that too without appreciating fully and properly the facts of the case.

3. On the facts and in the circumstances of the case and in law, the learned CIT erred in holding that the order dated 23-12.2019 passed under section 143(3) of the act by the Assessing Officer is erroneous and prejudicial to the interest of Revenue

4. On the facts and in the circumstances of the case and law, the learned CIT erred in setting aside the order passed under Section 143(3) of the I.T. Act, on 26.12.2019 although the return of income was selected for a complete scrutiny and all the issues were elaborately verified and discussed during the course of assessment proceedings."



03. Facts shows that assessee is a consumer co-operative society and is engaged in the business of running petrol/diesel pumps situated as APMC truck terminal, sector 19, Vashi, Mumbai.
04. It filed its return of income on 27/10/2017 declaring a **total income of ₹ 1,873,940/-** . Case was selected for a complete scrutiny. Based on this the assessment order was passed under section 143 (3) of the act determining **total income of the assessee at ₹ 2,699,689/-**. The only two additions made by the learned assessing officer is with **respect to unexplained money under section 69A of ₹ 14,500/-** and disallowance on account of deduction **claimed under section 80 P of ₹ 811,249/-**.
05. On examination of the record, the learned PCIT found that (1) that the learned assessing officer has not disallowed **an amount of ₹ 254,954/-** debited to the profit and loss account on account of loss on assets on disposal which is a capital expenditure (2) the learned AO has not called for any details of purchases and other expenses to verify the correctness of income declared by the assessee. Therefore, the assessment order is deficient/ erroneous insofar as it is prejudicial to the interest of revenue. Accordingly show cause notice was issued on 28/2/2022.
06. On 7/3/2022, assessee submitted a reply. It was stated that during the financial year 2014 - 15 and 2015 - 16, the Indian oil Corporation Ltd has renovated entire petrol pump by removing the old structure. The old assets such as old building structure, pump driveway, pump shed has



been written off in the books of accounts, as they were no longer in existence after the renovation of the pump. Therefore the total assets of 2,54,954/- were written off. **This included the building at Vashi at ₹ 52,805, pumps driveaway of ₹ 98,597 and shed over pump of ₹ 103,552.** It was submitted that the block of the above assets still existed on 31/3/2017 and depreciation of the same is not claimed as the assets were written off. With respect to the expenditure debited to the profit and loss account, assessee submitted these details before the learned principal Commissioner of income tax of such expenditure incurred above **₹ 1 lakh. It contained 11** annexure of various expenditure.

07. Based on above submission, the learned PCIT held that the capital loss of Rs 254,954/claimed by the assessee as revenue expenditure is not allowable as revenue expenditure. It is an undisputed fact that the asset in respect of which the capital loss has been claimed were part of the block of the assets on which depreciation under section 32 was also claimed. Assessee submitted that the block of assets that these assets were part of still continues. Therefore, the learned PCIT was of the view **that the capital loss of ₹ 254,954/-** claimed by the assessee as deduction was not admissible deduction for computing the business income. The learned assessing officer while completing the assessment under section 143 (3) should have disallowed the same. With respect to the expenditure, it was held that the learned assessing officer while completing the assessment has not verified the



purchases and other expenses claimed by the assessee as deduction. Therefore, the assessment order passed without making enquiry and verification, which should have been made by him, makes the order passed by the learned assessing officer is erroneous insofar as it is prejudicial to the interest of revenue. Therefore, the assessment order passed was set aside to the file of the learned assessing officer with a direction to make a fresh assessment. The learned PCIT directed the assessing officer to disallow the capital loss of ₹ 254,954/- and make other enquiry or verification with regard to purchases and other expenses claimed by the assessee as deduction. Accordingly, the revisionary order was passed under section 263 of the act on 11/3/2022.

08. Assessee is aggrieved with the above revisionary order. The learned authorized representative referred to notice issued under section 142 (1) calling for various details and referred to the details submitted by the assessee. It was further submitted that on the additions made by the learned assessing officer, the assessee has filed an appeal before the Commissioner of income tax (appeals) and the same is still pending. The learned authorized representative referred to page number 21 of the paper book, which is profit and loss account for the year ended on 31st of March 2017 wherein loss on assets disposed of of ₹ 254,954/- were disclosed. He submitted that the issue is covered by the decision of coordinate bench in case of 309 ITR (AT) 294 (Mumbai) in case of Mukand global Finance Ltd versus Deputy Commissioner Of Income



Tax wherein identical issue was considered. Therefore, such loss is allowable to the assessee. He further referred to the decision of honourable Supreme Court in case of Commissioner of income tax versus Max India Ltd (2007) 295 ITR 282 (SC) wherein it is held that when the assessing officer adopts one of courses permissible in law and it has resulted in loss of revenue, or where to views are possible and the assessing officer has taken one view, with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the revenue, unless the view taken by the assessing officer is unsustainable in law. The learned authorized representative further relied on the order of the honourable Bombay High Court in Commissioner of income tax versus Forrest development Corporation of Maharashtra Ltd (2015) 374 ITR 538 (Bombay) and decision of the coordinate bench in case of Narayan Tatu Rane (ITA number 2690/M/2016 for assessment year 2007 - 08 and ITA number 2691/M/2016 for assessment year 2008 - 09) that introduction of explanation 2 to section 263 of the act is not to empower the learned Commissioner of income tax to invoke the provisions of section 263 to give unfettered powers to revise each and every order, if in his opinion, the same has been passed without making inquiries or verification which should have been made. Accordingly, he submitted that the order passed by the learned assessing officer is neither erroneous nor prejudicial to the interest of revenue. He also submitted a written note containing chronology of



events and the points to be argued on the above line. In the end, he submitted, without prejudice, that the view taken by the AO is a possible view and therefore it cannot be said to be erroneous or prejudicial. Further, on verification of routine expenses such as purchases and other expenses does not make the assessment order erroneous and prejudicial when in past and in subsequent assessment years during the course of scrutiny assessment under section 143 (3) of the act, no such disallowances ever made. Further, the learned principal Commissioner of income tax has not pointed out as to what verification that should have been done but not done except making a general observation.

09. The learned departmental representative vehemently supported the order of the learned principal Commissioner of income tax. It was submitted that there is no evidence available that the learned assessing officer has asked about the capital loss claimed by the assessee or verified any of the expenditure stated by the learned PCIT. He submitted that all the inquiries made by the learned assessing officer revolve around addition under section 69A as well as deduction under section 80 P of the act. He submitted that none of the notices or submission of the details shows that the learned assessing officer has raised any enquiry with respect to the deduction of capital loss claimed by the assessee or any of the expenses incurred by assessee. Therefore, the order passed by the learned assessing officer is erroneous so far as prejudicial to the



interest of the revenue in terms of explanation 2 to section 263 of the act.

010. We have carefully considered the rival contention and perused the orders of the lower authorities. In this case **the return of income declaring total income of ₹ 18,73,940/-** was filed by the assessee. On selection of the case for scrutiny, the learned assessing officer has made an addition under section 69A of the act with respect to cash deposit made by the assessee of specified banknotes **with PMC bank Ltd amounting to ₹ 14,500. The AO further examined the deduction claimed by the assessee under section 80 P of ₹ 811,249/-**. Except, above two items, the learned assessing officer did not inquire any other matter or issues in the assessment proceedings. The notice issued under section 143 (2) of the act dated 21/9/2018 was only with respect to note on the E proceedings. Notice under section 142 (1) of the act dated 3/6/2019 is asking about the general information such as copy of the return of income, brief note on the nature of the business and activities carried on, details of bank account maintained, details of movable and immovable property, the deduction claimed under chapter VIA and reconciliation of interest on investment etc along with other income. The notice under section 142 (1) of the act dated 9/10/2019 mainly inquiring the deposit of cash in the bank account in various forms, details of sundry debtors, creditors et cetera. We further notice dated 12/12/2019 was also with respect to cash deposits. In the end the assessment proceedings resulted into a show cause notice dated



20/12/2019 with respect to the two issues on which the addition has been made by the learned assessing officer. The appeal pending before the learned CIT – A is only with respect to the additions made by the learned assessing officer. Therefore, none of the issue involved in the 263 proceedings are considered and decided by the learned CIT – A. Therefore, it is evident that the learned assessing officer did not inquire about the loss on assets disposal **claimed by the assessee of ₹ 254,954/-** as well as any of the expenditure debited in the profit and loss account. It is also the claim of the assessee that in earlier assessment years passed for assessment year 2013 – 14, 2014 – 15 and 2015 – 16 there is no disallowance on account of various expenses claimed. However, that cannot be criteria to prove that the learned assessing officer has enquired about the incurring of such expenditure for the assessment year. When the learned assessing officer has not asked any query during the assessment proceedings with respect to capital loss debited to the profit and loss account as well as the expenditure incurred by the assessee, there is no question that learned assessing officer has taken any view, which is unsustainable. In fact, the learned assessing officer has not applied his mind to the claim of the assessee of capital loss or various expenditure. In the case of Mukand global finance limited, the issue was different whether assessee can claim set-off of short-term capital loss against business income or not. The issue before us is whether the assessee can be allowed the capital loss debited in the profit and loss



account or not as revenue expenditure and that makes the assessment order unsustainable in law. Therefore, the decisions relied upon by the assessee are not applicable to the facts of present case. The case of the learned principal Commissioner of income tax clearly shows that the assessing officer has passed the assessment order without making inquiries or verification, which should have been made. When the case of the assessee was selected for complete scrutiny, the learned assessing officer is duty-bound to look at the profit and loss account and the expenditure, which is not revenue expenditure, should not have been allowed. Obviously, the loss in capital assets written off cannot be claimed as revenue expenditure. Further, there is no iota of evidence that the learned assessing officer has asked details of any of the expenditure debited in the profit and loss account. Thus, the assessment records examined by the learned principal Commissioner of income tax clearly showed that the learned assessing officer has not made any enquiry on these two items. Thus he is correct in forming an opinion that failure of the learned assessing officer to make any enquiry which he should have made with respect to the capital loss claimed as revenue expenditure as well as several expenditure debited to the profit and loss account makes the order of assessment erroneous and prejudicial to the interest of revenue. Accordingly, we have no hesitation in upholding the order of the learned principal Commissioner of income tax passed under section 263 of the income tax act for assessment year 2017 – 18.



011. Accordingly, appeal filed by the assessee is dismissed.

Order pronounced in the open court on 16.01.2023.

Sd/-
(PAVAN KUMAR GADALE)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 16.01.2023

Sudip Sarkar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai