

IN THE INCOME-TAX APPELLATE TRIBUNAL “A” BENCH MUMBAI
BEFORE SHRI G.S. PANNU, VICE-PRESIDENT AND
SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 2499/Mum/2017 (Assessment Year 2012-13)

M/s Amazia Developers Pvt. Ltd. 108, G- Wing, Akruti Commercial Complex, Next to Akruti Centre Point, Central Road, Andheri (East) Mumbai-400067. PAN: AACHCA6934H	Vs.	DCIT- Circle 1(1)(1) Room No. 533, 5 th Floor, Aayakar Bhavan, M.K. Road, Churchgate, Mumbai-400020.
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Appellant
Appellant by

Respondent by

Date of Hearing

Date of Pronouncement

Respondent

: Shri Vijay Mehta

with Anuj Kushandwala –CA’s (AR)

: Shri R.P. Meena CIT-DR

& M.K. Singh (Sr DR)

: 30.04.2019

: 08.05.2019

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT
PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by assessee under section 253 of Income tax Act is directed against the order of learned Principal of Commissioner of Income tax-1, Mumbai, passed under section 263 on 27th March 2017 for assessment year 2012-13.
2. Brief facts of the case are the assessee company is engaged in property development, filed its return of income for relevant assessment year on 3^{0th} September 2012 declaring total loss at Rs. 33,89,52,515/-. The return of

income was selected for scrutiny and assessment was completed under section 143(3) on 19th January 2015, determining total income of Rs. 10,90,39,612/-. In the return of income the assessee claimed lease rental income of Rs. 11,78,29,224/- as 'business income'. However, the assessing officer while passing the assessment order treated the lease rental income of Rs.11,78,29,224/- as income from 'other sources'. On appeal before learned Commissioner (Appeals), the lease rental income was allowed as 'business income' vide order dated 20.04.2016. No further appeal before Tribunal was filed by revenue/ assessing officer.

3. Subsequently, the learned Principal Commissioner of income tax (ld. Pr. Commissioner) issued a show cause notice under section 263 dated 03rd March 2017 for revising the assessment order dated 19th January 2015. In the show cause notice the ld. Pr. Commissioner show caused as to why the assessment order passed under section 143(3) be not set aside directing the assessing officer to pass the assessment order afresh qua the treatment given to lease rental income. As per the ld. Pr. Commissioner, the lease income was liable to be assessed under the head "Income from House Property". The assessee filed its reply dated 10th March 2017. In the reply the assessee stated that as per the doctrine of the merger the assessment order passed under section 143(3) dated 19.01.2015 merged with the order of first

appellate authority. The assessee also stated that the lease rental income arising from the units in the park constitutes business income which is consistently being claimed as business income and the same needs to be accepted for the current year. The assessee also the assessee also stated that assessment order sought to be revised is not prejudicial to the interest of revenue, since, if the lease income is assessed as 'income from house property' it would be beneficial to the assessee. The reply of assessee was not accepted by the learned Pr. Commissioner and hence, he set aside the assessment order directing the assessing order to pass the order afresh. The learned Pr. Commissioner while setting aside the assessment order concluded, since the learned Commissioner (Appeals) has upheld the stand of assessee on the issue of the income from lease rental, the same cannot be subjected to revision is not acceptable because the issue of taxability of lease rental as 'income from house property' has never been subject matter before learned Commissioner (Appeals). The Commissioner (Appeals) has decided the issue of lease rental being taxed by assessing officer under the head income from 'other sources' as against 'business income' declared by the assessee. The argument of assessee company on the issue of lease rental to be taxed as business income is not acceptable as the assessee owns the units in industrial park, and the lease income from such property, being building

and the land appurtenant thereto is chargeable to tax under section 22 under the head 'income from house property'. Aggrieved by the order of learned Pr. Commissioner the assessee has filed present appeal before this Tribunal by raising the various ground of appeal as referred below.

- (1) The order passed by learned Commissioner of income tax under section 263 of income tax Act is illegal and bad in law.*
- (2) The learned Commissioner of Income tax erred in law and on facts and that the order dated 19th January 2015, passed by the assessing officer under section 143 (3) of the Act was erroneous and prejudicial to the interest of revenue*
- (3) The learned Commissioner of Income tax has erred in law and on fact in setting aside the order dated 19th January 2015 passed by the assessing officer under section 143(3) of the Act and in directing to reframe the assessment in terms of the discussions made in the impugned order as regard the head of income under the lease rental income are to be assessed.*

4. We have heard the submission of learned authorize representative (AR) of the assessee and Id. Departmental Representatives (DR) for the revenue and perused the material available on record. We have also deliberated on various case laws relied by learned representative of the parties. The learned AR of the assessee submits that as per the theory Doctrine of Merger, the assessment order passed by assessing officer under section 143(3) dated 19th January 2015 has since merged with the order of learned Commissioner (Appeals) qua the issue sought to be revised by the Pr. Commissioner u/s 263 of the Act. The learned Pr. Commissioner has no power to revise the

assessment order passed by assessing officer on the issue which has been since examined by Commissioner (Appeal). In the return of income the assessee offered the lease rental income as 'business income', the same was not accepted by the assessing officer, the assessing officer treated the same as assessable under the head "Income from 'other sources'". The assessee filed appeal before Id. Commissioner (Appeals). In appeal the assessee filed detailed submissions explaining the correct 'head' under which such receipt should be assessed. The Id. Commissioner (Appeals) allowed the appeal of the assessee by accepting the lease rental income as 'business income'. The learned AR for the assessee further submits that the order of assessing officer on point of taxability of lease rental income has already merged with the order of Id. Commissioner (Appeals). It was submitted that in order of Id. Pr. Commissioner is liable to quashed and set aside only on the doctrine of merger alone. The learned AR for the assessee in support of his of the submission relied upon the following decision:

- (i) CIT Vs K.S Sera Productions Ltd. (374 ITR 503 Bom)
 - (ii) CIT Vs Nirma Chemicals Works P Ltd [309 ITR 67 (Guj)]
 - (iii) Sonal Garments Vs JCIT (95 ITD 363 Mum)
 - (iv) Marico Industries Vs ACIT (313 ITR(AT) 259 (Mum)
5. In second alternative submission the learned AR of the assessee submits the lease rental income earned by the assessee has been assessed as 'income from other sources' by the assessing officer. The view taken by assessing

officer is one of the possible views. It was submitted that the proceeding under section 263 initiated cannot be initiated by the learned Pr. Commissioner if the assessing officer has taken a possible view. In support of his submission the learned AR of the assessee relied upon the following decision

- (i) Malabar Industrial Company Ltd Versus CIT (243 ITR 82 SC)
- (ii) CIT Versus Max India (295 ITR 282 SC)
- (iii) CIT Vs Arvind Jewellers (290 ITR 689 Guj)
- (iv) CIT Vs Gabriel India Ltd (203 ITR 108 (Bom),
- (v) CIT Vs Development Credit Bank (323 ITR 206 Bom),
- (vi) CIT Vs Vikas Polymers (194 TAXMAN 57 Delhi),
- (vii) CIT Vs Anil Kumar Sharma (194 TAXMAN 504 Delhi)

6. The Id. AR for the assessee further submits that CBDT has issued a Circular No. 16/2017, dated 25.04.2017, wherein it is expressly stated that the rent received from letting of the property in the industrial park is to be treated as business income. The assessee has received the lease rental from the letting of the properties in the industrial park hence; the rent received from the rental income is to be treated as business income. It was further canvassed by Id AR for the assessee that if lease rental income is treated as 'income from the house property' then the addition would be Rs. 8,24,80,457/- (being 30% deduction of Rs 11,78,29,224/- would be Rs. 3,53,48,676/-). The Id. Pr. Commissioner can revise the assessment order if there is loss to the

revenue by the order of the assessing officer. In the present case there is no loss to the revenue rather there would be lower additions if the order passed by Id. Pr Commissioner is upheld.

7. On the other hand the Id. CIT-DR for the revenue supported the order of the Id. Pr Commissioner passed under section 263 of the Act. The Id. DR further submits that the taxability of lease rental income as income from house property was never before the Id. Commissioner (Appeals), therefore the theory of merger is not applicable in the present case. The CBDT circular cited by the Id. AR for the assessee is not applicable on the facts of the assessee as the assessee is not the developer of the industrial park. The Id. DR prayed for dismissal of the appeal filed by the assessee.
8. We have considered the rival submissions of the parties and have gone through the assessment order passed under section 143(3) dated 19.01.2015, order of Id Commissioner (Appeals) dated 20.04.2016 and the order of Id Pr Commissioner dated 27.03.2017(which is impugned before us). Perusal of the assessment order made it clear that the assessing officer treated the lease rental income as income from other sources. However, on appeal before Id. Commissioner (Appeals) the appeal of the assessee was allowed and the said income was allowed as business income. The Id. Commissioner (Appeals) before treating the said income as business income observed that the

assessee is consistently claiming the lease rental income as business income and the same has been accepted by department in assessment year 2010-11 and 2011-12 in assessment order passed under section 143(3). It was also noted by the Id. Commissioner (Appeals) that the assessee has no other income except the rental income from the units held by the assessee in the industrial park. No further appeal was filed by the revenue/ assessing officer. In our view the Id. Commissioner (Appeals) examined the taxability of the rental income after deep analysis of the facts. Factually, the appraisal shows that the issue regarding the nature of lease income was the subject matter of assessment by the Assessing Officer and also the adjudication by the Id. CIT(A) thereafter. The Id. Pr Commissioner issued show cause notice under section 263 dated 03.03.2015 for proposed revision of the assessment order on the ground that the lease income be assessed as income under the head as “House Property”. In reply to the show cause notice the assessee specifically stated that the subject matter of proposed revision was considered in the appeal by Id. Commissioner (Appeals) while deciding the appeal of the assessee, therefore, as per doctrine of merger the assessment is merged with the order of Id. Commissioner (Appeals). The taxability of the lease rental income was examined and considered by Id. Commissioner (Appeals) and thereby considering the doctrine of merger, once the issue has been

examined and decided by Id. Commissioner (Appeals), the revision order under section 263 cannot be made. Apart from the legal objection the assessee stated that similar income has been accepted by revenue as business income in assessment years 2009-10, 2010-11 and 2011-12. The reply of the assessee was not accepted by Id. Pr Commissioner by taking his view that the taxability of rental income as income from house property was not the subject matter before Id. Commissioner (Appeals).

9. Section 263 of the Act and *Explanation (c)* there under which are material for consideration on the issue in this appeal and read as under :—

"263. Revision of orders prejudicial to revenue.—(1) The 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 is erroneous insofar as it is prejudicial to the interest 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 an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

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

- (c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject-matter of any appeal, the powers of the Commissioner under this sub-section shall extend to such matters as had not been considered and decided in such appeal."

10. A careful reading of the provisions of section 263 makes it clear that the Commissioner of Income-tax is entitled to revise an assessment order insofar

as the order is erroneous and prejudicial to the interest of the revenue, however, *Explanation (c)* places an embargo on the Commissioner of Income-tax in case of subject-matter of any appeal which has been considered and decided in such appeal. In other words, before the Commissioner of Income-tax exercises the jurisdiction under section 263 of the Act, the Commissioner of Income-tax is required to ascertain whether the order referred to in sub-section (1) of section 263 of the Act had been the subject-matter of any appeal, and if yes, the revisional powers shall be available only if such subject-matter had not been considered and decided in such appeal

11. The Hon'ble Bombay High Court in CIT Vs K Sera Sera Productions Ltd (supra) held where issues of income of assessee from production of film and deduction of cost of production there against had been considered and decided in appeal by first appellate authority, said issues could not be made subject matter of revision under section 263. The relevant part of the order is extracted below:

“ 10. We find that despite this position emerging from the record and being undisputed, the order under section 263 of the Income Tax Act makes detailed reference to the show cause notice. The show cause notice as also this order passed under section 263 make detailed reference to the claims of the Assessee and which were part of the Appeal before the Commissioner and dealt with by him in his order dated 12th October, 2011. The order of the Commissioner under

section 263 dated 29th March, 2012, from paras 8 onwards, makes extensive reference to these aspects. In the circumstances, what further emerges is that not only did the revisional authority purport to revise the Assessing Officer's order, but he purported to deal with the same direction which was issued in the order of the first appellate authority and which was given effect to by the Assessing Officer. Meaning thereby, the contents of the remand report, giving effect to the order of the first appellate authority, as submitted by the Assessing Officer, came to be reconsidered and revisited. In addition thereto, one more aspect of sale of theatrical rights of "*Darna Zaroori Hai*" to M/s. RGV Enterprises was considered. Naturally, therefore, the doctrine of merger was invoked by the Assessee and it was applied by the Tribunal to uphold the objection raised by the Assessee.

11. In the above factual circumstances, we do not find that the Tribunal erred in holding that clause (c) of the *Explanation* to sub section (1) of section 263 of the Income Tax Act, 1961 cannot be applied. In the present case, that has no application because the matters which have been considered and decided in the Appeal by the first appellate authority are being made subject matter of the revisional authority's order. In other words, the power to revise, as conferred by section 263, is sought to be exercised so as to deal with the same matters which have been considered and decided in the Appeal. We do not find any merit in Mr. Mohanty's submission because detailed references have been made in the foregoing paragraphs to the case of the Assessee before the Assessing Officer, his initial order, the order of the first appellate authority, the direction issued by the first appellate authority and which was given effect to by the Assessing Officer. All these would denote that something which was very much part and parcel of the appellate authority's order and dealt with extensively therein is now sought to be revised and revisited. Firstly, if the income of the Assessee from the film is Rs.11,25,00,000/-, then, whether the explanation of the Assessee that it is not so deserves to be considered or not by the Assessing Officer is grievance No. 1/ground No. 1 before the first appellate authority. Secondly, if that is taken to be the income of the Assessee and without admitting it to be so the cost of

production of the film needs to be deducted by applying Rule 9A of the Income Tax Rules. Thus, that is ground No. 2 in the memo of Appeal before the first appellate authority and in his order dated 12th October, 2011. Both these matters are very much part of the revisional authority's order dated 29th March, 2012. The attempt to reopen them cannot be saved as clause (c) of *Explanation* below sub-section (1) of section 263 of the Income Tax Act, 1961 had no application.

12.The Hon'ble Gujarat High Court in CIT Vs Nirma Chemicals works P. Ltd

(supra) held that the Commissioner is entitled to revise an assessment order insofar as the order is erroneous and prejudicial to the interest of the revenue, but the Explanation (c) to section 263 places an embargo on the Commissioner in case of subject-matter of any appeal which had been considered and decided in such appeal. In other words, before the Commissioner exercises the jurisdiction under section 263, he is required to ascertain whether the order referred to in sub-section (1) of section 263 had been the subject-matter of any appeal, and if yes, the revisional powers should be available only if such subject-matter had not been considered and decided in such appeal.

13.Further Hon'ble Bombay High Court in Sonal garments Vs JCIT (supra)

held that from the chronology of events it appears that computation of deduction under section 80HHC was a subject-matter of appeal before the Commissioner (Appeals). The Commissioner (Appeals) had given some findings on the computation of deduction under section 80HHC. Therefore,

the assessment order had merged with the order of the Commissioner (Appeals). Thus, under Explanation (c) to section 263(1), such action of the Commissioner was not permissible. The word 'matter' is certainly a word of wide import and represents a subject or situation that one needs to think about, discuss or deal with. The Hon'ble High Court also after considering the similar objection of the department held that it was difficult to accept the submission of the department that the issue of depreciation being optional or the issue whether the assessee was at all entitled to deduction under section 80HHC or not, was not a subject-matter of appeal filed by the assessee before the Commissioner (Appeals). A matter might have many aspects and the above-mentioned two factors might be the aspects of the matter but not the entire 'matter' itself. The 'matter', in the instant case, was deduction under section 80HHC. Therefore, the assessment order, so far as it related to deduction under section 80HHC, had merged with the order of the Commissioner (Appeals) and, therefore, exercise of power by the Commissioner under section 263 was even not available under Explanation (c) to section 263(1). Therefore, order under section 263 was not a valid order in the eyes of law.

14. Now again turning to the events of the case in hand, in the return of income the assessee offered the lease rental income as business income, the

treatment of the income offered by assessee was not accepted by the assessing officer, the assessing officer treated the same as income from 'other sources'. The assessee filed appeal before Id. Commissioner (Appeals). The Id. Commissioner (Appeals) allowed the appeal of the assessee by accepting the lease rental income as 'business income'. Therefore, before the Id Commissioner (Appeals) there was issue of taxability of rental income, which was duly considered and decided by him. The Id Commissioner (Appeals) decided the issue after examining the memorandum of association of the assessee, nature of the income and facts that similar income was accepted as a business income. In our view the order of assessing officer on point of taxability of lease rental income is merged with the order of Id. Commissioner (Appeals). The revenue/ assessing officer accepted the finding of Id. Commissioner (Appeals) as no further appeal was filed before Tribunal. This fact was brought in the notice of Id. Pr Commissioner in the reply furnished by the assessee. The Id. Pr Commissioner took the view that the taxability of rental income as "House Property Income" was not the subject matter before Id. Commissioner (Appeals). In our view the Id. Pr Commissioner is wrong in his approach and the taxability of lease income as was very much before Id. Commissioner (Appeals). In view of the above factual and legal discussions the

Explanation (c) to section 263 places an embargo on the Commissioner in case of subject-matter of any appeal which had been considered and decided in such appeal. Before the Id. Commissioner exercises his jurisdiction under section 263, he is required to ascertain whether the order referred to in sub-section (1) of section 263 had been the subject-matter of any appeal, and if yes, the revisional powers should be available only with respect to subject-matter that had not been considered and decided in such appeal. Thus, in the present case, the Id. Pr Commissioner was wrong in revising the assessment order on the taxability of rental income as income from house property. Therefore, the order passed by him is not valid. We hold so.

15. As we have held the revision order dated 27.03.2017 passed by Id Pr Commissioner under section 263 is invalid, therefore adjudication of other alternative submissions of the Id AR for the assessee and discussion on the merit of the issue has become academic.

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

Order pronounced in the open court on 08/05/2019.

Sd/-
G.S. PANNU
VICE-PRESIDENT

Mumbai, Date: 08.05.2019

Sd/-
PAWAN SINGH
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. Assessee
2. Respondent

3. The concerned CIT(A)
4. The concerned CIT
5. DR "A" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

**Dy./Asst. Registrar
ITAT, Mumbai**