

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D", MUMBAI**

**BEFORE SHRI ABY T. VARKEY, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

ITA NO. 1106/MUM/2022 (A.Y: 2017-18)

The Manjri Stud Farm Pvt. Ltd., 41/44, Shapoorji Pallonji Centre Minoo Desai Marg, Colaba Mumbai - 400005 PAN: AA ACT1947J	v.	ACTI – Central Circle – 2(2)(2) Aayakar Bhavan, M.K. Road Mumbai - 400020
(Appellant)		(Respondent)

Assessee Represented by	:	Shri Ketan Ved
Department Represented by	:	Smt Riddhi Mishra
Date of Conclusion of Hearing	:	29.05.2023
Date of Pronouncement	:	09.08.2023

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against the order of Learned Principal Commissioner of Income Tax, Mumbai – 2 [hereinafter in short "Ld. Pr.CIT"] dated 29.03.2022 for the A.Y.2017-18 passed u/s. 263 of Income-tax Act, 1961 (in short "Act").

2. Brief facts of the case are, assessee filed its Return of income for A.Y. 2017-18 on 31.10.2017 declaring total loss at ₹.22,99,52,110/-. The case was selected for complete scrutiny under CASS and notices u/s.143(2) and 142(1) of the Act were issued and served on the assessee. In response, Authorised Representative of the assessee uploaded the details on the Income Tax E-Proceeding Portal from time to time.

3. Assessee is engaged in the business of Commercial leasing which includes IT Park an IT/ITES SEZ, Construction of Residential Flats and Sales, Hospitality Business. Assessing Officer passed the Assessment Order u/s. 143(3) of the Act on 25.12.2019 accepting the return of income filed by the assessee. Ld. Pr.CIT, Mumbai -2, while examining the records, observed that assessment order dated 25.12.2019 passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the revenue, and requires revision. Accordingly, he issued show cause notice to the assessee and recorded the reasons for revision. In the reasons recorded Ld. Pr.CIT mentioned that assessee has claimed deduction u/s. 24(b) of the Act of ₹.11,83,44,908/- and assessee has not furnished documentary evidences in support of its claim during the assessment proceedings. Further, he mentioned that on perusal of notices issued u/s 142(1) dated 30.09.2019 and 10.12.2019, that

Assessing Officer has not raised any query on deduction claimed u/s 24(b) in its return of income. The Assessing Officer did not make any further verification on this issues. He also mentioned that as per the provisions of section 24(b) no deduction is to be allowed to an assessee in absence of the requisite certificate. During assessment proceedings, Assessing Officer has not made enquiry on account of deduction claimed u/s 24(b) of the Act although the assessee did not furnish a certificate from the person to whom any interest is payable on the capital borrowed, specifying the amount of interest payable by the assessee.

4. In response, assessee has filed written submissions vide letter dated 15.03.2022, for the sake of clarity, same is reproduced below: -

"....We now proceed to firstly explain the brief factual background to the matter.

1. The Company has taken a term loan of approx. Rs. 200 crores and an Overdraft facility of Rs. 100 crores from Hongkong & Shanghai Banking Corporation Ltd. [HSBC Bank] against the hypothecation of property at 'S.P. Infocity, Pune'

- a copy of term loan agreement dated 28 July 2015 with HSBC Bank – refer "Appendix-A",*
- a copy of the Overdraft facility agreement dated 28 July 2015 with HSBC Bank - refer "Appendix-B".*
- a copy of Facility Advise Letters dated 03 May 2016 issued by the HSBC Bank- refer "Appendix-C";*
- a copy of sanction letter dated 13 December 2016 issued by HSBC Bank - refer "Appendix-D"*

The term loan/ overdraft facility is mainly to meet the day-to-day business requirements.

2. *A statement giving the details vis-a-vis interest paid on term loan and overdraft facility is forwarded herewith-refer "Appendix-E".*

3. *Further, we also forward the bank statements highlighting all the entries towards payment of interest for your Honour's ready reference-refer "Appendix-F".*

4. *The fact about the term loan and the overdraft facility from HSBC Bank is also forming part of the Notes to our Audited Annual Account for the year [refer Note S(0) a photocopy of our Audited Annual Accounts is forwarded herewith refer "Appendix G".*

5. *Further, we submit that, we have made an application to HSBC Bank to re-issue the interest certificate, since we are unable to trace the original interest certificate from HSBC Bank which was on our records. The Bank has informed us that the interest certificate will be provided in 7 working days from 14 March 2022- a copy of email from the HSBC Bank is also forwarded herewith for your Honour's ready reference- refer " Appendix- H". Accordingly, we have to request your Honour to grant us a period of around 8-9 days to furnish the same.*

6. *Be that as it may, we invite your Honour's attention to the fact that the finance cost debited to the profit and loss account is Rs. 20,19,03,981/-.*

The said amount alongwith other expenses have been apportioned between the income from house property' and 'income from business and profession' - a detailed working of apportionment of expenditure between various heads of income forms part of our statement showing computation of total income, which was filed with the Assessing Officer during the course of the assessment proceedings vide letter dated 03 October 2019- a copy of the said letter alongwith the statement showing computation of total income is also forwarded herewith for your Honour's ready reference- refer " Appendix-I".

7. *For your Honour's ready reference, we reproduced hereunder the apportionment of the finance cost from the aforesaid statement showing computation of total income*

	<i>Debited to the profit and loss account</i>	<i>Claimed under business income</i>	<i>Claimed under house property income</i>
<i>Finance Cost</i>	<i>20,19,09,981</i>	<i>8,35,59,073</i>	<i>11,83,44,908</i>
<i>{The calculation of Ratio is given below)</i>	<i>100%</i>	<i>41.3855%</i>	<i>58.6145%</i>

<i>Ratio:</i>	<i>As per FA Schedule</i>	<i>(%)</i>
<i>Total assets of IT Park & SEZ</i>	<i>2,861,503,135</i>	<i>100.00</i>
<i>Less: Gross Block for 'BUILDINGS"</i>	<i>1,677,254.326</i>	<i>58.6145</i>
<i>Other Gross Block</i>	<i>1,184,248,809</i>	<i>41.3855</i>

8. Here, we would also like to point out that the Assessing Officer had called for the details vis-a-vis the interest expense vide Notice dated 14 November 2019 issued u/s. 142(1) [copy attached refer "Appendix-J"), however, the details from the said notice were submitted in piecemeal till 20 December 2019, when we tried to file balance details on 20 December 2019 which inter-alia included the O details of interest expense, the tab on the income-tax portal was closed.

Having explained the factual background, we now proceed to give the our submissions as to why the provisions of section 263 of the Income-tax Act, 1961 cannot be invoked:

1. In the first instance the provisions of section 263 of the Income-tax Act, 1961 are reproduced herein below for your Honour's ready reference

"263. (1) The [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 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 an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment."

2. On a plain reading of the above it is clear that the power to revise u/s. 263 of the Income tax Act, 1961 can be invoked only if the following two conditions are satisfied

- *the Order of the Assessing Officer sought to be revised is erroneous*

and

- *it is prejudicial to the interests of the Revenue*

3. In this case the Assessment Order dated 25 December 2019 passed is neither erroneous nor is prejudicial to the interest of the revenue since the same has been passed in accordance with the provisions of the Income-tax Act, 1961.

4. In this connection your Honour's attention is invited to the meaning of the term 'Erroneous Assessment' as given on page 542 of Black 's Law Dictionary:

'Erroneous Assessment refers to an assessment that deviates from the law and is therefore invalid and is a defect that is jurisdictional in its nature, and does not refer to the judgment of the Assessing Officer in fixing the amount of valuation of the property. Similarly 'erroneous judgment' means 'one rendered according to course and practice of court, but contrary to law, upon mistaken view of law, or upon erroneous application of legal principles

5. Here, we would point out that we have debited interest expense of Rs. 20.19 crores to the profit and loss account and a detailed facts about the loan taken from HSBC Bank, the mortgage of asset against the loan, details of interest on the loan, repayable in 120 installments, etc. are forming part of the Notes to accounts of the Audited Annual Accounts.

Further, the details of apportionment of interest expense also forms part of the statement showing computation of total income which were filed vide letter dated 03 October 2019.

6. Accordingly, it is submitted that the Assessing Officer was fully aware of the fact that the term loan and overdraft facility has been taken and the interest has been paid on the same to HSBC Bank

7. Hence, the current proceedings to re-examine the issue are clearly beyond the scope of Section 263 of the Income-tax Act, 1961.

8. Thus it is submitted that considering the above facts and the legal position explained hereinabove the Assessment Order cannot be said to be erroneous and/or prejudicial to the interests of revenue which is a sine qua non for invoking the provisions of section 263 of the Income-tax Act, 1961 and hence we submit that further proceedings

in the matter be dropped. In view of the foregoing, it is submitted and will be appreciated that the amount in question is has been correctly been allowed by the Assessing Officer during the course of Original Assessment Proceedings. In view thereof we have to request your Honour to drop further proceedings in the matter.

We trust that the aforesaid clarifies. However, in case your Honour require further particulars and/or clarification please let us know and we shall be pleased to furnish the same."

5. After considering the submissions of the assessee, Ld. Pr.CIT observed that assessee has not submitted the Interest Certificate from the Bank during the course of assessment proceedings, nor during the proceedings u/s. 263 of the Act. Further, he observed that onus lies on the assessee to substantiate any claim made in the return of income with substantiating documents. He observed that vide its letter dated 15.03.2022, the assessee has submitted copy of term loan agreement evidencing that it had taken term loan from HSBC Bank Ltd., against hypothecation of some property at Pune. As per clause of Facility Advise Letter, in Annexure 1d which is Schedule IV Master Schedule which is defined in Annexure 1d, however, assessee has not annexed the Annexure 1d. Assessee has furnished loan agreements for term loan and overdraft facility and nowhere in this document it is stated that these loans are for acquisition or construction of properties in connection with which rental income is received and deduction u/s. 24(b) of the Act is claimed.

6. Further, Ld. Pr.CIT observed that in submissions assessee has stated that purpose of the loan is to "finance of existing term loan, additional capital expenditure or any other loan as per RBI guidelines". He observed that there is no mention of any building or property for acquisition or construction of which the loan would be used. Further, he observed that the assessee has submitted an email confirmation from bank about payment of interest made by assessee however, he observed that confirmation by Bank about payment of interest does not constitute Certificate as per section 24(b) of the Act.

7. Further, he observed that the assessee has not submitted supporting documents or any other relevant details regarding when the impugned property was acquired/constructed and there is no record to show that the utilization of the loan for the purpose of property acquired or constructed. Further, he observed that in Para No. 7 of its submission dated 15.3.2022, assessee has apportioned interest cost in both the head of income i.e., "Income from House Property" and "Income from Business". The same were apportioned on the basis of Gross Block of Assets relating to Buildings' and to Other Assets. He observed that there is no legal sanctity in such apportioning of interest costs.

8. Further, he observed that assessee has claimed that since loan facility was used for construction as well as other business activities, deduction of interest expenditure may alternatively be granted u/s. 37 of the Act if same is denied u/s. 24(b) of the Act. Accordingly, Ld. Pr.CIT observed that this claim is also not tenable since assessee has not submitted, with supporting evidences, how such loan was used for business activities from which other business income was generated.

9. Since Assessing Officer has not verified all these aspects during the assessment proceedings Accordingly, he invoked Explanation 2 to section 263 of the Act holding that Assessment Order passed without making enquiry or verification which would have been made in this case, by relying on various case law in relation to invoking provisions of section 263 of the Act and held that the Assessment Order dated 25.12.2019 erroneous in so far as it is prejudicial to the interest of the Revenue. Both the conditions specified u/s.263 of the Act are satisfied in this case and it is a fit case to invoke Explanation 2 to provisions of section 263 of the Act and he set aside the Assessment Order dated 25.12.2019 and directed the Assessing Officer to conduct requisite enquiries along the lines discussed in his order and frame the order of assessment denovo, after giving adequate opportunity of being heard to the assessee.

10. Aggrieved, assessee preferred appeal before us and raised following grounds in its appeal: -

"1:0 Re: Validity of Order u/s. 263:

1:1 The Principal Commissioner of Income-tax has erred in passing the Order dated 29 March 2022 u/s. 263 of the Income-tax Act, 1961.

1:2 The Principal Commissioner of Income-tax has erred in holding that the Assessment Order dated 25 December 2019 passed by the Assessing Officer was erroneous and prejudicial to the interests of revenue.

1:3 The Appellant submits that the impugned Order u/s. 263 of the Principal Commissioner of Income-tax be struck down.

Without prejudice to the aforesaid:

2.0 Re: Disallowance of Rs. 11,83,44,908/-- being interest expense u/s. 24(b):

2:1 The Principal Commissioner of Income-tax has erred in holding that the interest expenditure of Rs. 11,83,44,905/- is not allowable u/s. 24(b) of the Income-tax Act, 1961.

2:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject the interest expenses amounting to Rs. 11,83,44,908/- is allowable under the head income from house property' while computing its total income for the year and the stand taken by the Principal Commissioner of Income-tax in this regard is erroneous and not in accordance with law.

Without prejudice to the foregoing:

2:3 The Principal Commissioner of Income-tax has erred in not allowing the alternate plea of the Appellant that if the interest expenditure is considered as not allowable u/s. 24(b) of the Income-tax Act, 1961, the same may be allowed as business expenditure u/s. 37 of the Income-tax Act, 1961 while computing the taxable income of the Appellant for the year.

3:0 Re: General

3:1 The Appellant craves leave to add, alter, amend, substitute and/or modify in any manner whatsoever modify all or any of the foregoing grounds of appeal at or before the hearing of the appeal."

11. At the time of hearing, Ld. AR of the assessee brought to our notice the notice issued by the Ld. Pr.CIT u/s. 263 of the Act which is placed in the Paper Book and the relevant reply submitted by the assessee which is also placed at Page No. 4 of the Paper Book. Ld. AR of the assessee brought to our notice section 24(b) of the Act, and submitted that Ld. Pr.CIT heavily relied on the third proviso to section 24(b) of the Act. He submitted that the 3rd proviso is not applicable to the assessee and it is applicable for the individuals. He submitted that the proviso of 24(b) has to be read along with proviso 1 and 2 and he prayed that the findings given by Ld.Pr.CIT merely relying on third proviso to section 24(b) is not proper and he prayed that order maybe quashed.

12. On the other hand, Ld.DR brought to our notice Page No. 7 of the 263 order and submitted that the assessee has not furnished any information before the Assessing Officer and Assessing Officer has merely accepted the information filed by the assessee in their return of income and passed the Assessment Order without proper verification and further, he brought to our notice Page No. 178 of the Paper Book which is notes forming part of the financial statements in which the primary objects of the assessee are listed and as per which primarily the assessee is engaged in horse breeding and horse racing, related business and he submitted

that the assessee company was demerged its stud farm business undertaking w.e.f 01.04.2007, Ld.DR heavily relied on the findings of the Ld.Pr.CIT and he submitted that Ld. Pr.CIT is justified in invoking provisions of section 263 of the Act in this case.

13. On the other hand, Ld. AR in the rejoinder submitted that it is now engaged only in real estate development and brought to our notice Profit and Loss Account statement for the current Assessment Year in [Page No. 175 of the Paper Book] wherein assessee has declared revenue from operation and submitted that it consists of sale of residential flats, sale of services and other operating income [Page No. 190 of the Paper Book]. He also brought to our notice sale of services includes licence charges, common area maintenance receipts. At the same time, he also brought to our notice Page No. 191 of the Paper Book which is the finance costs and assessee has incurred the total interest expenditure of ₹.19.75 crores and brought to our notice Page No. 204 of the Paper Book which is computation of statement of property income in which assessee has claimed interest deduction u/s. 24(b) of the Act and the basis of allocation. Ld. AR of the assessee has submitted that without prejudice that even if the interest expenditure claimed by the assessee is not allowed u/s. 24(b) still assessee is eligible to claim the deduction u/s. 37 of the Act.

14. Considered the rival submissions and material placed on record, we observe that while verifying the assessment records the Ld. Pr.CIT observed that assessee has claimed interest expenditure u/s. 24(b) of the Act and according to him assessee has not submitted any information before the Assessing Officer to claim the same u/s. 24(b) and accordingly, he invoked third proviso to section 24(b) observing that in order to claim the expenditure u/s. 24(b) of the Act, assessee has to furnish certificate from the lender from whom the capital is borrowed and specify the amount of interest payable by the assessee for the purpose of acquisition or construction of the property or conversion of the whole or any part of the capital borrowed which remains to be repaid as a new loan. Since assessee has not furnished any document in this regard as per the third proviso to the section 24(b) and also no evidences found in the assessment record to show that Assessing Officer has verified the same before allowing claim of the assessee.

15. After considering the submissions of both parties, in our considered view proviso of section 24(b) states that "where the property has been acquired, constructed, repaired, renewed or reconstructed with borrowed capital, the amount of any interest payable on such capital"; however, we observe that this proviso is directly linked to the 1st and 2nd proviso. The

first proviso, states that in respect the property referred to in sub section (2) of section 23, which is the property consists of house or part of house which is in the occupation of the owner for the purpose of his own residence or it cannot actually be occupied by the owner by reason of the fact that owing to his employment, business or profession carried on at any other place, he has to reside at that other place in a building not belonging to him. In such situation, the annual value of such house shall be taken to be NIL. The first proviso has specifically relates to the situation discussed in section 23 sub-section 2 of the Act, where the individual can claim deduction not exceeding ₹.30,000/-.

16. The second Proviso is also in relation to first proviso, wherein the above said individual has acquired a constructed with the borrowed capital [within five years from the end of the Financial Year in which capital was borrowed] the amount of deduction shall not exceed two lakhs rupees.

17. The third proviso is also closely linked to the proviso 1 and 2 and gives certain contingencies in order to claim the deduction mentioned in proviso 1 and 2 therefore all the proviso mentioned in section 24(b) are relation to an individual who intend to claim deduction u/s. 23(2) of the Act. Therefore, the proviso contained in section 24(b) is not applicable to

assessee who borrows the capital for the purpose of earning income by letting out the property under the head "income from house property". Therefore, the interpretation of third proviso to 24(b) in isolation is not proper and we are not inclined to agree with the findings of the Ld. Pr.CIT u/s. 263 of the Act. As per the facts on record, we observe that assessee is in business of construction and letting of the property as well as maintenance of the property, in such combined business, it is normal in the construction business to borrow the capital for the overall business and apportion the same based on the head of income. It is not in dispute that assessee has paid the relevant interest to the bank.

18. We observe from the record that Assessing Officer has collected the information from the assessee and as per the assessment records there is no evidences to show that Assessing Officer has verified the same in detail. However, the assessee has submitted all the relevant information, the basis of allocation before the Assessing Officer. Even otherwise if we consider that Assessing Officer has not verified the claim made by the assessee it can be considered as erroneous order. However, in order to invoke provisions of section 263 of the Act, both conditions has to be satisfied, not just erroneous, even the condition, prejudicial to the revenue. But as per the discussion in the above paragraph we do not

agree with the Ld. Pr.CIT that the condition of prejudicial to the interest of the Revenue is satisfied. Therefore, twin conditions as per provisions of section 263 are not satisfied in this case. Hence the order passed u/s.263 is set aside. Accordingly, Ground Nos. 1 and 2 (except Ground No. 2.3) raised by the assessee are allowed and Ground No. 2.3 is not adjudicated at this stage and kept open. Ground No. 3 is general in nature. Accordingly, grounds raised by the assessee are partly allowed.

19. In the result, appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 09th August, 2023.

Sd/-
(ABY T. VARKEY)
JUDICIAL MEMBER
Mumbai / Dated 09/08/2023
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum