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

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 2663/Mum/2019

(A.Y: 2014-15)

Giraffe Developers Pvt Ltd 111, G Wing, Akruti Commercial Complex, Next to Akruti Centre Point, Central Road, Andheri (E), Mumbai- 400093	Vs.	Pr. CIT – 9, Room No. 214, 2nd Floor, Aayakar Bhavan, M.K. Road, Churchgate, Mumbai-400020.
PAN/GIR No. : AACCN2778D		
Appellant	..	Respondent

Appellant by :	Shri.Madhur Agrawal & Shri.Fenil Bhatt.AR
Respondent by :	Shri.S.Anbuselvam.DR

Date of Hearing	13.07.2022
Date of Pronouncement	25.07.2022

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

The assessee has filed the appeal against the order of Pr. Commissioner of Income Tax (Appeals)-9, Mumbai passed u/s 143(3) and 250 of the Act. The assessee has raised the following grounds of appeal:

1. On the facts and circumstances of Rs.NIL. the case and in law the Learned Principal Commissioner of Income

Tax-9, Mumbai ("PCIT") has grossly erred in Re-opening Assessment u/s 263 of the Act. The re-opening of assessment u/s263 of the Act is unfair, illegal and void ab-initio.

2. On the facts and circumstances of Rs.NIL the case and in law the Learned PCIT has grossly and unfairly erred in directing The Learned Assessing Officer ("LAO") to inquire in claim of interest on loan and bank deposits amounting to Rs. 6,31,42,956/-.

3. On the facts and circumstances of Rs.NIL the case and in law the Learned PCIT has grossly and unfairly erred in concluding that the re-opening of assessment on account was justified on account of the Ld.AO not including interest received from tata power amounting to Rs.67,044/- in the computation of Income form part of assessment order whereas the appellant had offered the same in return filed *u/s139(1) of the Act.*

4. On the facts and circumstances of Rs.NIL the case and in law the Learned PCIT has grossly and unfairly erred in directing that Hubtown Limited is a party covered u/s 40A(2) (b) of the Act.

5. On the facts and circumstances of Rs.NIL the case and in law the Learned PCIT has grossly and unfairly erred in directing / confirming applicability of penalty provisions under section 271AA of the Act for failure to report payment of interest on Rs.15,00,00,000 amounting to Rs. 15,00,00,000/- to Hubtown Limited as a Specified Domestic Transaction under the provisions of Section 92D of the Income Tax Act.

6. On the facts and circumstances of the case and in law the Learned PCIT has grossly and unfairly erred in directing that the penalty provisions of section 271BA were

applicable to the Company on account of its not having filed report in Form 3CEB required under the provisions of Section 92E of the Income Tax Act.

7. Under the circumstances the directions of the Learned PCIT are bad in law and against the principals of natural justice, equity and fairness.

8. The appellant craves leave to add, to amend, alter/delete and/or modify the above grounds of appeal on or before the final hearing.

2. The brief facts of the case are that the assessee company is engaged in the business as builder and developer. The assessee has filed the return of income for the A.Y 2014-15 electronically on 30.11.2014 disclosing a total income of Rs.67,040/- and the return of income was processed u/s 143(1) of the Act. The revised return of income was filed on 31.03.2014 with a total income of Rs.67,040/-.Subsequently the case was selected under the CASS and notice u/s 143(2) and 142(1) of the Act was issued. In compliance to the notice, the Ld. AR of the assessee appeared from time to time and filed the details and the case was discussed. The A.O. on perusal of the financial statements found that the assessee has claimed interest expenses of Rs. 19.42 Cr, and Rs. 20.40 Cr. are to be disallowed u/s 40(a)(ia) of the Act as the

assessee has not deposited the TDS in time, this includes interest expenses of Rs. 19.41 Cr. Further the assessee has sold some of the units in the current year and claimed full interest expenses on those units. Hence proportionate interest has to be allocated Therefore the interest expenses to the extent of Rs. 15.96 Cr is not allowed. Since the assessee has already disallowed interest expenses u/s 40(a)(ia) of the Act, therefore no separate addition / disallowance is made. Whereas in respect of other expenses, the assessee has claimed expenses allowable to the extent of Rs. 13.88 Cr were disallowed u/s 40(a)(ia) of the Act in the last year. The interest expenses which have been disallowed in the A.Y 2013-14 are related to part of the commercial project which was unsold during the year. Finally the A.O has assessed the total income of Rs. NIL after setting off the brought forward losses and passed the order u/s 143(3) of the Act dated 30.12.2016.

3. Subsequently, the Pr.CIT on perusal of the facts and the assessment record observed that the A.O has not made any enquiry in respect to certain primary facts/claims and considered the assessment order

passed u/s 143(3) of the Act is erroneous and prejudicial to the interest of revenue and issued notice u/s 263 of the Act dated 30.01.2019 read as under:

> *2. On perusal of Financial Statements for the year ending 31/03/2014 under the head "Other Income" that the assessee has received interest from fixed deposits to the tune of Rs.91,624/- and interest from loans of Rs.6,30,51,332/-. Further, during assessment proceedings, the assessee has filed revised computation of income. On perusal of revised computation, it is observed that the assessee has shown Rs.91,336/- on account of interest received from Tata Power under the head Income from Other Sources'. The assessee has received interest from bank fixed deposits and interest on loans to the tune of Rs.6,31,42,956 /- (91,624/- + 6,30,51,332) which have assessed as Business Income. Hence, the A.O. has erred in treating the interest received from fixed deposits and interest on loans to the tune of Rs.6,31,42,956 / - as Income from Business' as against Income from Other Sources' by setting off of the brought forward business losses against the interest income. In view of this, it appears that the assessment order u/s 143(3) passed by the AO on 30.12.2016 is erroneous and prejudicial to the interest of revenue within the meaning of section 263 of the Income Tax 1961.*
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> *3. In the revised computation of total income, the assessee has disclosed interest received from TATA Power of Rs.91,336/- as income from other source and offered an amount of Rs.67,044 /- for taxation after setting off the brought forward unabsorbed depreciation for A.Y.2012-13*

Of Rs.24,292/-. However, in the assessment order the A.0. has not assessed the interest received from Tata Power of Rs.67,044/- which resulted in underassessment to the tune of Rs.67,044/-. In view of this, it appears that the assessment order u/s 143(3) passed by the AO is erroneous and prejudicial to the interest of revenue within the meaning of section 263 of the Income Tax Act, 1961.

4.The A.O. observed from Tax Audit Report that the assessee has paid interest on securities amounting to Rs.15,00,00,000/- to M/s. Hum Town Ltd. Which is 100% shareholder in class B shares. However, the assessee has not prepared any report in Form No.3CEB as required under provisions of section 92D and 92E of the IT Act,1961. Further, the assessee has paid amounting to Rs. 15 crores as interest on debenture and it should have been reported as Specified Domestic Transaction. Accordingly, section 271AA for failure to report the specified domestic transaction u/s 92D(1) and section 271 BA for its failure to furnish the audit report u/s 92E, are applicable to the assessee. In view of this, it appears that the assessment order u/s 143(3) passed by the AO on 30.12.2016 is erroneous and prejudicial to the interest of revenue within the meaning of section 263 of the Income Tax Act, 1961. Therefore, you are requested to show cause as to why above mentioned assessment order passed by the Assessing Officer may not be held to be erroneous and prejudicial to the interest of revenue as per the provisions of section 263.

5. Therefore, you are hereby given an opportunity to appear before the undersigned on 13.02.2019 at 12.30 p.m either personally or through a representative duly authorized in writing in this behalf to explain your case on the aforesaid issue. If you do not wish to avail this opportunity of being heard in person or though an

authorized representative, you may reply in writing on or before the said date which will be considered before any order u/s 263 of the Act is passed.

4. In compliance to the notice, the assessee has filed the reply letter dated 20-02-20219 online as under:

a. Alleged Error in treating the interest received from fixed deposits and interest on loans to the tune of Rs.6,31,42,956/- as 'Income from Business' as against 'Income from Other Sources' by setting off the brought forward business losses against the interest income.

With regards to the above, assessee states that in earlier years it had acquired development rights / FSI for consideration which was partly paid by issue of debentures. These funds were utilised for the construction of the project and has a direct link to the business of the assessee. Later, when some of the units of the project were sold, the resulting funds were used to pay of the existing liabilities of the Company. The Company has received the above interest from funds received on sale of the FSI to JV and were temporarily set apart to pay of the debentures issued by it to pay for the acquition and construction of the same project. Thus, a global view of the whole facts of the case would lay bare the fact that the interest received has a direct connection to the business of the assessee, considering which the same has been offered under the head "Income from Business" Copy of fund flow of funds received and invested - Exhibit 7

Without prejudice to the above explanation, attention is invited that the Company has also paid interest on the funds received. A glance at the balance sheet would also lay bare the fact that most of the funds received and paid

are interest bearing and there is a direct nexus that can be established between the same. Even in that case, if the interest received is to be assessed under the head "Income from Other Sources", as is being presently proposed, the same would also need the proportionate interest paid to be considered for set-off against the interest received under the head "Income from other sources". The same would result in no variance or difference in the related tax liability. In the unlikely scenario, that there remains some net interest that remains taxable, the same would become eligible to be allowed for inter head set-off against the business loss of the current year. A appreciation of the above explanation would lay bare the fact that the restating of income n different heads of income is basically revenue neutral and there is no income that has escaped assessment. To press home the point, assessee invites attention to Exhibit 8 which comprises of the restated computation of income which would lay bare the above.

b. Alleged error by the A.0. of not assessing interest received from Tata power of Rs. 67,044/- which has resulted in underassessment to the tune of 67,044/.

Assessee states that on going through the facts of the case it seems that there is an apparent error in the assessment order us 143(3) of the Act. The netted interest of Rs. 67,044/- which was offered as income by the assessee in its computation has somehow not been taken for the computation of assessed income.

Without prejudice to the above, assessee states that the above is a mistake apparent from records and on account of oversight of the LAO and is subject to rectification u/s 154 of the Act.

c. Non-levy of Penalty us 27IAA for failure to report the specified domestic transaction u/s 92D(1) and section 27IBA for its failure to furnish the audit report u/s 92E of the Income Tax Act, 1961

On facts of the case:

Assessee states that the shareholding of the Company comprised of different classes of shares. These shares represented the actual ownership as well as investor shares which were held in a protective capacity to basically protect the investments made in the Company. The actual owners were entitled to dividend only after settling the dues / dividend / Return on Investments of the investor shares.

Certified copy of details of different classes of shares and their rights and obligations - Exhibit 9

b. With regards to the grounds raised, assessee submits that M/s Hubtown Limited had, during the year under review, held 100% of "B Class" of the shares of the assessee Company. These shares are not ordinary shares and do not represent the ordinary shareholders of the company who are the final and actual owners of the company. These shares are held in a protective capacity to safeguard the investments made in assessee company.

c. For all decisions relating to the operations and management of Giraffe, Hubtown was required to take prior consent of the Investors. The Investors had protective rights whereby all decisions relating to the operations and management of the Company, the consent of the Investor was necessary. In view of the above, Hubtown was not in a position to exercise significant influence and was not the beneficial owner of the Company of shares exceeding 20% of the voting powers.

d. Attention is also invited that in any case what needs to be verified is what was the holding of Hubtown in the total shareholding of the Company. In this regard it is submitted that M/s Hubtown held only 7.21 % of the total issued, subscribed and paid-up share capital of Giraffe, whereas the balance 92.79% was held by the Promoters and Investors. Considering the same, in any case, M/s Hubtown is not a related party in terms of Section 40A(2)(b) of the Act. Working of shareholding of Hubtown Ltd in assessee company - Exhibit 10

On Law

e. At the outset, assessee invites attention to the computation of income for the year under review. A glance at the same would reveal that the expense of Rs. 15,00,00,000 claimed as interest expense paid to M/s Hubtown during the year has been disallowed u/s 40a(ia) of the Act in the computation of income. Your honour will appreciate that the disallowance once having already been suo-moto affected there cannot be further disallowance and consequentially there is no tax impact on the completed assessment in the current year.

f. Assessee next invites attention that review proceedings under section 263 of the Act can be initiated if the completed assessment is erroneous and prejudicial to the interest of revenue. The same by implication would cover any omission or error in a completed assessment which has resulted a loss to the revenue.

Attention is invited that presently, the ground raised is with regards penalty proceedings u/s 271AA or 271BA of the Act. Penalty proceedings stand a separate and different leg altogether and are not part of the assessment proceedings. They are a separate code in themselves and

are not liable or required to be levied on all additions / disallowances made at the time of assessment proceedings. Further the levy of the same are subjective and are at the judicial discretion of the assessing officer. Considering that the assessment order has no role in the levy of penalty other than the process of initiating the penalty proceedings, it is humbly prayed before Your Honour that the levy or non-levy of penalty would not have any impact on the present assessment order whatsoever which would result in the principal requirement of the section of the order to be erroneous or prejudicial to the interest of the revenue, not being satisfied.

g. Assessee respectfully submits that even considering the facts of the case, the stated M/s Hubtown Limited does not have any necessary beneficial interest in the share-holding of the Company and is not a related party u/s 44A(2) (b) of the Act, considering which there is no legal ground to hold the assessee company liable to furnish an Audit report u/s 92E of the Act.

h. Without prejudice to the above, Assessee Company further states that the proposed levy of penalty provisions may themselves be "out of jurisdiction". It is emphasized that though assessment proceedings stand on completely independent and separate footings from the penalty proceedings, the Assessment Order is required to initiate proposed levy of Penalty Proceedings for the same to be legally enforceable. Attention in this regards is invited to the decision of the Hon'ble Delhi High Court reported in Addl. CIT vs. JK. D'Costa (1981) 25 CTR (Del) 224: (1982) 133 IT 7 (Del) which has held that the CIT cannot pass an order under s. 263 of the Act pertaining to imposition of penalty where the assessment order under Sec 143(3) is silent in that respect. The relevant observations recorded are: "It is well established that proceedings for the levy of

a penalty whether under s.271(1) (a) or under s. 273(b) are proceedings independent of and separate from the assessment proceedings. Though the expression assessment is used in the Act with different meanings in different contexts, so far as s.263 is concerned, it refers to a particular proceeding that is being considered ITA NO.3920 to 3922/MUM/2017 Jayesh V. Sheth by the CIT and it is not possible when the CIT is dealing with the assessment proceedings and the assessment order to expand the scope of these proceedings and to view the penalty proceedings also as part of the proceedings which are being sought to be revised by the CIT. There is no identity between the assessment proceedings and the penalty proceedings: the latter are separate proceedings, that may, in some cases, follow as a consequence of the assessment proceedings. As the Tribunal has pointed out, though it is usual for the ITO to record in the assessment order that penalty proceedings are being initiated, this is more a matter of convenience than of legal requirement. All that the law requires, so far as the penalty proceedings are concerned, is that they should be initiated in the Court of the proceedings for assessment. It is sufficient if there is some record somewhere, even apart from the assessment order itself, that the ITO has recorded his satisfaction that the assessed is guilty of concealment or other default for which penalty action is called for. Indeed, in certain cases it is possible for the ITO to issue a penalty notice or initiate penalty proceedings even long before the assessment is completed though the actual penalty order cannot be passed until the assessment finalized. We, therefore, agree with the view taken by the Tribunal that the penalty proceedings do not form part of the assessment proceedings and that the failure of the ITO to record in the assessment order his satisfaction or the lack of it in regard to the le- viability of penalty cannot be said to be a factor

vitiating the assessment order in any respect. An assessment cannot be said to be erroneous or prejudicial to the interest of the Revenue because of the failure of the ITO to record his opinion about the leviability of penalty in the case." Assessee company states that though the above relates to penalty sought to be levies u/s 271(1) (a) or 273(b) of the Act, the principal explained would be applicable to facts of the present case as well.

5. Whereas the Pr.CIT was not satisfied with explanations and dealt on the facts of the case in respect of claims made by the assessee and the domestic transfer pricing issues/penalty. The Pr.CIT finally observed that the order passed U/sec143(3) of the Act is erroneous and prejudicial to the interest of revenue and has set aside the assessment and issued the directions to the AO for de novo assessment. The observations of the Pr.CIT at Para 6 to 7 read as under:

6. The above facts clearly establish that the assessment has been completed without carrying out necessary enquires into the various issues and that the AO has not applied his mind on the issues under consideration and consequently the order of the AO is erroneous in so far as it is prejudicial to the interest of revenue.

It is now settled position in law that for invoking the provisions of section 263 of the Act. The CIT has to be satisfied of the twin conditions viz. the assessment order to be erroneous and it is also prejudicial to the interest of revenue. If these two conditions co-exist, the CIT is bound

to set aside the order of the AO u/s. 263 of the Act (Malabar Industrial Co. Ltd. vs. CIT 243 IT 83 (SC)]. Both these conditions do exist cumulatively in the case of the assessee in respect of all the three issues, discussed above. Further, in the case of Shripan Land Development Vs. CIT 46 SOT 447 [ITAT-Mum], as per the facts reported the assessee has received interest free security deposit against the premises rented to the bank, yet at the time of making assessment the A0 had not made addition on account of notional interest on interest free deposits under section 23 (1)(a) of the Act. In this regard, while adjudicating the assessee's appeal against the order u/s. 263 of the Act passed by the CIT, the Hon'ble ITAT has held that the queries were raised by the AO in respect of fixed deposits shown by the assessee as liability in the balance sheet for examining and ascertaining the sources of parties regarding security deposits. The AO had not discussed anything about the issue of notional interest for determining the fair market rent w/s. 23(1) (a) of the Act. Thus, it was held that the AO had not applied his mind or taken any view on the issue of notional interest. When the AO had not taken any view in respect of the issue which was a subject matter of the revision order under section 263 of the Act then it could not be said that the CIT had taken a different view, than the view taken by the AO and had wrongly assumed the jurisdiction us. 263 of the Act. It was further held that from the record, it was clear that the AO had not expressed any view, even the issue had not at all been discussed and no findings had been given by the AO. In order to ascertain that the AO has taken a view on a particular matter, the assessment order should exhibit some thought process of the AO on the issue under consideration. Once, it is manifest from the assessment order as well as the other records that the AO has not applied his mind then the order of the AO qua the issue in

question is erroneous in so far as it is prejudicial to the interest of revenue. It was further held that so far exercising the jurisdiction u/s. 263 is concerned, once the contention of non-application of mind on the part of the AO on a particular issue is satisfied, the invoking the provisions of section 263 is proper and justified. It was further observed that there was no doubt that the issue which was a subject matter of 263 order was a complex matter and there was a possibility of two views but when the AO had not expressed any view while framing the assessment then the question of substitution of the view by the CIT did not arise.

Similarly, in the case of Ninestar Enterprises Pvt. Ltd vs ACIT, 30 taxmann.com 57 (Hyd.) as reported the CIT passed a revision order u/s 263 setting aside assessment on various grounds such as while allowing assessee's claim of long term capital gain, the AO omitted to examine dates of acquisition of bonus shares; there was no evidence of receipt of dividend warrants to claim exemption under section 10(34) of the Act and therefore, expenditure incurred on exempt income was allowed ignoring the provisions of section 14A of the Act. On account of these facts the Hon'ble ITAT has held that perusal of the assessment order passed by the AO does not show any application of mind on his part. The AO simply accepted the claim of the assessee with regard to the issues considered by the CIT, therefore, this is a case where the AO mechanically accepted what the assessee wanted him to accept without any application of mind or enquiry. It was further held that the evidence available on record is not enough to hold that the return of the assessee is objectively examined or considered by the AO. According to the ITAT, it is because of such non consideration of issues on the part of the AO that the return filed by the assessee

stood automatically accepted without any proper scrutiny. Therefore, the assessment order passed by the AO was held to be clearly erroneous without proper examination or enquiry or verification or objective consideration of the claim made by the assessee. The ITAT has also held that the AO had completely omitted to examine the issue in question from consideration and made the assessment in an arbitrary manner. As the order of the AO was found to be completely non speaking order, therefore, it was found to be fit case for the CIT to exercise his provisional jurisdiction under section 263 of the Act.

Likewise, in the case of CIT vs. South India Shipping Corporation Ltd. 233 ITR 546 (Mad.) is held that the CIT having arrived at a finding on the basis of materials available on record that the claim under section 35B was allowed in a perfunctory manner and without indicating the sub clauses of section 35 B (1)(b) under which the claim would fall, he could validly exercise his jurisdiction under section 263 even without recording a final conclusion regarding allow ability of deduction. Similarly, in the case of Rampyari Devi Saragi Vs. CIT 67 ITR 84 (SC) the CIT under section 263 of the Act has concluded that assessments for the relevant assessment years (Assessment Year 1952-53 to 1960-61) was erroneous and prejudicial to the interest of revenue inasmuch as assessee has neither resided nor carried on any business from the address declared in return and that AO accepted initial capital, gift received and sale of jewellery, income from business etc without any enquiry and evidence whatsoever, was upheld.

In the case of Smt. LajjaWatiSingal Vs. CIT 226 ITR 527 (All.) the Hon'ble High Court has held that it is the duty of the assessing authority to make full enquiry and satisfy himself that the income surrendered was, in fact, earned

by the assessee. It was held that an assessment made on income surrendered by assessee without making an enquiry whether the same was in fact taxable in the hands of the assessee was erroneous and prejudicial to the interest of revenue.

In the case of Rishi Gagan Trust vs. ITO in 31 ITD 515 (Bom.) the Hon'ble jurisdictional ITAT 'B' bench noted that the assessee received certain amount in gift from a non-resident donor at Dubai. The AO while completing the assessment for the AY 1983-84 accepted it as a genuine gift on the basis that both the donor and doner had made the declaration in this behalf before the Consulate General at Dubai and the foreign remittance of the gift had been received through bank. The CIT, acting under section 263, set aside the assessment on the ground that proper and full enquiries had not been made by the AO while accepting this gift. On account of these facts the ITAT has held that when the AO completed the assessment, the financial capacity the donor to make the gift was not enquired into by him. The pieces of evidence and line of enquiry was only in relation to the identity of the parties, the remittance of the amount through banking channels and the offer and acceptance of the donor and donee before the Consulate General at Dubai. The assessment order was silent on the capacity of the donor to make the gift in question. Section 68 speaks of any sum found credited in the books of an assessee maintained for any previous year and a gift received by an assessee is a credit in its accounts. It was incumbent on the assessee to prove the genuinenss of the said cash credit and therefore, to say that the conditions for proving a credit and proving a gift were different, was not correct. In any case, whether it be a gift or a loan, the financial capacity or the credit worthiness of the person giving a loan or the gift was an

important fact which had to be ascertained while deciding the question of genuineness. The AO did not make any such enquiry when he finalized the assessment. The CIT had merely directed him to make fresh enquiries and complete the assessment according to law. Therefore the CIT was entitled to give this direction by acting u/s. 263 of the Act when he found that the order had been passed by the AO without making proper enquires.

Similar views are expressed by the Hon'ble ITAT E Bench Mumbai in the case of TCE Consulting Engineers vs. Addl. CIT in 20 taxmann.com 246 (Mum.) and by the Hon'ble M.P. High Court in the case of CIT Vs. Kohinoor Tobacco Products Pvt. Ltd. in 234 ITR 557 (M.P) as well as by the Delhi High Court in the case of GEE VEE Enterprises vs. Addl. CIT in 99 ITR 375 (Del.). The Hon'ble Delhi High Court has categorically held that the ITO being not only an adjudicator but also an investigator, he cannot remain passive in the face of a return which is apparently in order but calls for further enquiry in the facts and circumstances of the case and the word 'erroneous' in section 263 includes the failure to make such an enquiry. Therefore, CIT was justified in exercising his revisional jurisdiction on the ground that the TO had not made sufficient enquiries before granting registration to the firm.

7. Therefore, on account of the aforesaid facts and the position of law, the assessment order passed u/s 143(3) dated 30.12.2016 is erroneous and prejudicial to the interest of Revenue, within the meaning of section 263 of the IT Act. 1961 Therefore, the said assessment order is set aside to be passed a fresh as per law after conducting necessary enquiries and investigations and after giving reasonable opportunity of being heard to the assessee

6. Aggrieved by the order, the assessee has filed an appeal before the Honble Tribunal. At the time of hearing, the Ld. AR submitted that the Pr. CIT has erred in set aside the order of the A.O without considering the fact that the assessee has complied with the letters and filed the details in the assessment proceedings. Whereas, on the first disputed issue with respect to chargeability of the interest income under income from business or income from other sources the Ld. AR submitted that interest received on fixed deposits and interest on loans are treated as business income and company has received the funds from sale and were temporarily set apart to pay of the debentures issued. The Ld. AR submitted that the income cannot be offered under income from other sources and there is a direct nexus with the projects and supported his submissions with the judicial decision. On the second disputed issue with respect to not assessing interest received from Tata Power which resulted in underassessment the Ld.AR has nothing to say and accept the facts as the A.O. has not considered the income in computing the taxable income. On third disputed issue with respect to penalty notice

u/sec271AA of the Act to be issued for failure to report the domestic transactions U/sec92D(1) of the Act and Notice U/sec271BA of the Act for failure to furnish the Audit Report u/sec92E of the Act. The contentions of the LD. AR that the A.O. has no power under the Act to levy penalty for violation, and if at all the penalty is levied it should be commensurate with the charges and the provisions of Sec.40A(2)(b) of the Act. The Ld. AR substantiated the submissions with the judicial decisions and paper book and prayed for allowing the assessee appeal. Contra, the Ld.DR supported the order of the Pr.CIT.

7. We heard the rival submissions and perused the material on record. Prima-facie the contentions of the Ld. AR that the action of the Pr. CIT under 263 of the Act set aside the order u/s 143(3) is bad in law as the order passed by the A.O. does not satisfy the twin conditions that (i) erroneous and (ii) prejudicial to the interest of the revenue. The contentions of the Ld. AR on the first disputed issue with respect to treatment of interest received on fixed deposits and interest on loans, the Ld. AR submitted that there is a direct nexus with the business and therefore the funds are

utilized for the purpose of construction and for short time made fixed deposits being paid part and parcel of the business activity and also interest received on sale of the FSI to JV were temporarily set part to pay of the debentures issued by it to pay for acquisition and construction of the project. The interest received has a direct connection with the business operations therefore has been offered under the head income from business. The Ld. AR emphasized that the assessee has paid interest on funds received and the balance sheet discloses the interest bearing funds and there exist a direct nexus and form part of the business activity and the A.O has considered the factual aspects of funds utilization and accepted the disclosure under income from business. The Ld. AR substantiated the submissions with the material information and judicial decisions.

8. We find that the A.O. has not mentioned facts in the assessment order, but it is evident from the information that the assessee has utilized the funds wholly and exclusive for the purpose of business activities and there is no dispute. We support our view relying on the ratio of the jurisdictional Honble High

Court decision in the case of CIT Vs. Lok Holdings, [2010] 189 taxman 452 (Bombay). Accordingly, we are of the view that the A.O. has rightly allowed the claim and disclosure of interest under income from business.

9. On the second disputed issue with respect to interest received from Tata Power which resulted in underassessment to the tune of Rs. 67,044/-. We find that there was an error in assessment order u/s 143(3) where the net interest was offered as income by the assessee but however the A.O. has not considered the interest income for the computation of assessed income. The Ld. AR submitted that it is a mistake apparent from record and rectification petition u/s 154 of the Act is filed. We considering the facts and submissions do not find any infirmity in the directions of the Pr.CIT to the A.O.

10. On the third disputed issue, with respect to non-levy of penalty u/s 271AA of the Act for failure to report the specified domestic transaction u/s 92D(1) and Sec 271BA of the Act for failure to furnish the audit report. The contentions of the Ld.AR are that the shareholding of the company comprised of different

classes of shares and these shares represented the actual ownership as well as investor shares which were held in a protective capacity. The Ld. AR submitted that the M/s Hubtown Ltd has during the year under review held 100% of B Class of the shares of the company. These shares are not ordinary shares and do not represent the ordinary shareholders of the company who are the final and actual owners of the company. Therefore the decisions relating to the operations and management of the assessee company, were the M/s Hubtown Ltd is required to take prior consent . The investor has protective rights whereby all decisions relating to the operations and management of the company required the consent of the investor. Prima-facie the contentions of the Ld.AR are that the assessee company does not get benefited and the M/s Hubtown is not a related party under the provisions of section 40A(2)(b) of the Act. In respect of other issues with regard to case of holding of rights. The Ld. AR relied on the judicial decisions and mentioned that the penalty sought to levy under cannot be apply. We found that the explanations are satisfactory and the Ld.AR substantiated with the

decision of Honble High Court of Karnataka in the case of Pr. CIT Vs. Texport Overseas P Ltd, [2020] 114 taxmann.com 568 (Kar) held as under:

> *Section 92BA, read with sections 92CA and 260A, of Income-tax Act, 1961 Specified domestic transaction - Assessment years 2013-14 and 2014-15 - Assessing Officer had made a reference to Transfer Pricing Officer (PO) under section 92CA to determine arms length price as assessee had entered into specific domestic transaction and on ground that it was covered under section 92BA - Assessee filed an appeal before Tribunal against order of TPO Tribunal held that clause (1) of section 92BA had been omitted by Finance Act, 2017 with effect from 1-4-2017 and as such it came to be held that proceedings would lapse – Revenue filed appeal before High Court - Whether clause (i) of section 92BA having been omitted by Finance Act, 2017 with effect from 1-4-2017 from statute, resultant effect is that it had never been passed to be considered as a law never been existed, and, hence, decision taken by Assessing Office under effect of section 92BA() and reference made to TPO under section 92CA was invalid and bad in law - Held, yes [Para 6]*

Similarly in the case of Ashish Subodchandra Shah Vs. Pr. CIT, [2021] 129 taxmann.com 140,(Ahmedabad Tribunal) has observed as under:

> *The assessee was an individual and running proprietorship concern in the name and style of 'G.P. Textiles. He has filed his return of income for the Assessment year 2014-15 declaring total income at Rs. 33,98,080. This return was selected for scrutiny*

assessment and ultimately, the Assessing Officer has passed assessment order under section 143(3).

The Commissioner while going through the assessment order formed an opinion that in Form No. 3CEB the assessee has shown a domestic transaction. According to him, it is a specified domestic transaction and its value is more than Rs. 5 crores. Therefore, this transaction should have been referred to the TPO by the Assessing Officer for determining arm's length price, and only thereafter the assessment order should have been framed. He further opined that this action of the Assessing Officer is erroneous which has caused prejudice to the interest of the revenue. Accordingly, he initiated revisionary proceedings under section 263.

Sub-clause (i) of section 92BA has been omitted from the Act with effect from 1-4-2017. If this clauses is taken out, then the remaining clauses are clauses (ii) to (vi). On evaluating the transaction which at the most should be referred to PO for determination of arm's length price in the instant case and taking note of bifurcation of the transaction, it is found that out of all seven transactions only transaction no. 1 i.e. purchase from Global Enterprises at the most could be referred for determination of ALP under sub- clause (i) of section 92BA. This aspect has been gone into by the Assessing Officer and the assessee has explained qua this transaction. [Para 11]

On the basis of the explanation given by the assessee during the course of scrutiny assessment, the Assessing Officer did not refer this transaction to the PO for determination of ALP. Now reverting back to section 92BA, it reveals that only transaction, which could be fallen in the definition of specified domestic transaction is transaction mentioned at Serial no. 1, and in the case of

the assessee, that transaction could be purchase from the related parties. Now at the time of assessment proceedings, the Assessing Officer did not make reference to the PO, but by the time, the Commissioner took cognizance of the record for re-initiation of assessment order by exercising power under section 263. This clause has been omitted from the statute book. Therefore, the question is, whether in the absence of sub-clause (i) of section 92BA in the provision can still be transaction of the assessee regarding purchase made from the related party deserves to be referred to the TPO. Reply to this question has been given by the Karnataka High Court in the judgment of Pr:CIT v. Texport Overseas (P.) Ltd. [2020] 114 taxmann.com 568/271 Taxman 170. The facts before the Karnataka High Court was that there was a domestic transaction which fall within the definition of 'specified domestic transaction' with help of section 92BA(1). A reference was made to the TPO and objections were filed before the DRP also. But ultimately when the assessment order was passed under section 144(3), read with section 143(3), this clause has been omitted from the Act. In other words, the assessment order was passed on 30-6-2017, and this clause, on the strength of which this reference was made to the PO, stand omitted with effect from 1-4-2017. The case of the assessee was that after April, 2017 this proceeding would lapse, which was not accepted by the Assessing Officer as well as TPO, but the Tribunal accepted the stand of the assessee. Department took the matter in appeal before the Karnataka High Court, and the High Court answered the question in favour of the assessee, and against the revenue. [Para 12]

When the Commissioner issued a show cause notice under section 263 and ultimately passed impugned order; by that time the alleged domestic transaction of purchase from

related party was not required to be considered as a specified domestic transaction under/section 92BA of the Act as Clause (i) of section 92BA. It has been omitted, and therefore, no proceedings under section 263 should have been undertaken by the Commissioner. [Para 13]

11. We considering the ratio of the judicial decisions discussed are of the view that the order of the Pr.CIT does not holds good on the aspects of levy of penalty. Accordingly, We do not find infirmity in the order of the Pr.CIT on the directions to A.O. for assessing the interest received from Tata Power and partly allow the grounds of appeal of the assessee.

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

Order pronounced in the open court on 25.07.2022.

Sd/-	Sd/-
(PRASHANT MAHARISHI)	(PAVAN KUMAR GADALE)
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated 25.07.2022

KRK, PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)

4. Concerned CIT
5. DR, ITAT, Mumbai
6. Guard file.

आदेशानुसार/ BY ORDER,

//True Copy//

1.

(Asst. Registrar)
ITAT, Mumbai