

IN THE INCOME TAX APPELLATE TRIBUNAL
"D" Bench, Mumbai

Before Shri N.V. Vasudevan, Judicial Member
and Shri B. Ramakotiah, Accountant Member

ITA No. 2240/Mum/2009
(Assessment Year: 2005-06)

M/s. Rangbahar
109, Someshwar Nivas
Shivaji Park Road No. 3
Dadar, Mumbai 400028
PAN - AADFR 0490 A

Appellant

Commissioner of Income Tax - 18
Vs. Piramal Chambers, IT Office
Parel, Mumbai 400013

Respondent

Appellant by: Shri Kishore B. Karia
Respondent by: Shri R.N. Jha

ORDER

Per B. Ramakotiah, A.M.

This appeal by the assessee is against the order of the CIT-18, Mumbai under section 263 of the I.T. Act dated 16.01.2009 for A.Y. 2005-06.

2. Assessee has challenged the validity of the proceedings initiated by the CIT under section 263 in setting aside the order of the A.O. under section 143(3) dated 13.10.2007. The assessee has raised many grounds on the issue of legality of the proceedings under section 263.

3. Briefly stated, the assessee, M/s. Rangbahar is a firm comprising three partners, namely Mr. S.D. Upadhye, Mr. Y.S. Upadhye and Mrs. S.S. Upadhye, all family members. Mr. S.D. Upadhye is an Astrologer and a literary figure in Marathi and his wife Mrs. Sandhya Upadhye and son, who is a computer engineer and has expert knowledge of computer operations, are the partners of the firm. The firm came into existence from 01.04.1979 to undertake presentation of stage plays and cultural programmes in Marathi. In view of the expertise in astrology and its scientific study of Zodiac Signs, Shri Upadhye being a professional writer in astrology wrote a play and was performing all over Maharashtra and in the last 12 years more than 2000 stages shows were performed. During the year under consideration 178 stage shows were performed which involved a gross

revenue of Rs.40.94 lakhs. The assessee filed return of income and the same was accompanied by audit report in Form 3CB and 3CD declaring a total income of Rs.8,34,100/- . The case was selected for scrutiny and after obtaining various information and clarifications the A.O. determined the taxable income at Rs.9,15,170/- inter alia disallowing various expenses. The CIT, on examination of the record, had issued show cause notice invoking provisions of section 263 with reference to claim of depreciation on 2 flats being used by the assessee firm for business purposes, one at Andheri, Mumbai and other at Pune. In the show cause notice the reasons given were that the assessee neither disclosed nor assessed the house property income from the above 2 properties and the assessee has not furnished any documentary evidence for use of the flats for business purpose and there was wrong allowance of depreciation on the above 2 flats located in the residential areas. The assessee made elaborate arguments including the proof about the background of partners, firm and activities, highlights of 'Rashichakra' programmes, stage shows and submissions for requirement of office premises and replies on various issues raised. During the course of proceedings, in addition to the issue of the above 2 flats, the CIT also asked for various evidences on expenditure details and ultimately he concluded that the order of the A.O. was erroneous and prejudicial to the interest of Revenue. Vide paras 10 & 11 of the order he came to the conclusion that the main activity of the firm was conducting stage shows for which the above 2 flats were never used and thus the flats are not used for the purpose of business, hence claim of depreciation was wrong. In addition to the above issue the CIT also examined the remunerations paid and the expenditure claimed and was of the opinion that the expenditure was not fully allowable, accordingly the order was erroneous. The CIT also examined the advertisement expenses and vide para 16 he had come to the conclusion that the assessee could not substantiate the expenses wholly and exclusively for business and personal element cannot be ruled out and therefore the expenditure of Rs.4,18,335/- on account of hotel, diesel & petrol, toll charges and other miscellaneous charges are not allowable. Vide para 18 of the order the CIT was also of the opinion that the assessee has not provided the place of installation of assets as per the claim of

depreciation chart and accordingly depreciation on account of furniture, air conditioners, mobile phone, telephone, slide projector and computer was not allowable. Considering the above issues he has come to the conclusion that the assessment order is thus erroneous in so far as it is prejudicial to the interest of Revenue.

4. After finding that the order was erroneous and prejudicial to the interest of the Revenue, the CIT also gave the following finding in para 19 of the order as under: -

“19. On going through the entire material on record, it is evident that Shri Sharad Dattariya Upadhye put a veil of the firm on his own personal profession of arranging astrology shows to evade due taxes payable by him. He claimed depreciation on jointly owned flat No. 206 as it was bigger than his own adjacent flat No. 205. MTNL, Publicity agency etc. did not find any distinction in the flats as they addressed their bills as flat No. 205/206, Andheri. The assessee did not prove that flat No. 206 was purchased out of its own funds and not by individual funds of Mr. Upadhye, his wife and son. The assessee’s claim of visit by hundreds of people to flat No. 205/206 not cause any nuisance is apparently wrong. There is no evidence for seeking second opinion of noted literary figures, noted stage artists, discussion with technicians or contractors, etc. The services of contractors were used at the theatres at various locations to arrange shows. The letter of Mayor of Pune is addressed at “Pune” without mentioning the house number or address of the locality and appears to be fabricated. Mr. Upadhye, his wife and son used the assets for their own benefit. A proper investigation of the evidences will unveil the disguised planning of the assessee to evade taxes.”

5. The learned counsel referred to the paper booked filed in this regard and submitted that on all the issues which the CIT has formed opinion, the A.O. issued show cause notice, assessee has furnished detailed justification, complete details and the A.O., after examining assessee’s various claims has allowed the expenditure on depreciation as well as various other expenditures. He referred to the copy of Annexure to notice under section 142(1) calling for details placed in paper book pages 23 to 26. Copy of the replies filed vide letter dated 22.02.2007 is placed in paper book at pages 23 to 30, statement of programme receipts and expenses at pages 31 to 38, list of additional details called on 13.08.2007 at page 39 and its replies dated 21.08.2007. Further, note of business activities submitted during the assessment proceedings in A.Y. 2001-02 is placed in paper book at pages 43

and 44, which was also submitted during the assessment proceedings to the A.O. Finally the copy of letter dated 10.09.07 and copy of telephone bills and advertisement placed before the A.O. were also referred to. All these documents were placed in the paper book, which were furnished to the A.O. during the assessment proceedings. He also referred to the various clarifications given to the CIT during the proceedings under section 263, which was also placed in the paper book from pages 57 to 111. It was his submission that all the issues have been examined by the A.O. in detail in the assessment proceedings and he has formed an opinion and the CIT has taken different stand and invoked provisions of section 263 which is not correct under the provisions of section 263. He relied on the decision in the case of CIT vs. Gabriel India Ltd. 203 ITR 108 (Bom) and the decision of the ITAT in the case of Baid Credits & Portfolio (P) Ltd. 24 SOT 1 (Del) for the claim of depreciation on residential premises used for the purpose of business and Ahalya Trading Private Ltd. 22 SOT 68 (Mum) and Unilever PLC 18 SOT 136 (Mum) for the proposition that order of the CIT was bad in law as the issues were discussed and decided by the A.O. The learned counsel also placed on record statement showing actual position and observations made by the CIT in the order under section 263 explaining why the CIT has erred in considering the expenditure.

6. The learned D.R., however, relied on the order of the CIT and submitted that the assessee made wrong claim of depreciation.

7. We have considered the issue and perused the record and various case laws on this issue. The ITAT in the case of Mrs. Khatiza S. Oomerbhoy v. ITO (2006) 101 TTJ (Mum.) 1095, analysed in detail various authoritative pronouncements including the decision of Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. V. CIT (2000) 243 ITR 83 as well as Hon'ble Bombay High Court rendered in the case of CIT v. Gabriel India Ltd. (1993) 203 ITR 108 and has pronounced the following broader principles to judge the action of CIT taken under section 263: -

"The fundamental principle which emerge from the above case may be summarised below."

- i. *The CIT must record satisfaction that the order of the Assessing Officer is erroneous and prejudicial to the interest of the revenue. Both the conditions must be fulfilled.*
- ii. *Section 263 cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer and it was only when an order is erroneous that the section will be attracted.*
- iii. *An incorrect assumption of facts or an incorrect application of law will suffice the requirement of order being erroneous.*
- iv. *If the order is passed without application of mind, such order will fall under the category of erroneous order.*
- v. *Every loss of revenue cannot be treated as prejudicial to the interests of the revenue and if the Assessing Officer has adopted one of the course permissible under law or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order, unless the view taken by the Assessing Officer is unsustainable under law.*
- vi. *If while making the assessment, the Assessing Officer examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determine the income, the CIT, while exercising his power under section 263 is not permitted to substitute his estimate of income in place of the income estimated by the Assessing Officer.*
- vii. *The Assessing Officer exercises quasi-judicial power vested in his and if he exercises such power in accordance with law and arrives at a conclusion, such conclusion cannot be termed to be erroneous simply because the CIT does not feel satisfied with the conclusion.*
- viii. *The CIT, before exercising his jurisdiction under section 263 must have material on record to arrive at a satisfaction.*
- ix. *If the Assessing Officer has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation by a letter in writing and the Assessing Officer allows the claim on being satisfied with the explanation of the assessee, the decision of the Assessing Officer cannot be held to be erroneous simply because in his order he does not make an elaborate discussion in that regard."*

8. In the light of the above we examined the facts of the present case. As seen from the show cause notice issued by the A.O. the A.O. indeed asked for details of the claim of expenditure including the usage of property and the rent paid for godown hired by the assessee. The assessee has given detailed explanations how flat No. 206 was purchased by the assessee firm, source of funds and the enquiry made by the A.O. in A.Y. 2001-02 while allowing depreciation and also the necessary evidences that the premises in

Pune and Andheri are being used for business purposes including for storage of material, screens and stage requisites. It is also explained that in view of the heavy machinery and furniture which were required for stage show a premises was hired which is in the ground floor for which rental amount was paid. The assessee also furnished the details of stage shows, dates of advertisement, expenditures which were incurred for stage shows, telephone and other expenditures, details of which were seems to have been thoroughly examined. The assessment order do indicate that the A.O. has not only examined the details but also disallowed expenditures after verification as can be seen from para 2 of the assessment order and para 13, 14 & 15 which are disallowances on adhoc basis amounts out of telephone expenses and car expenses and further roundsum disallowance of miscellaneous expenses towards non-business expenses. He also disallowed expenses on which TDS was not deducted which included advertisement expenses, interest to ex-partners, etc. The assessment order do indicate that the A.O. called for detailed explanations and then only he has allowed the expenditure by making certain disallowances.

9. As seen from the show cause notice as well as the order, the main objection of the CIT seems to be on the fact that the assessee's partner own an apartment No. 205 in the same place and flat No. 206 was used by the firm. The assessee explained that flat No. 205 was purchased by the main partner in his individual capacity and flat No. 206 was purchased from the funds of the firm and was being used for the purpose of business. This aspect of usage for business was examined by the A.O. in detail in A.Y. 2001-02 and assessee was being allowed depreciation on the flat. The A.O. in the present assessment order also made similar enquiry not only about use of flat No. 206 in Andheri but also about the flat in Pune and payment of rent for godown being hired by the assessee. In addition to that the A.O. has also examined various stage shows, expenditure claims, details of the assets, purchase of new motor car during the year and various details of telephone and advertisement expenses and completed the assessment after due verification. In view of these facts available on record, we are not in a position to understand on what basis the CIT has come to the conclusion

that the order is erroneous so far as it is prejudicial to the interest of Revenue.

10. One of the findings given in para 11 is that the assessee has not used the flat for the purpose of business. To arrive at this finding by the CIT, there is no evidence with the CIT to conclude that the said flat was not used for the purpose of business. It is assessee's explanation that this flat was used for business purpose more so for holding discussions, conducting rehearsals, discussion with artists and further at present for the TV show being organised for ETV in Mumbai. Likewise the flat in Pune has also been used for business purposes and particularly for conducting stage shows in and around Maharashtra, periodically. There is no evidence on record to disprove assessee's claim as the assessee has given various evidences including telephone bills, correspondence from other artists and letter form the Mayor of Pune to indicate that these premises are being used for business purposes. Two Assessing Officers in two different assessment years have examined this issue and allowed the use of the said premises for business purposes. Without any evidence to the contrary, we are of the opinion that the CIT has come to the conclusion that the premises were not being used for business purpose, just because the premises is adjacent to the own residential flat of the main partner. On this pretext an opinion cannot be formed as there is no evidence that the said premises is used for personal purposes.

11. Coming to the findings in para 13 with reference to expenditure on account of payment to Artists, travelling and incidental expenses, these expenses have been verified in detail by the A.O. and as seen from the assessment order there were disallowances in advertisement expenditure, accounting charges, telephone expenses, motor car expenses and miscellaneous expenses. In view of the clear disallowances of specific heads the findings of the CIT(A) in para 13, which are in general nature cannot be accepted to come to a conclusion that the order is erroneous. Likewise his finding in para 16 with reference to other expenditures also does not have any basis. Apart from that the CIT also travelled beyond the issue in the show cause notice in holding that the assessee has not provided the place of

installation of assets like furniture, air conditioners, mobile phones, telephone, slide projector and computer, which is not allowable as per his observations in para 18. We are unable to understand how the learned CIT could arrive at this conclusion. Assessee is mainly involved in performing stage shows in various parts of Maharashtra and these stage shows are organised through out the year in different places for which they have their own assets like slide projectors, furniture, curtains, etc. Even the CIT surprisingly included the mobile phones for place of installation. By very nature of mobile phone, this cannot be fixed in a particular place. Finally the CIT's finding in para 19 was that Shri Sharad Dattatriya Upadhye put a veil of the firm on his own personal profession of arranging astrology shows to evade due taxes payable by him. This is very sweeping and personal opinion of the CIT without any evidence. By the very nature, the stage shows being organised by the firm cannot be performed alone. It is true that Shri Sharad Dattariya Upadhye is well known Astrologer and a writer but the firm is not involved in these two professions of Shri S.D. Upadhye. The firm is engaged in performing the stage shows which is a group activity. The CIT has not only misguided but also misdirected himself in mixing the individual talent of Shri S.D. Upadhye with that of the firm's business activity. Even the balance of the findings in para 19 of the order in our view are to be rejected as they have no basis at all for the conclusions drawn.

12. We are of the opinion that since the A.O. has examined all the issues at the time of assessment and since the A.O. has come to a conclusion in allowing the expenditure on depreciation claimed and also disallowing amounts of expenditure after due verification, the CIT cannot come to a different conclusion on presumptions in the order under section 263. It is the prerogative of the A.O. to pass the assessment and as seen from the assessment record he has examined all the issues which are considered by the CIT for invoking the powers u/s 263. The assessee has furnished the detailed material and explained the issues and has also pointed out that the depreciation on the two properties was examined as early as A.Y. 2001-02 and depreciation was allowed in all the years. Since the A.O. made enquiries in the course of assessment proceedings on the relevant issues and the A.O.

allowed the claim on being satisfied by the explanation of the assessee on the issue of depreciation and made certain disallowances with reference to various other expenses, we are of the opinion that the CIT has exercised the powers under section 263 without there being any evidence to the contrary. The principles established by the Hon'ble Bombay High Court in the case of CIT vs. Gabriel India Ltd. 203 ITR 108 will equally apply to the present order. Since the CIT has no material to come to the conclusion that the order of the A.O. is erroneous and prejudicial to the interest of Revenue, the order cannot be sustained. Even after examining the issues in his own perspective, the CIT has not given any conclusions about his findings except that his so called findings are used only to arrive at a conclusion that the order is erroneous and is prejudicial to the interest of Revenue. He set aside the issues to the A.O. for examination without giving any specific direction. For all these reasons, we are of the opinion that the CITA has no jurisdiction in revising the order under section 263. Accordingly the assessee's grounds are allowed. Order under section 263 is set aside.

13. In the result, appeal is allowed.

Order pronounced in the open court on 31st May 2010.

Sd/-
(N.V. Vasudevan)
Judicial Member

Sd/-
(B. Ramakotaiah)
Accountant Member

Mumbai, Dated: 31st May 2010

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) – XVIII, Mumbai*
4. *The CIT– XVIII, Mumbai City*
5. *The DR, “D” Bench, ITAT, Mumbai*

By Order

//True Copy//

*Assistant Registrar ITAT,
Mumbai Benches, Mumbai*

n.p.