IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH "A" NEW DELHI)
BEFORE SHRI I.C. SUDHIR AND SHRI T.S. KAPOOR

ITA No. 2500/Del/2012
Assessment Year: 2008-09

Ambience Hotel & Resort Pvt. Ltd., C/o Raj Kumar & Assciates, CA 4435/7, Ansari Road, Daryaganj, New Delhi. (PAN: AADCA7906K)	vs.	Commissioner of Income-tax, Central-II, New Delhi.
(Appellant)		(Respondent)

ITA No. 2501/Del/2012
Assessment Year: 2008-09

Ambience Developers & Infrastructure Pvt. Ltd., C/o Raj Kumar & Assciates, CA 4435/7, Ansari Road, Daryaganj, New Delhi.	vs.	C.I.T._II, Central-II, New Delhi.
(Appellant) (PAN: AAECA6894P)		(Respondent)

Appellant by: S/Shri RK Gupta & Samit Goel, CA
Respondent by: Ms. A. Misra, CIT(DR)

Date of hearing : 09.04.2015
Date of pronouncement: 16:06.2015

ORDER

PER I.C. SUDHIR: JUDICIAL MEMBER
ITA No.2500/Del/2012: (Ambience Hotel & Resort Pvt. Ltd.):

Assessee has questioned validity of revisional order passed under 263 of the Income-tax Act, The 1961 on the following grounds:

"1. That under the facts and circumstances, Learned CIT(Appeals) exceeded his jurisdiction in invoking provisions of sec. 263 of the Income-tax Act, 1961 as the order of the learned Assessing Officer is neither erroneous nor prejudicial to the interest of revenue apart from that no such circumstance exist which may justify invoking of sec. 263 of the I.T. Act.

2. That without prejudice, learned A.O. duly applied his mind lawfully and legally on the issue of assessabiity of that income in the hands of the assessee on which TDS of Rs.1,09,32,212 has been made, therefore, it is outside the scope of sec. 263.

3. That without prejudice, the directions and findings of the learned CIT are unsustainable and contradictory so much so that on one hand he has directed the A.O. to decide the issue of assessabiity of income in the hands of the assessee relating to TDS of Rs.1,09,32,212, afresh while on other hand he has held that the said income is taxable in the hands of another assessee namely M/s. Ambience Developers & Infrastructure (P) Ltd."

ITA No.2501/Del/2012: (Ambience Developers & Infrastrucrure Pvt. Ltd.:

2. Assessee has questioned validity of revisional order passed under 263 of the Income-tax Act, The 1961 on the following grounds:

"1. That under the facts and circumstances, Ld CIT exceeded his jurisdiction in invoking provisions of sec. 263 of the I.T. Act as the order of the A.O. is neither erroneous nor prejudicial to the interest of

Revenue apart from that no such circumstance exist which may justify invoking of Sec.263 of the I.T. Act.

2. That under the facts and circumstances, Ld. A.O. after proper application of mind has accepted the claim of the assessee that income of lease rental from leasing of retail space in Ambience Mall, Gurgaon is assessable under the head "income from house property", thus, took one of the possible views, therefore, the impugned order is neither erroneous nor prejudicial to the interest of revenue. Hence, setting aside this issue to the A.O. for examining the head of income under which this lease rental income could be assessed is unsustainable.

3.1 That under the facts and circumstances, the Ld.CIT erred in invoking sec. 263 by directing the A.O. to examine the issue that the lease rental incomes from shops/retail space owned by Ambience Hotels & Resorts Ltd. should not be assessed in the assessee's hands but in the hands of Ambience Hotels & Resorts Ltd. and thereafter in further directing the A.O., that if it is assessable in assessee hands, then it should be assessed as income from sub-letting and should be assessed under the head 'income from other sources'. The order of the Ld. A.O. on this issue is neither erroneous nor prejudicial to the interest of the Revenue.

3.2 That under the facts and circumstances, the Ld. A.O. after proper application of mind has taken a conscious decision by adopting one of the possible views, therefore, invoking of sec. 263 is unsustainable.

4. That under the facts and circumstances, Ld. CIT erred in law as well as on merits in holding that the acceptance by A.O. of sale consideration of shares of 6 group private limited companies at face value, at cost and at par without declaring any capital gain is erroneous and prejudicial to the interest of revenue."

3. The Learned AR pointed out that there is a typographical mistake in ground No.2 hereinabove as in place of "Ambience Mall, Gurgaon", "Ambience Hotel & Resort Pvt. Ltd., New Delhi" should have been typed. He requested that ground No.2 should be read and understood accordingly.

4. Heard and considered the arguments advanced by the parties in view of orders of the authorities below, material available on record and the decisions relied upon.

5. In both the appeals, the validity of revisional order passed under section 263 of the Income-tax Act, 1961 has been questioned on several grounds. In the case of Ambience Hotel & Resort Ltd., (in short "Hotel"), the Learned CIT has held the assessment order as erroneous as well as prejudicial to the interest of Revenue on the ground that the Assessing Officer has not carried out investigation, inquiry, verification on the claim of

TDS of Rs.1,09,32,212 without offering corresponding income for taxation. The Learned CIT also noted that the Hotel had got Rs.75 crores interest free deposits from Ambience Developers & Infrastructure (P) Ltd. (In short "developer") & and in turn the Hotel gave to the developer company the rights in some retails spaces in the hotel premises for managing leasing and to receive an appropriate revenue and receipts from said space. The revenue receipts from the said spaces during the year was Rs.6,27,84,240. The learned CIT held that the provisions of sec. 60 of the Income-tax Act, 1961 are applicable in the case of the Hotel. The learned CIT held that the Assessing Officer without application of mind, verification and investigation has accepted the declared income of Rs.6,27,84,240 as "income from house property" in the hands of Ambience Developers & Infrastructure (P) Ltd. The Learned CIT holding the assessment order as erroneous as well as prejudicial to the interest of revenue has set aside the same and restored it to the file of the Assessing Officer with direction to frame the assessment afresh on the issues as per the provisions of Income-tax Act, 1961 and allow permissible deductions as per law after affording the assessee an opportunity of being heard and after making proper inquiries and verifications. The Learned CIT has mentioned further that as the above lease income is taxable in the hands of Ambience Hotels & Resort Ltd., the Assessing Officer is

directed to reduce the same from Ambience Developers and Infrastructure P. Ltd. where the above income has been erroneously assessed. This revisional order has been questioned by the above named two assessees before the ITAT on several grounds.

6. In support of the grounds, the Learned AR submitted that the revisional orders are invalid on six aspects;

i) Firstly, both the assessments have been completed after search on 10.10.2007 after conducting investigation and inquiries by the Assessing Officer. Both the assessees are sister/related concerns. The hotels company was running a five star hotel by the name "The Leela" at Gurgaon. The developers company was having a mall adjacent to hotels. Hotel was in need of funds for the hotel project and the developers was having spare funds. Thus, both companies entered into an agreement whereby developers gave interest free refundable deposits of Rs.75 crores to Hotels. In turn, hotels company gave to developer company the rights in some retail spaces in the hotel premises for managing leasing and to receive an appropriate revenue and receipts from said spaces. The revenue receipts from the said retail spaces owned by hotels was Rs.6,27,84,240 during the year which was declared by the developers as income from house property. The same was assessed under sec. 143(3) of the Act. The Learned AR submitted that it is this amount which is the subject matter of the revisional order in question in both the cases. He submitted that both the assessment orders passed under sec. 143(3) on 31.12.2009 are by

the same Assessing Officer who had examined both the cases together. The Learned AR submitted that the income was duly declared in the statement of income of developers being part of their total income of Rs.29,18,07,201 which included Rs.6,27,84,240 in question. He submitted that complete books of account and other relevant records were examined. The issue was specifically addressed during the course of assessment proceedings in the case of developers. In this regard, he referred page No.22 and 23 of the paper book filed in the case of developers i.e. copy of the letter addressed to the Assessing Officer by the assessee on the subject of "assessment proceedings in the case of M/s. Ambience Developers and Infrastructure Pvt. Ltd. (ADIPL), assessment year 2008-09 –PAN AAECA6894P" explaining the receipt of Rs.75 crores and about the arrangement with its sister concern. The Learned AR submitted further that both the assessment orders have been passed after taking approval from Additional CIT, Central Range-5, New Delhi who had also examined the complete file along with the issues and approved the same. Thus, there is no error of law and fact while passing the impugned assessment order. He submitted that even in the case of two possible opinions, section 263 cannot be invoked. It is not the law that if the body of assessment orders does not touch upon some issues specifically, then section 263 can be invoked. The Learned AR placed reliance on several decisions including the decisions in the cases of Malabar Industries Co. Ltd. 243 ITR 83 (S.C), Supper Cassettes Industries Pvt. Ltd. 41 ITD 530 (Del.), Salora International Ltd. – 2 SOT 705 (Del.), Ganpat Rai Vishnoi – 152 Taxman 242 (Raj.) etc.;

Secondly, it is necessary for invocation of sec. 263 that the order should be erroneous as well as prejudicial to the interest of revenue. In the present case, both the orders are neither erroneous nor prejudicial to the interest of revenue, contended the Learned AR. He submitted that both the companies fall within the same tax bracket of 30%. He submitted that it is an admitted fact that Rs.6,26,84,240 has been declared as income from house property in the hands of developers company. The Learned CIT has opined that Rs.6,27,84,240 should have been assessed as income from house property in the hands of hotels company. Wherever it stands assessed, the tax impact shall be the same. The observation of the Learned CIT that in one case, there is a loss and in other case, there is profit, therefore, this alleged arrangement will affect the tax amount is totally misconceived. In case of loss in a company, the loss is allowed to be carried forward, therefore, it will ultimately neutralize the tax impact in subsequent years. The Learned AR accordingly submitted that in substance the impugned assessment orders are not prejudicial to the interest of Revenue.

Without prejudice to the above submissions, the Learned AR submitted that the Learned CIT in the order of developers has himself admitted that it is not prejudicial to the interest of revenue and referred the beginning paragraph at page No. 7 of the revisional order. He submitted further that in the order of hotels, the Learned CIT has directed the Assessing Officer to reduce the said income from developers.

Thirdly, both the assessment orders have been framed after approval of Additional CIT under sec. 153D of the Act, thus, the issues stands examined by the Assessing Officer and thereafter reexamined by the Additional CIT, hence, such findings are not open for disturbance under sec. 263 of the Act. In this regard, the Learned AR placed reliance on the decisions in the cases of Brij Bhushan Aggarwal – 2 SOT 811 (Agra) and CIT vs. Smt. Annapoorna Chander Shekhar – 204 Taxman 158 (Karl.) (Mag.).

Fourthly, the Learned CIT has given self-contradictory findings at different places. In the order of hotels, the Learned CIT has directed for the said income to frame fresh assessments as per law and in the same paragraph, he has mentioned that said income is taxable in the hands of hotels and has directed to reduce the same from developers. In support, the Learned AR has referred concluding paragraph of sec. 263 order in the case of hotels.

The Learned AR submitted further that the Learned CIT in the case of developers has directed that if the said income is assessed in the hands of developers, it will be assessed as income from sub-letting. In support, he referred beginning paragraphs of page 7 of section 263 order in the case of developers. The Learned AR pointed out that Learned CIT further said that the issue under consideration is not that the income should be taxed under which particular head but the fact that the issue has not been examined by the Assessing Officer during the course of assessment proceedings. In support, he referred page Nol. 8, para 2 of sec. 263 order in the case of developers.

Fifthly, the Learned CIT has given finding that provisions of sec. 60 of the Act are applicable in the present case which is not the correct position of law, contended the Learned AR. He submitted that sec. 60 is applicable where the income arises from an asset which is not transferred, such income shall be taxed in the hands of transferor. The Learned CIT has failed to appreciate the facts of the present case which are totally different. In the present case, developer has given Rs.75 crores interest free, refundable security to hotel. In turn, the hotel has compensated the developer by giving the rights to exploit and enjoy the receipts of certain retail spaces owned by hotel which exists in the hotel premises. It is a proper business assessment whereby, hotel is enjoying Rs. 75 crores interest free funds, therefore, it is not a case, where the income is transferred without any consideration. He submitted that the decision in the case of Tara Devi Aggarwal vs. CIT – 88 ITR 323 (S.C) relied upon by the Learned CIT is not applicable. IN that case, income was transferred in order to assist someone else who would have been assessed to a larger amount. Section 60 is applicable when the asset is not transferred. This "no transfer of assets" does not mean that to come out of sec. 60, assets should be permanently transferred. He pointed out that in the present case, there is transfer of assets by transferring the rights of exploiting the specified space owned by hotel to the developers against which Rs.75 crores was given. Transfer of rights in said retail spaces is a transfer. Right is also as asset. Thus, it is not a case of 'no transfer of asset'. Hence, section 60 is not applicable. In support, he placed

reliance on the decision in the case of ITO vs. Nalin Bhai M. Shah – 93 TTJ 107 (Ahm.).

Sixthly, the Learned CIT(Appeals) is not justified for an opinion that the amount should be assessed as income of hotels and under the head "house property". The Learned AR submitted that no income has been earned, accrued to hotel, therefore, it cannot be assessed as income of hotel. He submitted that income has been earned/accrued to the developer, therefore, it is the income of developer only. The interest free advance of Rs.75 crores tantamount to earning of deemed income by hotel by way of saving interest of Rs.75 crores, if the amount would have been borrowed from bank/other sources and if calculated @ 1% per month, it will be nearing to the amount of income earned by developers from retail spaces. Thus, the Learned CIT was incorrect in giving the finding the Rs. 6,27,84,240 should be assessed as income of hotels.

7. In support of ground No.4 of the appeal preferred by developers, the Learned AR submitted that shares of six companies were held by the developers. The developer was having substantial share holding in those companies. All the shares were transferred during the year at face value/cost, hence no capital gain was declared. The learned CIT has held that the Assessing Officer had not examined the sale value and also with reference to sec. 40A(2)(b) of the Act. The learned CIT was thus not justified in giving

direction to the Assessing Officer to examine the issue of capital gain on transfer of shares of six companies under sec. 40A(2)(b) of the Act. He submitted further that in the assessment framed under sec. 143(3)/263, no addition has been made on this issue. Without prejudice, he contended that this aspect has been fully examined by the Assessing Officer during original assessment proceedings as well as by the learned Additional CIT while giving approval.

8. The Learned AR also informed that consequential assessments have already been framed vide orders dated 28.3.2013 wherein the Assessing Officer has assessed Rs.627,84,240 on substantive basis in the hands of hotel as income from house property and on protective basis in the hands of developers. The Learned CIT(Appeals) has confirmed the substantive addition in the hands of hotel and deleted the protective addition in the hands of developers.

9. The Learned CIT(DR) on the other hand tried to justify the revisional orders impugned with the submission that the Assessing Officer had failed to examine the issue involved regarding the receipt of Rs.6,27,84,240 during the course of assessment proceedings before passing the original Assessment

order, the Learned CIT was justified in invoking the provisions laid down under sec. 263 of the Act. He submitted that income has to be assessed in the correct hands. The provisions laid down under sec. 60 of the Act cannot be compared with sec. 64 of the Act since both are having different proposition. She placed reliance on the decision of Hon'ble Supreme Court in the case of Smt. Tara Devi Aggarwal Vs. CIT - 88 ITR 323 (S.C).

10. Considering the above submissions, we find that receipt of Rs.6,27,84,240 is the subject matter of the orders passed under sec. 263 of the Act in both the cases. The related facts are that the hotel was in need of funds for its hotel project. The developer was having spare funds. Thus, both the companies entered into an agreement whereby the developer gave interest free refundable deposits of Rs.75 crores to hotels. In turn, hotels gave to the developers the right in some retail spaces in the hotel premises for managing leasing and to receive an appropriate revenue and receipts from said spaces. Rs.6,27,84,240 was declared as income from house property by the developers in their hands. The learned CIT is of the view that the said income from house property should have been assessed in the hands of hotels. Now, the issue before us under the background of the provisions laid down under sec. 263 of the Income-tax Act, 1961 is as to

whether the assessment orders on the issue is erroneous as well as prejudicial to the interest of revenue. If the Assessing Officer has failed to verify, examine and inquire during the assessment proceedings the validity of the claimed income, then certainly the assessment order is erroneous. The assessment order is also held erroneous when the finding of the Assessing Officer is contrary to the law. If an assessment order is erroneous then the second step would be to examine as to whether the said assessment order is also prejudicial to the interest of the revenue. It is now a established proposition of law that for invocation of the provisions laid down under sec. 263 of the Act, both the ingredients i.e. firstly the assessment order must be erroneous and secondly it must be prejudicial to the interest of revenue are to be examined. It appears from the assessment orders that taxability of Rs.6,27,84,240 in the proper hand in view of the provisions of section 60 of the Income-tax Act, 1961 as well as Section 53A of the Transfer of the Property Act, has not been examined by the Assessing Officer as the issue was linked to both the assessees as it was to be taxed in one hand and effect thereof was to be given in the other hand. Thus, it can be said that in absence of examination/inquiry of the above aspect the assessment orders are erroneous as well as prejudicial to the interest of Revenue. To this extent the revisional orders in question are upheld. The ground Nos. 1 and 2 in the case

of Ambience Hotel & Resorts (P) Ltd. and ground Nos. 1, 2, 3.2 are thus rejected.

We, however, are of the view that when the learned CIT was setting aside the matter to the file of the A.O. for framing the assessment orders afresh as per the law after examining/making inquiry on the issue, he was not justified and a contradiction in his stand in directing the Assessing Officer to tax the lease income in the hands of the Ambience Hotel & Resorts and reduce the same from Ambience Developer & Infrastructure Pvt., especially when keeping in view the peculiar facts and circumstances of the case and in absence of examination/making inquiry by the A.O., it was a debatable issue as to in whose hand and under what head the lease income is to be taxed. For a ready reference, the relevant portion of the revisional order in the case of Ambience Hotel & Resorts Ltd. affecting the taxability of Ambience Developers & Infra-structure (P) Ltd. as well, is being reproduced as under:

> *"I, thus, hold that the assessment order passed in the case of the assessee by the Assessing Officer, Central Circle-16, New Delhi on 31.12.2009 u/s. 143(3) is erroneous and prejudicial to the interest of Revenue. Therefore, the said order is set aside on the above issue and the assessment proceedings on the issue are restored back to the file of the Assessing Officer. The A.O. is directed to frame the assessment afresh on this issue as per the provisions of the Income-tax Act and allow permissible deductions as per law, after affording the assessee an opportunity of being heard and after making proper inquiries and verifications.* ***Further, as the above lease income is taxable in the***

hands of the assessee i.e. M/s. Ambience Hotel & Resorts Ltd., the A.O. is directed to reduce the same from M/s. Ambience Developers & Infrastructure P. Ltd. where the above income has erroneously assessed."

11. The above findings of Learned CIT typed in bold to tax the lease income in the hands of M/s. Ambience Hotel & Resorts Ltd., and direction to the Assessing Officer to reduce the same income from M/s. Ambience Developers & Infra-structure (P) Ltd. are thus held invalid and are modified by deleting the same. Ground Nos. 3 in the appeal of Ambience Hotel & Resorts (P) Ltd. and Ground No.3.1 in the appeal of Ambience Developers & Infra-structures (P) Ltd. are allowed.

11. In result, appeals are partly allowed.

Order pronounced in the open court on 16 .06.2015

Sd/-	Sd/-
(T.S. KAPOOR)	(I.C. SUDHIR)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated: 16/06/2015
Mohan Lal

Copy forwarded to:

1) Appellant
2) Respondent
3) CIT
4) CIT(Appeals)
5) DR:ITAT

ASSISTANT REGISTRAR

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