आयकर अपीलीय अधिकरण, पुणे न्यायपीठ "बी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री प्रदीप कुमार केडिया, लेखा सदस्य के समक्ष

BEFORE MS. SUSHMA CHOWLA, JM AND SHRI PRADIP KUMAR KEDIA, AM

ITA No.991/PN/2013
Assessment Year : 2008-09

M/s Jagdamba Sahakari Sakhar Karkhana Ltd.,
At & P.O. Rashin, Tal. Karjat,
Dist. Ahmednagar.
PAN : AAAAS3208H .... Appellant

Vs.

The Commissioner of Income Tax-I,
Pune .... Respondent

अपीलार्थी की ओर से / Appellant by : Shri (Dr.) Prayag Jha & Shri Prateek Jha

प्रत्यर्थी की ओर से / Respondent by : Smt. Harshvardhini Buty

सुनवाई की तारीख / **Date of Hearing : 26.08.2015**		घोषणा की तारीख / **Date of Pronouncement: 06.11.2015**

आदेश / ORDER

PER PRADIP KUMAR KEDIA, AM :

The above captioned appeal filed by the assessee is against the order of Commissioner of Income Tax-I, Pune (in short "the Commissioner") dated 28.03.2013 relating to assessment year 2008-09 passed under section 263 of the Income-tax Act, 1961 (in short "the Act").

2. The assessee has raised the following grounds of appeal :-

"1. The ld. CIT erred in setting aside the assessment order made u/s 143(3), after proper enquiries and not without any application of mind and the order made u/s 263 its bad in law and deserve to be cancelled.

2. The ld. CIT erred in setting aside the assessment order without providing that the said order was erroneous in so far as it was prejudicial to the interest of revenue. Therefore, the revision order is bad in law.

3. The ld. CIT erred in invoking the provisions of sec.263 merely on the basis of change of opinion.

4. The ld. CIT grossly erred in holding that depreciation was not allowable though assets were used for earning lease rent.

5. The ld. CIT erred in holding that interest expense of Rs.2,84,95,000/- was not allowable ignoring the fact that this expense pertained to the loan taken for acquiring the assets which were leased out.

6. The ld. CIT further erred in holding that expenses on salary and wages and administrative expenses were wrongly allowed without appreciating that these expenses were small and incurred on day to day activity of the appellant.

7. The ld. CIT grossly erred in exercising power u/s 263 though the assessment order was not erroneous and prejudicial to the interest of revenue and the issues considered by him were highly debatable and hence not within the purview of section 263 of the Act.

8. The above Grounds of Appeal are without prejudice to one another.

9. The Appellant craves leave to revise, modify, alter or delete any of the above Grounds of Appeal or to add new Grounds of Appeal."

3. The relevant facts of the case are that for the assessment year 2008-09, the assessee filed its return of income on 23.07.2009 declaring therein NIL income. The income declared in the return was shown under the head "profits and gains of business or profession" and brought forward business losses pertaining to the earlier years was set-off to the extent of business income declared i.e. Rs.2,68,64,699/- and accordingly the total income was declared at NIL. The return of income was subjected to scrutiny under section 143(3) of the Act and the Assessing Officer completed the scrutiny assessment vide order dated 19.11.2010. In the scrutiny assessment, the returned income was accepted in *toto*. On subsequent examination of records in supervisonary jurisdiction, the Ld. Commissioner noticed that gross income received by the assessee during the relevant assessment year was Rs.2,93,83,760/- which included lease rent of Rs.2,90,47,300/-, other income of Rs.1,99,798/-, interest income of Rs.66,642/- and seed farm income of Rs.70,020/-. Thus, the gross total income received during the year did not include any income from manufacturing business and sale of sugar. The Ld. Commissioner also noticed from examination of records that the assessee had received rental income which arose from the leasing out of its entire factory premises and industrial unit to M/s Natural Sugar & Allied Industries Ltd.. In-fact, it had not carried out any business of its own even in the preceding 5 years. In the light of aforesaid facts, the Ld. Commissioner observed that the assessee was not justified in showing the rental income and other income under the head

"business income". He was of the prima-facie view that such income ought to have been appropriately shown under the head "income from other sources" or "income from house property". The Ld. Commissioner next observed that as the assessee is no longer carrying on business, it was not entitled to bring forward and set-off earlier year's business losses against the current year's non business income. In the scrutiny assessment, the Assessing Officer did not take any cognizance of these aspects. The facets namely (i) correct head of income under which the returned income should be assessed and (ii) whether or not the assessee was eligible for set-off of brought forward business losses did not engage the attention of the Assessing Officer in any manner. No query whatsoever was raised in this regard. The Ld. Commissioner further observed that on examination of records, it was seen that despite not having any business activity, the assessee had claimed several expenses viz. salary and wages, administrative expenses, interest, depreciation, etc. which were prima-facie not admissible. The expenses were routinely allowed without any application of mind. In short, the Ld. Commissioner alleged that assessment suffers from the vice of non-application of mind. As a result the returned income was assessed as it was i.e., under the wrong head and without any enquiry also by erroneously allowing the assessee the benefit of set-off of carry forward business losses which it was not entitled to.

4. In view of the aforesaid failures on the part of the Assessing Officer as alleged, the assessment order dated 19.11.2010 passed under section 143(3) of the Act was considered to be erroneous in so far as it is prejudicial to the interest of the Revenue by the Commissioner. Accordingly, the notice under section 263 of the Act was issued to the assessee on 14.03.2013 calling upon it to show-cause as to why the impugned assessment order should not be revised.

5. The relevant paras of show cause notice under section 263 of the Act issued to the Assessee are reproduced hereinbelow for convenience :-

> *"3. It is seen from records that you had stopped manufacturing sugar since crushing season 2001-02 and there was virtually no activity during the succeeding years until, on 03.05.2006, you entered into a Lease Agreement with M/s Natural Sugar & Allied Industries Ltd. thereby leasing out the entire factory*

premises/industrial unit for a period of six years i.e. with effect from 2006-07 to 2011-12. The above lease agreement was executed on your behalf by the Official Liquidator. As is evident from the said lease agreement, you stopped your business activities altogether and were only to receive monthly lease rent from the lessee. The monthly lease rent/ hire charges were fixed on the basis of per metric ton (MT) of sugar-cane to be crushed during every succeeding crushing seasons. Consequent upon the lease, you ceased to have any income from business and your only income hereinafter consisted of lease rent income, interest receipts and other income.

3.1 Prima-facie, when there is discontinuance of business and complete stoppage of business activities, the rental receipts would partake the nature of income under the head "Income From House Property". For the same reason, the interest receipts and other income would partake the nature of income under the head "Income From Other Sources". Against such income under the head "Income from house property" and "other sources", only the expenses admissible under the relevant provisions (viz. sections 23 and 24 relating to house property and sections 57 and 58 relating to other sources) could be claimed and allowed as deduction. Further, in view of stoppage of business resulting in absence of any business income, the prior years' unabsorbed business losses were not eligible to be brought forward and set off against the current year's non-business income.

3.2 However, in the Return of Income filed for this assessment year, you had claimed several expenses as deduction. Most such expenses, claimed under the sub-heads "Salary and wages", "Administrative expenses" and "Depreciation" (which also included unproductive express of Rs.7,06,865/-) were prima-facie inadmissible either under the head "income from house property" or under the head "income from other sources". In the statements accompanying the Return of Income, you had not furnished any details as would indicate, let alone establish, that these were so admissible. An illustration may be taken of the interest expenses of Rs.2,84,95,000/- claimed under the sub-head "administrative expenses". Nothing had been furnished by you to show that any part thereof had been incurred for earning the interest income or any other income. Similarly, in your Return of Income you had brought forward and set off earlier year's business losses of Rs.2,68,64,699/- even though in the absence of any business / business income, you were not eligible to such set off.

4. During the course of the scrutiny proceeding, the Assessing Officer did not raise any question, nor made any enquiry whatsoever, regarding the issues / claims mentioned in the preceding para. A questionnaire was issued by him on 21.06.2010. However, in the said questionnaire, not a single query was raised as regards the heads of income under which the income returned by you should be assessed and the eligibility or otherwise of the various expenses claimed by you as deduction under such respective heads. The Assessing Officer also did not raise any question regarding your eligibility for set off of brought forward losses. In fact, the above questions / issues did not cross his mind at all. In any assessment under the Income-tax Act, 1961, income has to be assessed head-wise and that too by applying the relevant statutory provisions. As the questionnaire dated 21.06.2010 would clearly show, these aspects escaped the attention of the Assessing Officer altogether. On the contrary, in the questionnaire dated 21.06.2010, the Assessing Officer called for details in respect of Khodki charges, excess cane prices paid to members and non-members, sale of sugar at concessional rate to members and non-members etc. even though none of the above claims had been made by you for this assessment year. This in itself would establish

that the questionnaire was raised and eventually the assessment was made in a very routine manner and without any application of mind.

5. For the reasons stated hereinabove, the order dated 19.11.2010 made by the Assessing Officer in your case for the A.Y.2008-09 is considered to be erroneous in so far as it is prejudicial to the interest of the revenue. Accordingly, and by virtue of the authority vested in the undersigned as per the provisions of section 263 of the Income-tax Act, 1961, the said order is proposed to be revised under the said section."

6. Pursuant to the notice proposing to revise the completed assessment, the assessee filed written submissions before the Commissioner to justify the correctness of action of the AO. It was submitted therein that even though the assessee leased out its entire factory premises and all the assets to M/s Natural Sugar & Allied Industries (lessee) for a period of six years from assessment years 2006-07 to 2011-12, the lessee was also producing white crystal sugar which was the manufacturing activity of the assessee and that the intention of the assessee behind letting out the business assets was not to discontinue of the business but was aimed at the re-construction of the assessee society. As submitted, it was just that the entire business assets of the assessee society were let out temporarily. In the circumstances, the rental income derived by the assessee was only assessable as business income and not under any other head. The assessee relied on the decision in the cases of CIT vs. Vikram Cotton Mills Ltd., (1988) 169 ITR 597 (SC); and CIT vs. Mohiddin Hotels (P) Ltd. & Anr., (2006) 284 ITR 229 (Bom). The assessee further submitted before the Ld. Commissioner that as the financial statements viz. Profit & Loss Account and Balance Sheet would show, the assessee business was going on. Therefore, it was justified in claiming interest costs of Rs.2,84,95,000/- as business expenditure. In this connection, the assessee also stated that the above interest had been incurred for acquiring fixed assets, setting up plants and for other business purposes. The assets thus acquired continued to be used by the lessee in the business of manufacturing sugar. Therefore, the assessee was eligible for deduction of the interest so incurred. For the same reason, its claim of depreciation was also valid. Lastly, the business was temporarily leased out and therefore the assessee's claim of set-off of unabsorbed business losses against the current year's income was also justified.

7. As a sequel to the aforesaid reply of the assessee, the Ld. Commissioner required the assessee to furnish year-wise details of manufacturing and any other business related works done by it on its own (i.e. not through the lessee) since the year 2001. As the assessee claimed in its written submissions that it had not discontinued its business but had leased out the business assets only temporarily, the assessee was asked to inform if it has resumed its business after the expiry of the lease period. The assessee was also asked to submit copy of the order whereby its affairs came to be vested in the financial liquidator. However, the assessee did not choose to reply in respect of aforesaid queries.

8. In the above background, the Ld. Commissioner observed that sufficient opportunity was given to the assessee and it has not been denied by the assessee that various issues raised in the notice under section 263 of the Act were not considered by the Assessing Officer in any manner. The assessee has also not rebutted the allegation that the impugned assessment order is erroneous in so far as it is prejudicial to the interest of the Revenue. The facts stated in the notice under section 263 of the Act as regards discontinuance of manufacturing activity by the assessee itself since the year 2001 have not been controverted by the assessee. It is also evident from the lease agreement and accepted by the assessee as well that it had leased out its entire factory and industrial unit to the lessee, M/s Natural Sugar & Allied Industries Ltd.. The Ld. Commissioner observed that as per the lease agreement, every activity was hitherto (prior to 2001) being carried out by the assessee itself was to be carried out by the lessee. Further, all obligations including the statutory once got passed on to the lessee. Hereinafter and subject to disposal of stocks which had been generated prior to entering into lease, the assessee virtually did not have to do anything on its own apart from waiting for the periodic lease rent from time to time. In other words, the assessee's role became that of an ordinary landlord who lets out his property thereby putting the property to profitable account. In such a situation, where the landlord does not have to carry out any systematic or continuous activity after having let out the assets, the income from letting/leasing would normally partake the nature of "income

from house property" or income from other sources" depending on the nature of the assets. The Ld. Commissioner accordingly justified issuance of show cause notice under section 263 of the Act proposing to revise the assessment order in which the Assessing Officer had accepted the rentals etc. returned by the assessee under the head "business" even while the facts on records in his opinion indicated to the contrary.

9. The Ld. Commissioner next distinguished the decision in the case of Vikram Cotton Mills Ltd. (supra) and Mohiddin Hotels (P) Ltd. & Anr. (supra) on facts. The Ld. Commissioner made averments to the effect that the intention of the parties to carry on business vis-à-vis exploitation of assets has to be gathered from the overall facts. He thereafter relied upon the decision in the case of New Sevan Sugar and Gur Refinery Co. Ltd. vs. CIT, (1969) 74 ITR 7 (SC); Madras Silk and Rayon Mills (P) Ltd. vs. ITO & Anr., 262 ITR 122 (Mad); and, Universal Plats Limited vs. CIT, 237 ITR 454 (SC) to support his action under section 263 of the Act.

10. The Ld. Commissioner *inter alia* observed that from the various decisions cited, it can be seen that question whether income derived by an assessee from leasing its premises is in the nature of income from business or income from other sources/ house property will have to be decided on the basis of the facts and circumstances of the given case, the terms and conditions of the lease, and above all, from the intention of the lessor in resorting to leasing. Accordingly, it will have to be decided whether lease was made due to a crisis situation which the lessor was not in a position to confront and whether the lease was in the nature of a make-shift and transient alternative means of commercial exploitation of the commercial assets and not a case of exploitation of property by the owner simplicitor. Above all, it will have to be seen if the intention of the lessor was to resume business at all when the situation improved.

11. The Ld. Commissioner then adverted to the clauses of the lease agreement to ascertain the intention of the Assessee. The relevant extract of his order on this aspect is reproduced below:-

> *"At page 2 of the agreement the reason which made the assessee to enter into lease agreement has been stated thus; "whereas the lesser on account of circumstances beyond its control as also on account of its limited crushing capacity was unable to operate during the last crushing season and was constrained to keep the unit shut for the season 2001-02 onwards to this day. " By virtue of the lease agreement, the assessee-lessor parted with its entire industrial unit for a period of 6 years, i.e., w.e.f. 2006-07 to 2011-12; and the lessee, Natural Sugar and Allied Industries Ltd., was given the right to use the assessee's factory to manufacture sugar without any fetters, by using the sugarcane procured by it from the assessee's area of operation. As already mentioned, the agreement also fastened to the lessee all the obligations, statutory or otherwise, arising to it in the course of its operations during the period of the lease agreement. The assessee-lessor ceased to have any liability what-so-ever in respect of such obligations except in so far as the same related to the period prior to the lease. The assessee-lessor also was not to be involved in the manufacturing and other operations in any manner except for its right to dispose of the sugar and other by-products which were still in stock at the commencement of the lease. In short, during the period that the lease agreement was to be in force, the assessee-lessor would have no business rights or liabilities arising during the lease period. Thus, the assessee-lessor had, by virtue of the lease agreement, no role what-so-ever to play except receiving the hire charges. The lease agreement provided that minimum hire charges would be paid for each year irrespective of actual crushing.*
>
> *That the assessee virtually came out of business as per the lease agreement and for the lease period would be evident from clause 38 which stipulated that –*
>
> *"The lesser shall give vacant possession of the sugar godowns, molasses tank or any other storage places situated within the factory premises of the lessor that are vacant on the date of the agreement. In as much as those of such premises that are not vacant the lessor shall hand over the vacant possession thereof immediately on the same becoming vacant."*

12. Based on the analysis of the terms and conditions of the lease agreement above, the Ld. Commissioner observed that even though the assets leased out continued to be commercial assets, the lessee was entitled for full-scale exploitation thereof, with the assessee no way involved in it. In so far as the assessee was concerned, it was a lease simplicitor. Of course, the lease agreement stipulated a few obligations on the lease such as to procure sugarcane from the assessee's area of operation, among others; to make minimum payment of sugarcane price at SMP and clause 5A etc.; to pay annual contributions to C.M. Relief Fund, Maharashtra Rajya SSK Sangh Ltd., Mumbai; VSI, Pune; National Sugar Federation of Cooperative Sugar Factories, New Delhi; etc.. However, these obligations will have to be seen in the light of the fact that the sugar factories in Maharashtra are controlled by

certain laws and rules administered by the Government of Maharashtra. Hence, these obligations by themselves will not throw any light on the nature of the lease arrangement. He accordingly observed that the terms and conditions of the lease agreement would cumulatively indicate that the leasing made by the assessee was akin to exploitation of property by an owner thereof. The Ld. Commissioner thereafter observed that while the contention of the assessee that the business of manufacturing has been only temporarily suspended with the object of tiding over the crisis situation and the intention of the assessee is not to discontinue the business but to lease out the assets for a temporary period and thus the lease rent is assessable as business income and not as income from other sources will have to be seen in the light of speaking facts of the case. Where all the assets of the business are let out as in the present case, the period for which there are let out will be a relevant factor to find out the intention of the assessee to restart or to stop the business in the light of the Hon'ble Supreme Court in the case of Universal Plast Ltd. and Vikram Cotton Mills Ltd. (supra). If there is no intention to resume the business, the transaction will not be for exploitation of business asset and will be taken as transaction for exploitation of property by the owner.

13. The Ld. Commissioner noted that in the present case before entering into the lease of 5 years also, the assessee had shut its operations for nearly 5 years from the crushing season 2001-02 onwards. Therefore, when reckoned from the year 2001-02 upto the last year of lease i.e. 2011-12, it is fairly long period. Therefore, the assessee had exited the business during this period of 10 years. Critically analyzing the reasons provided in the lease agreement for shutting the business operations is that the assessee was unable to operate on account of circumstances beyond its control, as also on account of its limited crushing capacity, he noted that the "circumstances beyond control" have not been specified in the agreement, nor explained during the present proceedings. As for "limited crushing capacity" as the reasons advanced is also not plausible reason since the lessee who stepped into the shoes of the assessee for carrying on manufacturing operations also was operating with the same limited crushing capacity. Therefore, from the lease agreement, it would appear that the

intention of the assessee in stopping the business and in parting with its factory premises and industrial unit through an arrangement of lease does not seem to be for commercial exploitation of business assets. On the contrary, the intention seems to be to exploit its properties as the owner thereof. The Ld. Commissioner further observed that from the lease agreement, it is evident that assessee did not have any role in the business operation apart from getting periodic rent. The assessee would get the rent irrespective of whether any crushing was done or not. These are further indicators that the intention was to put the assets to profitable account much as an owner of the property would do. The Ld. Commissioner reiterated that information pertaining to year to year basis business related work since 2001 and other details were not provided which only strengthen the inference that since the year 2001 the assessee has gone out of business. The fact that the assessee has been out of business for more than 10 years in itself should suffice to decide the issues raised in the notice under section 263 against it. The assessee has not provided the status of the present position after the end of the lease period also. Therefore, it would appear that the assessee has not resumed the business as yet.

14. In the light of aforesaid discussions and analysis of lease agreement and attendant circumstances narrated above, the Ld. Commissioner held that the order of the AO suffers from the 'error' contemplated under S. 263 in accepting the rental income from letting activity etc. as business income which is liable to be assessed under the head 'income from house property' or 'income from other sources' and the order is also 'prejudicial to the interest of revenue' in as much as the business losses of the earlier years have been allowed against non business income of this year. Besides, the expenses which are not susceptible to legitimate deductions have been erroneously allowed. The relevant operative part of the order of the Ld. Commissioner is reproduced hereinbelow :-

> *"6. In the light of the foregoing detailed discussion, the income derived by the assessee by letting out its factory premises and the entire industrial unit is liable to be treated as income not assessable under the head "profits and gains of business and profession. All indications are that the income in the nature of rent, interest or*

other Income" are liable to be assessed either under the head "Income from Other Sources" or "Income from House Property". Such a treatment would have consequential bearing on the admissibility of the various expenses claimed by the assessee as deduction because deduction can be allowed only under the respective 'Heads of Income' if so permitted. It would also have bearing on the assessee's claim of set off of brought forward losses against the current year's income. As already mentioned, these issues did not engage the Assessing Officer's attention in any manner. He routinely accepted the Return of Income without making any enquiry. On the contrary, he raised some queries which were not at all relevant. Therefore, the assessment order dated 19.11.2010 has certainly been an erroneous one within the meaning of section 263.

7. Having stated as above, I would still desist from deciding on the issues raised in the notice u/s.263 conclusively at this point of time. Even though the various indicators emerging from the lease agreement would lead to the inference that the assessee's income is not liable to be assessed under the head "Profit and Gains of Business and Profession", I would deem it proper to remit this matter to the file of the Assessing Officer so as to enable him to examine the issues raised in the notice u/s.263 and discussed here-in-above afresh after calling for all the relevant details and evidences and also after making such further enquiries as are warranted. This course is being preferred because the assessee has not met the queries raised during the present proceedings, and the present status of operations has also not been made known. Accordingly, the assessment is hereby set aside to the file of the Assessing Officer with a direction to do the same afresh and decide the issues raised in the notice under section 263 as per law. Needless to say, the Assessing Officer shall make the fresh assessment after giving the assessee reasonable opportunity of being heard.

8. In the result, the assessment made in the subject assessee's case for the A.Y. 2008-09, vide order dated 19.11.2010, is set aside."

15. Aggrieved by the order of the Ld. Commissioner invoking section 263 of the Act, the assessee is in appeal before us.

16. The Ld. Authorized Representative for the assessee reiterated that the factory premises and entire industrial unit was temporarily given on lease to as a measure to tide over looming financial crisis while having solemn intention to return to the manufacturing activity itself sooner. The finding of the Ld. Commissioner that enquiries were not made and the assessment order was passed without application of mind is not factually correct. The assessment order has been subjected to scrutiny assessment in the assessment years 2004-05, 2005-06 and 2007-08 also prior to the impugned assessment order for assessment year 2008-09. The position of the assessee was endorsed in those assessment orders also which has not been questioned. There is no reason to deviate from the earlier stand taken by the Revenue in the matter. The Ld. Authorized Representative for the assessee further assailed the order on the

ground that the assessment made under section 143(3) of the Act has been set-aside holding that rent, interest or other income are liable to be assessed either under the head "income from other sources" or "income from house property" without any definite finding on this aspect. Therefore, the action of the Ld. Commissioner is without jurisdiction. He relied upon the decision in the case of (i) Jewel of India vs. ACIT, (2010) 325 ITR 92 (Bom); (ii) CIT vs. Gabriel India Ltd., (2003) 203 ITR 108 (Bom); and, (iii) Globus Infocom Ltd. vs. CIT, (2014) 108 DTR 363 (Del) to buttress its contentions. The Ld. Authorized Representative for the assessee further contended that the Ld. Commissioner is not entitled to assume revisionary jurisdiction under section 263 of the Act merely because he is not happy with the quality of the assessment or drafting of the order. For this proposition, he relied upon the decision in the case of M/s Khatiza S Oomerbhoy vs. ITO, (2006) 101 TTJ 1095 (Mum). The Ld. Authorized Representative for the assessee extensively argued in the alternative and without prejudice to the aforesaid contentions to say that while the lease rentals are assessed under the head 'income from other sources', depreciation and interest expenses are nevertheless allowable as deduction under section 57. Even unpaid interest on loan taken for purchase of business assets allowable under section 57(iii) as section 43B would not apply. Likewise, When the lease rent is assessed under the head 'income from house property', the impugned interest expense is allowable under section 24 even if remaining unpaid because section 43B would not apply here also. Moreover, the assessee would be entitled to 30% statutory deduction from gross rent. In the light of aforesaid the revision proposed by the Ld. Commissioner will not lead to any loss on the revenue as demonstrated below :-

"Income from other sources-			
Gross rent-			2,90,47,300/-
Less interest-	2,84,95,300/-		
Depreciation-	30,23,116/-		
Admin Exp.-	7,64,771/-		
Total-			3,22,83,187/-
Balance-		Loss-	32,35,807/-

House Property Income-		
Gross Rent-		2,90,47,300/-
Less Prop. Tax-……..		
30% u/s 24(a)-	87,14,190/-	
Interest-	2,84,95,300/-	
	3,72,09,490/-	
Balance-		(-)81,62,190/-”

In essence, it is the case on behalf of the assessee that there is no loss to the revenue even if the nature of lease rent is considered to be ‘income from other sources’ or ‘income from house property’. Therefore, the action in any case is not prejudicial to the interest of revenue which is sin qua non for invoking S. 263.

17. He next contended that the assessee always wanted to continue its business. Suspension of business was because of lack of working capital and huge brought forward losses which incapacitated the assessee to actual carry on of the business. Therefore, the leasing out of the factory premises for temporarily should not be seen adversely and lease rent be taken as business income as claimed. For this proposition, he relied upon the decision of the Hon’ble Supreme Court in the case of CIT vs. Vikram Cotton Mills Ltd. reported in 169 ITR 597 (SC). The Ld. Authorized Representative for the assessee further supported its case on the ground that the assessee never surrendered licenses to run sugar factory, registrations under Central Excise, Sales Tax, etc. and lessee carried on the business in the name of the assessee. He relied upon the decision of the Hon’ble Bombay High Court in the case of CIT vs. Mohiddin Hotels Pvt. Ltd. reported in 284 ITR 229 (Bom) and the decision of Mumbai Bench of the Tribunal in the case of Plaza Hotels (P) Ltd. vs. DCIT reported in (2014) 109 DTR 171 (Mumbai-Trib). It is further case of the Assessee that in none of assessment orders in the past, the Assessing Officer have uttered that assessee had stopped its business and accordingly business loss was determined by the Assessing Officer and allowed to be carried forward in these respective assessment years. He therefore pleaded that on the principles of consistency, the action of the Assessing Officer in passing

the similar order was fully justified and no interference of the Commissioner under section 263 is called for. For this proposition on principles of consistency, the relied upon the following decisions :-

(i) CIT vs. Pathy Cine Enterprises, (2007) 163 Taxmann 624 (Mad);
(ii) CIT vs. Gujarat Alkalis & Chemicals Ltd., (2015) 372 ITR 237 (Guj); and,
(iii) Radhasoami Satsang vs. CIT, (1992) 193 ITR 321 (SC).

18 He therefore vehemently contended that impugned revisionsal order in appeal is without jurisdiction and is legally not sustainable and therefore deserves to be set-aside.

19. The Ld. Departmental Representative for the Revenue, on the other hand, strongly relied upon threadbare analysis of facts recorded in the order of the Ld. Commissioner and submitted that the Assessee as a matter of fact is not doing any business activity since 2001 onwards and entering into lease agreement for long period of six years from assessment year 2006-07 to 2011-12 would clearly demonstrate that there is no intention to carry on the manufacturing activity by the assessee itself. The action of the assessee in entering into lease agreement clearly is towards exploitation of the property as an owner thereof and therefore the Ld. Commissioner has come to a correct finding that the income declared under the head “business income” should be assessed either under income from other sources of under income from house property based on the facts and circumstances, the terms and conditions of the lease etc. for which the matter has been rightly set aside to the file of the AO in terms of the directions given. The assessee has not demonstrated the crisis situation as well as circumstances beyond its control. The assessee has not clarified whether the business started even today inspite of fair opportunity in this regard. It is evident from the assessment order itself that the Assessing Officer has not made any enquiry whatsoever to ascertain the correctness of the claim of the assessee that the income declared as income from business is in tune with law in the given facts. There is no application of mind whatsoever in the light of the detailed observations and reason advanced of the Commissioner. The order of the Commissioner is based on strong legal foundation and should not be interfere with.

20. We have carefully considered the rival submissions, orders of the authorities below and perused case laws cited.

21. The supervisonary jurisdiction conferred upon the CIT under S. 263 has been invoked in the present case setting aside the assessment order passed by the Assessing officer under S. 143(3) for the AY 2008-09 on the ground that income declared by the Assessee has been wrongly accepted by the AO under the head 'business income' as offered by the Assessee. Consequently, the unabsorbed business losses brought forward from earlier years have been wrongly allowed to be set off against the income of the assessment year in appeal. The CIT has also alleged that assessment has been completed in a perfunctory manner endorsing the income returned without conducting any enquiry on the correctness of head of income. The bonafides of expenditures claimed etc. as per provisions of the Act and correct head of deductions etc. has not been examined.

22. It is seen from the facts available on record that the Assessee has ceased to undertake the manufacturing activity of sugar, bye product of baggase, molasses, press mud etc.. for more than 10 years. The entire factory has been given on lease basis to another person, namely, Natural Sugar & Allied Industries Ltd. i.e. the lessee for a period of five years vide Lease Agreement dated 03.05.2006 as per copy of Lease Agreement annexed at pages 65 to 82 of the Paper Book. The observations of the Ld. CIT that prior to entering of aforesaid lease also, the Assessee had stopped the business for about 5 years is also to be borne in mind. In our view, once the assessee has ceased to carry on business activities since long and has also entered into lease for a fairly long period of 5 years, intention to exploit the factory premises and industrial unit as a owner thereof and not the commercial exploitation of the property by taking attendant business risks is manifest. We find the contention of the Assessee that business has only been suspended temporarily as highly unconvincing and inexplicable. When as per the facts recorded, the Assessee is out of business for nearly a decade and the affairs of the Assessee are also now saddled with Liquidator, it is highly unpalatable for a person instructed under

law to accept such plea of the Assessee. The presence of Liquidator spells out that command over regular affairs are also vested with third person. Such a situation renders the possibility of resumption of business illusory.

23. The terms of the lease deed makes it abundantly clear that the Assessee is in no way involved in the business activity any more as quipped by the Ld. CIT and the entire factory premises and Industrial unit have been let out. The Assessee is merely entitled to pre-determined fixed periodic rent for exploitation of property simplicitor dehors the capacity utilization etc. and is in no way sharing the business risks. The fixed rent speaks of the fact that Assessee is not prepared to live in any kind of business uncertainty. The stand taken by the Assessee that it has stopped manufacturing activity due to financial crisis and circumstances beyond control also appear to be belligerent. If it is taken at face value, the situation has only aggravated over the years. The onus lies on the assessee to prove its intention that it wants to come back in the business affairs actively in the near future, which has not been discharged except for making flippant averments. The facts of the case, on the other hand, are repugnant to the version of the assessee. We concur with the view of the Ld. Commissioner that the terms of the Lease Agreement would show that assessee is no way involved in the manufacturing activity. The assessee is holding the factory premises and industrial unit in the capacity of lessor alone. The terms of the lease agreement does not throw any light on the intention of the assessee to enable it to resume on the manufacturing activity itself at the opportune time. The obligations cast on the Assessee viz. to procure sugarcane from assessee's area of operation, make minimum payment of sugarcane price at SMP etc. etc. as noted in para 13 of the order are trivial. Nothing turns out on such marginal obligations.

24. We notice that the Assessee has drawn blank over the query about the current situation on resumption of manufacturing activities which tantamount to implicit admission that no re-commencement of business activity has taken place. There appears to be no rationale or intelligible nexus between the plea of the Assessee and the fact situation. In the totality of situation viz. stipulations

in lease deed revealing the continuance of business by the lessee by exploiting the business set-up of the lessor in exclusion to the lessor, passive conduct over fairly long period of 10 years or so, stepping in of liquidator in the shoes of the management etc., We find ourselves in agreement with the conclusion of the CIT that the situation has become irreversible in the immediate future and the Assessee has exited the business of manufacturing activity without there being any trappings of temporariness about it.

25. The most pertinent of all observations is the complete lack of enquiry and total lack of application of mind. This in itself renders the order erroneous as well as prejudicial to the interest of revenue without anything further. This well settled proposition is supported by long line of cases namely CIT vs. Shri Bhagwandas 272 ITR 367(All.) ; Vijendra Pal Singh vs. CIT 163 ITR 129 (Mad.); Dhariwal Industries Ltd. vs. ACIT 111 ITD 379 (SB) ; Ambika Agro Supplies vs. ITO 95 ITD 326 (Pune) ; Pancard Clubs Ltd. vs. Dy. CIT ITA No. 2389 & 2418 /Mum/2009 order dated 16/3/2011; etc. It would be expedient to note here that the decision of the Hon'ble Bombay High Court in the case of Gabriel India (supra) relied upon on behalf of the Assessee is distinguishable on facts since an informed and plausible view was taken by the AO after proper enquiry which was sought to be displaced by the CIT. On facts, it is evident that no enquiry has been shown to be made by the AO on the relevant aspects of the matter which have direct bearing on the taxability of income. The submission of the Assessee were taken at face value. The action of the AO in summarily accepting the lease rent as 'business income' as offered by the Assessee is thus vitiated by non application of mind. As a corollary, the assessment order is 'erroneous' in so far as it is prejudicial to the interest of revenue. We also observe that it was also not demonstrated that enquiry about the bonafides of various expenditure claimed during the year has been made. The AO further clearly failed to examine the deductibility of such expenditure *qua* the lease rental etc. when assessed either under head 'income from house property' or 'income from other sources'. The text and tenor of the assessment order clearly reveals that order has been passed mechanically rendering it erroneous and prejudicial to the interest of revenue. The absence of appropriate

questionnaire from Assessing officer showing application of mind is also not placed before us to weigh the same. Once, it is found that the income is not chargeable to tax under the head business income, the entitlement of the Assessee to set off the income of the year with the carried forward losses of the earlier years is lost. The Assessee has set off current year income of Rs.2.68 crores approx against the unabsorbed business losses of the earlier years and rest has been carried forward on the premise that the lease rent continues to be in the nature of the business income since the act of let out is only temporary and therefore continue to retain the colour of 'business'. Once it is found that the premise of treating the lease rent as 'business' is factually tenous and not on a sound footing, the set off of the carried forward loss is rendered incorrect and thus causes loss to the revenue. The impugned set off is thus also pre judicial to the interest of revenue. Likewise, the allowability of expenses claimed without examination and its sustainability in terms of legal provision is also prejudicial to the interest of revenue.

26. We also bear in mind the argument of the Assessee that even if the lease rent is subjected to chargeability under the head 'income from house property' or income from other sources', it is not prejudicial to revenue in view of purported losses declared. We are not convinced with this contention either. The income returned under the head 'business income' for Rs. 2.68 crores is not reconciliable with the profit & loss account as well as estimated computation under different heads as noted in para 16 supra. The business income of the magnitude of Rs. 2.68 cr. gets converted in loss of 32.35 lacs odd under the narrow and disadvantaged head of 'income from other sources' is perplexing and intriguing. Notwithstanding, the present act of accepting the income as business income will continue to grant the assessee, the right to carry forward and set off. This is also prejudicial to the revenues' interest by itself. Be that as it may, the correctness of claim of expenditure as well as its allowability qua the proper head of income need to be examined after conducting suitable enquiry. The entire act is thus prejudicial to the interest of revenue.

27. The judicial decisions cited by the learned AR for the Assessee are clearly distinguishable in the factual matrix of the case. The reliance placed on the decision of (i) Jewel of India vs. ACIT (2010) 325 ITR 92(Bom.) (ii) CIT vs. Gabriel India Ltd. 203 ITR 108 (Bom.) (iii) Globus Infocom Ltd. 108 DTR 363 (Del.) for the proposition that in the absence of clear finding of the CIT that order sought to be revised is erroneous and prejudicial to the interest of revenue is misplaced in the facts. There can be no quarrel with the legal proposition. However, we find that the findings of the CIT are clear and unambiguous backed by elaborate analysis of facts objectively. There is a definite finding by the CIT under S. 263 in unequivocal terms to the effect that rental income cannot be assessed as 'business income' in the given facts in contradiction to the stand of the Assessee. The issue on rental income whether to be taxed under the head 'income from house property' or 'income from other sources' has been set aside to be examined by the AO in line with the provision of S. 263 of the Act.

28. Again while reliance placed on the decision of coordinate bench of tribunal in the case of Khatiza S. Oomerbhoy Vs. ITO 101 TTJ 1095 (Mum.) for the proposition that revisional powers cannot be invoked merely because the CIT is not happy with the quality of the assessment order is well taken. However, in the same vein, it is manifest that no enquiry whatsoever on the relevant aspect of the case has been carried out and the order is marred by the flippancy and non application of mind. It will be expedient at this juncture to note that the action of the CIT is based on record present before it. The CIT has merely set aside the matter for denovo assessment. The Assessee is at liberty to take the matter to logical conclusion and make claims based on correct head of income in accordance with law. Mere set aside of the assessment under S. 263 on demonstrable grounds does not cause prejudice to the assessee per se so long as the return of income filed is in accordance with law. The Assessee continues to enjoy fair opportunity to seek fresh assessment in accordance with law.

29. The decision relied upon in the case of CIT vs. Vikram Cotton Mills Ltd. 169 ITR 597 (SC); Tamil Naidu Tourism Development Corporation 368 ITR 533 (Mad.); Mohiddin Hotels Pvt. Ltd. 284 ITR 229 (Bom.) and others to treat the lease rent as business income when the business is shut temporarily is required to be seen in the facts of given case. The decisions cited have application only in those cases where the conduct of the Assessee exhibits the anxiety to resume the business venture soonest possible. In view of the finding that the Assessee is no longer in the business of its own having regard to conduct over fairly long period and leasing out of the entire premises with no immediate recourse left with it to restart the business, near absence of risk element etc. etc., the exit from business can not just be seen to be temporary in nature.

30. We are also not impressed by the other plank of argument on behalf of the Assessee that in the earlier assessment years, the order framed under S. 143(3) assessing lease rentals as business income on the similar facts have been accepted by the revenue. A bare perusal of the Assessment order pertaining to AY 2007-08; 2005-06; 2004-05 annexed to the paper book would show that no discussion on the taxability of the rental income as 'business income' is discernible. There is nothing on record to show that the assessment was framed in the past after consideration of issue involved in this year. These orders therefore do not operate as any kind of precedent. This year is independent and also with every passage of day, the circumstance is changing materially for visualizing the true intention of the Assessee on running business with its associated risks. The elapse of time has a direct consequence on the purported intention harped by the Assessee. Thus the circumstance namely, possibility of revival of business existing in the earlier year has eroded further in this year. The doctrine of principles of consistency has no bearing when it is found as a matter of fact that the present assessment proceedings have been concluded in a nonchalant manner.

31. Thus, on objective analysis of facts and attendant circumstances of the case and judicial precedents cited, the conclusion is inescapable that the

assessment order passed is erroneous as well prejudicial to the interest of revenue and therefore rightly set aside by the CIT in exercise of power under S. 263 of the Act. Hence, we find that the action of the Ld. CIT is backed by authority of law and therefore we decline to interfere with it. However, We may hasten to add at this juncture that our observations are limited to the correctness of the assumption of jurisdiction under S. 263 of the Act and should not in any manner be read as our expression on merits.

32. In the result, the appeal of the assessee is dismissed.

Order pronounced on this 06th day of November, 2015.

Sd/-	**Sd/-**
(**SUSHMA CHOWLA**)	(**PRADIP KUMAR KEDIA**)
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

पुणे Pune; दिनांक Dated : 06th November, 2015.

सुजीत

आदेश की प्रतिलिपि अग्रेषित/Copy of the order is forwarded to :

1) The Assessee;
2) The Department;
3) The CIT-I, Pune;
4) The DR "B" Bench, I.T.A.T., Pune;
5) Guard File.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune