

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 2816 of 2018****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE AKIL KURESHI****and****HONOURABLE MR.JUSTICE B.N. KARIA**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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Versus**PR. COMMISSIONER OF INCOME TAX RAJKOT - I****Appearance:****MR TUSHAR HEMANI WITH MS VAIBHAVI K PARIKH for the PETITIONER(s) No. 1****MR MANISH BHATT, SR COUNSEL WITH MRS MAUNA M BHATT(174) for the RESPONDENT(s) No. 1****CORAM: HONOURABLE MR.JUSTICE AKIL KURESHI****and****HONOURABLE MR.JUSTICE B.N. KARIA****Date : 28/08/2018****ORAL JUDGMENT**

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. The petitioner has challenged a notice dated 02/04.01.2008 issued by the respondent Principal Commissioner of Income-tax, Rajkot, seeking to take the assessment of the petitioner for the assessment year 2013-2014 in revision in exercise of powers under section 263 of the Income Tax Act ("the Act" for short).
2. Brief facts are as under. Petitioner is a private limited company and is engaged in the business of letting out shops situated in Shopping mall on lease. For the assessment year 2013-2014, the petitioner had filed return of income on 21.9.2013 declaring total income as nil. This return was later on revised on 21.9.2013 declaring loss of Rs.2.41 crores (rounded off). In the return, the petitioner had shown principally two sources of income namely, rental income earned by letting out immovable properties and income from other sources. In the return, the petitioner had shown the rent receipt of Rs.3.46 crores (rounded off) and income from other sources at Rs. 1.09 crores (rounded off).
3. The Assessing Officer undertook the assessment of the return. During the course of assessment proceedings, several issues came up for consideration. One of them was the petitioner's claim for expenditure of Rs.4.04 crores (rounded off) being interest paid on debentures. The Assessing Officer also examined the petitioner's computation of income from other sources and the

expenditure claimed by the petitioner to have been incurred for earning such income. The Assessing Officer issued notice dated 4.8.2015 asking the petitioner to provide the following details :

“3. Brief description about nature of your business.

4. Bills/vouchers for expenses claimed.

5. Please explain the reasons for claiming high ratio of refund of TDS/Advance tax.

6. Please justify your claim for deduction u/s. 57 of the I.T. Act.

7. Please explain how the amounts of incomes/receipts in respect of which you have claimed credit of TDS Certificates (as per form No.26AS) are shown in your return of income for the year under consideration.

22. Please furnish the copy of the following accounts as appearing in your books of account:

Sr. No.	Nature of expenses	Amount(Rs.)
1	Property Tax Exp.	1,15,95,495/-
2	Electricity Exp.	39,78,674/-
3	Legal and professional charges	18,86,800/-
4	Housekeeping exp.	19,52,284/-
5	AMC Cost	15,93,440/-
6	Security Services charges	18,75,037/-

4. The petitioner replied to such notice under a letter dated 27.8.2015. Details called for were supplied as under :

“3. We are providing the Immovable Property at rent, Organize Events for various occasion and provide Advertising Services.

4. We provide Bills/Vouchers for expense claimed separately with books of account.

5. We have offered income from rent under the head house property and as per the provisions of the Income Tax Act, 1961, following deduction u/s 24 available from that income and the same has been claimed;

a) Standard Deduction

b) Property Tax

c) Interest if any

Hence there has been loss from the house property income. Further clarified that, TDS@ 10% from rent deducted by the lessee as per the provisions of the Income Tax Act, 1961.

Due to above facts of the case, tds deducted from the receipts claimed as refund.

6. We received the CAM charges from the lessee as per the agreement with them. The income from CAM offered under the head other head income. As per terms and condition of agreement, it is our responsibility to provide continuous common facility of light, lift, water, building maintenance, security etc. to run the mall to lessee.

To comply with the terms and conditions of providing common facility to lessee, we had provided services and incurred expenditure for electricity, lift, water, building maintenance, security, etc. expenses and the same claimed against income from other sources.

We submit that, the expenditure incurred rightly claimed u/s. 57 of Income Tax Act, 1961 since it is compulsory to earn income in the form of CAM as per the terms and conditions of agreement with lessee, which offered under the head income from other sources compulsory.

7. Income from the rent and CAM received of Rs.4,48,58,396/- during the year under consideration shown in the books of account. Where as figure shown in 26AS on which TDS deducted of Rs.3,88,53,503/-.

22. Detail copy of following account is attached at page no. 21 to 45

a) Property Tax Expenses

- b) Electricity Expenses
- c) Legal & Professional Expenses
- d) House Keeping Expenses
- e) AMC Cost
- f) Security Services Charges”

5. The Assessing Officer called further details such as property tax expenses, receipts of security expenses, receipts of house keeping expenses, receipts of professional charges paid and receipts of electricity expenses, which all were supplied by the petitioner.
6. The Assessing Officer after such scrutiny passed the order of assessment on 9.3.2016 in which he disallowed the petitioner's claim of interest expenses of Rs. 4.04 crores with which we are not directly concerned. With respect to the petitioner's declaration of rental income as well as petitioner's computation of income from other sources which would include the receipt as well as expenditure, the Assessing Officer made no major changes.
7. To take such order of assessment in suo motu revision, the Commissioner has issued the impugned notice in which he has cited the following grounds :

“The Assessment for A.Y. 2013-14 was finalized u/s.143 (3) of the Act on 09/03/2016 determining total income at Rs. 1,63,24,030/- which was set off against the brought forward losses.

2. On perusal of record, it is seen that during the previous year

2012-13 relevant to A.Y 2013-14 your company had shown gross annual rent of Rs.3,46,69,782/- against the claim of RMC taxes of Rs.1,15,95,495/- under the head income from house properties. Your company is having single immovable property namely Grand Central Mall at Rajkot and leased out the units to various parties and has entered into leave and license agreement with each such parties. The another company M/s Gandhi Reality (India) Pvt. Ltd. having similar kind of property i.e. Crystal Mall, Rajkot in the nearby vicinity, had offered rental income of Rs.1,50,07,501/- against the payment of RMC taxes of Rs.18,61,053/-. Considering the same rate of the property taxes by the RMC in both the cases, the sum for which your property (Grand Central Mall) might reasonably be expected to let from year to year can be arrived at Rs.9,35,05,882/- $(1,50,07,501 * 1,15,95,495 / 18,61,053)$. Thus, the assessment has been finalized without inquiries and verification.

3. Also it is seen that in the preceding year your company had shown income from other sources u/s 56 of Rs.1,09,25,338/- $(1,02,02,408 \text{ CAM charges} + 7,22,930 \text{ interest on income tax refund})$ and claimed deduction of Rs.1,59,96,787/- u/s 57 on it. However, some of the expenditure which may not be entirely related to income offered u/s 56 ie. AMC cost of Rs.15,93,440/-, Housekeeping expenses of Rs.19,52,284/-, Legal and Professional charges of Rs.18,86,800/- and Marketing and Event expenses of Rs.13,52,369/- etc. could be related to the operating expenses of the Grand Central Mall also. Therefore, the entire expenses were required to be apportioned between the income under the head income from House Property and that of the income from Other Sources. The proportional expenditure for the income from other sources can be arrived at Rs.87,81,340/- $(1,09,25,338 * 8,39,37,543 / 10,44,31,220 \text{ total deemed income})$. Thus your company has claimed excess deduction of Rs.72,15,447/- $(1,59,96,787 - 87,81,340)$.

5. Thus, the assessment order passed by the Assessing Officer for A.Y 2013-14 is erroneous and prejudicial to interest of the revenue. Therefore, I hereby initiate proceedings u/s 263 of the Act with a view to pass a suitable order. Before passing of such order, you are hereby given an opportunity of being heard in the matter. In this connection you are requested to attend this office on 16-01-2018 at 5:30 PM. alongwith your written submission.”

8. The petitioner opposed such notice by filing a detailed reply dated 9.2.2018. In such reply, the petitioner contended

that the order of assessment is neither erroneous nor prejudicial to the Revenue. It was therefore, not open for the Commissioner to exercise revisional powers. The petitioner made detailed submissions with respect to the two grounds sought to be pressed in such notice. With respect to the first of the two grounds, the petitioner contended that the annual rental charges of a property cannot be made the basis for assessing the rent received by the assessee in a particular year. In any case, annual rental value of two properties cannot be compared for assessing rent receivable for the respective properties. With respect to the second ground raised by the Commissioner, the petitioner contended that the issue was thoroughly examined by the Assessing Officer during the original assessment proceedings. The assessee had satisfied the Assessing Officer about the correctness of the expenditure claimed for earning the income from other sources. There was no basis for shifting any part of the expenditure for rental charges. The petitioner also referred to large number of judgments of various High Courts and Supreme Court in support of the contention that when proper inquiries have been made by the Assessing Officer, pursuant to which the Assessing Officer has taken a view which is plausible, revisional power could not be exercised. When the Principal Commissioner was unrelenting, the petitioner moved the present petition and challenged the very notice under section 263 of the Act.

9. Learned counsel for the petitioner submitted that the

Commissioner has committed a serious error in assuming jurisdiction not vested in him. For exercise of powers under section 263, the twin conditions of order of assessment being erroneous and prejudicial to the interest of the Revenue must exist. Both these conditions in the present case are not existing. With respect to the first issue, counsel submitted that the Commissioner has compared two incomparable instances. There is no basis for contending even prima facie that merely because other entity engaged in the same business has shown higher rental income in proportion to the Municipal charges paid for the property in question, the petitioner also must declare rental income at the same rate. Counsel submitted that range of factors go into deciding the municipal taxes of an immovable property. Equal number of variables go into deciding the rental charges for such properties. The Commissioner cannot bring down the two on a mathematical calculation erroneously devised by him. With respect to the second issue raised by the Commissioner in the impugned notice, counsel submitted that the Assessing Officer had carried out detailed inquiry during the course of assessment proceedings. Merely because the Commissioner holding a different belief would not permit him to take the order in revision.

10. On the other hand, learned counsel Shri Bhatt for the department opposed the petition contending that the challenge at this stage of issuance of show cause notice should not be encouraged. The Commissioner has recorded

proper reasons. The petitioner would have full opportunity to participate in the proceedings. The proceedings at this stage should not be terminated. Counsel further submitted that both the grounds are valid and germane. A similar property in the same locality has fetched much higher charges in case of another entity engaged in the same business. There is thus the starting point to suggest that the petitioner had not correctly declared the rental charges for its properties. Regarding the second issue, counsel submitted that same was completely unrelated and independent of the first one. The petitioner had diverted greater expenditure towards income from other sources. Proper allocation should have been done and part of the expenditure should have been diverted for earning income from house property.

11. Having heard the learned advocates for the parties and having perused the documents on record, we may peruse the reasons recorded by the Commissioner for issuing the impugned notice minutely. The Commissioner relied on two factors. In first one, he suggests that the petitioner had shown gross annual rent of Rs. 3.46 crores. The petitioner had paid monthly taxes of Rs.1.15 crores (rounded off) for such property. Such property was a single mall situated in Rajkot. The petitioner had leased out the units situated in such property out of which it had earned rental income. He pointed out that another entity one M/s. Gandhi Reality (India) Pvt. Ltd. which is also engaged in similar business who possesses property of similar kind

which is also a mall at Rajkot in the nearby vicinity had offered rental income of Rs.1.50 crores (rounded off) against the payment of RMC taxes of Rs. 18. 61 lacs (rounded off). In the opinion of the Commissioner, this would demonstrate extremely low rental charges declared by the petitioner. He took the mathematical projection of the proportion of the rental income declared by M/s. Gandhi Reality (India) Pvt. Ltd. against RMC taxes paid in case of the petitioner by taking RMC taxes of Rs. 1.15 crores as a test. In the process, he arrived at the figure of Rs. 9.35 crores (rounded off) which ought to have been rental charges received by the petitioner.

12. In our opinion, this comparison is wholly erroneous. Firstly, the Commissioner merely proceeded to record that both the immovable properties namely, the mall managed by the petitioner company and one managed by M/s. Gandhi Reality (India) Pvt. Ltd., both are situated in the nearby locality, without giving the distance between the two properties and without even prima facie ascertaining their respective locations. This would be relevant as we discuss the issue further. Next the Commissioner also merely adopted the respective municipal taxes of the two properties as the basis for considering commercial rental value of these properties.

13. The municipal tax rate as well as the potential for fetching rental charges for the immovable properties have many variables. As is well known, the municipal taxes are fixed on the basis of various factors such as built-up area,

the age of the property, location of the property, nature of occupation of the property, use of the property, etc. Further, so far as the rent potential of the property is concerned, equal number of variables would go into deciding the same such as, location of the property, area under rent, the age of the building, the nature of the business surrounding the property. In an immovable property even a small distance of location can make a big difference if one property is situated at a prime location at an important junction and the other does not enjoy any such advantage. These aspects cannot be standardised by applying a mathematical formula. The Commissioner compared the two most variable factors by merely taking the proportion of the two sets of properties between RMC taxes and the rentals received or receivable. In our opinion the starting point for making further inquiry itself was erroneous.

14. Coming to the second issue, we have noticed the correspondence between the Assessing Officer and the assessee during the course of assessment proceedings in the earlier portion of his order. Considerable attention was given to the question of assessee's income from other sources and the expenditure claimed by the assessee in order to earn such income. In particular, the entire break-up of such expenditure was before the Assessing Officer. The Assessing Officer having asked for details, the assessee supplied full details of property tax expenses, electricity expenses, legal and professional expenses, security charges, etc. It was after such detailed inquiry, the

Assessing Officer made no additions. This was thus clearly a case of full inquiry having been made by the Assessing Officer before he made up his mind. This is not a case where there were no inquiries or no germane inquiries having been made. On this basis, the second ground of the Commissioner also must fail and yet another area on this ground where the Commissioner has committed error while apportioning the cost between two heads of income where the Commissioner has taken the projected income of Rs. 9.35 crores from the house property as estimated by him on the basis of projections. All in all, we do not find this a fit case where Commissioner would have exercised revisional powers.

15. Impugned notice therefore, is set aside. Petition is disposed of.

(AKIL KURESHI, J)

(B.N. KARIA, J)

Raghu