

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "D NEW DELHI  
BEFORE SHRI S.V. MEHROTRA : ACCOUNTANT MEMBER  
AND  
MS. SUCHITRA KAMBLE : JUDICIAL MEMBER

ITA no. 4562/Del/2011  
Asstt. Yr: 2007-08

Krishan Kumar Saraf,  
S/O Sh. Brij Lal Saraf,  
Bichla Bazar, Near City  
Police Stationj, Bhiwani.  
PAN: AMQPS 3147J  
( Appellant )

Vs. Commissioner of Income-tax,  
Hissar.

(Respondent)

Appellant by : Shri N.K. Jain Adv.  
Respondent by : Ms. Sulekha Verma CIT (DR)

Date of hearing : 07/09/2015.  
Date of order : 24/09/2015.

**ORDER**

**PER S.V. MEHROTRA, A.M:**

This appeal has been preferred by the assessee against the order dated 10-08-2011 passed by the Commissioner of Income-tax, Hisar u/s 263 of the Income-tax Act, 1961, relating to asstt. Year 2007-08.

2. Brief facts of the case are that the ld. Commissioner called for the assessment record and on examination of the assessment order passed by the AO u/s 143(3), observed that the said order was erroneous, in so far as it was prejudicial to the interest of revenue for the following reasons:

“On perusal, it is noticed that the assessee has started new business and opening capital of RS.2251672.32 has been reflected in Capital A/c, the source of which should have been

got explained, however, the A.O. neither put any query in this regard nor further scrutinized the issue.

II. Further, the assessee has purchased land measuring 1 kanals 13.6 marla on 27.03.2001 at Rs.1,24,000/- and during the financial year under consideration sold various shops for RS.31,98,000/- constructed on 381.04 sq. yard portion of this land. The assessee has declared long term capital gain at Rs.22,62,575/- from this transaction.

In view of Punjab & Haryana High Court's decision in the case of Harbans Singh Vs. CIT Amritsar-I (132 ITR 77 & 23 CTR 335) and Supreme Court's decision in the case of Raja J. Rarneshwar Rao Vs. CIT Hyderabad cited in 42 ITR 179), the income earned from the transaction of purchasing plot of lands, constructing shops thereon and selling those shops should have been treated as business income instead of Long Term Capital Gain, but the A.O. failed to do so and without scrutinizing the issue accepted Long Term Capital gain as claimed by the assessee.

iii. Further, the assessee has declared short term capital loss amounting to RS.35002/-. The A.O. accepted this short term capital loss without obtaining any documentary evidence in support of the assessee's claim 'of short term capital loss. As the genuineness of loss has not been scrutinized by the A.O., the order passed by the AO on this issue is also erroneous and prejudicial to the interest of revenue.

iv. The assessee has credited Capital A/c with NSC interest received on maturity amounting to Rs.21880/-. The interest relevant to year under consideration should have been included in total income but the AO failed to do so.

3. He, therefore, issued notice u/s 263(1) and after considering the assessee's submissions, set aside the assessment order and directed the AO to reframe the assessment as per the directions given in his order.

4. Being aggrieved with the order of Id. CIT, the assessee is in appeal before us and has taken following grounds of appeal:

“That the order of the Ld. CIT setting aside the Assessment order u/s 263(1) by considering it as erroneous in so far as it is prejudicial to the interest of revenue is against law & facts for the alleged reason that :-

- (i) The sale of plot out of the land in which money was invested to acquired & held as a capital assets as a Trading activity and directing to assess the income there from as business income in view of judgment of P&H High Court passed on different facts by ignoring later judgments of the same high court and of other courts.
- (ii) To verify the short term capital loss of Rs. 35002/- duly proved on sale of shops.
- (iii) To verify the receipt of interest of Rs. 6188 and credited directly to capital account received on maturity of NSC ignoring that it was already shown as income on accrual basis by considering it as income from MIC Intt. against facts.
- (iv) To verify the detail of expenses incurred in construction of shops duly verifiable and already verified from the books of accounts and to tax the unexplained investment.
- (v) In treating source of marriage expense to the extent of Rs. 244000+51000, as unexplained u/s 69 C of I.T. Act & to assess the same as income against law.

Without properly considering the material on record and the explanation submitted in the Assessment proceeding and also before the Ld CIT without showing how the order is erroneous & prejudicial to the interest of revenue merely because the

order of the AO was not in the lines as considered by the Ld CIT.

2. The Ld. CIT has initiated the proceeding without fulfilling the requirement of sect. 263 which is essential before proceeding u/s 263(1) and therefore also the order is bad in law.

3. Ld. CIT has failed to appreciate the fact that no notice u/s 143(2) was served before the assessment proceeding was initiated within the statutory period which is a statutory requirement and as such the entire assessment was without authority of law and as such no order as passed should have been passed rather it should have cancelled instead of setting it aside.

4. The appellant craves leave to add amend or rescind any of the ground at the time of or before hearing of appeal.”

5. At the outset ld. counsel for the assessee referred to ground no. 3 noted above and pointed out that since the original assessment order passed by AO was bad in law, therefore, the said order could not be revised u/s 263 of the Act. He submitted that original return for AY 2007-08 was filed on 31-7-2007 and the notice u/s 143(2), which should have been issued before 31-7-2008 was admittedly issued on 5-9-2008 fixing the case for hearing on 17-9-2008.

6. Ld. counsel submitted that the law as applicable on the date of filing of return will be applicable and accordingly the notice u/s 143(2) should have been issued within 12 months from the end of the month in which the return was furnished and hence not amenable to revision u/s 263. Therefore, the assessment order passed in pursuance to the said notice was without jurisdiction.

7. Ld. counsel referred to the decision of Hon'ble Madras High Court in the case of CIT Vs. Gitsons Engineering Co. (2015) 370 ITR 87 (Mad.), wherein the Hon'ble High Court, following the decision of Hon'ble Supreme Court in the case of ACIT Vs. Hotel Blue Moon 321 iTR 362 (SC) has held that the objection in relation to wrong service of notice contemplated u/s 143(2) of the Act could be taken before the ITAT as it was a legal plea.

8. Ld. counsel further referred to the decision of Hon'ble Delhi High Court in the case of CIT Central-I, Vs. Escorts Farms Pvt. Ltd. 180 ITR 280, wherein the facts were as under:

“Briefly stated, the facts are that in respect of the assessment year 1973-74, the Income tax Officer made an assessment. An appeal was taken to the Commissioner of Income tax, who allowed the same. Further appeal was filed by the Department to the Tribunal and the same was decided in favour of the Department.

The assessee, thereafter, moved an application under section 254(2) of the Income tax Act in which it was contended that at the time of the hearing of the main appeal, the assessee's counsel had submitted that the assessment order itself was barred by time. The submission was that this contention had not been dealt with by the Tribunal. The Tribunal then passed an order under section 254(2) rectifying its earlier order. The Tribunal came to the conclusion that such a contention had been raised by the assessee and it decided that contention in favour of the assessee. The decision of the Tribunal, therefore, was that the assessment was barred by time, but, at the same time, on merits, the Tribunal had decided in favour of the Department.

Against the aforesaid order passed under section 254(2) of the Act, the Department filed a reference application under section 256(1), but the said application was dismissed.

The assessee then moved a second miscellaneous application being No. 14 of 1986 in which it prayed that the Tribunal should recall its order passed in the main appeal being ITA No. 1325 of 1983. The Tribunal observed, vide its order dated February 12, 1986, while disposing of the second miscellaneous application, that the effect of its order passed in M. A. No.4 of 1985, was that all subsequent proceedings by way of appeal before the Commissioner of Income tax and the Appellate Tribunal would lose effect and would become infructuous. Against the said decision, the Department filed an application under section 256(1) which was dismissed and now an application under section 256(2) has been filed seeking reference of the question of law which has been reproduced above.”

9. On these facts Hon'ble Delhi High Court held as under:

In our opinion, the decision of the Tribunal is correct when it stated that the effect of holding that the assessment was barred by time is that all further proceedings pursuant to the said decision would be infructuous. The Income tax Officer gets jurisdiction to pass an assessment order if it is within limitation. If the assessment is barred by time, then any decision on merits would be of no consequence, and for the same reason, the decision, on merits, by the appellate authorities would also be of no consequence and would have to be ignored. This is exactly what the Tribunal has observed in the impugned order. For, if the assessment is barred by time, no effect can be given to the other decision on merits. If, however, the reference of the Department against the order passed in M. A. No.4 of 1985

succeeds, then the decision on merits of the various appellate authorities would automatically remain.”

10. With reference to above decisions, ld. counsel submitted that the objection regarding assessment order being bad in law can be taken at any stage of proceedings and since the assessment order was bad in law, therefore, any decision on merit is of no consequence.

11. Ld. counsel further submitted that the protection given u/s 292BB is also not available for the present assessment order as the said section has been held to be prospective. In this regard he relied on the decision of Amritsar Bench of the ITAT in the case of DCIT Vs. Mangat Ram 154 TTJ (Asr)(UO) 24.

12. Ld. DR submitted that the plea regarding invalidity of the assessment order, on the basis of issuance of notice u/s 143(2), beyond one year, cannot be taken in the proceedings u/s 263 because section 263 is for the benefit of revenue in regard to orders which are prejudicial to interest of revenue and, therefore, assessee cannot take the plea of assessment order being bad in law at this stage.

13. Ld. DR referred to the decision of Hon'ble Punjab & Haryana High Court in the case of Harbans Singh vs. CIT 132 ITR 77, in which, the decision of Hon'ble Supreme Court in the case of Raja J. Rameshwar Rao v. CIT 42 ITR 179 was followed. The proposition laid down in these two decisions is that when a person acquires land with a view to sell it later after

developing, he is carrying on an activity resulting in profit and the activity can only be described as a business venture.

14. The third decision, relied upon by Id. CIT(DR) is that of Hon'ble Delhi High Court is in the case of Gee Vee Enterprises v. Addl. CIT 99 ITR 375, wherein it was held that a writ petition would not lie if the petitioner had not filed any appeal against the order of Commissioner nor had given any explanation as to why he did not file appeal against order u/s 263 nor any exceptional circumstances were shown to exist. She submitted that assessee had not filed any appeal against the assessment order and, therefore, at this juncture this plea cannot be taken.

15. She further referred to the decision of the ITAT in the case of Krishna Shriram Vs. CIT (ITA no. 1649/Del/2011 – order dated 29-1-2014), wherein 263 order had been upheld, following the decision of Hon'ble Jurisdictional High Court in the case of Gee Vee Enterprises (supra), because AO had not carried out any inquiry We have considered the rival submissions and have perused the record of the case. Before we come to the merits of the case the preliminary objection, raised by assessee vide ground no. 3, needs to be addressed.

16. Admittedly the notice u/s 143(2) was issued beyond time and, therefore, the assessment order was bad in law. Ld. CIT(DR)'s submission is that assessee has not challenged the assessment order. However, since the assessee was not aggrieved with the assessment order, therefore, he did not challenge. However, nothing turns on this when we consider the issue in the backdrop of proceedings initiated u/s 263 by Id. Commissioner. The

moot point for consideration is as to whether this objection can be entertained at this stage of proceeding or not. In this regard we find that the decision of Hon'ble Delhi High Court in the case of Escorts Farms Pvt. Ltd. (supra), which we have extensively reproduced earlier, clearly supports the assessee's plea.

17. There is no quarrel with the proposition advanced by Id. DR that the proceedings u/s 263 are for the benefit of revenue and not for assessee.

18. However, u/s 263 the Id. Commissioner cannot revise a non est order in the eye of law. Since the assessment order was passed in pursuance to the notice u/s 143(2), which was beyond time, therefore, the assessment order passed in pursuance to the barred notice had no legs to stand as the same was non est in the eyes of law. All proceedings subsequent to the said notice are of no consequence. Further, the decision of Hon'ble Madras High Court in the case of CIT Vs. Gitsons Engineering Co. 370 ITR 87 (Mad) clearly holds that the objection in relation to non service of notice could be raised for the first time before the Tribunal as the same was legal, which went to the root of the matter.

19. While exercising powers u/s 263 Id. Commissioner cannot revise an assessment order which is non est in the eye of law because it would prejudice the right of assessee which has accrued in favour of assessee on account of its income being determined. If Id. Commissioner revises such an assessment order, then it would imply extending/ granting fresh limitation for passing fresh assessment order. It is settled law that by the action of the

authorities the limitation cannot be extended, because the provisions of limitation are provided in the statute.

20. In view of above discussion, ground no. 3 is allowed and the revisional order passed u/s 263 is quashed.

21. In the result, assessee's appeal is allowed.

Order pronounced in open court on 24/09/2015..

Sd/-  
(SUCHITRA KAMBLE)  
JUDICIAL MEMBER  
Dated: 24/09/2015.

Sd/-  
(S.V. MEHROTRA)  
ACCOUNTANT MEMBER

**\*MP\***

Copy of order to:

1. Assessee
2. AO
3. CIT
4. CIT(A)
5. DR, ITAT, New Delhi.

-+		Date	Initial	
1.	Draft dictated on	23-09.2015		PS
2.	Draft placed before author	24.09.2015		PS
3.	Draft proposed & placed before the second member			JM/AM
4.	Draft discussed/approved by Second Member.			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			PS/PS
6.	Kept for pronouncement on			PS
7.	File sent to the Bench Clerk			PS
8.	Date on which file goes to the AR			
9.	Date on which file goes to the Head Clerk.			
10.	Date of dispatch of Order.			