आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI

श्री चंद्र पूजारी,लेखा सदस्य एवं श्रीजी. पवन कुमार,न्यायिकसदस्यकेसमक्ष

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SHRI G. PAVAN KUMAR, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No.565/Mds/2016

निर्धारण वर्ष /Assessment year : 2008-2009

The Income Tax Officer, Non Corporate Ward 15(4) Chennai 600 034.	**Vs.**	Smt. V.P. Safiya, 5/25, 5th Street, APMS Marakkayar Nagar, Neelankarai, Chennai 600 041. **[PAN AWNPS 6909D]**
(अपीलार्थी/Appellant)		**(प्रत्यर्थी/Respondent)**

अपीलार्थी की ओर से/ Appellant by : None

प्रत्यर्थी की ओर से /Respondent by : Shri. B. Suresh, CA

सुनवाई की तारीख/Date of Hearing : 11-05-2016

घोषणा की तारीख /Date of Pronouncement : 26-05-2016

आदेश / O R D E R

PER G. PAVAN KUMAR, JUDICIAL MEMBER:

The appeal filed by the Revenue is directed against order of the Commissioner of Income-tax (Appeals)-15, Chennai in ITA No.147/CIT(A)-15/14-15, dated 15.12.2015 for the assessment year

2008-2009 passed u/s.143(3) and 250 of the Income Tax Act, 1961 (herein after referred to as 'the Act').

2. The Revenue has raised the grounds challenging the order of Commissioner of Income Tax (Appeals) erred in allowing the appeal based on the order of ITAT quashing the order u/s.263 of the Act. Further Revenue has not accepted the ITAT decision and Appeal u/s.260A of the Act was filed in High Court and is pending. The Commissioner of Income Tax (Appeals) also erred in deleting the addition.

3. The Brief facts of the case the assessee is an individual having income from capital gains and other sources and filed income tax E-return for the assessment year 2008-09 on 02.10.2009 with income of long term capital gains at ₹2,05,11,296/- and bank interest. The case was selected for scrutiny and the Assessment was completed u/s.143(3) of the Act on 31.12.2010. Subsequently, the Commissioner of Income Tax-VI, Chennai found the order passed u/s.143(3) of the Act dated 31.12.2010 is erroneous and prejudicial to the interest of Revenue as the ld. Assessing Officer has not examined the facts and allowed exemption and deduction to the assessee. With these observations and findings, the l.d Commissioner of Income Tax set aside the order u/sec. 143(3) of the Act and passed revision order

u/s.263 of the Act dated 26.12.2012. Subsequent to the directions of Commissioner of Income Tax, the ld. Assessing Officer called for the information and discussed elaborately at page Nos.10 to 16 of the order on disallowances and assessed total income of ₹4,45,29,340/- under sec. 143(3) r.w.s 263 of the Act. Aggrieved by the order, the assessee filed an appeal before Commissioner of Income Tax (Appeals).

4. In the appellate proceedings, the ld. Authorised Representative raised the grounds on disallowance and reiterated the submissions made before Assessing Officer. The ld. Commissioner of Income Tax (Appeals) considered assessment record, findings of the Assessing Officer, grounds and submissions of the assessee and observed on merits that the order passed u/s.263 of the Act of Commissioner of Income Tax dated 26.12.2012 was quashed by Tribunal in ITA No.367/Mds/2013 dated 21.03.2014 and observed at para 5.1 and 5.1.1 of his order as under and allowed the appeal.

> *''5.1 All the grounds of appeal raised by the appellant are against addition on account of Long Term Capital Gains to the tune of ₹4,43,91,141/-. The AO the assessment order held that the assessee is not eligible for exemption u/s 54 for two properties because according to Sec.54 of the IT Act, assessee is eligible for claiming exemption in respect of one residential house only. The property purchased by the assessee in 1979 & 1980 for an amount of Rs.4.03 lakhs was valued at ₹46.47 lakhs which is very high i.e. within 1 or 2 years value of property cannot appreciate by 12*

times. The assessee also could not prove the basis on which this FMV was adopted at such a higher figure. As there was error in claim in indexation by the assessee, value of Rs.18,97,829/- cannot be adopted. For the 1/4th share of property which she had inherited from her husband, she should have adopted cost inflation index for the year 2003-04 which was the first year in which the asset was held by the assessee. But the assessee has not done so which has resulted in excess claim in the form of indexed cost of acquisition. The value ascertained from the DVO is adopted which is as per law. The assessee has claimed indexed cost of improvement at Rs. 72, 17,000/-. Assessee's 40/64th share out of Rs.20,36,789/- works out to Rs.12,72,993/-. In the computation of Long Term Capital Gain, assessee has claimed expenditure towards tenancy vacation at Rs.1,81,56,250/-. Since the assessee has not furnished confirmation and address of the parties, effort was made to check the creditworthiness of the transaction. The AO rejected the plea of the AR of the asessee because once claim is made by the assessee in her return of income, it is her duty to prove the claim. The assessee has also claimed expenditure towards brokerage at ₹38,03,125/-. Since the payments were confirmed by the bank, they are allowed

5.1.1 I have considered the findings given by the AO and also submissions made by the AR of the appellant. The ITAT"B" Bench, Chennai vide ITA No.367/Mds 2013 for A.Y.2008-09 dated 21.03.2014 in the case of the assessee has allowed the appeal of the assessee stating that " ... the CIT cannot direct an Assessing Officer to conduct further enquiry or verification."' In view of the aforesaid decision of the Hon'ble ITAT, the order passed by the Assessing Officer in pursuance of directions given by the CIT in order u/s. 263 cannot be sustained and the additions made by him are deleted''.

Aggrieved by the Commissioner of Income Tax (Appeals) order, the Revenue has assailed an appeal before Tribunal.

5. At the time of hearing, the Department filed adjournment petition and the same was rejected and proceeded to decide the case on merits.

6. The ld. Authorised Representative relied on findings and order of the Commissioner of Income Tax (Appeals) and prayed for dismissing the appeal.

7. We heard the ld. Authorised Representative and perused the material on record. The only contention of the Department before the Tribunal that the Revenue has not accepted the order of Tribunal and an appeal has been filed in Madras High Court. This Tribunal is of the considered opinion that mere filing of appeal in High Court cannot be a reason to take a different view. The order of Tribunal is binding on all the authorities in the State of Tamil Nadu and Union Territory of Pondicherry. Therefore, the Commissioner of Income Tax (Appeals) has rightly allowed the claim of the assessee by following the Coordinate Bench decision in assessee's own case in ITA No.367/Mds/2013, assessment year 2008-09, dated 21.03.2014 observed at para 7 & 8 as under:-

''7. We have heard both parties and gone through the case file. As stated hereinabove, the assessee's plea is that the Assessing Officer had examined all issues and conducted necessary enquiries at the time of framing 'regular' assessment. Against this, the Revenue's argument is that since no enquiry or verification had been conducted, the CIT has rightly assumed jurisdiction u/s 263 of the Act. Proceeding on this question, we notice that during 'scrutiny' and in pursuance to section 142(1) notice, the assessee had placed on record all necessary particulars(supra). In our view, when an Assessing Officer quotes any material placed on record after 142(1) notice in an assessment order passed u/s 143(3), a conclusion can be safely drawn that he has duly applied his mind to the same. In such case, the Revenue cannot allege that it is a case of 'no enquiry' as it becomes part of the decision taken. Coming to show cause notice u/s 263 dated 5.10.2012, we find that the very reason for assumption of jurisdiction reads as follows:

> ***" In view of the above mistakes committed by the AO while completing scrutiny assessment, prejudice is very much caused to the interests of revenue and since the twin conditions of mistakes committed by the AO and these mistakes caused prejudice to the interests of revenue were fulfilled, it is hereby decided to set aside the assessment u/s 263 of the IT Act. It is a settled law now that not conducting enquiries wherever it is required, is a mistake and this mistake causes prejudice to the interests of Revenue and under these circumstances, the revisionary power of CIT were upheld by Supreme Court also. Your objections, if any, may reach the undersigned by 15th October, 2012, failing which it is presumed that there are no objections from your side and action will be taken as per law."***

The purpose of our reproducing hereinabove the contents of section 142(1) notice is that the assessee's evidence stands recorded in assessment order is to substantiate our view that the present is not a case of 'no enquiry' as contended by the Revenue. We observe that this situation would arise only in case this material would not have at all been discussed in the assessment order. Undisputedly, this is not the case in hand. The assessment order only disallows a sum of ₹7 lakhs. Meaning thereby that all other claims(supra) are deemed to have been accepted by the assessing authority. In that case, the necessary presumption is that the Assessing Officer has taken a conscious decision to allow assessee's claim of reinvestment of capital gains and other reliefs. In doing so, we reiterate that present is a case of assumption of section 263 jurisdiction wherein the CIT alleges 'no enquiry' or verification by the Assessing Authority. It is a trite proposition that under the provisions of the Act, powers of the CIT in this regard have to be literally construed and benefit of doubt goes to the assessee. 8. Now, the question arises as to whether in such a case of deemed application of mind, decision at the hands of the Assessing Officer, could it be held as a case of 'no enquiry' or not. In our view, the question has to be answered in assessee's favour. We find from the case law quoted (supra) that the hon'ble Delhi high court has distinguished a case of 'no enquiry' and a 'wrong' decision by drawing a distinction between the two as follows:

> ***" As held above, a distinction must be drawn in the cases where the Assessing Officer does not conduct an enquiry; as lack of enquiry by itself renders the order being erroneous and prejudicial to the interest of the Revenue and cases where the Assessing***

***Officer conducts enquiry but finding recorded is erroneous and which is also prejudicial to the interests of the Revenue. In latter cases, the Commissioner of Incometax has to examine the order of the Assessing Officer on the merits or the decision taken by the Assessing Officer on the merits and then hold and form an opinion on the merits that the order passed by the Assessing Officer is erroneous and prejudicial to the interests of the Revenue. In the second set of cases, the Commissioner of Income-tax cannot direct the Assessing Officer to conduct further enquiry to verify and find out whether the order passed in erroneous or not.*"**

In these circumstances and taking cue therefrom, we hold that in the present case, the Assessing Officer had framed 'regular' assessment after applying his mind to the material placed on record by the assessee(supra). Therefore, assumption of jurisdiction in 263 proceedings falls under the latter instance. So, it is hit by the principle that in case of a wrong decision, the CIT cannot direct an Assessing Officer to conduct further enquiry or verification.

9. The assessee's appeal is allowed."

Further, the ld. Counsel of the assessee submitted copy of the order of ITAT in ITA No.367/Mds/2013, for assessment year 2008-2009 dated 21.03.2014 and we find the order of the ITAT has been decided on merits and we respectfully follow the order of Co-ordinate Bench

decision and dismiss the grounds of the Revenue.

8. In the result, the appeal of the Revenue in ITA No.565/Mds/2016 is dismissed.

Order pronounced on Thursday, the 26th day of May, 2016, at Chennai.

Sd/-	Sd/-
(चंद्र पूजारी)	(जी. पवन कुमार)
(CHANDRA POOJARI)	**(G. PAVAN KUMAR)**
लेखा सदस्य /ACCOUNTANT MEMBER	**न्यायिक सदस्य/JUDICIAL MEMBER**

चेन्नई/Chennai
दिनांक/Dated:26.05.2016
KV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant	3. आयकर आयुक्त (अपील)/CIT(A)	5. विभागीय प्रतिनिधि/DR
2. प्रत्यर्थी/Respondent	4. आयकर आयुक्त/CIT	6. गार्ड फाईल/GF