

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: 'SMC' NEW DELHI**

**BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER**

**ITA Nos.-7810 to 7812/Del/2017  
(Assessment Year: 2007-08)**

Kalyan Kumar Banerjee Through L/H Malabika Bhattacharya N-13, Kailash Colony, New Delhi. <b>AAJPB7177N</b>	vs	ITO, Ward 36(2) New Delhi.
<b>Assessee by</b>	<b>Sh. S. Krishnan, Adv.</b>	
<b>Revenue by</b>	<b>Ms. Ashima Neb, Sr. DR</b>	

<b>Date of Hearing</b>	<b>25.04.2018</b>
<b>Date of Pronouncement</b>	<b>24.05. 2018</b>

**ORDER**

By the present appeals the assessee assails the correctness of the separate orders dt. 25.9.2017 of CIT(A)-12, New Delhi pertaining to 2007-08 asstt. year passed in the quantum proceedings; the penalty proceedings u/s 271(1)(c ) and 271(1)(b) respectively on the following grounds:

*“On the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in confirming the following actions of the Assessing Officer:*

- 1. Initiating proceedings u/s 147/148 of the Income-tax Act, 1961 without there being any material leading to belief of escapement of income.*
- 2. Passing order u/s 144/148 of the Act an income of Rs. 25,00,000/- against no return filed. The assessee order is without jurisdiction and against the norms of natural justice as the assessee never received any statutory notices u/s 147/148, 142(1) and 143(2) of the Act.*
- 3. Passing order u/s 147/148 of the Act being bad in law as the assessee was never afforded an opportunity of objecting to the reasons recorded for reopening the assessment.*
- 4. Making an addition of Rs. 25 lacs on account of alleged Long Term Capital gain earned on entering into the collaboration agreement with a builder.*

*All the actions being misconceived, erroneous and unjust must be quashed with directions for relief.”*

2. The Ld. AR inviting attention to the material available on record and the submissions extracted by the CIT(A) in para 5.2 at pages 4 to 7 of the impugned order submitted that the CIT(A) without addressing the specific facts has proceeded to dismiss the jurisdictional issue. It was his submission that the exercise of power without addressing the facts and submissions basing conclusionS on presumptions cannot be said to

be a fair exercise of power. It was his submission that even on merits, nothing has been brought on record to justify as to why the benefit of indexation for the cost of acquisition as has NOT been made available qua the 25 lakh received by the assessee which is sought to be brought to tax as capital gain has been denied. The decision of the Hon'ble Delhi High Court in the case of CIT vs. Geeta Duggal , it was submitted, has not been considered. Apart from these patent shortcomings of ignoring the ratio of the decision of the jurisdictional High Court, it was submitted, that there were other issues also for consideration. It was his submission that the sole issue considered by the jurisdictional High Court was not only the issue of one residential house, accordingly, it was his submission that the order was a non-speaking order and deserves to be set aside.

3. The Ld. Sr. DR submitted that the assessee did not participate in the proceedings before the AO and the submissions extracted in the order need to be corroborated with the relevant facts on record and cannot be out rightly accepted. It was her submission that either the relevant records may be permitted to be called for and thus, grant time alternately the matter may be remanded. She was also unable to support the conclusion drawn on merits as there is no discussion in the order as to why the calculation provided by the assessee before the CIT(A) were found to be wanting. Accordingly, finally it was her submission that the issue may be remanded.

4. I have heard the submissionS and perused the material available on record. Since, the jurisdictional issue itself has to be first addressed, accordingly, refraining from making any observations on the said issue in the peculiar facts & circumstances of the case, it is deemed appropriate to set aside the impugned order. The said conclusion has been arrived at taking note of the fact that as per the submissions of the assessee advanced before the CIT(A) extracted in the order, it is seen that the assessee was claimed to be at the relevant point of time about 91 years who is stated to have been residing in Kolkata from 2006 onwards and had applied for PAN Card. The relevant submissions of the assessee are extracted from the impugned order:

***“The Appellant has stated as under in his written submission dated 17.05.2017:***

*"With reference to the above, thiyaTofiring tofouHtqnor's kind attention that I, Kalyan Kumar Banerji, aged (about 91 Years, had started residing in Kolkata from the year 2006 onwards and applied for PAN cardAfi Kolkata ilselj. I was issued PAN No. AAJPB7177N wheTemdAiad-dexNaredmy then address to be Flat F-2, Govt. Flats, 44 Iron Side Road, PO Ballygunge, Kolkata - 700019, West Bengal.*

*Later, I had shifted to my new residence at AC-83, Action area-1, PO New town, Kolkata - 700156, West Bengal and on my application for change of address, the Department had confirmed such change in the PAN record.*

*During that financial year, I had not filed return of income as the requirement for the same did not arise in my hands based on the provisions of Income Tax Act, 1961.*

*This is to further inform your honor that I had received a letter dated 26/02/2015' (received on 04/03/2015) from the respective ITO, Ward - 36(2), New Delhi asking for certain details in respect of Assessment Proceedings u/s 148 of the Income Tax act, 1961 related to the AY. 2007-08.*

*On receipt of the letter, it was for the first time that I came to know of the fact that the Assessing Officer had initiated Assessment Proceedings u/s 148 of the Income Tax Act. 1961 for the A. Y 2007-08.*

*Accordingly, I had denied receipt of any notice u/s 148 of the Act or any other communication with respect to the above. Further. I had raised objection for issuance of notice u/s 148 of the Income Tax Act, 1961 as my case does not fall under the jurisdiction of ITO, New Delhi and also sending a requisition asking to provide the certified copies of the Notice u/s 148 of the IT Act, 1961 vide Letter dated: 06/03/2015, in view of the fact that the PAN: AAJPB7177N was allotted in Kolkata.*

*In response of the above, the ITO, ward 36(4), New Delhi provided the documents to me on 13/03/2015 which had enclosed with it the notice issued u/s 148 of the IT Act, 1961 dated 25/03/2014 and other notices under sections 142(1) & 143(2) of the Income Tax Act, 1961.*

*I saw that all these notices were issued at the address N-13, Kailash Colony, New Delhi instead of Kolkata Address. Accordingly, in my reply to the respective ITO of Ward 36(4) New Delhi on 18/03/2015, I asserted reiterated the fact of non- receipt of notice u/s 148 of the IT Act. I also requested to refer the matter to the Principal CCIT or Principal CIT in terms of Section 124(2) read with section 124(4) of the IT Act in view of the jurisdictional dispute raised in the proceedings.*

*Furthermore, this is to bring to your honor's kind attention that when I did not receive any intimation from the Department on the above matter. I enquired with the ITO Ward-36(2), New Delhi and came to know that the Assessment Order dated 24/03/2015 was passed under section 144/148 of the Income Tax Act, 1961 with an addition of Rs. 25,00,000/- to the Total Income being addition in the nature of Escaped income earned during the financial year 2006-07. The said order was served upon me on 23/03/2016.*

*The respective AO without giving reasonable opportunity to me of being heard and represent myself had issued the Order u/s 148 of the Income Tax Act, 1961 based on the information received that I had entered into collaboration agreement on 30/09/2006 with M/s Sabharwal Developers and Promoters Ltd for re-developing the property (estimated Area: 500 yards or 4108.64 sq. m) as per the latest available amenities.*

*In accordance to the reasons recorded by the ITO, Ward - 36(2), New Delhi, served upon me vide letter dated: 23.03.2016 and that of the details of the collaboration Agreement with M/s Sabharwal Developer's and Promoters Ltd. were as follows:- The owner's share was entire basement unit with 10% undivided, indivisible, impartible land rights underneath, entire ground floor with 30% undivided, indivisible, impartible land rights underneath (with entire front lawn and rear courtyard along with one car*

parking span- In the driveway and one ear park hip space exclusively carved out in the front town alongwith separate gate) and entire first floor with 30% undivided, indivisible. Impartible land rights underneath with entire front lawn and rear courtyard along with two air park lay space inside the driveway.

The builder was to yet entire second floor with 30% undivided indivisible, impartible land rights underneath with entire front lawn and rear courtyard along with two car parking space inside the driveway. Besides, the above two servant quarters were to be constructed for the owner and one for the builders. Apart from this, I had received a sum of Rs. 25,00,000/- from the builder.

This is to further bring to your honor's kind attention that In light of the landmark judgement passed by the Hon'ble Delhi High Court belong the Jurisdictional High Court in this case of Commissioner of Income Tax vs. Gita Duggal, IT A 1237/2011. where the contention of the assessee that the cost of construction, being treated as the sale consideration shall be subsequently deemed to have been fully reinvested in the sold flat and subsequent allowance of exemption u/s 54 in the hands of the assessee, was held to be justified by the Honorable Delhi High Court. Further, the Calculation of Taxable long Term Capital Gains/Loss with respect to the Cash Component Received by the assessee was also clearly laid down in the said judgment by the Honorable Jurisdictional High Court, which has not been considered by the Ld. Assessing officer, thereby the said order is perverse and bad in eyes of Law.

In light of the aforesaid judgment, I would like to present for your honor's kind attention and perusal the fact that I had actually incurred Long Term Capital Loss for consideration of Rs. 25,00,000/- as received as per Collaboration Agreement, the details of which is presented below with circumstantial proofs and evidences of calculation. The addition of Rs. 25,00,000/- is uncalled for as I had not earned any Income out of the said money.

Particulars	Amount
Income from Capital Gain	2,500,000.00
Consideration as per Collaboration Agreement	
Less: Indexed Cost of Acquisition #	
(Rs. 837, 280/- * being Fair Value as on 01/04/1981 is considered, as the Property was purchased in the Year 1953)	4,345,483.20
Long Term Capital Loss	1,845,483.20

Notes:-

As per explanation (ii) to Section 48 of the Income Tax Act, 1961 "indexed cost of acquisition" means an amount which bears to the cost of acquisition the same proportion as cost Inflation Index for the year in which the asset is transferred bears to the cost Inflation Index for the Year in which the asset was held by the Assessee or for the year beginning on the 1st day of April,1981, whichever is earlier.

In my case, the said land was purchased on 12<sup>th</sup> September, 1953. which is evident from the attached purchase deed, thus, in light of the aforesaid explanation, the Fair market Value as on 01.04.1981 is being adopted for purpose of Determining indexed cost of Acquisition.

2) Calculation of Fair market Value of the Property

Area of Land: 500 yards (As per deed), which is equivalent to 418.64 sq.m.

Fair market value per sq. m.: Rs. 2,000/-

Source of information: From Land & Development Officer, Ministry of Urban Development ([www.ldo.nlc.in](http://www.ldo.nlc.in)) taking Into consideration the Scheduled Market Rates of Residential Land in Delhi per Sq m for the period (01.04.1981 to 31.03.1985 i.e., Rs. 2,000/- per Sq. m. for area under the Jurisdiction of Lajpat Nagar (abutting Ring Road & Link Road).

Therefore, Fair Value as on 01.04.1981 = Rs. 2,000 \* 418.64 Sq.m.  
= Rs. 837,280/-

# CII for the F. Y. : 2006-07 = 519 CII  
for the F. Y.: 1981-82 = 100

*Thus, in light of the above, I shall submit for your honor's kind perusal, the fact that the said addition by the Ld. Assessing officer is without giving a reasonable opportunity of being heard and without considering the facts as stated above, which in turn has caused unjust and undue hardships in my hands."*

4.1 I find that the order in the peculiar facts of the present case cannot be said to be a speaking order. Accordingly, in the light of the submissions of the parties before the Bench, the impugned order is set aside back to the file of the AO with a direction to first decide the jurisdictional issue and thereafter if need be to proceed to decide the issue on merits. Needless to say that a reasonable opportunity of hearing shall be granted to the assessee. Said order was pronounced in the open court at the time of hearing itself.

5. In the result, the appeal of the assessee is allowed for statistical purposes.

6. Since in ITA 7811/del/2017 the correctness of the penalty order passed by the AO u/s 271(1)(c) which has been sustained by the Ld. CIT(A) has been assailed. In view of the fact that the quantum order has been set aside back to the AO, the same becomes infructuous. Accordingly, the penalty cannot survive. The appeal of the assessee is dismissed as infructuous.

7. In ITA 7812/del/2017 the penalty imposed u/s 271(1)(b) upheld in appeal by the CIT(A) is assailed. On a perusal of the record, it is seen that the specific date on account of which the said penalty has been levied has not been referred to in the order. Even otherwise, the assessee has canvassed that the assessment order passed u/s 144 was passed without issuing notice to the assessee which issue has been set aside to the file of the AO. Accordingly, on considering the impugned order and the penalty order, the order has to be quashed. It is seen from the penalty order that various dates have been mentioned by the AO, however, he fails to address the specific date on account of which fact penalty of Rs. 10,000/- has been imposed. The ld. Sr.DR was specifically required to point out the specific date taken note of by the AO. In the absence of relevant discussion in the order, she could not point out the same. Since the correctness of the assessment order itself is in flux, the penalty order is quashed. Said order was pronounced in the open court at the time of hearing itself.

8. In the result, ITA No. 7810/Del/2017 is allowed for statistical purposes, ITA 7811/Del/2017 is dismissed as infructuous and ITA No. 7812/Del/2017 is allowed.

Order pronounced in the open court on 24<sup>TH</sup> May 2018.

Sd/-

**(DIVA SINGH)**  
**JUDICIAL MEMBER**

\*Kavita Arora/Poonam(CHD)

Copy forwarded to:

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2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT
- 6.

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