

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT
AND SHRI VIKAS AWASTHY, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.1149/PUN/16
निर्धारण वर्ष / Assessment Year : 2011-12

Smt. Asha Sushil Agarwal,
"Basera", Plot No.46,
Sector 25, PCNTDA,
Nigdi, Pune – 411 044
PAN : AARPA0352Q

Vs.

The Pr. CIT-5,
Pune

(Appellant)

(Respondent)

Appellant by
Respondent by

Shri Vipin Gujarathi
Ms. Nandita Kanchan

Date of hearing 08-04-2019
Date of pronouncement 09-04-2019

आदेश / ORDER

PER R.S.SYAL, VP :

This appeal by the assessee is directed against the order dated 30-03-2016 passed by the Pr.CIT-5, Pune u/s.263 of the Income-tax Act, 1961 (hereinafter also called 'the Act') in relation to the assessment year 2011-12.

2. Briefly stated, the facts of the case are that the assessment in this case was completed u/s.143(3) of the Act on 20-03-2014 accepting the declared income at Rs. 3,02,48,100/-. The ld. Pr. CIT, on scrutiny of assessment records, observed that the

assessment order passed by the Assessing Officer (AO) was erroneous as well as prejudicial to the interest of the Revenue on the ground that the assessee claimed long term capital gain in respect of certain commercial shops transferred to third persons, which were earlier transferred by her proprietorship concern to self, and the same ought to have been taxed as 'Business income'. Apart from that, the ld. Pr. CIT also held the assessment order to be erroneous on account of non-charging of interest. The assessee's submissions did not find favour with the ld. Pr. CIT, who concluded the assessment order to be erroneous as well as prejudicial to the interest of the Revenue. The assessment order was set-aside and the matter was restored to the file of AO for framing the assessment afresh after allowing opportunity of hearing to the assessee.

3. We have heard both the sides and perused the relevant material on record. The assessee is a proprietor of "Goyal Developers". A development agreement was signed between Pimpri Chinchwad Municipal Corporation (PCMC) and Goyal Developers on 13-09-2002, under which the assessee got the right to develop commercial properties on a certain piece of land allotted to her. The assessee was liable to pay certain

amount at a specified rate on per sq.ft. basis to PCMC and 4000 sq.ft. of built up area. In lieu of that, the assessee was to get possession of the developed complex. The assessee purchased and executed a sale deed between Goyal Developers (her own proprietorship concern) and herself on 06-03-2007 for 11 shops in the commercial complex developed on the PCMC land for a sum of Rs.1.30 crore, which amount was credited to the Profit and loss account. During the year under consideration, the assessee sold such 11 shops for a sum of Rs.5.35 crore. In the return filed for the year under consideration, the assessee computed long term capital gain on transfer of such shops, after applying indexation, at Rs.2,72,53,656/-. These shops which would otherwise have been transferred as stock in trade by the assessee resulting into generation of business income, were shown to have been sold as capital asset. We are unable to comprehend as to how a person can sell certain property to himself/herself. In order to carry out a sale, it is necessary that there should be two parties viz, one the buyer and the other seller. Under no such circumstances, both the buyer and the seller can be one and the same person. Here is a case in which the proprietorship concern of Mrs. Asha Sushil Agarwal (assessee), transferred such shops to herself, namely, Mrs. Asha

Sushil Agarwal. In our considered opinion, the execution of such a registered sale deed between the same persons is illegal and the resultant showing Rs.1.30 crore to the credit side of the Profit and loss account for the A.Y. 2007-08 is inconsequential. Further, the Id. AR could not point out that the credit to the Profit and loss account for the A.Y. 2007-08 was on market price basis. In this exercise, the full sale value of Rs.5.35 crore which would have otherwise been shown as business income in the instant year got squeezed to a mere long term capital of Rs.2.72 crore. The AO ought to have examined the transaction, which he miserably failed to do. There is no reference whatsoever of this transaction in the assessment order. The Hon'ble Supreme Court in *Malabar Industrial Company Ltd. Vs. CIT (2000) 243 ITR 83 (SC)* has held that where AO does not apply his mind before completing the assessment, the revisional order passed u/s.263 has to be held as valid.

4. At this stage, it is pertinent to mention that the Finance Act, 2015 w.e.f. 01-06-2015 has inserted Explanation (2) to section 263 deeming the assessment order to be erroneous in so far as it is prejudicial to the interest of the Revenue, if in the opinion of the Pr. CIT, *inter alia*, : `the order is passed without making

inquiries or verification which should have been made' or 'the order is passed allowing any relief without inquiring into the claim'. In the hue of the above mandatory statutory prescription, which is applicable to the facts and circumstances of the instant case, we have no hesitation in ruling that the Id. Pr. CIT was fully justified in holding the assessment order to be erroneous as well as prejudicial to the interest of the Revenue thereby setting aside the same. We, therefore, uphold the impugned order.

5. In the result, the appeal is dismissed.

Order pronounced in the Open Court on 09th April 2019.

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Sd/-
(R.S.SYAL)
VICE PRESIDENT

पुणे Pune; दिनांक Dated : 09th April, 2019
सतीश

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "B" / DR 'B', ITAT, Pune;
4. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,**// True Copy //**

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	08-04-2019	Sr.PS
2.	Draft placed before author	08-04-2019	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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