

**IN THE INCOME TAX APPELLATE TRIBUNAL
“D” BENCH, AHMEDABAD**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER &
Ms. MADHUMITA ROY, JUDICIAL MEMBER**

I.T.A. No.1069/Ahd/2016
(Assessment Year : 2009-10)

Shri Shiraz Behram Contractor, Vs. DCIT,
‘Shiphidol’, 8, Fatehgunj, Circle – 1(2)1, Baroda.
Vadodara.

And

I.T.A. No.1139/Ahd/2014
(Assessment Year : 2009-10)

Shri Shiraz Behram Vs. ACIT,
Contractor, ‘Shiphidol’, 8, Circle – 2(2), Baroda.
Fatehgunj, Vadodara.

[PAN No. ACBPC 4149 F]

(Appellant)

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(Respondent)

Appellant by : Shri M.J. Shah, A.R.

Respondent by : Shri Uma Shankar Prasad, Sr. D.R.

Date of Hearing 14.02.2019

Date of Pronouncement 03.05.2019

ORDER

PER Ms. MADHUMITA ROY - JM:

Both the appeals filed by the assessee are against the order dated 09.12.2015 passed by the Commissioner of Income Tax (Appeals)-4, Vadodara under section 143(3) r.w.s. 263 of the Income Tax Act, 1961 (in short ‘The Act’) arising out of the order dated 05.01.2015 passed by the DCIT Circle - 1(2), Baroda for Assessment Year 2009-10 and the order dated 24.02.2014

passed by the Commissioner of Income Tax-I, Baroda under section 263 of the Act arising out of the orders dated 28.12.2011 passed by the DCIT, Circle - 2(2), Baroda for A.Y. 2009-10.

Since both the appeals relate to same assessee those are heard analogously and are being disposed of by a common order.

ITA No.1139/Ahd/2014 for A.Y. 2009-10 :

2. The brief facts leading to this case is this that the assessee initially filed its return of income on 20.11.2009 declaring total income at Rs.97,65,659/- which was processed u/s 143(3) of the Act. Such income was declared by the assessee comprised of salary income, income from capital gain and income from other sources, which was finalized on 28.12.2011 upon determination of assessed income at Rs.1,02,50,559/- On verification of the records, it was found by the Learned CIT that the order passed by the Learned AO was erroneous in so far as prejudicial to the interest of the revenue on the following aspect:

"Whereas it is noticed that in respect of LTCG that the assessee had sold a property at Devika on 13.08.2008 for Rs.6,00,000/-. The value of property as 01.04,1981 was determined at Rs.7,57,800/- (Value of construction 5,01,840/- + Value of land 2,56,000/-) by a private valuer. After getting benefit of indexation, LTCG on this property was worked out at Rs.15,89,604/-. The valuer had valued the constructed structure excluding land at Rs.5,01,840/-.

However, as per the valuation report and sale deed, the property was constructed during Portuguese regime and its written history is available only from 1944. It was further noticed from the valuation report, where the valuer has himself stated that "bungalow was in very bad and dilapidated condition. It cannot be repaired with minimum expenses. The cost of reconditioning of structure will be as good as building a new structure". This clearly indicated that in the valuer own admission the value of the structure was 'nil'. As such, while computing value of property, it was required to be taken as zero."

In that view of the matter, a show-cause dated 18.12.2013 u/s 263(1) was issued against the assessee, upon which the assessee filed a written submission on 11.02.2014, wherein the assessee submitted as follows:

"I am in receipt of your above referred notice wherein you have mentioned that as per the Valuation Report, the impugned property was constructed during Portuguese Regime and its written history is available from 1044. It was further noticed by you from the Valuation Report that the Valuer has himself stated that "bungalow was in very bad and dilapidated condition. It cannot be repaired with minimum expenses. The cost of reconditioning of structure will be as good as building a new structure" On the basis of above remarks, you have assumed the value of structure as 'NIL'

In the matter I would like to highlight that –

First of all valuation of whole property is done for the purpose of valuation of Capital Gain and that the date of valuation is 1-4-1081. Whereas the Valuer Report is dated 30-1-2009 that is inspection of the property by the Valuer is 30.01.2009 and above referred description given by the Valuer is for 30-1-2000 only and Undoes not relate to the date of valuation i.e. 1-4-1081.

The Valuer has put a remark of the present condition of the property. However, the valuation of the property, as per his Valuation Report, is as under:

<i>Construction Cost:</i>	<i>Rs.5,01,840</i>
<i>Land Area:</i>	<i><u>2,56,000</u></i>
<i>Total:</i>	<i>Rs.7,57,840</i>
<i>Net Value:</i>	<i>Rs.7,57,840</i>

As per Section 48 of the I.T Act, in case of property which is owned by the assessee before 1-4-1981. the value of property shall be taken as on 1-4-1981 and the same shall be increased as per cost of indexation applicable to it.

Generally, value of property is valued by the competent Valuer and in our case valuation of the property is valued by the approved Valuer who is approved by the Income Tax Department.

Further, earlier the case was under scrutiny and the same has been assessed by the A.O. U/s 143(3) wherein your assessee has submitted Valuation Report and on the basis of Valuation Report, he has accepted the value of the property as reported in the Valuation Report, i.e. A.O. has applied his mind while processing the Assessment Order and has accepted the value as it is.

It will not be out of place if I mention that there cannot be Nil Value for any structure, since even wood, bricks, stones, any building material will have value. In my case the building may be very old but it has a value and therefore, after considering all these aspects, the Valuer has valued the property.

Further, valuation of property is highly technical matter and value can be determined by the technical person, who has a knowledge of such a valuation. The same approach has been followed by your assessee and your assessee has obtained a Valuation Report from an approved Valuer, who has valued the property and the same has been adopted by your assessee while filing the Return of Income.

The value of property is based on several factors and this being highly technical, can be determined by a technical person only when the valuation is to be determined for a previous date as compared to present valuation, which is based on market forces and can be adopted by taking a juntry value as declared by the State Government.

In view of above. I request you to kindly drop the penalty proceedings and oblige.”

However, such plea of the assessee was not accepted by the Learned CIT and he thus set aside the order passed by the Learned AO with a further direction upon him to pass a fresh order after bringing on record all relevant evidences making enquiry and also after giving the assessee an opportunity of being heard. While doing so, the Learned CIT observed that the Registered Valuer report suffers from self contradiction. The bungalow is in extremely dilapidated condition and was not in a position of being repaired and apparently had no market value and yet the same has been estimated by the Registered Valuer at a very high value, this particular aspect of the matter has not been examined by the Assessing Officer as also opined by the Learned CIT. The comparable instances given by the Registered Valuer has not been verified by the Assessing Officer. In order to attract the point as raised by the

assessee that valuation is a technical matter and can be determined by the technical person, the Learned CIT observed that the Assessing Officer is not precluded from applying his mind to this issue. It was the contention of the Learned CIT that since the Assessing Officer did not make proper enquiry and failed to apply his mind, the order is both prejudicial as well as erroneous. Hence, the instant appeal before us.

3. At the time of hearing of the appeal, the Learned AR appearing for the assessee submitted that initially the assessment was finalized upon scrutiny by the Learned AO wherein, the valuation report was duly submitted by the assessee. Further that the valuation of property was done for the purpose of valuation of capital gain and thus though the valuation was done as on 01.04.1981 but the valuer report was of dated 30.01.2009, when upon inspection of the property description was made by the valuer which does not relate to the date of valuation i.e. 01.04.1981 but practically as on 30.01.2009. It was argued by the Learned AR that on the basis of the valuation report upon application of mind the Learned AO accepted the value of the property.

Since while passing assessment order the Assessing Officer had applied his mind on the issue under consideration and accordingly pass orders, the finding of the Learned CIT that the cost of property should be taken as Nil for calculation of the long term capital gain seems to be changed of opinion. He also placed relied on the judgment passed by the Jurisdictional High Court in the case of PCIT-vs-CLP India Pvt. Ltd. On the contrary, the Learned DR relied upon the order passed by the authorities below.

4. Heard the respective parties, perused the relevant materials available on record. The valuation report dated 30.01.2009 which is on record before us has also been duly taken care of where the date of valuation made as mentioned was of 30.01.2009. The description given in the said valuation report in respect of the property in question is as follows:

“The property consisting of an N.A. land bearing plot no. 38 of village Devka in the Dist. Daman, is located on the main road from Nani Daman to Devka. it admeasures 6400.00 sq.mt. land area. The Bungalow existing on the plot is known as "HILL VIEW" bungalow, it is an old structure, traditional architectural style, built in stone, bricks and wood. As it is not in use for quite long and not maintained so far, It is in a very bad and dilapidated condition. It apparently seems that it cannot be repaired with minimum expenses. The cost of reconditioning of the structure will be as good as building a new structure.

Thus, even though the location of the plot is on the main road (prime area), the construction on the plot is not possible as on today, and the utility, usage of the plot is nil except, keeping it open Moreover the plot is at higher level and the soil is rocky. The level of the ground near the existing bungalow is approximately 10'-0" higher than that of the existing main road.

There is a nala passing through the approach culvert which is partly broken. At present there is no direct approach to the plot from the main road and it is observed that there is village road on the rear side (East side) of the plot from which the vehicle can be brought to the plot. There is no new construction near by, not seen for many years, in the line with the existing bungalow.”

Thus it appears that the property was described in its present condition since the verb ‘is’, is available in the 6th line of the first paragraph of description at Page 5 of the valuation report. It was further mentioned that the present condition of the structure is not good, not in use, not repairable. Presently no water or electric power connection is available and no direct approach to the plot is found. The plot is covered by illegal tents. The Learned CIT in the second paragraph of this notice observed “bungalow was in very bad and dilapidated condition. It cannot be repaired with minimum expenses.

The cost of reconditioning of structure will be as good as building a new a new structure”. But it does not reflect the actual position of the matter. The description of the property given in the valuation report as on the date of inspection i.e. on 30.01.2009 and not on 01.04.1981 but the valuation was assessed as on 01.04.1981. This particular aspect of the matter has not at all been taken care of by the Learned CIT(A) which had already been taken care of by the Learned AO in the original assessment proceeding under scrutiny. The change of opinion is thus apparent of the face of records. Further that, merely because the AO adopted one of the two views possible and that as has resulted in loss of revenue it cannot be treated as erroneous order prejudicial to the interest of the revenue. In fact, A plain reading of Section 263 of the Act suggests that the commissioner may call for and examine the records of any proceeding under this Act, and if he considers firstly that the order passed by the Assessing Officer is erroneous so far as it is prejudicial to the interest of the revenue, then he, may, upon making an enquiry after giving the assessee an opportunity of hearing can pass such order thereon as the circumstances of the case justify including an order of enhancement or modification of the order or cancellation of the assessment order and direct a fresh assessment by the Assessing officer. Therefore, the first and foremost condition is to satisfy that the order passed by the Assessing Officer is erroneous and the same is prejudicial to the interest of Revenue. In the instant case, we have gone through the order passed by the Learned CIT but we have failed to understand as to why such order passed by the Assessing Officer is erroneous.

It is the law of the land that before the Commissioner exercise jurisdiction of suo moto revision he has to be satisfied about the fulfillment of twin conditions as stated above namely; (i) the order of Assessing Officer

sought to be revised is erroneous, (ii) it is prejudicial to the interest of Revenue. If one of them is absent recourse cannot be had to Section 263(1) of the Act. If the order is erroneous but is not prejudicial to the interest of Revenue or if the order is not erroneous but is prejudicial to the interest of Revenue, the Commissioner of Income Tax cannot exercise revisional powers. It has been further held that when the Assessing Officer has adopted one of the courses permissible in law and it has resulted in loss of Revenue it cannot be treated as prejudicial to the interest of Revenue or where two views are possible and the AO has taken one view with which the Commissioner does not agree, the order cannot be treated as an erroneous order prejudicial to the interest of the Revenue unless the view taken by the AO is unsustainable in law. In the present case, action of the Commissioner will have to be tested at the anvil of the aforesaid principles.

In our considered view, the order of the AO could not be termed as erroneous or prejudicial to the interest of the revenue warranting exercise of revisional jurisdiction u/s 263 because the Learned CIT formed a different opinion. The valuer as simply commented upon condition of the property during the course of his verification only. This does not automatically mean that property was under bad and dilapidated condition as on 01.04.1981. However, we find that when two views are possible and that has resulted in loss of the revenue it cannot be treated as erroneous order prejudicial to the interest of the revenue unless the view taken by the Assessing officer is unsustainable in law. So far as the allegation against the Assessing Officer for not making proper enquiry during original assessment preceding, the Learned AR relied upon the judgment passed in the matter of PCIT-vs-CLP India Pvt.

Ltd. which we have also taken care of. The relevant portion whereof is as follows:

“5. Having heard learned counsel for the Revenue we may not entirely agree with the observation of the Tribunal in the impugned judgement when it seems to be suggesting that merely because the Assessing Officer noted the provision of section 40(a)(ia) and made certain limited disallowance, the order of assessment cannot be taken into revision. We do not propose to lay down such broad legal propositions. Nevertheless in the facts of the present case we are not inclined to interfere for entirely different reasons. As noted the assessee's contentions before the Assessing Officer and the Commissioner was that the recipient of the payments, the German Company had no tax liability and there was therefore no question of deducting tax at source and further that with respect to the second head of payments, the assessee company had merely corrected an error and recovered the amounts from the company. These issues were before the Assessing Officer and unless shown to the contrary can be presumed to have been considered by him while not making the additions. If the Commissioner was of the opinion that either of the two contentions were invalid in facts or law, he ought to have come to such a conclusion without holding to the contrary. He merely brushed aside the assessee's contentions observing that the Assessing Officer had not made proper inquiries. For such reasons, tax appeal is dismissed”

Upon going through the records particularly the order passed by the Learned AO, we find nothing contrary to come to a conclusion that the Learned AO has not made any enquiry in the assessment proceeding.

Taking into consideration, the entire aspect of the matter we are of the considered view that the order impugned before us is nothing but a change of opinion and the very basis of such order i.e. the finding of the CIT does not depict the original factual matrix of the matter. At the cost of repetition we say that the valuation of the property was made upon inspection on 31.01.2009. The description of the property was in respect of that relevant point of time and not of the 01.04.1981 of which the valuation was assessed by the registered valuer. Since, the very basis of the finding of the CIT is not proper, we find no merit in the order impugned before us u/s 263 of the Act passed by the Learned

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CIT. Thus, the same is hereby quashed. The appeal preferred by the assessee is, therefore, allowed.

ITA No.1069/Ahd/2016 for A.Y. 2009-10:

5. Since the very basis of this appeal being order dated 24.02.2014 u/s 263 of the Act, 1961 has been quashed by us, this appeal becomes infructuous and hence dismissed as infructuous.

6. In the combined result, the appeals filed by the assessee bearing ITA No.1139/Ahd/2014 is allowed and ITA No.1069/Ahd/2016 is dismissed as infructuous.

This Order pronounced in Open Court on 03/05/2019

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

Ahmedabad; Dated 03/05/2019

Priti Yadav, Sr.PS

Sd/-
(Ms. MADHUMITA ROY)
JUDICIAL MEMBER

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-4, Vadodara & I, Baroda.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt.Registrar)

आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad