

**IN THE INCOME TAX APPELLATE TRIBUNAL  
LUCKNOW BENCH 'B', LUCKNOW**

**BEFORE SHRI A. D. JAIN, VICE PRESIDENT AND  
SHRI T. S. KAPOOR, ACCOUNTANT MEMBER**

ITA No.511 & 512/Lkw/2017  
Assessment Year:2012-13

Shri Prem Manohar Gupta, 77, Factory Area, Fazalganj, Kanpur. PAN:ACDPG 9412 D (Appellant)	Vs.	Dy.C.I.T.-2, Kanpur.  (Respondent)
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Appellant by	Shri Ashish Jaiswal, Advocate
Respondent by	Shri Sushil Kumar Madhuk, CIT (D.R.)
Date of hearing	24/04/2019
Date of pronouncement	03/05/2019

**ORDER**

**PER BENCH:**

These two appeals have been filed by the assessee against the separate orders of learned CIT(A), both dated 09/05/2017. The grounds raised by the assessee are as under:

**I.T.A. No.511/Lkw/2017**

"1. That the Ld.CIT(A) has erred in dismissing the appeal filed against the order of AO passed u/s 251/143(3) of the IT Act, 1961 on the issue and applicability of section 36(1)(iii) of the IT Act, 1961 and addition worked out at Rs.38,89,062/-.

2. That the Ld.CIT(A) has erred in not taking the cognizance of the fact that the Id.AO has not gone into the applicability of section 36(1)(iii) on the facts of the case and has worked out the disallowance erroneously without application of mind.

3. That the Ld.CIT(A) has erred in not taking the cognizance of the submission made before him that the finding in Id.CIT(A)

*order against the assessment order u/s 143(3) on the issue of section 36(1)(iii) is erroneous and doesn't relate to appellate proceeding carried by the Ld.CIT(A) and facts of the case as well as submission made before him.*

4. *That the Ld.CIT(A) has erred in giving finding that the appellant has not accepted the order and filed appeal before the hon'ble ITAT, whereas the appeal was filed only to the extent of addition sustained and not on the issue of section 36(1)(iii) which was independent from the appeal filed.*

5. *That the Ld.CIT(A) has erred in directing the AO to work out the disallowance u/s 36(1)(iii) in case of non relative depositors, whereas the AO erred in working out disallowance in case of relative without application of mind."*

#### **I.T.A. No.512/Lkw/2017**

"1. *That the Ld.CIT(A) has erred in not rectifying the mistake apparent on record in the appellate order u/s 154 of the IT Act, 1961.*

2. *That the Ld.CIT(A) has erred in not taking cognizance of the facts and submission made before him that the finding made by the Ld.CIT(A) in his order is erroneous and does not relate the appellants case and appellate proceedings.*

3. *That the Ld.CIT(A) has erred in recording the finding of the fact that appellant has admitted lending does not have commercial expediency, whereas the appellant neither during appellate proceeding nor at any stage admitted this fact.*

4. *That the Ld.CIT(A) has erred in not providing appropriate relief by rectifying the order by correcting the facts of the case and finding upon it, which has lead to erroneous addition made by the AO on reliance to order of CIT(A)."*

2. These appeals are interconnected and were heard together therefore, for the sake of convenience a common and consolidated order is being passed.

3. The facts, in brief are that assessment of the assessee was completed u/s 143(3) of the Act and various disallowances were made. Against the

order of the Assessing Officer, the assessee filed appeal before the learned CIT(A) who upheld the order of the Assessing Officer. Besides upholding the order of the Assessing Officer, he further directed the Assessing Officer to make a further disallowance u/s. 36(1)(ii) of the Act. The assessee filed appeal before the Hon'ble I.T.A.T. and the Hon'ble I.T.A.T. vide order dt 7/12/2016 partly allowed relief to the assessee. The assessee had challenged the additions sustained by the learned CIT(A) before the Hon'ble I.T.A.T. but had not challenged the directions of the learned CIT(A) with regard to addition u/s. 36(1)(iii) of the Act. In the meantime, in view of the learned CIT(A)'s directions, the Assessing Officer, vide order dated 31/08/2016, passed a consequential order and further made a disallowance of Rs.38,89,062/- u/s 36(1)(iii) of the Act. Against such order of the Assessing Officer the assessee filed appeal before learned CIT(A) but learned CIT(A) dismissed the appeal of the assessee and therefore, the assessee is in appeal before us in ITA No.511/Lkw/2017. The assessee also filed rectification application before the learned CIT(A) which again was dismissed and against which the assessee again filed appeal before this Tribunal which is in the form of I.T.A. No.512.

3. At the outset, Learned A. R. invited our attention to additional ground of appeal which was filed by the assessee on 30/05/2018 and it was argued that since the ground of appeal taken by the assessee is legal in nature therefore, the same may be admitted and reliance in this respect was placed on a number of case laws including the Supreme Court decision in the case of NTPC Limited. We noted that the additional ground taken by the assessee was the action of learned CIT(A) by which he has enhanced the income of the assessee without issuing notice of enhancement to the assessee. The additional ground of appeal taken by the assessee reads as under:

*"That the learned CIT(A) has erred in giving finding in the form of direction to the Assessing Officer under section 36(1)(iii) of the I.T. Act resulting in enhancement of income without issuing notice of enhancement to the appellant."*

3.1 Learned D. R. had no objection to admission of additional ground and the ground being legal in nature, the same was admitted and assessee was asked to proceed with his arguments.

4. Learned A. R. in this respect invited our attention to the assessment order placed at pages 31 to 34 of the paper book and submitted that vide order dated 27/02/2015, besides other additions, the Assessing Officer had made addition of Rs.12,47,183/- u/s 40A(2)(b) of the Act. It was submitted that against the assessment order the assessee filed appeal before CIT(A). The learned CIT(A), vide order dated 29/06/2016 placed at pages 20 to 26 of the paper book, not only upheld the disallowance u/s 40A(2)(b) but also directed the Assessing Officer to further make the disallowance u/s 36(1)(iii) of the Act. Learned A. R. submitted that the CIT(A) has in fact enhanced the income of the assessee without giving notice to the assessee which is in violation of the provisions of law and therefore, the order of learned CIT(A) directing the Assessing Officer to make further disallowance is null and void keeping in view the decision of Hon'ble Pune Bench of the Tribunal in the case of Naresh Sunderlal Chug vs. Income Tax Officer [2018] 171 ITD 116 (Pune Trib.) and further reliance was placed on the decision of Delhi Bench of the Tribunal in the case of Bikram Singh vs. DCIT [2016] 48 ITR (T) 689 (Delhi Trib.). Therefore, it was prayed that order of learned CIT(A) to this extent be held as null and void.

5. Learned D. R., on the other hand, heavily relied on the orders of the authorities below.

6. We have heard the rival parties and have gone through the material placed on record. We find that in the assessment order completed u/s 143(3), the Assessing Officer had made disallowance out of interest expenses amounting to Rs.12,47,183/- on account of disallowance u/s

40A(2)(b). Besides the above disallowance, certain other disallowances were made. The assessee filed appeal before CIT(A), who vide order dated 29/06/2016 partly allowed the appeal of the assessee but upheld the disallowance u/s 40A(2)(b) of the Act. Besides upholding the disallowance, the learned CIT(A) directed the Assessing Officer to make further disallowance u/s 36(1)(iii) of the Act. The assessee against the order of learned CIT(A), filed appeal before the Tribunal and Tribunal vide order dated 07/12/2016 allowed relief to the assessee on account of disallowance u/s 40A(2)(b). However, the grievance of the assessee regarding direction to the Assessing Officer for further disallowance u/s 36(1)(iii) was not taken to the Tribunal. In the meantime, the Assessing Officer passed a consequential order dated 31/08/2016 and thereby made a disallowance of interest u/s 36(1)(iii) amounting to Rs.38,89,062/-. The learned CIT(A) dismissed the appeal of assessee simply by saying that Assessing Officer had complied with the directions of learned CIT(A) and therefore, the assessee has filed appeal before this Tribunal. The assessee vide additional ground of appeal has challenged the action of learned CIT(A) in directing the Assessing Officer to make further disallowance u/s 36(1)(iii) on the basis that no notice for enhancement was given to the assessee. In this respect we find that section 251 deals with the powers of CIT(A) whereby he can allow the appeal or can enhance the appeal or can annul the assessment. However, sub clause (2) of section 251 states that CIT(A) shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction. In the present case, it is apparent from the order of learned CIT(A) that no such opportunity was given to the assessee nor was Learned D. R. able to demonstrate that opportunity was given to the assessee. Therefore, there is violation of principles of natural justice. Hon'ble Pune Bench of the Tribunal in the case of Naresh Sunderlal Chug vs. Income Tax Officer [2018] 171 ITD 116 (Pune Trib.), vide order dated

12/04/2018 has held that CIT(A) cannot enhance the assessment without giving an opportunity or show cause notice of enhancement to the assessee. The findings of Hon'ble Tribunal, as contained in para 14 & 15, are reproduced below:

*"14. The CIT (A) after receiving the submission of assessee, remand report of Assessing Officer and comment of assessee, went on to decide the issue as to assessability of gain arising on transfer of development rights. It may be pointed out herein itself, the said issue of assessability of capital gain was completed before the Assessing Officer who accepted the stand of assessee that the said gain was to be assessed as income from capital gains. There was no dispute about the assessability of gains as income from Long Term Capital Gain. The only dispute was that whether against such gains, the assessee could claim deduction under section 54F of the Act on account of investment in new asset. In this regard, action of the CIT (A) in holding that the said income on sale of development rights was to be treated as adventure in the nature of trade/ business income, was not correct as per provisions of the Act. The powers of CIT (A) are coterminous with the power of Assessing Officer. In other words, the CIT (A) has wide power while deciding the appeal. However, as per Clause (2) of Section 251 of the Act, it is provided that the CIT(A) shall not enhance an assessment or a penalty or reduce the amount of refund, unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction. The Explanation talks about the power of CIT(A) in deciding the appeal and stresses that he may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the CIT (A) by the appellant. In view of the said provisions, the CIT (A) has power to decide any matter arising out of the proceedings but the said power has to be exercised after giving reasonable opportunity to the assessee to show cause against such enhancement or reduction. The CIT (A) was not only changing the head of income but was also enhancing the assessment, since income which is assessed in the hands of assessee as per. direction of CIT (A) had worked out at Rs.49,41,225/- as against income assessed by the Assessing Officer under the head Long Term Capital Gain at Rs.48,75,610/-. The second aspect is rate of tax. In case income is assessed under the head Long Term Capital Gain, the*

*rate of tax is lower than the rate applied when the income is being assessed as business income. In view thereof in not giving an opportunity or any show cause notice of enhancement as required under section 251(2) of the Act, the order of CIT (A) suffers from infirmity and the same cannot be sustained.*

*15. Another point to be noted here is that when income was assessed under the head Long Term Capital Gain, then rate of tax was lower than the rate applied when the income was being assessed as business income. Regarding second aspect, the Ld. DR for the Revenue submitted that where issue of different head of income had arisen, assessability was done by the Assessing Officer, then notice had to be issued by Assessing Officer, when remand report was called for his comments. It may be pointed out herein in itself that after assessing income as Long Term Capital Gain, Assessing Officer proposed to assess income as income from other sources, as per his comment in the remand report, which was confronted to the assessee; but when the income was assessed as business income, no notice whatsoever, was given by CIT (A). Accordingly, we hold that the enhancement made by CIT (A) does not survive. Thus, we reverse the order of CIT (A). The income was assessed in the hands of assessee as income from Long Term Capital Gain. The CIT (A) vide Para 15 and 16 has decided the issue of entitlement of claim under section 54F of the Act and held the assessee to be eligible for said claim. The Revenue is not in appeal against the order of CIT (A). Accordingly, we direct the Assessing Officer to allow claim of assessee under section 54F of the Act. The grounds of appeal raised by assessee are thus, allowed."*

Similarly, Hon'ble Delhi Tribunal in the case of Bikram Singh vs. DCIT [2016] 48 ITR (T) 689 (Delhi Trib.), vide order dated 13/03/2016 has held that CIT(A) cannot touch upon an issue which does not arise from the order of assessment and was outside scope of assessment. The relevant findings, as contained in para 11, are reproduced below:

*"11. We have perused all the records and heard both the counsels, it is pertinent to know that the Assessing Officer has not dealt the reply and the enclosures/documents given on the date of assessment order i.e. 19/11/2011, the same was not testified before the CIT(A). The CIT(A) should have taken cognizance of all those records and the letters. This shows that*

*the CIT (A) has totally ignored this letter along with the enclosures/documents and passed the order accordingly which is not tenable under the law. The appropriate opportunity was not given to the assessee. The A.O has proceeded to compute income of the assessee on the basis of the income as per intimation u/s 143(1) of the Act; whereas the A.O was required to compute the income of the assessee on the basis of income returned. This was a ground raised before the CIT(A) and is a part of ground of appeals in the present appeal. It being wholly legal ground of the appeal deserves to be adjudicated. The Assessing Officer has acted beyond the jurisdiction by computing income of the assessee on the basis of the income as per Section 143(3) where as the intimation was u/s 143(1). The CIT(A) acted beyond its power by directing the Assessing Officer to tax the capital gains in respect of sale of land at Gurgaon, though, there was no addition made by the Assessing Officer in the assessment order to that respect. Capital gain is an independent and different source of income and was not the subject matter of appeal before him nor was the issue considered by the Assessing Officer by framing an assessment order. Instead, the Assessing Officer termed the same as commission on the sale of land. The Ld. AR has relied on the various case laws more preciously that of Shapoorji Pattonji Mistry v. CIT [1958] 34 ITR 342 (Bom.) (confirmed by the Apex Court in CIT v. Shapoorji Pattonji Mistry [1962] 44 ITR 891 (SC) wherein the Hon'ble Bombay High Court while dealing with the powers of the CIT(A) held that CIT(A) was not empower to enhance an income on an issue which was not the subject matter of the assessment. The ratio laid down in the judgment of full Bench of Delhi High Court in the case of Sardari Lal & Co. (supra) is also relevant in assessee's case that the CIT(A) cannot touch upon an issue which does not arise from the order of the assessment and was outside the scope of the order of the assessment. The order of the CIT(A) does not sustain."*

6.1 In the present case, we find that though assessee had not agitated before Hon'ble Tribunal the issue of directions given by learned CIT(A) when he first agitated the order of the CIT(A) but when the Assessing Officer passed the order for making compliance of the directions, only then the assessee challenged the directions as an additional ground. Though the earlier order of the learned CIT(A) dated 29.06.2016 merged with the order of Hon'ble Tribunal dated 07.12.2016 and wherein the directions of learned

CIT(A) were neither challenged nor adjudicated and therefore the order of the Hon'ble Tribunal had attained finality but in the present case the cause of action against the directions of learned CIT(A) survive to the assessee when vide order dated 31.08.2016 the Assessing Officer complied with the directions and made the addition as per the directions. Therefore, the action of assessee challenging the power of giving directions by learned CIT(A) without giving notice to the assessee is justified. In the present case, we find that the assessee was not provided an opportunity before making direction to Assessing Officer for making further disallowance u/s 36(1)(iii) of the Act. Moreover, we find that subject matter of the appeal before learned CIT(A) was not relating to disallowance u/s 36(1)(iii). The assessee had only agitated the disallowance u/s 40A(2)(b) and therefore, also the learned CIT(A) was not empowered to touch upon an issue which was not in the assessment order. Therefore, keeping in view the above facts and circumstances and judicial precedent we allow the appeal of the assessee in I.T.A. No.511/Lkw/2017.

7. The appeal in I.T.A. No.512/Lkw/2017 is against the dismissal of application u/s 154 of the Act, filed with the CIT(A) on the same issue which, due to our decision in I.T.A. No.511 has become infructuous therefore, the same is dismissed as infructuous.

8. In the result, appeal in I.T.A. No.511 is allowed whereas appeal in I.T.A. No.512 is dismissed as infructuous.

(Order pronounced in the open court on 03/05/2019)

**Sd/.**  
**( A. D. JAIN )**  
**Vice President**

**Sd/.**  
**( T. S. KAPOOR )**  
**Accountant Member**

Dated:03/05/2019

\*Singh

**Copy of the order forwarded to :**

1. The Appellant
2. The Respondent.
3. Concerned CIT
4. The CIT(A)
5. D.R., I.T.A.T., Lucknow