

आयकर अपीलीय अधिकरण, दिल्ली न्यायपीठ "ए", नई दिल्ली में

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A', NEW DELHI**

सुश्री सुषमा चावला, न्यायिक सदस्य एवं डॉ.बी. आर. आर. कुमार, लेखा सदस्य के समक्ष

**BEFORE MS. SUSHMA CHOWLA, JUDICIAL MEMBER &
DR.B.R.R.KUMAR, ACCOUNTANT MEMBER**

आयकर अपील सं. / ITA No.506/Del/2019

निर्धारण वर्ष / Assessment Year: 2010-11

Anil T.Kriplani,
C/-M/s. RRA TaxIndia, D-28,
South Extension, Part-1, New Delhi-110049.
PAN-BFSPK8660Q

.....अपीलार्थी / Appellant

vs

The CIT(IT-2),
New Delhi.

..... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : Dr. Rakesh Gupta &
Sh. Somil Agarwal, Adv.
प्रत्यर्थी की ओर से / Respondent by : Sh. Sanjay Goyal, CIT DR

सुनवाई की तारीख / Date of Hearing:	01.10.2019	घोषणा की तारीख / Date of Pronouncement:	29.11.2019
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आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The appeal filed by assessee is against order of
CIT(International Taxation-2), New Delhi, dated 30.11.2018 relating to

assessment year 2010-11 passed under section 263 of the Income-tax Act, 1961 (in short "Act").

2. The assessee has raised following grounds of appeal:-

1. *"That having regard to facts & circumstances of the case, Ld, CIT has erred in law and on facts in assuming jurisdiction u/s 263 of Income Tax Act, 1961 and has erred in holding the assessment order as erroneous and prejudicial to the interest of revenue.*

2. *That having regard to facts & circumstances of the case, Ld. CIT has erred in law and on facts in cancelling the assessment order dated 29-12-2016 passed by Ld. AO u/s 143(3)/254 and directing the assessing officer to make fresh assessment and that too by recording incorrect facts and findings and without observing the principles of natural justice.*

3. *That having regard to facts & circumstances of the case, Ld. CIT has erred in law and on facts in holding the assessment order passed u/s 143(3)/254 dated 29-12- 2016 is erroneous and prejudicial to the interest of revenue and further erred in holding that AO has not made enquiry or investigation with regard to the issue involved.*

4. *That having regard to facts & circumstances of the case, Ld. CIT has erred in law and on facts in passing the impugned order u/s 263*

which is bad in law and against the facts and circumstances of the case and is in violation of principles of natural justice.

5. That the appellant craves the leave to add, amend, modify, delete any of the grounds of appeal before or at the time of hearing and all the above grounds are without prejudice to each other.”

3. The only issue raised in the present appeal is against the exercise of jurisdiction u/s 263 of the Act by the Commissioner against order passed u/s 143(3)/254 of the Act.

4. Briefly in the facts of the present case the original assessment was completed u/s 143(3) of the Act vide order dated 28.03.2013 and total income of Rs.7.72 crores was assessed as against returned income of Rs.4.74 crores. In the facts of the case, the assessee had declared long term capital gains from sale of property at B-59, Mayfair Garden, New Delhi which was held by him to the extent of 50% share. The said property was sold for a total consideration of Rs.15,80,00,000/- vide registered Sale Deed on 05.05.2009. The assessee worked out the cost of acquisition of the property at Rs.1,01,00,000/- and after taking the indexation at Rs.6,38,32,000/-. The said valuation was on the basis of valuation report of Govt. Approved Valuer as on 01.04.1981. The Assessing Officer, however, made a reference to the District Valuation Officer (in short 'DVO') u/s 55A of the Act for valuing the property as on 01.04.1981. The DVO estimated the fair market value of the said property at Rs.6,70,000/- as on

01.04.1981. The assessee was accordingly, issued show cause notice in the first round of proceedings. The Assessing Officer however, did not accept the submissions of the assessee and re-calculated the long term capital gains at Rs.7,68,82,800/-. The CIT(A) however, reversed the order of the Assessing Officer and directed him to adopt the cost of acquisition as on 01.04.1981 at Rs.1,01,00,000/-. The Revenue filed an appeal before the Tribunal which vide its order dated 23.09.2015, restored the matter back to the file of Assessing Officer for *denovo* assessment. The relevant findings of the Tribunal are reproduced in para 5 at page 3 of the assessment order. As per the aforesaid directions, it was observed that the value assessed by Registration authority for stamp duty process could not be the basis for estimating the fair market value, hence, the need to restore back to the matter to the Assessing Officer for *denovo* assessment. In view of the directions of the Tribunal, the assessee was provided an opportunity of hearing and in response thereto, the assessee filed its submissions and justified the cost of acquisition adopted by it as on 01.04.1981, being the fair market value of the property. The Assessing Officer vide para 6.2 notes that the valuer in the valuation report had given comparable instance, before arriving at the fair market value of the said property and had considered various factors including the location of the property and also reliance was placed on the value of the property in respect of which acquisition proceedings were carried out by the Office of the Inspecting Asstt. Commissioner of Income tax (Acq.), Range-3, New Delhi and

compared with the report of the DVO and estimated the fair market value of the said property at Rs.95,28,000/- as on 01.04.1981. The assessment order was passed u/s 143(3) of the Act after remand from the Tribunal determining the fair market value of the property as on 01.04.1981 was passed on 29.12.1960.

5. Consequent thereto, the Commissioner exercising his jurisdiction u/s 263 of the Act, issued show cause notice to the assessee and referred to the valuation done by an authorized valuer valuing the property at Rs.95,28,000/- as on 01.04.1981. After going through the assessment records, the Commissioner observed that the assessment order dated 29.12.2016 was erroneous and prejudicial to the interest of the Revenue. He observed that the valuation report of the second valuer did not match with the directions of the Tribunal to adopt comparable valuation. He was of the view that the Assessing Officer should have made the inquiries to find the value of any comparable incident in 1981. Further, the Assessing Officer had accepted the cost of acquisition adopted by the assessee as such, without making any inquiries in this regard, hence, the show cause notice issued to the assessee. The assessee objected to the proposal raised by the Commissioner u/s 263 of the Act. However, the Commissioner was of the view that the valuation report of the valuer could not be accepted on the simplicitor reason that the property in question was a superior property having better litigation etc. The Commissioner was of the view that the

Assessing Officer should have tried to find out if there was any comparable instance in 1981, instead of adopting of comparable of year 1985 and indexing it backwards. He was of the view that the acceptance of the higher value on the ground that the property was a superior property and had better location, without carrying out any investigation could not be accepted. The second objection was on the size of the plot and the size of the property whose particulars were adopted for comparison. The Commissioner also objected to the acceptance of the cost of construction as such. He was of the view that where the Assessing Officer had not carried out any inquiry and verification which was needed and mandated by the Tribunal and thus he directed the Assessing Officer to make fresh assessment after making proper inquiry and investigation.

6. The assessee is in appeal against the order of the Commissioner.

7. The Ld.AR for the assessee pointed out that the Assessing Officer vide his order dated 29.12.2016, in the second round of proceedings had accepted the value of Registered Valuer and also took instance of sale in 1985 and also instance of acquisition proceedings. He stressed where the Assessing Officer had applied his mind and passed a speaking order, then the Commissioner cannot hold the order to be erroneous and prejudicial to the interest of the Revenue. Our attention was drawn to the evidences filed before the Assessing Officer and also placed at pages 90 to 98 of the Paper Book and also the order sheet entries placed at pages 117 to 119 of the

Paper Book. He further pointed out where the Assessing Officer had taken a view and since fair market value was an estimation, in such circumstances, the Commissioner cannot substitute his view. The Ld.AR for the assessee referred to the observation of Commissioner in para 9 and pointed out that no reference was possible for estimating the fair market value by the DVO u/s 55A(a) of the Act, where the fair market value was less than the value declared by assessee. In this regard, reliance was placed on the decision of Hon'ble Bombay High Court in CIT vs Puja Prints [2014] 360 ITR 697 (Bom.) and also decision of Pune Bench of the Tribunal in the case of Sh. Maruti G.Thopte vs ITO in ITA No.863/Pun/2017 dated 05.01.2018. He further pointed out that in case, no reference could be made to the DVO then the Assessing Officer had to accept the valuation of the Registered Valuer and other material and in such cases the assessment order cannot be said to be erroneous and prejudicial to the interest of the Revenue.

8. The Ld. DR for the Revenue has furnished written submissions before us and he has pointed out that where the Assessing Officer had made no inquiries or any investigation then the order of the Assessing Officer is both erroneous and prejudicial to the interest of the Revenue. In such circumstances, the Commissioner had the power to exercise his jurisdiction u/s 263 of the Act. In the absence of making any inquiry, the Ld. DR for the Revenue stressed that the order suffers from infirmities and

open to exercise of jurisdiction u/s 263 of the Act. He placed reliance on the ratio laid down by the Hon'ble Supreme Court in Malabar Industrial Ltd. [2000] 243 ITR 83 (SC). He also referred to the amendment to section 263 of the Act which has been inserted by the Finance Act, 2015 w.e.f. 01.06.2015.

9. The Ld. AR for the assessee in re-joinder pointed that the Commissioner has just remitted the matter back to the file of Assessing Officer and in case he was of the view that no inquiries were made by him then he ought to have made inquiries. In this regard, reliance was placed on the decision of Hon'ble Delhi High Court in Director of Income Tax vs Jyoti Foundation 357 ITR 388 (Delhi). He also pointed out that the amendment to section 263 of the Act is prospective in nature and cannot be applied.

10. We have heard the rival contentions and perused the record. The issue arising in the present appeal is against the exercise of jurisdiction u/s 263 of the Act, wherein the Commissioner has the power, incase the assessment order passed by the Assessing Officer is erroneous and also prejudicial to the interest of the Revenue. The requirement of law is that both the conditions of the section i.e. order being erroneous and prejudicial to the interest of the Revenue, have to be fulfilled incase the Commissioner wants to exercise his power u/s 263 of the Act. The Hon'ble Supreme Court in Malabar Industrial Co. Ltd. Vs. CIT (supra) had held that twin conditions

of section 263 of the Act are to be satisfied and in case one of them is absent i.e. order of the Assessing Officer is erroneous but not prejudicial to the interest of revenue or if it is prejudicial to the interest of revenue, but not erroneous, then recourse cannot be made to section 263(1) of the Act. Further, it has been laid down by the Hon'ble Supreme Court in the said case that the provisions cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted and incorrect assessment of facts or incorrect application of law will satisfy the requirement of order being erroneous. In the same category falls the orders passed without applying the principles of natural justice or without application of mind. It was further held by the Apex Court that the phrase prejudicial to the interest of revenue has to be read in conjunction with erroneous order passed by the Assessing Officer. Every loss of revenue as consequent of an order of the Assessing Officer cannot be treated as prejudicial to the interest of revenue; for example, when Income Tax Officer adopted one of the courses permissible in law and it has resulted any loss of revenue or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as erroneous order which is prejudicial to the interest of revenue unless the view taken by the ITO is unsustainable in law.

11. In the facts of the present case, the proceedings before the Assessing Officer were in second round where the matter was remitted back to the file of the Assessing Officer to make a *denovo* assessment as per the directions of the Tribunal in assessee's own case. The dispute was with regard to computation of long term capital gains vis-a-vis the cost of acquisition as on 01.04.1981. The assessee in the initial assessment proceedings had filed a valuer report of Registered Valuer in support of the fair market value as on 01.04.1981. In the second round of litigation, the assessee again filed a valuer report of Registered Valuer and had placed reliance on sale instance of another property in 1985 in the adjacent area and also instance of acquisition proceedings by the Income tax Department in another case. The Registered Valuer on the basis of the same had adopted the value of the property at Rs.95,28,000/- i.e. by backward calculation from 1985 to 1981. On the other hand, the DVO had made backward calculation of the valuation of the property from the date of sale and had not relied on any sale instance during the corresponding period. The Tribunal had not accepted the DVO's report in the first round. The Commissioner was of the view that the Assessing Officer has failed to correctly determine the fair market value as on 01.04.1981.

12. Before going into the merits whether the value has been correctly determined or not, we may refer to the decision of Hon'ble Bombay High Court in CIT vs Puja Prints (supra) wherein it has been laid down that the

provisions of section 55A(a) of the Act cannot be applied and no reference is possible to be made to the DVO for determining the market value of the property at a figure less than that shown by the assessee. Accordingly, the Assessing Officer had no authority to make any such reference to the DVO to determine the value of the property i.e. cost of acquisition as on 01.04.1981, at any price less than the price shown by the assessee. In such facts and circumstances of the case, the Assessing Officer has to accept the valuation shown by the assessee as on 01.04.1981. The said valuation is supported by a report of the Registered Valuer and other sales instance during the period. In such facts and circumstances, we find no merit in the exercise of the jurisdiction by the Commissioner u/s 263 of the Act. Hence, we reverse the same and hold the said order passed u/s 263 of the Act as both invalid and bad in law. Thus, grounds raised by the assessee are allowed.

13. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 29th day of November, 2019.

Sd/-

(B.R.R.KUMAR)
लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(SUSHMA CHOWLA)
न्यायिक सदस्य/JUDICIAL MEMBER

दिल्ली / दिनांक Dated : 29th November, 2019.

* Amit Kumar *

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. मुख्य आयकर आयुक्त / The Pr. CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, दिल्ली / DR, ITAT, Delhi
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

सहायक रजिस्ट्रार, आयकर अपीलीय अधिकरण ,दिल्ली
Assistant Registrar, ITAT, Delhi