



IN THE INCOME TAX APPELLATE TRIBUNAL
"G" BENCH, MUMBAI

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT, AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA no.3105/Mum./2018
(Assessment Year : 2013-14)

Gordon Bruce Serrao
Tracy Villa, Plot no.13
Sector-8, Lane-F, Vadhi
Navi Mumbai 400 703
PAN - ALWPS8430R

..... Appellant

v/s

Pr. Commissioner of Income Tax
Circle-28, Mumbai

..... Respondent

Assessee by : Dr. K. Shivaram a/w
Shri Sashank Dundu
Revenue by : Shri M. Daya Sagar

Date of Hearing - 29.08.2019

Date of Order - 05.12.2019

ORDER

PER SAKTIJIT DEY, J.M.

The captioned appeal has been filed by the assessee challenging the order dated 15th March 2018, passed under section 263 of the Income Tax Act, 1961 (for short "*the Act*") by the learned Principal Commissioner of Income Tax (PCIT)-28, Mumbai, for the assessment year 2013-14.

2. Brief facts are, the assessee, an individual, filed his return of income for the impugned assessment year on 25th September 2013, declaring total income of ₹ 1,58,43,130. Assessment in case of the assessee was completed under section 143(3) of the Act vide order dated 23rd February 2016, accepting the return of income. After completion of the assessment as aforesaid, learned PCIT, in exercise of power under section 263 of the Act, called for and examined the assessment records. After such examination, he found that the assessee was allotted seven flats in a housing project "*The Spring*", at Plot no.4, Sector-20, Roadpalli, Kalamboli, by a single allotment letter dated 14th August 2007, for a consideration of ₹ 1 crore. Whereas, during the year under consideration, the assessee had sold all these flats and the income derived from such sale was not only offered as long term capital gain in the assessment years 2013-14 and 2014-15, but the assessee had also claimed deduction under section 54 of the Act on such long term capital gain. On a perusal of the sale deeds, learned PCIT found that the flats were not registered in the name of the assessee. However, the Builder sold the flats to third parties on behalf of the assessee and subsequently transferred the sale proceeds to assessee's account. He found that the assessee had never used these flats for the purpose of his residence as he is residing at Tracy Villa, Plot no.13, Sector-8, Vashi, Navi Mumbai. Thus, on the basis of

the aforesaid facts, learned PCIT formed an opinion that the assessee had no intention to acquire these flats for residential purpose. He observed, the assessee was just waiting for the expiry of the period of holding to be treated as long term capital asset so as to claim the income as long term capital gain and simultaneously get all benefits attached to long term capital gain. Learned PCIT observed, the intention and conduct of the assessee clearly established that the transaction entered into by the assessee is adventure in the nature of trade, hence, surplus generated from sale of flats has to be assessed as business income. The learned PCIT observed, the Assessing Officer while completing the assessment under section 143(3) of the Act has allowed assessee's claim of long term capital gain without making any enquiry which has resulted in allowance of excess claim made by the assessee. Therefore, he issued a show cause notice to the assessee to explain as to why the assessment order should not be revised. In response, the assessee filed his reply on 7th March 2017. After considering the reply of the assessee, learned PCIT finally concluded that the Assessing Officer has not at all examined/enquired into the intention of the assessee at the time of booking of seven flats and whether the income derived from sale of flats is to be assessed under the head "*Business*" or "*Capital Gain*". Accordingly, he set aside the impugned assessment order by directing the Assessing Officer to make

adequate enquiry / investigation and pass a fresh assessment order in accordance with law after examining assessee's claim of long term capital gain.

3. Dr. K. Shivaram, learned Counsel for the assessee submitted, merely because in the assessment order the Assessing Officer has not made detailed discussion regarding purchase and sale of flats and incidental capital gain, it does not mean that he has not examined the issue or enquired into it so as to make the assessment order erroneous and prejudicial to the interests of Revenue. He submitted, whether the income from sale of flats is assessable as business income or long term capital gain is a debatable issue where two views are possible. Therefore, in such circumstances, the assessment order cannot be held to be erroneous and prejudicial to the interests of Revenue. The learned Counsel submitted, learned PCIT has grossly erred in holding that the income received from sale of flats is to be assessed as business income and not as capital gain. Further elaborating, he submitted, the assessee had purchased the flats in the year 2007 for the purpose of residence of his family members. He submitted, subsequently, since the flats were not required for such purpose, they were sold and income derived there from was offered as capital gain. He submitted, since the assessee is not in real estate business and is in a completely different line of business, he never had

intention to do business in purchase and sale of properties at the time of booking the flats. He submitted, at the time of making investment in flats in the year 2007, the assessee had no intention to re-sale them and earn profit. Further, he submitted, in the course of assessment proceedings, the Assessing Officer conducted enquiry by issuing notice under section 142(1) of the Act. Drawing our attention to the questionnaire issued along with the said notice, he submitted, the Assessing Officer has specifically called upon the assessee to furnish the sale deeds of the property held by him. Thus, he submitted, the allegation of learned PCIT that the Assessing Officer has not enquired into or examined the issue is without any basis. Further, he submitted, if learned Principal Commissioner was of the view that the Assessing Officer has not made enquiry with regard to the nature of income, instead of deciding the issue himself he should have directed the Assessing Officer to make enquiry and examine the issue afresh. In support of his contention, the learned Counsel relied upon the following decisions:-

- i) *Janki Ram Bahadur Ram v/s CIT, [1995] 57 ITR 21 (SC);*
- ii) *CIT v/s Dhable & Ors., [1993] 202 ITR 98 (Bom.);*
- iii) *CIT v/s Gabriel India Ltd., [1993] 203 ITR 108 (Bom.);*
- iv) *CIT v/s Design & Automation Engineers (Bombay) Pvt. Ltd., [2008] 323 ITR 632 (Bom.);*
- v) *CIT v/s Kiran Hirji Shah, [2015] 231 Taxman 670 (Bom.);*

- vi) *CIT v/s Fine Jewellery (I) Ltd., [2015] 372 ITR 303 (Bom.);*
- vii) *MOIL Ltd. v/sCIT, [2017] 396 ITR 244 (Bom.);*
- viii) *CIT v/s Nirav Modi, [2017] 390 ITR 292 (Bom.);*
- ix) *CIT v/s Reliance Communication Ltd., [2017] 244 Taxman 55 (SC);*
- x) *CIT v/s Paville Fashhions Pvt. Ltd., [2017] 398 ITR 603 (Bom.);*
- xi) *CIT v/s Anandlal Becharlal & Co., [1997] 107 ITR 677 (Bom.);*
- xii) *CIT v/s Sun Engineering Works Pvt. Ltd., [1992] 198 ITR 297 (SC);*
- xiii) *Malabar Industrial Co. Ltd. v/s CIT, [2000] 243 ITR 83 (SC);*
- xiv) *Venkatakrishna Rice Co. v/s CIT, [1987] 163 ITR 129 (Mad.);*
- xv) *Bismillah Trading Co. v/s IO, [2001] 248 ITR 292 (Ker.);*
- xvi) *Smt. Tara Devi Aggarwal v/s CIT, [1973] 88 ITR 323 (SC);*
- xvii) *Thalibai F. Jain v/s ITO, [1975] 101 ITR 1 (Kar.); and*
- xviii) *CIT v/s Pushpa Devi, [1987] 164 ITR 639 (Patna).*

4. Shri M. Dayasagar, the learned Departmental Representative strongly relying upon the observations of learned PCIT submitted, the Assessing Officer has not made any enquiry at all with regard to the nature of income derived by the assessee from sale of flats. He submitted, the very fact that the assessee had booked seven flats at a time and has subsequently sold them without occupying them clearly

reveals the intention of the assessee that he wanted to make profit out of sale of flats. Drawing our attention to the assessment order, the learned Departmental Representative submitted, the Assessing Officer has not discussed even a single line on the issue and passed the order mechanically accepting assessee's claim. Thus, he submitted, the assessment order being erroneous and prejudicial to the interests of revenue due to non-examination of nature of income, learned PCIT has correctly exercised power under section 263 of the Act.

5. We have considered rival submissions and perused the material on record. We have also applied our mind to the decisions relied upon. Undisputed facts are, in the year 2007 the assessee had booked/purchased seven flats in a building for a consideration of ₹ 1 crore and subsequently, during the financial year 2012-13 and 2013-14, he has sold all the flats with considerable gain. In the returns of income filed for the assessment year 2013-14 and 2014-15, the assessee declared such income from sale of flats as long term capital gain and claimed deduction under section 54 of the Act. On a perusal of the impugned assessment order, which we must say is very cryptic and non speaking, it appears that the Assessing Officer has accepted assessee's claim of long term capital gain and deduction claimed under section 54 of the Act without any enquiry and examination. Further, except the questionnaire issued by the Assessing Officer along with

notice under section 142(1) of the Act, which is of general nature, no material has been brought on record either before learned PCIT or even before us demonstrating that the Assessing Officer has made any enquiry with regard to the nature of income derived by the assessee from sale of flats, whether business income or long term capital gain. The explanation/submissions by the assessee that the flats were booked / purchased for the residential purpose for his family members were made only during proceedings under section 263 of the Act before learned PCIT. The very fact that a person has booked / purchased seven flats in a single go, that too, for residential purpose is against normal human behavior, hence, definitely would beg a query regarding the real intention of the person concerned, whether to use them for residence or to sale them for deriving maximum profit. This should have prompted the Assessing Officer to make proper enquiry to ascertain the real intention of the assessee while purchasing the flats. The material on record reveals that absolutely no enquiry was conducted by the Assessing Officer to find out the real intention of the assessee for buying the flats. Whatever explanation the assessee has furnished to justify the purchase/booking of seven flats were only furnished before learned PCIT during the proceeding under section 263 of the Act. Thus, the facts and materials on record clearly demonstrate that before accepting assessee's claim the Assessing Officer has failed

to make any enquiry with regard to the nature of income derived by the assessee from sale of flats. That being the case, the assessment order passed is certainly erroneous and prejudicial to the interests of revenue, thereby, empowering learned PCIT to revise it under section 263 of the Act.

6. However, in our considered opinion, learned PCIT should not have expressed any opinion with regard to the nature of income, whether business or long term capital gain, considering the fact that the Assessing Officer had not enquired into or examined the issue at his level to find out the real nature and character of income derived by the assessee. In such circumstances, learned PCIT should have directed the Assessing Officer to make necessary enquiry and decide the nature and character of income independently without any strings attached. Therefore, to that extent, we agree with the submissions of learned Counsel for the assessee that the order passed under section 263 of the Act needs to be modified. In view of the aforesaid, we direct the Assessing Officer to pass fresh assessment order after conducting necessary enquiry in respect of assessee's claim of long term capital gain without being influenced by any of the observations of learned PCIT on merits. The Assessing Officer must afford reasonable opportunity of being heard to the assessee before deciding the issue.

7. In the result, appeal stands partly allowed for statistical purposes.

Order pronounced in the open Court on 05.12.2019

**PRAMOD KUMAR
VICE PRESIDENT**

**SAKTIJIT DEY
JUDICIAL MEMBER**

MUMBAI, DATED:

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

*Pradeep J. Chowdhury
Sr. Private Secretary*

By Order

Assistant Registrar
ITAT, Mumbai