आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCH 'B', JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
Before : Shri Vijay Pal Rao, JM & Shri Vikram Singh Yadav, AM

आयकर अपील सं./ITA No. 530/JP/2019
निर्धारण वर्ष/Assessment Year : 2015-16

Shri Subhash Chand Khandelwal Nagar Palika Ki Gali, Rajgarh, Alwar	बनाम Vs.	The Pr.CIT Alwar
स्थायी लेखा सं./जीआईआर सं./P AN/GIR No.: DMAPK 5188 Q		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri Ashok Kumar Gupta &
Shri S.L.Jain ,Advocate

राजस्व की ओर से/ Revenue by : Smt. Manisha Chandra, CIT- DR

सुनवाई की तारीख/ Date of Hearing : 12/12/2019
घोषणा की तारीख/ Date of Pronouncement : 13 /12/2019

आदेश/ ORDER

PER VIJAY PAL RAO, JM

This appeal by the assessee is directed against the revision order of ld. Pr.CIT, Alwar dated 19-02-2019 passed u/s 263 of the Income Tax Act, 1961 for the Assessment Year 2015-16. The assessee has raised the following grounds.

''1. ***Profit on Sale of Ancestral Property is taxable under Capital gain*** *:-*

That on the facts and in the circumstances of the case Ld. Pr. CIT Alwar has grossly erred in law and facts in holding that the assessment order of Ld. AO is erroneous and prejudiced to the interest of revenue on the ground that profit on sale of ancestral property has to be taxed under the head income from business instead of capital gain, after computing capital gain u/s 45(2) of the IT Act 1961 on conversion of capital assets into "Stock in trade".

2. ***Apex Court Judgment is not applicable*** *:-*

That on the facts and in the circumstances of the case Ld. Pr. CIT Alwar has grossly erred in law and facts in placing reliance on the judgment of Hon'ble Apex Court in the case of Raja J Rameshwar Rao Vs CIT (1961) 42 ITR 179(SC) which is per-se irrelevant and assessee facts are not identical.

3. ***Limited power of Pr. CIT*** *:-*

That on the facts and in the circumstances of the case the revisionary jurisdiction cannot be allowed to be exercised by the commissioner either for substituting his own opinion for that of the AO or for making a fishing or roving enquiry.

4. ***AO's Order is not Prejudicial to the Interest of Revenue :-***

That on the facts and in the circumstances of the case Ld. Pr. CIT Alwar has grossly erred in law and facts in the sale price mines market value as on the date of conversion shall be treated as business income and taxed under profit and gains of business.

5. ***Mere Change in Opinion - Revision is bad in law :-***

That on the facts and in the circumstances of the case Ld. Pr. CIT Alwar has grossly erred in law and facts in where the AO has applied his mind at the time of passing the assessment order allowed the claimed of assessee. AO 's view was a legally permissible view. The original order cannot be liable to be visited with a revisionary order by the PR. CIT having different opinion.

- Malabar Industrial Co. Ltd. Vs CIT 243 ITR 83(SC)

6. ***Where Two views Passable :-***

That on the facts and in the circumstances of the case Ld. Pr. CIT Alwar has grossly erred in law and facts in where two are passable one which is

beneficial to the assesssee was to be taken while deciding the issue in terms of the decision.

- CIT Vs Vegetable Products Ltd. (1973)88ITR 192(SC)

7. ***No Proper Opportunity was Provided :-***

That on the facts and in the circumstances of the case Ld. Pr. CIT Alwar has grossly erred in law and facts in not providing an opportunity to represent his case which is also specifically mandated u/s 236 of the Act and the principle of natural justice has been violated.

8. ***Proper Enquiry was Conducted :-***

That on the facts and in the circumstances of the case Ld. Pr. CIT Alwar has grossly erred in law and facts in holding that Ld. AO has not conducted proper enquiry / investigation before accepting the statement of the assessee.''

2.1 The assessee is an individual and filed E-Return of income on 11-07-2015 declaring total income of Rs. 10,28,910/-. The scrutiny assessment was completed u/s 143(3) of the Act on 27-03-2017 whereby the AO accepted the returned income at Rs. 10,28,910/-. Subsequently, the ld. Pr.CIT noted that the order passed by the AO is erroneous and prejudicial to the interest of Revenue. Accordingly, the show cause notice u/s 263 of the Act was issued on 3-01-2019. The ld. Pr.CIT was of the view that the AO has accepted the capital gains offered by the assessee from sale of ancestral property without considering the fact that the assessee sold the said property by plotting to 59 different persons. Thus in view of the ld. Pr.CIT, the transactions should have been judged as

business income instead of capital gains after computing the capital gains u/s 45(2) of the Act. The ld. Pr.CIT has then proceeded to pass the impugned order ex-parte. Thus it was held that order passed by the AO dated 27-03-2017 is erroneous and prejudicial to the interest of Revenue and consequently the same was cancelled with the direction to the AO to pass the speaking assessment order after considering the issue as take up in the revision proceedings.

2.2 Before the Tribunal, the ld.AR of the assessee submitted that the jurisdiction u/s 263 of the Act can be invoked by the ld. Pr.CIT only when the order passed by the AO is found to be erroneous as well as prejudicial to the interest of Revenue. The ld.AR thus contended that for invoking the revisionary power u/s 263 of the Act, the twin conditions being the order passed by the AO is erroneous as well as prejudicial to the interest of Revenue are to be satisfied. In the case in hand, the AO has accepted the capital gains declared by the assessee from the sale of the ancestral property after claiming the deduction u/s 54F of the Act. The ld. Pr.CIT has proposed to revise the assessment order only on the issue that provisions of Section 45(2) of the Act are applicable in this case as the assessee has sold the property by plotting to 59 different persons and consequently the income has to be assessed as business income instead of

capital gains. The ld.AR further contended that even if the provisions of section 45(2) of the Act is applied in the case of the assessee, there would be no change so far as the capital gains arising from the said transaction and there will be no business income as the cost of stock in trade would be same as sale consideration being the fair market price. If the valuation u/s 50C is applied then the cost of stock in trade u/s 45(2) would be Rs. 10,08,25,150/- which is equivalent to the sale consideration. Therefore, there would be nil business income. Thus the ld.AR of the assessee submitted that even after applying the provisions of Section 45(2) of the Act, there would be no Revenue effect and consequently the order passed by the AO would not be prejudicial to the interest of Revenue. The ld.AR of the assessee further contended that the issue of treating the ancestral property sold by the assessee as business transaction or sale of capital assets is debatable issue. The ld.AR further contended that since it was a sale of ancestral property by the assessee for realizing the maximum price. If the assessee has sold the property in various plots instead of one piece of land then the same would not change the character of the property which is a capital asset to trading activity. Thus even on merits of the issue, once the AO has accepted the transactions of sale of the property as sale of capital asset which is one of the possible views then

the ld. Pr.CIT is not permissible to excise its revisionary powers only because he does not agree with the view taken by the AO. In support of his contentions, the ld.AR of the assessee relied on the decision of Hon'ble Madras High Court in the case of CIT vs A Mohammed Mohideen 74, CTR 129 (Mad). He has also relied on the decision of Bombay High Court in the case of India Hume Pipe Co. Ltd vs CIT , 107 CTR 95 (Bom.). Thus the ld.AR of the assessee submitted that when the assessee has never indulged in the business or trading activity of real estate and the transaction of the sale of the ancestral property is only sale of capital asset then selling the said property by plotting itself would not be regarded that the assessee was indulging in trading activity. Thus the ld.AR of the assessee submitted that the order passed by the ld. Pr.CIT is not sustainable in law and the same may be set aside.

2.3 On the other hand, the ld. DR submitted that it is a case of lack of enquiry on the part of the AO while passing the assessment order. Therefore, the order of the AO is erroneous for want of proper enquiry on the issue of applicability of provisions of Section 45(2) of the Act. The ld. DR further submitted that the ld. Pr.CIT has not given any finding on the merits of the capital gains or business income but directed the AO pass the speaking assessment order after considering the issue as raised in the

revision proceedings. The ld. DR relied on the impugned revision order passed by the ld. Pr.CIT.

2.4 We have considered the rival submissions as well as relevant materials available on record. The assessee has sold the ancestral property during the year under consideration for a consideration of Rs. 1,08,28,148/-. The stamp duty valuation of the said property was amounting to Rs.1,08,25,150/-. Therefore, the deemed full value consideration u/s 50C of the Act cannot be applied in the case of the assessee where the sale consideration shown in the sale deed and declared by the assessee is equivalent to the stamp duty valuation. The AO while passing the assessment u/s 143(3) on 27-03-2017 has accepted the capital gains as claimed by the assessee from the sale of ancestral property. Subsequently, the ld. Pr.CIT has exercised its revisionary power u/s 263 of the Act and issued show cause notice dated 3-01-2019 as under:-

> ‘’During the relevant period, you had sold your ancestral property and got your share amounting to Rs. 1,08,28,148/- whereon you had computed capital gain. Thereafter, you had purchased a property i.e. 42, Yadav Nagar Kachhi Basti, Pani Pech, Jaipur for Rs. 45.00 lakhs on 29-09-2014 and claimed deduction u/s 54F thereon. You had also invested Rs. 35.00 lakhs in NHAI Bonds on 31-03-2015 and claimed deduction u/s 54EC thereon separately.
>
> It is perused from the record that you had sold your ancestral property by plotting to 59 different persons

> and offered capital gain thereon for taxation, however, in view of the Judgement of Hon'ble Apex Court in the case of Raja J Rameshwawr Rao vs Commissioner of Income Tax (1961) 42 ITR 179 (SC) – the nature of such transaction should have been judged as business income instead of capital gain after computing capital gain u/s 45(2) of the I.T. Act, 1961 on conversion of capital assets into ''stock in trade.''

Thus it is clear that the ld. Pr.CIT invoked the provisions of Section 263 of the Act only in respect of capital gains declared by the assessee from the sale of ancestral property as the AO has not applied the provisions of Section 45(2) of the Act and consequently the profit arising from sale of the property ought to have been bifurcated into capital gains as well as business income. There is no allegation by the ld. Pr.CIT in show cause notice that the assessment order passed by the AO is erroneous on account of lack of enquiry. At the outset, we note that when the ancestral property was sold by the assessee during the year under consideration by plotting to 59 different persons then even if provisions of Section 45(2) are applied in the case and the capital asset is treated as converted into stock in trade then the fair market value of the asset on the date of such conversion or treatment shall be deemed to be the full value of the consideration received or accruing as a result of transfer of capital asset. For ready reference, we reproduce section 45(2) of the Act as under:-

> ''[(2) Notwithstanding anything contained in sub-section (1), the profits or gains arising from the transfer by way of conversion by the owner of a capital asset into, or its treatment by him as stock-in-trade of a business carried on by him shall be chargeable to income-tax as his income of the previous year in which such stock-in-trade is sold or otherwise transferred by him and, for the purposes of section 48, the fair market value of the asset on the date of such conversion or treatment shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset.]''

Thus for the purpose of computing the capital gains, the fair market value of the asset as on the date of such conversion will be deemed as full value consideration received or accrued on transfer of capital asset and consequently the same amount will be taken as cost of acquisition of stock in trade. In the case in hand, the fair market value of the asset shall be taken as the valuation adopted by the stamp duty authority as provided u/s 50C of the Act being full value consideration and therefore, for the purpose of computing the capital gains the said amount of Rs. 1,08,25,150/- would be deemed to be full value consideration which is the actual sale consideration. Therefore, there will be no change in the capital gains computed and declared by the assessee even after applying the provisions of section 45(2) of the Act. Resultantly, the business income, if any, from the said transfer under the provisions of Section 45(2) of the Act would be Nil being the cost of acquisition of stock in trade and the sale consideration of the said property is the same. Therefore, even after

invoking the provisions of Section 45(2) of the Act, there would be no change in the tax liability of the assessee and hence the order passed by the AO cannot be said prejudicial to the interest of the Revenue. It is undisputed proposition of law that for exercising the power u/s 263 of the Act, the Commissioner has to satisfy itself that the order passed by the AO is erroneous as well as prejudicial to the interest of the Revenue. Without satisfaction of the twin conditions that the order passed by the AO is erroneous as well as prejudicial to the interest of the Revenue, the provisions of Section 263 cant be invoked. Therefore, in the case in hand, when there will be no Revenue loss even if provisions of section 45(2) is applied then in such a situation the Commissioner is not allowed to exercise its power u/s 263 of the Act merely because the AO has accepted the capital gains declared by the assessee. Hence, in the facts and circumstances of the case, the impugned ex-parte order passed by the ld.PR. CIT without proper opportunity of hearing to the assessee and without establishing the order of the AO is prejudicial to the interest of the Revenue is not sustainable in law and consequently the same is quashed and set aside.

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

Order pronounced in the open court on 13 /12/2019.

Sd/-	Sd/-
(विक्रम सिंह यादव)	(विजय पाल राव)
(Vikram Singh Yadav)	(Vijay Pal Rao)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 13 /12/ 2019

*Mishra
आदेश की प्रतिलिपि अग्रेशित / Copy of the order forwarded to:
1. अपीलार्थी / The Appellant- Shri Subhash Chand Khandelwal Alwar
2. प्रत्यर्थी / The Respondent- The Pr.CIT, Alwar
3. आयकर आयुक्त / CIT,
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
5. गार्ड फाईल / Guard File (ITA No.530/JP/2019)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar