

IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI B R BASKARAN, ACCOUNTANT MEMBER

ITA Nos. 1454 & 1455/Bang/2018
Assessment year : 2009-10

M/s. Chandrika Investments, No.8/A, 24 th A Main, 1 st Phase, J P Nagar, Bangalore – 560 078. PAN: AAFFC 6379R	Vs.	The Income Tax Officer, Ward 4(3)(3), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri S Annamalai, Advocate
Respondent by	:	Shri Pradeep Kumar, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	08.06.2020
Date of Pronouncement	:	10.06.2020

ORDER

Per N.V. Vasudevan, Vice President

ITA No.1454/Bang/2018 is an appeal by the assessee against the order dated 28.02.2018 of the CIT(Appeals)-4, Bangalore relating to assessment year 2009-10 arising out of an order passed by the AO u/s. 154 of the Income-tax Act, 1961 [the Act] dated 6.4.2017.

2. ITA No.1455/Bang/2018 is also an appeal by the assessee against the order dated 28.02.2018 of the CIT(Appeals)-4, Bangalore relating to assessment year 2009-10 which arises out of an order passed by the AO u/s. 154 of the Income-tax Act, 1961 [the Act] dated 28.4.2017.

3. The facts and circumstances under which these appeals arise for consideration are that the assessee is a partnership firm. The business of assessee was acquiring land and carrying out construction of commercial complexes, shopping malls, residential apartments, etc. For the AY 2009-10, the assessee filed a return of income in response to notice u/s. 142(1) dated 17.3.2010 declaring total income of Rs.3,42,45,991. The assessee filed a revised return of income on 31.3.2010 declaring total income of Rs.1,27,50,047. An order of assessment dated 17.10.2011 was passed by the ITO, Ward 4(3), Bangalore. The assessee challenged the order of assessment before the CIT(Appeals). By an order dated 17.10.2011 the CIT(Appeals) confirmed the order of AO. The assessee preferred appeal against the order of CIT(A) in ITA No.631/Bang.2013. The Tribunal by its order dated 23.9.2016 held that the ITO, Ward 4(3) did not have jurisdiction over the case of assessee and that the competent Officer was ACIT/DCIT. The order of assessment was set aside and the same was restored back for framing a *de novo* assessment by a competent Officer being ACIT /DCIT.

4. Pursuant to the order of Tribunal, the AO i.e., ITO, Ward 4 (3), Bangalore, passed an order dated 17.2.2017 giving effect to the order of the Tribunal dated 23.9.2016 in which he determined the total income of the assessee as per the revised return of income @ Rs.1,27,50,050. By virtue of this order, a refund became payable to the Assessee as per the following calculations:

	Amount in Rs.
Revised income as per OGE to order of CIT(A)-II, Bangalore dated 20.05.2013	14,99,13,600
Less: Relief allowed by ITAT	13,71,63,550
Total Taxable Income as per the revised return of income filed on 31.3.2010	1,27,50,050

Tax thereon		38,25,015
Add : Surcharge 10%		3,82,502
Add : Educational Cess @ 3%		1,26,226
Total Tax Payable		43,33,743
Add: Interest 234A	2,60,025	
Interest 234B	5,20,050	
Interest 234C	1,60,348	9,40,423
Total Tax and Interest payable		52,74,166
Less: Tax paid		1,00,00,950
Balance refundable		47,26,784
Add: Interest u/s. 24A		13,86,268
Total tax and interest refundable		61,13,052
Rounded off u/s. 288B		61,13,050

5. The AO thereafter passed an order u/s. 154 of the Act dated 6.4.2017 in and by which he observed that as per the CBDT Instruction No.1725 dated 22.8.2016 whereby the CBDT has laid down that if an assessment is set aside for being done afresh, the demand relating to the point on which the assessment has been remanded should not be enforced, but should be kept in abeyance, till fresh orders on the points are passed. The AO therefore modified the order giving effect to the order of the Tribunal passed by him on 17.2.2017 by observing that the demand raised pursuant to the order giving effect should be kept in abeyance till the assessment is completed by a competent Officer as per the directions of the Tribunal. The Officer passed this order because as we have already observed, by virtue of order dated 17.2.2017, a refund was to be issued to the assessee and with a view to ensure that refund is not issued to the Assessee.

6. The AO again issued another notice u/s. 154 of the Act by an order dated 28.4.2017 whereby the AO rectified the order dated 6.4.2017 working out the outstanding demand as follows:-

Income Assessed as per Assessment Order dated 26.12.2011	18,87,86,930
Less: Relief allowed by CIT(A)-II, vide order dated 14.03.2013	3,88,73,330
Total Taxable income	14,99,13,600
Tax thereon	4,49,74,080
Add: Surcharge @ 10% 44,97,408	
Education cess @ 3% 14,84,145/-	59,81,553
Total tax payable	5,09,55,633
Interest* 234A	30,57,336
234B	1,54,96,205
234C	1,60,348
Total Interest	1,87,13,889
Less: Tax Collected	1,00,00,950
Balance Tax Collectible	5,96,68,572

* Interest computed only till 26.12.2013

7. This order is based on the computation after giving effect to CIT(A)'s order dated 14.3.2013. The reason given for passing this order was that the demand as determined in the order dated 6.4.2017 was incorrect and hence was being rectified by order dated 28.4.2017.

8. Aggrieved by the two orders passed u/s. 154 of the Act dated 6.4.2017 and 28.4.2017, the assessee filed two appeals before the CIT(Appeals). The CIT(A) dismissed both the appeals holding that the order of AO was legally and factually correct. Aggrieved by the aforesaid orders, the assessee has preferred the present appeals before the Tribunal.

9. We have heard the rival submissions. In both the impugned orders passed u/s. 154 of the Act, the revenue has relied on the CBDT Circular No.1725 dated 22.8.2016 of the CBDT which reads as follows:-

“Instruction No: 1725

Date of Issue: 22/8/1986

Allahabad and Andhra Pradesh High Courts have in their judgements in CIT Vs. Bandaru Sanyasi Raju (1981) 127 ITR 453 (AP) and S.P. Kocher Vs. ITO (1984) 145 ITR 255 (Alld) held that first appellate authorities have power to set aside assessments partially by deciding some of the points in appeal before them and remanding the case to the assessing officer for fresh assessment on other points.

It is found that in giving appeal effect to such appellate orders as partially set aside assessment orders different practices are followed in different charges. After considering various practices being followed in different charges, the Board has decided that in giving effect to such appellate orders, the original order should be revised as per appellate order in respect of the points which are decided in the appellate order. In regards to points on which the assessment has been remanded for fresh order, the amount as originally assessed may be included and the demand be raised accordingly subject to rectification on completion of fresh assessment on those points. The demand relating to the points on which the assessments has been remanded should not be enforced and should be kept in abeyance tilt the fresh order on those points is passed and the demand is rectified accordingly.

The Board desires that this practice should be uniformly followed in all charges.”

10. A bare perusal of the aforesaid Instruction would show that it is only applicable to order giving effect to the order of the first appellate authority viz., the CIT(Appeals). By virtue of amendment to the provisions of section 251 of the Act w.e.f. 1.6.2001, the first appellate authority does not have any power to set aside an assessment or issue for consideration by the AO. Hence, as rightly contended by the assessee, the aforesaid Instruction cannot be the basis for passing the impugned orders.

11. Secondly, the Tribunal vide order dated 28.3.2016 in ITA No.631/Bang/2013 has held that the assessment order framed by the ITO is not valid and that the assessment has to be framed *de novo* by a

competent Officer either ACIT/DCIT. By virtue of this order of Tribunal, the order of the AO which is sought to be rectified in the proceedings u/s. 154 of the Act is no longer in existence and even on this ground, the proceedings u/s. 154 of the Act are thoroughly misconceived, and in our view, deserves to be quashed.

12. Thirdly, it was also brought to our notice by the Id. counsel for the assessee that pursuant to the order of the Tribunal, the ACIT, Circle 4(3)(1), Bangalore has passed an order u/s. 254 of the Act r.w.s. 143(3) dated 30.12.2017 determining the total income of assessee at Rs.18,87,86,930. By virtue of this order of assessment, the previous determination of total income and tax payable no longer survives and therefore the orders passed u/s. 154 of the Act are purely academic. The assessee has already filed an appeal against the order dated 30.12.2017 and the same is stated to be pending for adjudication before the first appellate authority.

13. In the circumstances, we are of the view that the orders passed u/s. 154 of the Act are required to be quashed and are accordingly quashed.

14. In the result, both the appeals are allowed.

Pronounced in the open court on this 10th day of June, 2020.

Sd/-
(B R BASKARAN)
ACCOUNTANT MEMBER

Sd/-
(N V VASUDEVAN)
VICE PRESIDENT

Bangalore,
Dated, the 10th June, 2020.

/Desai S Murthy /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.