

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH “C”: NEW DELHI
BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
(Through Video Conferencing)

ITA No. 1205/Del/2020
(Assessment Year: 2015-16)

Gunjan Garg, C/o. Raj Kumar & Associates CA, L-7A(LGF) South Exten. Part-II, New Delhi PAN: AAGPG5718B (Appellant)	Vs.	Pr. CIT-16, Room No. 101, Drum Shape Building, New Delhi (Respondent)
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ITA No. 1206/Del/2020
(Assessment Year: 2015-16)

Mukesh Garg, C/o. Raj Kumar & Associates CA, L-7A(LGF) South Exten. Part-II, New Delhi PAN: AAAPG2585Q (Appellant)	Vs.	Pr. CIT-16, Room No. 101, Drum Shape Building, New Delhi (Respondent)
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Assessee by :	Shri Raj Kumar Gupta, CA Shri Sumit Goel, CA
Revenue by:	Ms. Suniita Singh, CIT DR
Date of Hearing	24/09/2020
Date of pronouncement	09/11/2020

ORDER

PER PRASHANT MAHARISHI, A. M.

1. These are the two appeals filed by the family members of one family having identical facts, for same Assessment years against the order passed u/s 263 of The Income Tax Act [hereinafter referred to as “the Act’] on 30 March 2020 by THE PRINCIPAL COMMISSIONER OF INCOME TAX – 16, New Delhi [hereinafter referred to the ‘CIT’] therefore those are heard together and disposed of by this common order.
2. ITA number 1205/Del/2020 is filed by Mr. Gunjan Garg [hereinafter referred to as the “Assessee” or “Appellant”] against the order of the Id Pr. CIT 16, New Delhi dated 30.03.2020 for the AY 2015-16 u/s 263 of The Act.

3. Similarly ITA number 1206/del/2020 is filed by Mr Mukesh Garg against the order of the learned Principal Commissioner Of Income Tax – 16, New Delhi passed u/s 263 of The Act on 30th of March 2020.

4. Identical grounds of appeal have been raised in both these above appeals as Under:-

- “1. That under the facts and circumstances, the asstt. order u/s. 143(3) Dtd.22.11.17 is neither erroneous nor prejudicial to the interest of revenue and there exists no such circumstances which provides for invoking Sec.263, hence, jurisdiction u/s.263 has been wrongly assumed.
2. That under the facts and circumstances and in view of provisions of SeC.245F and other related sections, only the Hon’ble ITSC was having the jurisdiction, hence the order passed u/s.263 by POT is outside the scope and powers of Ld. POT.
3. That the order passed u/s.263 is unsustainable in law so much so that SCN has been issued for different issue and the findings and directions are given on different
4. That Ld. POT exceeded his jurisdiction in invoking Sec.263 for fresh examining the issue of STCG as the same stood properly examined and adjudicated on merit by Ld. A.O. during regular proceedings u/s. 143(3) of the I.T. Act.
5. That Ld. POT further erred in law in directing to pass denovo asstt. order, when the specific directions are for examining the issue of short term capital gain only.
6. That under the facts and circumstances, the order passed on 31.03.20 u/s.263 is unsustainable in law since, on 31.03.20 it was complete lockdown with all Govt, offices closed fully due to COVID-19 and the limitation stood extended from 31.03.20 to 30.06.20.”

5. Facts of the case culled out from the assessment order passed in case of Mr. Mukesh Garg shows that Assessee is earning business income from a partnership firm engaged in manufacturing and export of pan masala containing tobacco, filed his return of income on 30 September 2015 at the total income of ₹ 34,432,330/-. The case of the assessee was selected for scrutiny under CASS for limited scrutiny to examine :-

- i. large value transactions (sale of equity with delivery) reported in STT return and sale consideration disclosed in capital gain scheme
- ii. sale consideration of property in ITR is less than sale consideration reported in form 26QB,
- iii. large deduction claim u/s 54B, 54C, 54D, 54G and 54GA

Subsequently notices were issued and explanation was filed by the assessee. Consequent to that the income of the assessee was assessed u/s 143 (3) of The Act on 29 November 2017 at the same income which was returned, by the Asst Commissioner Of Income Tax, Circle 48 (1), New Delhi [The Id AO] .

6. In review of assessment by The Joint Commissioner Of Income Tax, Range – 47, Delhi, it was noted that the order passed on 22 November 2017 by the AO is erroneous and prejudicial

to the interest of the revenue. Therefore notice u/s 263 of the income tax act was issued on 12/9/2018 wherein following reasons were recorded:-

“..... A proposal for review in your case for assessment year 2015 – 16 has been received from the ACIT, Circle 47 (1) duly forwarded by JCIT, range 47, New Delhi. As per the proposal, the assessment order and the assessment records, it is found that the assessment order passed u/s 143 (3) by the assessing officer for the assessment year 2015 – 16 dated 29/11/2017 is erroneous insofar as it is prejudicial to the interest of the revenue.

On examination of the assessment records and details furnished, it has been observed that, one of the issues of scrutiny was larger short-term capital gains declared u/s 111 A. It is seen from the submission made during the assessment proceedings that the assessee has claimed STCG of ₹ 22,504,526/- u/s 111 A on purchase of various shares at ₹ 50,601,612/- and sale of shares at ₹ 73,106,138/-. All the purchases and sale of shares has been carried out between April, 2014 and September, 2014. The assessee has carried out shares transaction in 35 listed companies. Majority of shares have been purchased during the month of April and May, 2014 and these are sold during the month of June, July and September 2014. The average period of holding around 3 – 4 months. The purchases of the same script were made in lots on different dates. Holding period is also less and intention is to make quick money from the purchase and sale of large number of shares over a relatively short period of time.”

Thereafter, the CIT referred to CBDT circular number 4/2007 and 6/2016 wherein the tests are laid down between the shares held as stock in trade and shares held as investment.

Thereafter it was noted that:-

“the purchase and sale of shares with the motive of earning a profit, would result in the transactions being in the nature of trade/adventure in the nature of trade, but where the objective of the investment in shares of a company is to derive income by way of a dividend etc. then the profits accruing by changing such investment (by sale of shares) will yield capital gain and not revenue receipt on the cursory look, due to the sheer quantum and duration of share transactions it looks like these transaction should have been treated as

business income chargeable to tax at the rate of 30% and not STCG which is chargeable rate of 15% tax.”

Therefore it was stated that the assessment order passed by the learned that AO why should not be set aside being erroneous and prejudicial to the interest of revenue.

7. Subsequently, another notice dated 27/9/2018 was issued by CIT stating that further, on perusal of the Ledger of Kisna Traders private limited filed by the assessee and claim that the shares were purchased through kisna Traders private limited, it is noted that most of the shares purchase shown on credit, peak balance of which is RS 4,76,18,622/- which is abnormal in share trading business. The assessee has failed to submit any proof of purchase in physical/Demat format. This raises serious doubts on the date of purchase of such shares. Even survey carried out in case of M/s Varun capital services private limited by the Deputy Commissioner Of Income Tax (OSD), New Delhi through which assessee sold shares, it was reported that the entries are the off market share transaction, trades are not settled through clearing corporation or a clearinghouse and transactions are settled outside NSDL environment. It was further stated in the notice that the off-line purchases transaction made are found to be a sham transaction as the director of Varun Capital Services Pvt Ltd admitted in the statement recorded by ITO, Ward 14 (3), New Delhi that he is acting merely as a front to Shri Rajneesh Gupta director of Varun capital services private limited. He further noted that unaccounted capital in the book attracts income tax at the rate of 30%, however if the same capital is rooted in the books in the form of short-term capital gains on sales of shares, it attracts a flat rate of 15% tax thus saving almost half of the tax applicable. Thereafter, he discussed the modus operandi of typical accommodation entry provider. He therefore stated that assessee has failed to show before AO the date of purchase of shares, when were the shares were delivered to the assessee along with proof, distinctive number of each of the shares, name and address of party from whom purchases were made, Demat account from whom such shares are purchased, how the shares were purchased without payment of a single rupee at the time of purchase, how the payments are made to the seller only after realization of sale proceeds and stating that it shows that the real date of purchase and the same date is a sale as per the transactions in the Demat statement. Accordingly, CIT noted that since no investment was made by the assessee out of his own funds and purchases if any made only on credit basis and purchases/sales of shares were made frequently which clearly shows that the transactions were made to earn profit without making any investment which is assessable under the head business income rather than capital gains. This issue was also not examined. With respect to the agricultural income, it was noted that agricultural income of ₹ 5.90 lakhs were shown when there is no agricultural land holding. On the third issue, it was noted that

when the property in Chanakyapuri is self occupied it need to examine in which year it was purchased. The fourth issue that was stated that assessee has purchases right of Vimal brand for ₹ 1.73 crores which is a sham transaction as amount of ₹ 1.30 crore is shown as creditor for purchase of such rights.

8. The assessee submitted its reply with respect to share transactions that during the assessment the AO asked question number eight on 1/2/17 and in response to that assessee submitted contract notes in support of the same and complete details were submitted by letter dated 17/2/2017, 3/11/2017, 11/11/2017 and 11/11/2017 (another letter) wherein the Demat statement, Ledger account of Varun capital services Ltd, Ledger account of assessee from the brokers books of accounts. It was contended that after examining the above, claim of the assessee was accepted over and above the explanation for which issues raised by the so-called notice were also submitted. With respect to the agricultural income of ₹ 5.90 lakhs assessee submitted that the case was selected for limited scrutiny only and same was not the issue before the AO and therefore it could not have been enquired by the AO. Further with respect to the income from house property and purchase of rights of Vimal brand same arguments were raised. Though, assessee also explained these issues.
9. Assessee also submitted that that the case of the assessee for assessment year 2015 – 16 has already been admitted by the Income Tax Settlement Commission (ITSC) u/s 245C (1)/245D (1) vide order dated 18/12/2019 and therefore the proceedings before the learned CIT gets abated as provided in Section 245F (1)/(2) read with first proviso thereto.
10. The learned CIT with respect to the proceedings before the Income Tax Settlement Commission noted that while the proceedings u/s 263 of the Income Tax Act were underway, the assessee filed an application before the settlement commission u/s 245C (1) of the income tax act 1961 on 05/12/2019. The assessee made an application for assessment year 2013 – 14, 2014 – 15, 2015 – 16, 2017 – 18, 2018 – 19 and assessment year 2019 – 20. He referred to the provisions of Section 263 (3) of the act and stated that the authorities mentioned in that Section do not mention the Income Tax Settlement Commission. He further referred to the provisions of Section 245A and held that combined reading of Section 263 (3) and Section 245A (b) leads to intention that settlement application for particular assessment year i.e. assessment year 2015-16 can be filed only when the proceedings are pending before the AO or notice u/s 148 would have been issued. However for the assessment year 2015 – 16 proceedings u/s 263 is already pending for that year for examining the information received in consequence of the survey on Varun capital services private limited. Therefore reopening u/s 148 and assessment u/s 147 of the act would not have been possible in this case.

Therefore it was stated that the application of the assessee for settlement in assessment year 2015 – 16 is not valid. Accordingly the objection of the assessee on this issue was rejected.

11. Thereafter considering the whole facts of the case and the examination of records before him after considering the explanation of the assessee, the learned CIT set-aside the assessment for to the file of the AO for making de novo assessment after giving proper opportunity to the assessee limiting the sphere of examination as Under:-
 - a. Short-term capital gain and its nature and quantum, whether it is bogus or not, whether. Of holding shares is only 1 – 2 days as per the Demat account or 4 – 5 months as claimed, whether it is to be taxed at the rate of 15% or 30%, whether 1 – 2% commission is to be added for taking bogus accommodation entry of STCG from the entities controlled by Mr Rajneesh Gupta including Varun capital services private limited and Kisna creditors private limited, whether transaction of of market purchases of such shares was settled in 48 are sword not
 - b. the source of investment in these shares may also be examined
 - c. Bank statement of relevant period may be examined to see timing of payment for purchase and sale of shares and whether they are in sync with the crediting and debiting of such shares in the Demat account
 - d. any other relevant point related to this issue
12. Accordingly order u/s 263 of the act was passed on 30 March 2020 which is under challenge before us.
13. As assessee is aggrieved with above order and challenges it on following counts:-
 - a. Referring Ground no 2 of appeal, the order is without jurisdiction in view of provisions of Section 245F (1)/(2) read with first proviso thereto stating that assessee filed a petition before the settlement commission on 5 December 2019 wherein the admission of the petition was ordered by settlement commission on 18 December 2019 and order u/s 245D (2C) was passed on 14th of February 2020 whereas the date of order u/s 263 is 30th of March 2020. Therefore the contention is the order u/s 263 has been passed after filing petition u/s 245C as well as u/s 245D (1) and 245D (2C) by Income Tax Settlement Commission. Therefore once the petition stands filed before the settlement commission the exclusive jurisdiction from the point of filing of the same lies only with the settlement commission.
 - b. It was further contended that the issue of subject matter Section 263 proceedings as well as before the settlement commission is the same. He stated that the 263 order has been passed to examine the nature and taxability of the declaring short-term capital gain of ₹ 35,386,947 whereas the petition before the settlement commission is on the

same issue for same transaction in the same shares for the same assessment year wherein assessee offered same as short term capital gain income for which the petition stands admitted. Therefore the exclusive jurisdiction comes to settlement commission for the entire assessment for assessment year 2015 – 16 which would be settled by the settlement commission. He further submitted that the learned CIT has also wrongly mentioned that reopening u/s 147 and 148 are not possible whereas the income tax settlement commission has already held that reopening u/s 147 and 148 could have been done for assessment year 2015 – 16. He further referred to the judicial precedent in case of 103 taxmann.com 301, 88 taxmann.com 77, ITA number 468/Kol/2009 and 19 taxmann.com 176.

- c. Adverting to ground number 5 and 6, the learned authorised representative referred to show cause notice issued on 27/9/2018 and such submitted that this notice was issued for taxing the short-term capital gain as business income whereas the finding of the learned CIT was on the issue and examination of the genuineness of the short-term capital gain. Therefore it was submitted that in absence of any show cause notice on this issue the directions contained in order u/s 263 are without jurisdiction as same could not have been issued. For this proposition he relied on the decision of the honourable Delhi High Court in 295 CTR (Del) 181 as well as 22 DTR (Del) 158 and honourable Punjab and Haryana High Court in 140 ITR 490.
- d. Adverting to ground number 1, 3 and 4 he submitted that the order of the learned assessing officer is neither erroneous nor prejudicial to the interest of the revenue as the issue has been examined u/s 143 (3) of the act. He submitted that the original assessment order was passed u/s 143 (3) and the issue in the limited scrutiny case was completely examined. He referred to notice u/s 142 (1) 2 February 2017, reply of the assessee dated 17 February 2017 and 2 November 2017 where the complete details were submitted. It was further stated that there was no discrepancy found in the above dated by the learned and CIT also. Therefore it cannot be said to be a case of even inadequate enquiry. Further, he submitted that in case of a limited scrutiny cases selected, limited enquiry is to be made. If such a limited inquiries made by the learned assessing officer, cannot be subject to 263 revisionary proceedings by CIT by stating that AO should have made expansive enquiries, then CIT should have stated that not converting the limited scrutiny case into the complete scrutiny and erroneous order of the learned assessing officer, he submitted that, that is not the case of the CIT.

- e. He further submitted that in the case of two family members ANUJ GARG huF and m k garG huf for assessment year 2012 – 13 similar to 63 proceedings were initiated by the principal Commissioner of income tax which were subsequently dropped. He referred to both these orders and submitted that these are identical cases except the change in the assessment year there are no other changes. Therefore, in case of the assessee are different stand cannot be taken by the revenue.
 - f. Adverting to ground number seven he submitted that the direction of the learned principal Commissioner of income tax by setting aside the whole assessment to the file of the learned assessing officer and to pass a D no assessment order is also devoid of any merit.
 - g. Adverting to ground number 8 and 9 he submitted that you to commit 19 there was a complete lockdown in whole India with effect from 23 March 2020. The limitation. Which was to expire normally on 31st of March 2020 was increased up to 30 June 2020 and thereafter up to 30 September 2020 and as on this date up to 31st of March 2021. Therefore the impugned order passed on 30th of March 2020 in the lockdown. Is not sustainable in law. He further stated that the case of the assessee was last put for hearing on 21 October 2019 wherein complete details were furnished and thereafter no new date was fixed. He further stated that on filing of the petition before the settlement commission on 5 December 2019 and after receipt of order u/s 240 5D (1) on 18 December 2019, the assessee on his own submitted a letter dated 20 December 2019 in forming the CIT for filing the petition and the order of the settlement commission of admission. Therefore after that, this order was passed on 30th of March 2020 on ITBA. He therefore submitted that when the last hearing concluded on 21st of October 2019 and the order was passed only on 30th of March 2020 after more than six months from the last date of hearing is clearly violative of the principles of natural justice and no reasonable and adequate opportunity of hearing to the assessee was provided therefore such order is not sustainable in law. He relied on the decision of the honourable Delhi High Court in 305 ITR 83 (Del), 194 taxmann 57 (Del).
 - h. With respect to the applicability of the order u/s 263 of the act with respect to inadequate enquiry, conceivably two opinions et cetera et cetera several judicial precedents were relied upon.
14. The learned and CIT DR vehemently opposed the arguments of the learned authorised representative and supported the orders of the learned CIT she referred to the scheme of the act and stated that when the show cause notice was issued u/s 263 of the act thereafter the

assessee proceeded to the settlement commission. She stated that as soon as the proceedings commenced u/s 263 of the act the assessee approached the settlement commission therefore, the date of passing of the order u/s 263 is irrelevant but the date of initiation of proceedings u/s 263 of the act are relevant. With respect to the erroneous and prejudicial order of the learned assessing officer, she submitted that, the assessee is avoiding the penalty u/s 271 (1) (C) of the act and prosecution by obtaining the order of the learned settlement commission. He therefore submitted that for this reason the order passed by the learned assessing officer is erroneous and prejudicial to the interest of revenue.

15. We have carefully considered the rival contention and perused the orders of the lower authorities. We have also perused the order of the settlement commission. It is important to mention certain dates here. The assessee filed his return of income on 30 September 2015. Assessment u/s 143 (3) of the act was passed on 29/11/2017. The notice u/s 263 of the act was first issued on 12/9/2018. Assessee filed an application before the settlement commission u/s 245C (1) of the act on 5 December 2019. Therefore it is required to be seen whether assessee could have gone before the settlement commission in this case. According to Section 245C (1) and assessee may at any stage of a “case” relating to him make an application containing a full and true disclosure of his income which has not been disclosed before the AO and the manner in which such income has been derived, the additional amount of income tax payable on such income to the settlement commission to have his “case” settled. Therefore it is important to note that whether there was any “case” of the assessee or not. The word “ case” has been defined Under Section 245A (b) of the act in the manner that it means any proceedings for assessment of any person in respect of any assessment year or assessment years which may be pending before the assessing officer on the date on which an application Under subsection (1) of Section 245C is made. Therefore it is required to be ascertained whether there was any “case” pending of the assessee on the date of making an application before the settlement commission i.e. on 5 December 2019. Explanation to Section 245A specifies the proceedings Under is to which a settlement application can be filed which are as Under:-

- a. where a proceeding u/s 147, initiated by issue of notice u/s 148, is pending for an assessment year and any assessment years for which a notice u/s 148 could have been issued on such date.
- b. Where as fresh assessment proceedings, initiated pursuant to an order u/s 254 or 263 or 264, setting aside or cancelling an assessment, is pending
- c. Search and seizure -related cases covered by issue of notice u/s 153A or 153C
- d. where regular assessment proceedings are pending.

16. A proceeding can be said to be “pending” after its commencement and till it is concluded. In the present case it is not the case where fresh assessment pursuant of an order u/s 254 or 263 of the 264 has been made setting aside or cancelling an assessment order already passed. It is also not a case of search assessment u/s 153A or 153C. The regular assessment has also commenced at the time the return of income and furnished by the assessee and assessment order has been passed. The date of conclusion of an assessment proceedings is either the date of completion of an assessment order the expiry of the time limit specified u/s 153 (1) whichever is earlier. The only issue in the present case is that the assessment order has already been passed u/s 143 (3) of the act on 29/11/2017 and notices could have been issued to the assessee u/s 147 of the income tax act as the impugned assessment year is assessment year 2015 – 16, the notice u/s 147 would have been issued to the assessee till the expiry of four years from the end of the relevant assessment year or if a specified conditions are fulfilled then feel the expiry of six years from the end of the relevant assessment year. The relevant assessment year ended on 31st of March 2016, the first four years would have ended on 31st of March 2020, by which date the notice u/s 147/148 could have been issued to the assessee, assessee preferred an application before the settlement commission on 5 December 2019. Therefore on the date of preferring an application before the settlement commission on 5 December 2019, by that date notices could have been issued to the assessee Under the provisions of Section 148/147 of the act and therefore assessee is legally entitled to approach the settlement commission for settlement of his case for assessment year 2015 – 16. In view of this we are of the view that there is no infirmity in the application for settlement commission made by the assessee before the ITSC on 5 December 2019 and therefore the learned CIT cannot have assumed the jurisdiction u/s 263 of the income tax act. The settlement commission has also passed an order admitting the application of the assessee u/s 240 5D (1) of the act on 18 December 2019. The settlement commission assumes exclusive jurisdiction to exercise the powers and perform the functions of an income tax authority in relation to the case from the date on which the application is made and until an order u/s 245D (4) of the act is passed. In the present case, therefore from 5 December 2019 till the order u/s 245D (4) of the act is passed the only authority which can exercise the jurisdiction for the income tax matters is only settlement commission. This issue was also raised before the settlement commission which dealt with it in the similar manner. Therefore also we are of the view that assumption of jurisdiction by the learned and CIT in passing an order u/s 263 of the act on 30th of March 2020 is not proper.
17. Further the only issue in the revisionary proceedings is assessment of the short-term capital gain earned by the assessee on sale of shares. This issue has already been considered by the

settlement commission which has been offered by the assessee as an additional income on which tax at appropriate rate is payable. Therefore even otherwise there is no prejudice caused to the revenue because assessee has already offered the above income as additional income before the settlement commission. Further the only grievance of the revenue to say that the order is erroneous and prejudicial to the interest of the revenue for the reason that assessee has been saved from penalty and prosecution on the issue. We have carefully considered the argument of the learned CIT DR on this aspect and find that when a specific authority is given to the settlement commission u/s 245H of the act to grant immunity from prosecution and penalty. Therefore, when a settlement commission is given a special power to grant immunity from prosecution and penalty Under the income tax act itself, it cannot be said that assumption of jurisdiction by the settlement commission in accordance with the law wherein there are chances for waiver of penalty as well as immunity from prosecution is an order which will constitute prejudicial to the interest of the revenue. More so, there is no error in such order, which is yet to be passed. The assessee may get and immunity from prosecution and penalty order or it may not get. Therefore such situation cannot be preempted to assume jurisdiction u/s 263 of the act.

18. In view of above findings, we quash the order passed by the learned CIT u/s 263 of the income tax act. Therefore, appeal of the assessee is allowed considering the above two aspects and keeping the other aspects open.
19. The appeal of the assessee is allowed.
20. As in both the above appeals of both the assessee, facts are similar both the appeals are allowed.

Order pronounced in the open court on 09/11/2020.

-Sd/-
(H.S.SIDHU)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 09/11/2020
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi