

**IN THE INCOME TAX APPELLATE TRIBUNAL
RAIPUR BENCH, RAIPUR**

**BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER AND
SHRI N.K. CHOUDHRY, JUDICIAL MEMBER**

**ITA No.34/RPR/2021
Assessment Year: 2016-17**

Shri Dilip Sangoi,
Samta Colony
Ramsagar Para
Raipur (CG)
[PAN – AJGPS 3531 D]

vs. DCIT, Circle 1(1),
Raipur.

**ITA No.33/RPR/2021
Assessment Year: 2016-17**

Shri Arvind Sangoi,
Ganjpara,
Ramsagar Para
Raipur (CG)
[PAN – AUCPS 4150 P]
(Appellants)

vs. DCIT, Circle 1(1),
Raipur.

(Respondent)

Appellants by : Shri Amit Maloo Jain, C.A.
Respondent by : Shri R.K. Singh, CIT D.R.

Date of hearing : 30.07.2021
Date of pronouncement : 29.09.2021

ORDER

PER PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER :

ITA No.34/RPR/2021 – A.Y. 2016-17 – Shri Dilip Sangoi

The captioned appeal has been filed at the instance of the assessee against the revisional order of the Principal Commissioner of Income Tax (PCIT in short), Raipur communicated to assessee on 26.03.2021 passed under section 263 of the Income Tax Act, 1961 (the Act in short) whereby the assessment order passed by the Assessing Officer (A.O.) dated 24.10.2018 under section 143(3) of the Act concerning Assessment Year (A.Y.) 2016-17 was sought to be set aside for reframing the assessment in terms of supervisory jurisdiction.

2. As per its grounds of appeal, the assessee has challenged the revisional action of the PCIT whereby the A.O. was directed to pass the assessment order *denovo* after making enquiries on the points set out in the notice which are stated to be already examined and considered during the original assessment proceedings concerning A.Y. 2016-17. The assessee has challenged the assumption of jurisdiction by the PCIT under section 263 of the Act on the ground that the Assessment Order under revision is neither erroneous nor prejudicial to the interest of the revenue.

3. The background facts leading to revision are that the return of income of the assessee was subjected to assessment proceedings for the A.Y. 2016-17 in question and the assessment was completed under section 143(3) of the Act dated 24.10.2018. The PCIT called for the examination of assessment records and was of the opinion that the assessment order so passed is erroneous in so far it is prejudicial to the interest of the revenue for the reasons that the A.O. has failed to make proper enquiries in respect of nature & character of income arising on co-ownership sale of land. The PCIT opined that the facts in the case of the assessee suggests that the profit arising on sale of land in question has given rise to 'business income' as against the 'capital gains' claimed by the assessee. The PCIT accordingly issued show cause notice under section 263 of the Act as to why the assessment order so passed should not be set aside or modified to withdraw the concessional tax rate availed by the assessee by characterising the surplus on sale of land as 'capital gains' in departure with its true nature as business income.

4. It will be apt to reproduce the show cause notice for easy reference:-

"NOTICE FOR THE HEARING

M/s/Mr/Ms

Subject: Notice for Hearing in respect of Revision proceedings u/s **263** of the **THE INCOME TAX ACT, 1961** – Assessment Year **2016-17**.

*In this regard, a hearing in the matter is fixed on **16/03/2021 at 11:30 AM**. You are requested to attend in person or through an authorized representative to submit your representation, if any along with supporting documents/information in support of the issues involved (as mentioned below). If you wish that the Revision proceeding be concluded on the basis of your*

written submissions/representations filed in this office, on or before the said due date, then your personal attendance is not required. You also have the option to file your submission from the e-filing portal using the link: **incometaxindiaefiling.gov.in**

On examination of your Income Tax records for the above assessment year, I find that the order passed u/s 143(3) r.w.s 147 on **24.10.2018** of the Income tax Act, 1961 is erroneous in so far as it is prejudicial to the interest of revenue in the following manner: -

The order in the aforesaid case is erroneous so far as prejudicial to the interest of revenue on the following grounds:

In this case return of income was filed by the assessee for the year under consideration on 10.09.2016 declaring total income of Rs. 22,18,460/- for AY 16-17. The case was selected for limited scrutiny through CASS and accordingly, assessment u/s 143(3) of the Act was completed on 24.10.2018.

In this case on perusal of the assessment folder following issues came to notice:-

On perusal of case record, it was seen that the assessee has been solely working with the intention to acquire land with one co-owner and then sell it at profit. Therefore, the income was to be held as adventure in the nature of trade and profit and gains there from was liable for taxation as business income whether from sale of agriculture land or non-agriculture land.

It is apparent from the record that the intention of the assessee was not to perform any agricultural activity on the land and investment in agriculture land. The intent and purpose for purchasing the land, after conversion of land use for residential purpose and selling it of such land can by no means qualify for LTCG.

Here it is worthwhile to mention and reproduced section 2(13) of IT Act : which states as under:

Business includes any-trade, commerce or manufacturing or any adventure or concern in the nature of trade, commerce or manufacture. The issue was to what should constitute as adventure in the nature of trade, has been considered and examined by various higher courts.

Hon'ble Supreme Court in its judgment in the case of CIT vs. M/s Sutjej Cotton Mills Supply Agency Lt. 100 ITR706 has held that " if the dominant intention was to carry on an adventure in the nature of business, the profit can be taxed". Since it is proved that the intention of the assessee was to earn profit

from transaction of purchase and sale of agriculture land, profit earned can be taxed from sale of such agricultural land as business income.

Further the Hon'ble Supreme Court in the case of G. Venkat swani/Naidu & Co. Vs. CIT 35 ITR594 has held that in cases where purchases have been made solely and exclusively with intention to "resell at a profit and purchaser has no intention of holding property for himself or otherwise enjoying or using it, presence of such an intention is a relevant factor and unless it is obstructed by presence of other factors it could raise a strong presumption that the transaction is an adventure in the nature of trade.

Audit examination revealed that the assessee had purchased the land within limit of Municipality of Raipur situated at Village Mova, measuring area 36000 Sq. Ft. with another co-owner Shri Arvind Sangoion 26.03.2007. Further, it was observed that the said land was diverted for residential use by the competent authority on 16.01.2015. During the year under consideration the assessee and co-owner had sold the land 7983 Sq. ft. out of 36000 Sqft. For Rs. 1,18,74,959/- to the four persons. The assessee had disclosed his share from sale of land of Rs. 5,93,74,780/- and worked out LTCG from sale of land for Rs. 11,78,210/- after deducting indexation cost of land and adjustment of long term capital loss of Rs. 27,49,277/- on sale of Page 2 of 4 AJGPS3531D-DILIP SANGOI A.Y. 2016-17 ITBA/REV/F/REV1/2020-21/1031409603(1) unlisted shares and securities. Since, the assessee acquired land with a view to selling it later resulting in profit and the activity can only be described as business venture. The assessee had calculated LTCG from sale of land Rs. 42,96,423/- and claimed indexation cost was not in order. The profit from sale of land for Rs. 52,92,123/- (5937480 – 645357) without considering transfer expenses and benefit of indexation of acquisition cost was required to be taxed as business income which was not found so.

In view of provisions of section 74 of IT Act the assessee had claimed and allowed set-off long term capital loss from sale of property which was required to be treated as business income also not in order.

Since the above facts and enquiry in relation to the above discussed issues remained to be done by the AO during the course of assessment proceeding and the AO failed to tax profit from sale of land treating as business income, the order passed u/s 143(3) of IT Act for AY 2016-17 on 24.10.2018 is prejudicial to the interest of revenue which resulted in under assessment.

As the above aspect regarding non-disclosure of investment in shares in the books of accounts, remained to be examined during the course of assessment proceeding, the assessment order is erroneous and prejudicial to the interest of revenue, the same needs detailed verification enquiry.

3. *In view of these facts, there is no documentary evidence to satisfactorily explain the nature and source of cash transaction/contract receipts. Consequently, there is no proper verification made by the AO in this case.*

4. *Hence, there is no application of mind on the part of the AO to correctly tax the income of the assessee in the return of income and therefore, the assessment order passed u/s 144 of the Act is erroneous in so far as it is prejudicial to the interest of revenue.*

Therefore, in exercise of the powers conferred on me by section 263 of the I.T. Act, 1961, I propose to suitable revise the order u/s 263, which may include setting aside the order as such. Accordingly, an opportunity is being extended to explain your case along with details, documents and necessary evidences. An absence of any submission or reply shall lead to the conclusion that you have no objection for the proposed action and the proceedings shall be finalized accordingly.

Your submission/reply may kindly be sent through the e-mail on or before 16/03/2021.

If you wish to appear personally or through your authorized representative, personal hearing may kindly be availed on 16/03/2021 at 11:30 pm in the office of PCIT-1, Central Revenue Building, Civil Lines, Raipur.

5. In response to the show cause notice, the assessee filed a detailed reply dated 19.03.2021 seeking to demonstrate that the surplus arising on sale of land has been rightly characterised as capital gains and the A.O. made necessary enquiries in this regard while accepting the stand of the assessee. The PCIT, however, alleged that the A.O. has not conducted proper enquiry regarding genuineness of the contentions put forth by the assessee. The A.O. was accordingly directed to make adequate enquiries with regard to the nature of transaction in the light of provisions of section 2(13) of the Act and consequent set off of loss. The assessment order was accordingly set aside and remanded back to the file of the A.O. for fresh adjudication of the issue by invoking the revisional power under section 263 of the Act.

6. Aggrieved, the assessee preferred appeal before the Tribunal. The learned counsel for the assessee, at the outset, submitted that the impugned assessment order is neither erroneous nor prejudicial to the interest of the revenue. Several contentions were raised in this regard:-

- i) The PCIT has wrongly assumed that the land purchased by the assessee along with the other co-owner Shri Arvind Sangoi (ITA No.33/RPR/2021) is 36000 sq. ft., whereas, the land is only 13000 sq. ft., out of which, the share of each co-owner is 6500 sq. ft. The size of land parcel has somewhat wrongly influenced the mind of PCIT.
- ii) The assessee was subjected to limited scrutiny and one of the reasons was to verify whether the capital gains/loss on sale of property has been correctly shown in the return of income. Hence, a normal presumption would arise that the points specified in notice has been examined.
- iii) The query letter dated 14.08.2018 issued in the course of the assessment proceedings would show that the A.O. has specifically called the documents to verify the capital gains and has also referred to the submissions made by the assessee and the documents filed along with the submissions dated 13.09.2018.
- iv) The A.O. has completed the assessment proceedings after verification of documents and the assessment was completed by adopting one of the possible and plausible view towards nature & character of income which is, typically, a debatable issue and is subject matter of litigation in many cases. Thus, the opinion formed by the A.O. on the character of income i.e. whether taxable under 'business income' under the head 'capital gains' is a matter of subjective opinion having regard to the facts of a given case. The PCIT under section 263 of the Act could not have invoked revisional powers to substitute his opinion on debatable issue without showing as to how the A.O. was in legal error in adopting one of the plausible views. The decision of the Hon'ble Supreme Court in CIT vs. Green World Corporation (2009) 77 CCH 449 was relied upon. A reference was also made to the decision of the Tribunal in the case of Minal Nayan Shah vs. PCIT (2019) 180 ITD 149 (Ahd.), Torrent Pharmaceuticals vs. DCIT (2018) 173 ITD 130 for the proposition that a plausible view taken in exercise of quasi judicial function cannot be dislodged in a light hearted manner in the name of inadequacy in enquiries or verification as perceived in the opinion of the revisional authority and the revisional powers cannot be

exercised for directing a fuller enquiry to merely find out whether the earlier view was taken erroneously, particularly when a plausible view was already taken after enquiry.

- v) It was finally contended that all the relevant documents and facts concerning the transaction were available on record before the PCIT. The PCIT has not done anything except directing the A.O. to recommence some un-spelled and so-called proper enquiry on the issue. The PCIT himself could have examined the issue if he so desired which depended on mere logical appreciation of facts which were duly available before him.
- vi) The PCIT is precluded from directing more enquiries without showing the nature of enquiries required to be conducted and without carrying out some minimum enquiries himself. The PCIT has only issued a single notice dated 19.03.2021 and passed the revisional order hurriedly dated 23.07.2021 without making any enquiry expected of him in this regard and after placing reliance on incorrect basic facts.

In the light of submissions made, it was urged that the revisional order of the PCIT be set aside and the Assessment Order passed under section 143(3) of the Act be restored.

7. The learned Departmental Representative, on the other hand, relied upon the revisional order and contended that Explanation-2 to section 263 of the Act enables the PCIT to hold the order passed by the A.O. to be erroneous in so far as it is prejudicial to the interest of the revenue, where the order is passed without making enquiries or verifications which should have been made in the context of the case.

8. We have carefully heard the rival submissions and perused the revisional order as well as the Assessment Order sought to be revised. The material/documents referred to and relied upon in the course of appeal has been perused in accordance with Rule 18(6) of the ITAT Rules, 1963. On perusal of the facts, it emerges that the assessee herein along with other co-owner sold a part of land parcel. It is the case of the assessee that, in past, he has never indulged into any business of real estate or sale or purchase of plots which fact has been duly placed before the A.O. in the course of assessment proceedings. No interest bearing funds have been utilised and

no development expenses have been incurred. It is the claim of the assessee that the gain has arisen to the assessee due to efflux of time without any specific efforts and because of meteoric rise in value of land parcels arising to every land owners on account of unprecedented development of Raipur City.

8.1 When, we see the facts in its natural perspective, the characterisation of the income as 'capital gain' in the given facts, looks quite plausible. It cannot certainly be branded as an issue free of any debate. The law is well settled that where the A.O. has taken a view which is plausible in law, cannot be displaced and substituted by the subjective view of a superior authority. In the instant case, the PCIT has not shown as to how the A.O. has gone wrong while admitting the nature of income declared by the assessee. There is nothing on record to show that the A.O. acted arbitrarily in exercise of quasi judicial powers. The A.O. had merely adopted one of the courses permissible in law and backed by a long line of judicial precedents holding such income to be capital gains. In contrast, the PCIT has adopted erroneous measurement of land giving the impression of large parcel of land which is not true. The basic features of a capital asset were also overlooked. Secondly, it was open for the PCIT to examine the facts himself and come to a conclusion of un-debatable nature. We fail to understand what kind of enquiries is needed in such cases when the relevant facts are available on record both before the A.O. as well as the PCIT and only warrants a relook at the same.

8.2 Explanation-2 to section 263 of the Act does not give a uncontrolled & unbridled power to the revisional Commissioner to reopen a completed assessment to conduct further enquiries to verify and find out whether order passed is in fact erroneous or not. The facts explained on behalf of the assessee gives an infallible impression that the course adopted by the assessee in treating the gains as capital gains chargeable under section 145 of the Act and endorsed by the A.O. to be plausible.

8.3 The revisional power exercised in the facts of the case is plainly without authority of law. Consequently, the revisional order passed under section 263 is liable to be quashed and set aside.

In the result, appeal of the assessee is allowed.

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9. The assessee herein is other co-owner of the same land parcel, the character of gain arising on sale therefrom is in dispute. The configuration of facts being replica to the other co-owner (Dilip Sangoi - ITA No.34/RPR/2021) supra, the conclusion drawn therein shall apply *mutatis mutandis* to the instant case as well. Consequently, the revisional order passed under section 263 of the Act in the case of Arvind Sangoi is also quashed and set aside.

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

11. In the combined result, the appeals of both the assesseees captioned above are allowed.

PRONOUNCED ON 29.09.2021 as per Rule 34(4) of the Income Tax Appellate Tribunal Rules,1963.

Sd/-
(N.K. CHOUDHRY)
Judicial Member

Sd/-
(PRADIP KUMAR KEDIA)
Accountant Member

True Copy

PBN/*

Copies to: (1) *The appellant*
(2) *The respondent*
(3) *CIT*
(4) *CIT(A)*
(5) *Departmental Representative*
(6) *Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Raipur Bench, Raipur