

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'A' BENCH, KOLKATA**

(Before Sri Manish Borad, Accountant Member & Sri Sonjoy Sarma, Judicial Member)

**I.T.A. No.: 121/Kol/2021
Assessment Year: 2016-17**

Shri Sujit Kumar Dey.....Appellant
[PAN: AGJPD 4345 E]

Vs.

ACIT, Circle-24(1), Hooghly.....Respondent

Appearances by:

*Sh. S.M. Surana, Adv. &
Sh. Sunil Surana, CA, appeared on behalf of the Assessee.*

Sh. Sudipta Guha, CIT (D/R), appeared on behalf of the Revenue.

Date of concluding the hearing : April 26th, 2022

Date of pronouncing the order : May 24th, 2022

ORDER

Per Manish Borad, Accountant Member:

This appeal filed by the assessee pertaining to the Assessment Year (in short "AY") 2016-17 is directed against the order of Id. Pr. Commissioner of Income-tax-5, Kolkata [in short Id. "PCIT"] U/s 263 of the Act dated 18.03.2021.

2. The assessee is in appeal before the Tribunal raising the following grounds:

"(i) For that the revisionary proceedings initiated on the basis of audit objection from the Revenue Audit without the initial trigger from the Pr. CIT is unjustified and not in accordance with law.

(ii) For that the Ld CIT erred in holding the view as if the entire land was received by the developers for a consideration of Rs. 1.50 crores when the developers were to further incur construction expenses and in exchange were entitled to only part of the project and not the whole land.

(iii) For that the Ld CIT erred in assuming jurisdiction u/s 263 when there was no purchase or transfer of any property so as to apply the provisions of section 56(2)(vii) since only the development agreement was executed. And thereafter there was no further act, nor any sanction of plan, the assessee did not received possession and hence, assessment order was neither erroneous nor prejudicial to the interest of the revenue.

(iv) For that the Ld CIT erred in holding the view that provision of section 56(2)(vii) was applicable when the same is applicable only if the assessee received any immovable property when the assessee did not receive any immovable property being land or building.

(v) For that the Ld CIT erred in holding that the assessment completed u/s 143(3) was erroneous and prejudicial to the interest of revenue on the fact that the advance paid to landlord was shown as "Advance for Land" and not as "Stock-in-trade" whereas the money paid to landlord was actually the refundable deposit.

(vi) For that the Ld CIT erred in not accepting the explanations of the assessee that the development agreement and the amount advanced to the landlord was duly disclosed to the AO and were on record.

(vii) For that even otherwise the revisionary proceedings were not in accordance with law."

3. From perusal of the grounds raised by the assessee we find that the solitary grievance of the assessee is that ld. PCIT erred in invoking the revisionary jurisdiction without satisfying the conditions precedent is as laid down u/s 263 of the Act i.e. without validly holding that the ld. Assessing Officer's (in short ld. "AO") order is erroneous as well as prejudicial to the interests of the Revenue. Since the jurisdictional issue has been raised, we will first of all adjudicate the legal issue.

4. Brief facts of the case are that the assessee is an individual. Income of Rs. 10,13,620/- declared in the e-return filed on 14.10.2016 for AY 2016-17. Case selected for scrutiny for the reason to verify "whether the investment and income relating to property disclosed". Notice issued u/s 142(1) of the Act to verify details which were filed including the details filed for development agreement entered into by the assessee with other two developers with the landlord Mr. Mahendra Pratap Singh & Others. After being satisfied with the details filed, ld. AO concluded the assessment accepting the returned income vide assessment order dated 24.12.2018 passed u/s 143(3) of the Act.

5. Subsequently, ld. PCIT on perusal of the assessment records noticed that in the agreement entered between Mr. Mahendra Pratap Singh and others with the assessee and two other individuals, fair market value of the property is Rs. 8.65 Cr. Ld. PCIT, further observed that this being a transaction of purchase, the assessee has only paid Rs. 50 lakh as against the 1/3rd share of the fair market value i.e. 2.38 Cr. Accordingly following show cause notice dated 01.03.2021 was issued:

“On examination of records revealed that the assessee along with two others called developers had purchased 0.7680 acre of land along with two storied commuted pucca structure measuring 16577 Sq.ft, from Mahendra Pratap Singh and Abhisekh Kumar Singh called landlords on 28 August 2015. It was registered under rule 21 of West Bengal Registration Rule where the fair market value of the property (stamp duty) was Rs.8.65 crore (land 6.53 structure-2.12)/The developers has not been registered in any form’ or under any act etc They are individuals.

The landlords had transferred the above property to the developers (assessee along with 2 others) for construction of a multi-storied building; the sole purpose of which is to sale to customers by the three developers 1/3rd of the property (33.33%) was transferred to the assessee. An amount of Rs. 1.50 crore was paid to the landlords by the developers of which an amount of Rs.50 lakh (1/3rd) being his share was paid by the assessee. The assessee did not disclose anything with regard to the property in his return. However, the Assessing Officer did not consider the purchase under the above stated section and allowed the inadequate consideration which resulted in underassessment of income by Rs.2.38crore (2,88,22,020-50,00,000) and thereby undercharge of tax amounting to Rs.65,27 lakh (49.07+16.19).

Under assessment of income/capital gain	Rs.2,38,22,020/-
Undercharge of tax	47,64,404/-
Edu cess	1,42,932/-
Total undercharge of tax	49,07,336/-
Interest (234B)	16,19,420/-
Total Tax	65,26,756/-

In this regard, it; is stated that the assessee along with 2 other persons has entered into a development agreement with landlords on 28.08.2015. As per the building is to be constructed on the land belonging to the land owners. As per the agreement, landlords shall get 10 numbers of triple bed room residential flats, 5 numbers of double bed room residential flats, 1 number of 4 bed room residential flat, a commercial area measuring 3000 sq. ft. on the ground floor and 3000 sq.ft, on the 1st floor after completion of multi-storied building. The landlords are also to receive refundable advance amount of Rs. 1.50 crores which shall be adjusted during the time of delivery of structural portions to the land vendors.

Developers on the other hand Shall get remaining total built-up area of the multi-storied building. As per the agreement no assignment or conveyance in law by the land owners to the developers is permitted so as to create any right, title or interest in respect thereof other than an exclusive license to the developers to execute the work contemplated and to deal with the developers allocated share in the proposed new multi-storied building.

Thus, it can be seen it is a joint development/ venture agreement wherein assessee is a developer in the agreement. Thus, this is a business activity of the assessee and it is not a purchase of land by the assessee. Therefore, there is no question of income from capital gain or income from capital gain or income from any other source as per section 56(2)(vii). Section 45(5A) with effect from A.Y.2018-19 addresses issue pertaining to capital gain of landlord. Therefore, Sections quoted by audit, i.e. 56(2)(vii) and 45A are not applicable in the assessee’s case and are out of context in view of the’ detailed discussion.

In view of the above, the order passed by the A.O. u/s 143(3) on 29.12.2018.

Your case is fixed for hearing on 10.03.2021 at 11.30 a.m. in the chamber of, Pr. Commissioner of Income Tax-5, Kolkata at Aayakar Bhawan Purba, 110, SHANTIPALLY, E.M. BYPASS, KOLKATA-700107, 6th Floor, Room No, 601, Kolkata -700107. You are requested to appear either in person or through your authorized representative on the scheduled date, time, and place along with your written explanation with supporting evidences, failing which the case may be decided ex-parte without making any further correspondence with you. Due to COVID-19, you may submit your written submission through official e-mail: Kolkata.pcit5@incometax.gov.in.”

6. During the course of revisionary proceedings, it was submitted that the agreement entered between Mr. Mahendra Pratap Singh and the assessee was in the nature of development agreement and it was not purchase agreement. It was also submitted that no development work was taken up during the year and subsequently, the assessee received back his investment in the property. All these details were also called for by the ld. AO and were verified. However, ld. PCIT was not satisfied with the submissions and came to a conclusion that ld. AO passed assessment order without making any enquiry or independent verification and accordingly exercised the jurisdiction conferred by Section 263 of the Act and set aside the assessment order with direction to the ld. AO to pass an order in light of the observations made in the impugned order.

7. Aggrieved, the assessee is in appeal before the Tribunal. Ld. Counsel for the assessee reiterated the submissions made by the assessee before the ld. PCIT during the revisionary proceedings. Reference was also made to various documents filed in the paper book dated 29.09.2011 containing 76 pages.

8. Per contra, ld. D/R vehemently argued supporting the order of the ld. PCIT.

9. We have heard rival contentions and perused the records placed before us. The assumption of jurisdiction u/s 263 of the Act by ld. PCIT has been challenged before us by the assessee. Before we advert to the facts and law involved in this issue before us, let us revisit the law governing the issue before us. The assessee has challenged in the first place, the very usurpation of jurisdiction by ld. PCIT to invoke his revisional powers enjoyed u/s 263 of the Act. Therefore, first we have to see whether the requisite jurisdiction

necessary to assume revisional jurisdiction is existing in this case before the PCIT rightfully exercises his revisional power. For that, we have to examine as to whether in the first place the order of the Assessing Officer found fault by the Principal CIT is erroneous as well as prejudicial to the interest of the Revenue. For that, let us take the guidance of judicial precedence laid down by the Hon'ble Apex Court in *Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83(SC)* wherein their Lordship have held that twin conditions need to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the ld. PCIT. The twin conditions are that the order of the ld. AO must be erroneous insofar as prejudicial to the interests of the Revenue. In the following circumstances, the order of the ld. AO can be held to be erroneous order, that is (i) if the ld. AO's order was passed on incorrect assumption of fact; or (ii) incorrect application of law; or (iii) Ld. AO's order is in violation of the principle of natural justice; or (iv) if the order is passed by the ld. AO without application of mind; (v) if the AO has not investigated the issue before him; [because AO has to discharge dual role of an investigator as well as that of an adjudicator] then in aforesaid any event the order passed by the ld. AO can be termed as erroneous order. Coming next to the second limb, which is required to be examined as to whether the actions of the ld. AO can be termed as prejudicial to the interests of Revenue. When this aspect is examined, one has to understand what is prejudicial to the interests of the Revenue. The Hon'ble Supreme Court in the case of *Malabar Industries* (supra) held that this phrase i.e. "prejudicial to the interests of the revenue" has to be read in conjunction with an erroneous order passed by the ld. AO. Their Lordship held that it has to be remembered that every loss of revenue as a consequence of an order of ld. AO cannot be treated as prejudicial to the interests of the Revenue. When the ld. AO adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the ld. AO has taken one view with which the ld. PCIT does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue "unless the view taken by the ld. AO is unsustainable in law".

10. Keeping the aforesaid judicial position of law in mind, we note that ld. PCIT has alleged lack of enquiry on the part of ld. AO to examine the transaction entered into by the assessee along with other two persons with Mr. Mahendra Pratap Singh and Mr. Abhisekh Kumar Singh. After going through the observation of the ld. AO, details filed by the assessee in the paper book including the development agreement dated 28.08.2015 placed at page 6 to 47, detailed submissions made before the ld. PCIT and the finding given in the impugned order, we note that Ld. PCIT has alleged that the assessee has entered into a purchase agreement with two other buyers and the fair market value of the property was Rs. 8.65 Cr and it is, further alleged that the assessee's share of purchase consideration is 2.38 Cr and the assessee has only paid Rs. 50 lakh and, thus, there is an undisclosed investment by the assessee. After going through the records, we are of the view that Ld. PCIT failed to examine the facts in the right prospective because the transaction in question is not a transaction of purchase of immovable property. As per the development agreement dated 28.08.2015, the assessee along with two other persons namely Mr. Rajendra Rampal and Mr. Bishwanath Sukumar Dey approached the land owner Mr. Mahendra Pratap Singh and Mr. Abhisekh Kumar Singh for developing their property located at Chandernagore, Dist.-Hooghly, land measuring 0.7680 acre while entering into the development agreement of Rs. 50 lakh each was paid as advance by the three developers including the assessee. The said transaction is not a purchase transaction being undertaken by the assessee and other two persons with Mr. Mahendra Pratap Singh and others. Actually the said agreement is a development agreement entered into between the land owner and three developers including the assessee for developing the land and then sharing revenue/gains at the mutually agreed ratio. It is also an undisputed fact that after entering into the development agreement no further development took place and the amount advanced by the assessee as per the development agreement was refunded back in subsequent period.

11. We, further find that Id. AO while completing the assessment u/s 143(3) of the Act has examined this transaction in detail and has also discussed the issue in the assessment order at para 3 and the same reads as follows:

“3. On the basis of submission of the assessee and on verification of the books of accounts along with bank account transactions received from the banks and in view of the facts & circumstances of the case, it is observed:

(i) There has been a development agreement on 28.08.2015 at DSR-II, Hooghly vide Deed No:I-060201501/2015 and registered under rule 21 of West Bengal Registration Rule, 1962 between the landlords Sri Manwendra Pratap Singh and Sri Abhishek Kumar Singh and the Developers for construction of a multi storied building the sole purpose of which is to sale to customers by the three developers being-

- 1. Sri Rajendra Rampal*
- 2. Sri Biswanath Kumar Dey and*
- 3. Sri Sujit Kumar Dey, (the assessee in this case).*

On verification of the Accounts filed by the assessee along with his balance sheet and P&L A/c and the banking transaction filed by the assessee and as received from the banks and submissions made by the assessee on different dates that the assessee, Sri Sujit Kumar Dey (Developer and attorney) as per terms and condition laid down in the Development Agreement have paid as advance an amount of Rs.50,00,000/- by six A/c payee drafts (copy of counterpart placed on record) which is also clearly reflected in the Balance Sheet as advance for land under current assets.”

12. Under these given facts and circumstances of the case where the issue raised in the show cause notice has been examined properly by the Id. AO after conducting necessary enquiry and has also examined the facts properly their hardly remains any scope for Id. PCIT to exercise jurisdiction u/s 263 of the Act. Therefore, since the Id. AO has made necessary enquiry, applied his mind on the issue, examined the facts properly and has taken a possible view, we cannot agree with the finding of the Id. PCIT of setting aside the assessment order. Accordingly, the proceedings u/s 263 of the Act are quashed and the assessment order dated 24.12.2018 u/s 143(3) of the Act is restored. Thus, all the grounds raised by the assessee are allowed.

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

Kolkata, the 24th May, 2022.

Sd/-
[Sonjoy Sarma]
Judicial Member

Sd/-
[Manish Borad]
Accountant Member

Dated: 24.05.2022

Bidhan (P.S.)

Copy of the order forwarded to:

1. **Shri Sujit Kumar Dey, Mahamaya Colony, Dharampur, Chinsurah, West Bengal-712 101.**
2. **ACIT, Circle-24(1), Hooghly.**
3. CIT(A)
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata