आयकर अपीलीय अधिकरण,चण्डीगढ़ न्यायपीठ,चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH, "B", CHANDIGARH

BEFORE SHRI N.K. SAINI, VICE PRESIDENT &
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

आयकरअपीलसं./**ITA No.47/CHD/2021**
निर्धारणवर्ष / Assessment Year :2011-12

Shri Sunil Kumar Batta, Flat No. 105, Exotic Heights, Peer Muchhalla, Zirakpur, Mohali	बनाम	The PCIT, Panchkula
स्थायी लेखा सं./PAN NO: ADGPB3542B		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Sh. Parikshit Aggarwal, CA
राजस्व की ओर से/ Revenue by : Sh. Sarabjeet Singh, CIT DR

सुनवाई की तारीख/Date of Hearing : 25.05.2022
उदघोषणा की तारीख/Date of Pronouncement : 22.08.2022

आदेश/Order

Per Sudhanshu Srivastava, Judicial Member:

This appeal preferred by the assessee against order dated 18.03.2021 passed by the Ld. Pr. Commissioner of Income Tax,

Panchkula (Ld. PCIT) under section 263 of the Income Tax Act,1961 (hereinafter called 'the Act') for the assessment year 2011-12.

2.0 The brief fact of the case are that as per Annual Information Report (AIR), during the year under consideration, the assessee had sold an immovable property for a consideration of Rs.51,57,000/- and, therefore, proceedings under section 147 of the Act were initiated after recording of reasons by the Assessing Officer (AO). Thereafter, in response to the notice issued under section 148 of the Act, the assessee filed return of income declaring income of Rs.1,75,700/- under the head income from salary and income from long term capital gain.

2.1 The assessee was required to furnish details in respect of the sale of immovable property and, it was the submission of the assessee before the AO that he had sold his residential house at Panchkula for Rs.51,57,000/-. The assessee also filed documentary evidences like copies of the sale and purchase deeds and copy of the bank statements etc. before the AO. It was further submitted by the assessee before the AO that the assessee had made an

investment in another residential house- property at Panchkula for a sum of Rs.27,41,022/- and had claimed deduction under section 54 of the Act in respect thereof. On perusal of the computation chart, the AO noticed that the assessee had claimed Rs.12,17,106/- towards cost of improvement of the property sold during the financial year 2000-01 and Rs.9,38,520/- on account of purchase consideration of the said property during the financial year 1987-88. The AO required the assessee to provide documentary evidence in form of bills and vouchers with respect to the cost of improvement and cost of construction claimed but since the assessee could not furnish the required documentary evidences, the AO proceeded to disallow an amount of 5% of such expenses claimed which came to Rs. 1,07,781/-. Thus, this amount was added to the income of the assessee and the assessment was completed at taxable income of Rs. 2,83,482/-.

2.2 Subsequently, the Ld. PCIT issued a show cause notice under section 263 of the Act on 24.02.2021 mentioning instance of failure on the part of the AO vis-à-vis not having made any enquiry in

respect of the assessee's claim of indexed cost of improvement at Rs. 23,52,633/-. As per the impugned order, no reply to the said show cause notice was received from the side of the assessee. Therefore, based on the record before him, the Ld. PCIT observed that the replies filed by the assessee during the course of the assessment proceedings were just placed on record and that the AO had failed to make any independent enquiry to verify the contention of the assessee with respect to the cost of improvement and further since no document relating to cost of construction or improvement was provided by the assessee and the same having been accepted without enquiry by the AO, this had rendered the assessment order erroneous in so far has being prejudicial to the interest of the revenue. The assessment order was set-aside with the observation by the Ld. PCIT that the AO had passed the order in undue haste and without conducting worthwhile enquiry. The AO was directed to pass an order afresh after making detailed enquiries with respect to the observations of the Ld. PCIT.

2.3 Aggrieved, the assessee has now approached this Tribunal challenging the order passed under section 263 of the Act by raising the following Grounds of appeal:

> 1. *That on law, facts & circumstances of the case, the Worthy Pr. CIT has grossly erred assuming jurisdiction u/s 263 even when:*
>
> *1.1 The original assessment order passed under section 147 r.w.s. 143(3) did not satisfy the twin conditions of being an "erroneous order" and "prejudicial to the interest of revenue"*
>
> *1.2 The Worthy Pr. CIT has erred in setting aside the assessment order under section 147 r.w.s. 143(3) and in directing the AO to make assessment afresh on the ground that AO had not conducted worthwhile enquiries.*
>
> *1.3 The Worthy Pr. CIT erred in holding the cost of improvement of house sold claimed at Rs.23,52,633/- as wrongly allowed by the Ld. AO.*
>
> *1.4 The Statutory show cause notice u/s 263 was never served till the end of limitation period.*
>
> *1.5 The Worthy Pr. CIT has conducted the impugned proceedings under section 263 in extreme haste and without affording*

reasonable opportunity of being heard to the appellant.

2. *That the appellant craves leave for any addition, deletion or amendment in the ground of appeal on or before the disposal of the same.*

3.0 The Ld. AR submitted that at the outset, the assessee was denying service of the show cause notice on the assessee. Drawing our attention to the Affidavit filed by the assessee dated 07.07.2021, the Ld. AR submitted that it was only after the assessee had received the impugned order via email on 18.03.2021, he came to know that such an order had been passed and, thereafter, he checked through the Income Tax portal and found that the show cause notice was being shown in the e-proceedings tab. It was further submitted that when the assessee clicked on it, the contents of the show cause notice were not available for download. It was further submitted that a copy of screen shot taken from the portal of the Income Tax department was also being enclosed as annexure to the Affidavit which showed that the document (show cause notice) was not available for download due to server issues. It was further submitted that the assessee had also

not received any SMS alert with respect to the show cause notice having been issued and neither was any show cause notice served physically on the address of his residence i.e. House No. 105, Sarv Priya Housing Society, Exotic Heights, Zirakpur, Mohali wherein he had been residing for the past 10-11 years and even the income tax returns were being filed showing this address only. He drew our attention to copy of acknowledgement of the ITR for the captioned year to demonstrate that the said return also contained the address of Sarv Priya Housing Society. It was further submitted that the impugned order contained a different address. i.e. House No. 656, Sector 2, Panchkula which used to be the address of the house property which had been sold during the year under consideration. The Ld. AR submitted that the assessee was contesting the service of notice and was deposing on oath that the assessee had not received the show cause notice either physically or electronically and, therefore, the impugned order had been passed without affording any opportunity to the assessee to present his case and, therefore, the impugned order was void *ab initio* and the same deserved to be set-aside.

3.1 On merits, the Ld. AR submitted that the AO had raised queries regarding the cost of acquisition as well as the cost of improvement of the house property vide notice issued under section 142(1) of the Act dated 13.10.2018 and placed at Pages 7 and 8 of the Paper-book requiring the assessee to furnish complete details of property sold along with the name and address of the buyer and copy of the sale deed, date and cost of purchase and construction as well as computation of capital gain. It was further submitted that in response, the assessee had filed a detailed reply along with the documentary evidences as required by the AO and same was placed at Pages 14 to 34 of the Paper-Book. The Ld. AR further submitted that in the said reply, the assessee had given all the relevant details giving the cost of acquisition and cost of improvement and since the evidences regarding cost of improvement pertained to the financial year 2000-01, the same could not be provided as the same related to almost 17-18 years ago. It was submitted that even the income Tax Act does not ordinarily require maintenance and preservation of documents beyond a period of 8 years.

3.2 It was further submitted that the query as well as the reply filed by the assessee before the AO, however, proves that the AO had made adequate enquiry and the assessee also had duly complied with such enquiries and the fact that the AO had disallowed an amount of 5% on account of unverifiable cost of improvement, made it clear that the non-availability of documents was within the knowledge of the AO and, therefore, while making the disallowance @ 5%, the AO had duly applied her mind to the facts before her and, therefore, the allegation of the Ld. PCIT that the AO had not conducted any worthwhile enquiry and had completed the assessment in undue haste was totally against the facts of on the record.

3.3 The AO placed reliance on numerous judicial precedents to support his contention that when there is due application mind by the AO, the Ld. PCIT does not have to power to invoke the revisionary jurisdiction under section 263 of the Act and further even an inadequate enquiry will not render the assessment order erroneous and prejudicial to the interest of the revenue.

3.4 The Ld. AR also submitted that even the re-assessment proceedings under section 147 of the Act had been wrongly initiated as the copy of the reasons recorded would show that the re-assessment proceedings had been initiated on the ground that the assessee had not filed his return of income which was a fact contrary to the record as was evident from the copy of the return filed and placed in the Paper book at Page 2. The AR submitted that reopening was based on wrong reasoning and was liable to be set-aside and if the reopening was set-aside, even the subsequent proceedings under section 263 of the Act were bad in law and could not be sustained in the eyes of law.

4.0 Per contra the Ld. CIT DR vehemently supported the order of the Ld. PCIT and argued that the fact remained that the AO had not conducted any examination or enquiry vis-à-vis cost of acquisition and that the *ad hoc* disallowance of 5% had been made without any basis. It was further submitted that the assessee cannot take the excuse of the documents being unavailable due to lapse of time and escape the rigour of taxation because the assessee cannot avoid the

onus placed on him to support the claims being made with documentary evidences. It was argued that the AO also had simply accepted the assessee's claim without any proper enquiry and had simply resorted to an estimated disallowance while completing the assessment.

4.1 With respect to the assessee challenge to the reopening under section 14t of the Act, the Ld. CIT DR submitted that the assessee had not challenged the reopening at the time when the reopening was initiated and, therefore, raising this issue at this point of time was beyond the scope of the issue involved in the present appeal.

4.2 With respect to the assessee's claim of non-receipt of the show cause notice, the Ld. CIT DR refuted this claim and submitted that this kind of pleading was more of an after-thought and the assessee was trying to cover up for his inability to submit the required bills and documentary evidences with respect of the cost of construction and cost of improvement. It was further submitted that if the assessee did not undertake to check the Income Tax portal from time to time, it was at his own peril and the department cannot be

expected to withhold any proceeding under the Act until the assessee acknowledges that he had received the notice regarding any proceedings under the Income Tax law. The Ld. CIT DR prayed that appeal of the assessee be dismissed.

5.0 We have heard the rival submissions and have also perused the material on record. We have also gone through the contents of the Affidavit filed by the assessee wherein he has denied having received any show cause notice vis-à-vis the proceedings under section 263 of the Act. In the said Affidavit, it has been deposed by the assessee that he came to know about the order passed under section 263 of the Act only when he received a copy of the impugned order via email. It also been deposed in the Affidavit that when the assessee was searching for the show cause notice after receiving the impugned order, at that point of time also, only the body of the show cause notice was being shown and the contents of the show cause notice (in the PDF attachment) was not found. The copy of screen shot of the portal has also been enclosed with the Affidavit to demonstrate that the contents of said show cause notice

were not available on the portal of the Income Tax department. The assessee has also deposed in the Affidavit that the address from which he had filed his return of income was that of House No.105, Sarv Priya Housing Society, Exotic Heights, Zirakpur, Mohali whereas the order under section 263 of the Act was addressed to the taxpayer at House No. 656, Sector 2, Panchkula. A perusal of the record shows that this address of Panchkula was the earlier address of the assessee and is the address of the property which was sold by the assessee giving rise to the re-assessment proceedings. It is also seen that even the re-assessment order which was passed on 28.12.2018 shows the Panchkula address. However, the assessee has not disputed the service of this assessment order. All the same, the fact remains and is evident from the impugned order also that the assessee had not responded to the show cause notice issued under section 263 of the Act and further the impugned order was passed in absence of any representation by the assessee before the Ld. PCIT. In light of these facts, we are of the considered opinion that no assessee would benefit from ignoring a statutory notice when non-compliance of the same might result in

the assessee being saddled not only with tax burden but also with interest as well as penal consequences. Further, no mala fide on the part of the assessee has been pointed out by the Ld. CIT DR with respect of the assessee's claim regarding non-service of the show cause notice. Although, we do agree with the contentions of the Ld. CIT DR that the assessee is expected to be diligent towards the notices and queries issued by the Income Tax department in order to protect in his best interests, all the same since electronic mode of communication is still facing teething troubles and as is often reported in the news papers, it is quite frequent that the assessees are facing problems receiving notices or uploading replies thereto and there have been innumerable instances where the assessees have failed to file their replies within the stipulated period due to server issues either at the end of the assessee or at the end of the department. Therefore, we are inclined to accept the contention of the assessee regarding non-service of the show cause notice at its face value and we hold that in absence of proof of valid service of show cause notice under section 263 of the Act, the resultant proceedings under section 263 of the Act would not hold good.

While coming to this conclusion were have also given credence to the fact that there has been a change in the address of the assessee which has not been taken into account by the department and we have also duly considered the fact that the impugned order was passed ex-parte *qua* the assessee and restoring it to the file to the Ld. PCIT again at this juncture would not be in the best interest of the common taxpayer especially when the Government of India is committed to simplifying the tax regime and ending tax litigation as far as possible.

5.1 We have also duly taken note of the fact that even on merits, the AO has made a reasonable disallowance with respect to unverifiable cost of construction / cost of improvement and, thus, the AO had taken a possible view based on the facts and record before him and, therefore, the Ld. PCIT could not have legally set-aside the order of the AO and directed him to re-examine the issue as per his directions especially because the Ld. PCIT himself did not conduct any enquiry himself in this regard as was incumbent upon

him as per law. Therefore, we set-aside the order passed under section 263 of the Act.

5.2 Since we have already held that the 263 proceedings are bad in law on account of non-service of show cause notice, we are not inclined to consider the assessee's ground regarding the re-assessment order being bad in law at this juncture.

6.0 In the final result the appeal of the assessee stands allowed.

Order pronounced on 22.08.2022.

Sd/-	**Sd/-**
(N.K. SAINI)	**(SUDHANSHU SRIVASTAVA)**
Vice President	**Judicial Member**

Dated : 22.08.2022

"आर.के."

आदेश की प्रतिलिपि अग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)
5. विभागीय प्रतिनिधि, आयकरअपीलीयआधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,

सहायकपंजीकार/Assistant

Registrar