

**IN THE INCOME TAX APPELLATE TRIBUNAL
“D” BENCH, MUMBAI**

**BEFORE SHRI AMIT SHUKLA, JM &
SHRI S. RIFAUR RAHMAN, AM**

1. आयकरअपीलसं./ I.T.A. No. 538/Mum/2022
(निर्धारणवर्ष / Assessment Year: 2012-13)

Raj Real Estate & Finvest Pvt. Ltd. 1807, Panchartna Building, Mama Parmanand Marg Opera House, Mumbai-400 004	बनाम/ Vs.	PCIT Mumbai-5, R. No. 515, 5 th floor, Aayakar Bhavan, M. K. Road, Mumbai-400 020
स्थायीलेखासं ./जीआइआरसं ./PAN No. AABCR3037J		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri Suchek Anchaliya T Tushar Nagori, Ld. ARs
प्रत्यर्थीकीओरसे/ Respondent by	:	Shri Mahita Nayar, Ld. DR
सुनवाईकीतारीख/ Date of Hearing	:	07.07.2022
घोषणाकीतारीख / Date of Pronouncement	:	03.10.2022

आदेश / O R D E R

Per Amit Shukla, Judicial Member:

1. The aforesaid appeal has been filed by assessee against order dated 16.03.2022 passed by the Ld. PCIT, Mumbai-5 in his revisionary jurisdiction u/s 263 for A.Y. 2012-13.

2. The assessee has challenged the order passed u/s 263 on various counts and one of the grounds raised before us by Ld. Counsel of the assessee is that the order of the Ld. PCIT is barred by limitation.

3. The facts in brief are that assessee has filed its return of income on 30.09.2012 declaring total loss of Rs. 17,76,360/-. Thereafter, assessee has filed revised return on 01.01.2013 and the said return was duly processed u/s 143(1). Further the case was reopened u/s 147 by issuance of notice u/s 148 dated 31.03.2019 and in response to the same, the case was reopened on the ground of some information was received that assessee was beneficiary of penny stock scrip of Nyssa Corporation Ltd. and assessee has incurred short term capital loss of Rs. 4,03,625/-. Ld. AO after detail discussion had added the said short term capital loss of Rs. 4,03,625/- u/s 68 vide order dated 18.12.2019 whereby the income was assessed on total loss of Rs. 13,72,360/- after making an addition of Rs. 4,03,625/- u/s 68.

4. Thereafter, Ld. PCIT had sought to revise the assessment order 18.12.2019. He observed that AO has wrongly allowed the set off

long term capital loss of Rs. (-60,83,488/-) without any inquiry or verification and further assessee had shown closing stock of furnished goods of Rs. 10,23,000/- which was unsold stocks of flats and therefore Annual Lettable Value (ALV) has to be determined in view of section 22 for the inventory of unsold flats in view of the judgment of Hon'ble Delhi High Court **Ansal Housing Finance and Leasing Co. Ltd. (354 ITR 154)** and thereafter discussing assessee's submission, he held that AO has failed to conduct necessary inquiries and verification on this 2 issues.

5. The issue which has been raised before us is that the points which have been raised by the Ld. PCIT in his show cause notice and in his order is beyond the scope of reopening u/s 147 and therefore, the issue which were not subject of reopening, the period of limitation for revision would commence from the date of order of original assessment and not reassessment. In support of it, he strongly relied on the judgment of Hon'ble Jurisdictional High Court in the case of **CIT vs. Lark Chemical Ltd. (368 ITR 655)** and also the decision of Coordinate Bench of ITAT in the case of **Royal Western India Turf Club vs. PCIT (ITA No. 640/Mum/2021)**. Thus, the entire order of Ld PCIT u/s 263 is barred by limitation.

6. On the other hand, Ld. DR submitted that there was no assessment order as earlier it was only intimation u/s 143(1) which was issued. The assessment was framed for the first time only u/s 143(3) /147 and therefore Ld. PCIT sought to revise only this order passed u/s 143(3) /147 dated 18.12.2019.

7. We have heard the rival submissions and also perused the relevant findings given in the impugned order as well as material placed on record. Here in this case, the assessment was reopened u/s 147 on the following reasons recorded:-

Information is received in the case of Raj Real Estate & finvest Pvt. Ltd. from Kolkata via email on 29.03.2019 in respect of Penny Stock.

A data in respect of penny stock was received in which it was alleged that the scrip of Nyssa Corporation Ltd. Is a penny stock scrip which has been used by the beneficiary to launder money in the garb of Long Term Capital Gains while claiming tax exemption under section 10(38) of the I.T. Act, 1961 or by claiming Short Term Capital Loss. It is observed that share price of in the case of Nyssa Corporation Ltd sharp rise and fall. However, the sharp rise in the share price of this captioned scrip is not prima facie supported by financial fundamentals of the scrip, which raises suspicion. Enquiry was made to verify the genuineness of sharp rise in the

share price but no logical explanation was found in the sharp rise of the share price.

The persons selling the scrip when the price of scrip is high at its peak are all beneficiaries of bogus long term capital gain. The exit providers were not able to provide any logical explanation of the source of funds they have invested in the scrip when they purchased the scrip when the price was at its peak. On perusal of the data of FY 2011-12 i.e., AY 2012-13, it is found that the assessee is one of beneficiaries who sold of shares of Nyssa Corporation Ltd. And got benefit of Rs 10,50,399/- and claimed Long Term Capital Gain.

On verification of the above, I have reason to believe that income chargeable to tax has escaped assessment for the assessment year 2012-13 within the meaning of section 147 of the Income Tax Act, 1961. The income has escaped assessment due to failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for the AY 2012-13 and the income which has escaped assessment amounts to or likely to amount to Rs. 10,50,399/- or more.

8. Thus, the entire scope of assessment was on the grounds raised in the reasons recorded, i.e., whether the assessee was beneficiary of accommodation entries of long term capital gain on sale of shares of Nyssa Corporation Ltd. Ld. AO had discussed this issue in detail and has made specific addition wherein he has

disallowed short term capital loss of Rs. 4,03,625/- which has been added u/s 68. However, Ld. PCIT in his show cause u/s 263 has raised following two issues which are entirely different from the reasons recorded:-

3. On perusal of the records, it is observed that set off of long term capital loss of Rs. (-)6083488/- has been wrongly allowed as the assessee has not offered any genuine evidences as per schedule Capital Gain in ITR. It has been transpired that such loss was engineered transaction with the sole purpose of tax evasion.

3.1 Audit scrutiny of Balance Sheet that during the year consideration, the assessee has shown Closing Stock of Finished Goods of Rs.10,23,000/-. The assessee vide their submission dated 27/11/2019 had stated that since the project was completed in 2010 and said closing stock were shown as unsold. Since, as per the above discussion, it may be evident that assessee project has been completed and the said inventory is in nature or Unsold Flats

As per Hon'ble Delhi High court in the case of Ansal Housing wherein it was held that Annual Lettable Value (ALV) has to be determined in view of section 22 of IT Act for Inventory of unsold flats.

4. Therefore, it is clear that the assessment order passed u/s. 143(3) r.w.s. 147 of the IT Act dated 18.12.2019, is erroneous in so far as it is prejudicial to the interest of revenue, within the meaning

of Sec.263 of the Act. Hence, it is proposed to revise the aforesaid order u/s.263 of the Act.

9. In his impugned order u/s 263, Ld. PCIT has set aside the assessment order to examine these two issues only. Ostensibly, the issues, which have been raised in the show cause notice and have been discussed in the revisionary order, were neither the subject matter of reopening u/s 147 nor the issue on which assessment was sought to be reopened. Once the return income stands concluded either by way of intimation or later on by way scrutiny proceedings u/s 143(3), then it is said to be that assessment has been completed. If the return income has been accepted and no scrutiny has been done, then also it is treated as assessment has been completed and has attained finality. Such assessment can be reopened u/s 147, if AO has reason to believe based on any material or information coming on record that income chargeable to tax has escaped assessment. It is only on such reasons to believe and the issues raised in reasons recorded, AO can pass assessment order or re-assessment and it cannot travel beyond the reasons unless something tangible material comes on record during such assessment /reassessment proceedings. Here in this case, it is not

a case that AO has reopened assessment on account of any set off of long term capital loss or determination of ALV u/s 22 for the inventory unsold flats. Ld. PCIT in his revisionary jurisdiction u/s 263 cannot enlarge the scope of reopening u/s 147 and go beyond the reasons recorded. Here, the present order of the Ld. PCIT is on the issues which are beyond the scope of section 147 and therefore, he could not have roped in some other issues based on the figures given in the balance sheet or profit and loss account which already stood concluded and assessed way back in the year 2013.

10. The Hon'ble Jurisdictional High Court in **CIT vs. Lark Chemical Ltd. (368 ITR 655)** on a similar situation and circumstances has held that notice u/s 263 cannot be issued beyond the period of 2 years from the date when order sought to be revised is passed and jurisdiction u/s 263 cannot be exercise with reference to the issue which were not subject matter of reopening of assessment and the period of limitation provided u/s 263(2) would commence from the date of order and not from the date of order of reassessment has been passed. The relevant observation and the finding of the Hon'ble Court reads as under:-

12. We have considered the rival submissions. It is not disputed that save and except the issue of non-genuine Purchases all other issues dealt with by the Commissioner of Income-tax in the order dated March 30, 2009, were not a subject matter of the assessment order passed on June 28, 2006, under section 143(3)/147 of the Act. All the other issues on which the Commissioner of Income-tax is seeking to exercise the jurisdiction under section 263 of the Act were concluded by virtue of an intimation under section 143(1) of the Act which admittedly was done beyond a period of two years prior to the notice dated March 17, 2009, issued under section 263 of the Act. Section 263(2) of the Act provides that the order would be made in exercise of the jurisdiction under section 263(1) of the Act after the expiry of two years from the end of the financial year in which the order sought to be revised was passed. It is an admitted position that the Commissioner of Income-tax has not exercised the revisional jurisdiction in respect of the order/intimation passed section 143(1) of the Act within two years of it being passed. Therefore, exercise of jurisdiction on those issues under section 263 of the Act is time barred as held by this court in *CIT v. Anderson Marine & Sons (P.) Ltd.* [2004] 266 ITR 694/139 Taxman 16. Moreover, in view of the decision of the apex court in the matter of *Alagendran Finance Ltd.*'s case (*supra*) as well as our court in the matter of *Ashoka Buildcon Ltd.*'s case (*supra*) the jurisdiction under section 263 of the Act cannot be exercised on issues which were not subject matter of consideration while passing the order of reassessment

under section 143(3)7147 of the Act but a part of an assessment done earlier under the Act.

11. Thus, the aforesaid ratio and the principle laid down by the Hon'ble Jurisdictional High Court following the judgment of Hon'ble Supreme Court, is clearly applicable in the present case also, and not only that, Ld. PCIT has travelled beyond the scope of issues which were not subject matter of consideration in the re-assessment order which he cannot go beyond the reasons recorded and therefore the order of PCIT is barred by limitation. Thus, on this ground, we quashed the impugned order.

12. In the result, the appeal filed by the assessee is **allowed**.

Orders pronounced in the open court on 3rd October, 2022.

Sd/-

(S. Rifaur Rahman)
Accountant Member

मुंबई Mumbai; दिनांक Dated : 03/10/2022

Sr.PS. Dhananjay

Sd/-

(Amit Shukla)
Judicial Member

आदेशकीप्रतिलिपिअप्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ **ITAT, Mumbai**