

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'H' BENCH,  
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND  
SHRI KUL BHARAT, JUDICIAL MEMBER

ITA No. 806/DEL/2021 [A.Y 2013-14]

M/s H.B. Exports  
BN - 96, West Shalimar Bagh  
Delhi

Vs.

The P.C.I.T - 12  
New Delhi

PAN: AAAFH 4938 A

(Applicant)

(Respondent)

Assessee By : Shri Salil Aggarwal, Sr. Adv  
Shri Madhur Aggarwal, Adv  
Shri Shailesh Gupta, CA.

Department By : Shri M. Baranwal, CIT- DR

Date of Hearing : 21.11.2022

Date of Pronouncement : .11.2022

**ORDER**

**PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-**

This appeal by the assessee is preferred against the order dated 30.03.2021 framed u/s 263 of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'] by the PCIT, Delhi -12.

2. The sum and substance of the grievance of the assessee is that the PCIT erred in law in assuming jurisdiction u/s 263 of the Act and further erred in holding the assessment order passed by the Assessing Officer as erroneous and prejudicial to the interest of the Revenue.

3. The representatives of both the sides were heard at length, the case records carefully perused. Relevant documentary evidences brought on record duly considered in light of Rule 18(6) of ITAT Rules.

4. Briefly stated, the facts of the case are that original return of income was filed on 30.09.2013 declaring total income of Rs. 1,45,04,688/-, which, *inter alia*, included capital gains on sale of land and capital gains on sale of building.

5. Assessment was completed vide order dated 10.03.2016 framed u/s 143(3) of the Act by making addition of Rs. 65,939/- being 1/4<sup>th</sup> of the expenses claimed and Rs. 1,20,000/- on account of salary expenses. Income was assessed at Rs. 1,46,90,610/-.

6. Subsequently, vide notice dated 30.03.2018 issued u/s 148 of the Act, completed assessment was reopened. Detailed reasons for

reopening assessment are exhibited at pages 32 to 37 of the Paper Book.

7. The sum and substance of the reasons for reopening the assessment relates to computation of capital gains. Reassessment was completed vide order dated 18.11.2018 wherein the capital gain was recomputed and addition of Rs. 2,11,76,360/- was made.

8. The reassessed income was challenged before the Id. CIT(A) by raising the following grounds of appeal in Form No. 35:

***“1. That theLd. Assessing Officer has wrongly invoked the Section 147/148 for re-opening of the assessment.***

***2. That theLd. Assessing Officer has erred in making an addition of Rs. 2,11,76,360.00 by invoking section 50(C) of the Income-tax Act, 1961.***

***3. That theLd. Assessing Officer has wrongly issued penalty notice u/s 271(1)(c) of Income-tax Act, 1961.***

***4 The appellant reserves the right to add, alter, amend or delete any ground of appeal at the time of hearing.”***

9. Before the appellate proceedings could start, the PCIT assumed jurisdiction u/s 263 of the Act and served the following notice:

**“NOTICE FOR THE HEARING****M/s/Mr/Ms****Subject: Notice for Hearing in respect of revision proceedings u/s 263 of the INCOME TAX ACT, 1961 - Assessment Year 2013-14.**

**In this regard, a hearing in the matter is fixed on 26/03/2021 at 12:00 PM. You are requested to attend in person or through an authorized representative to submit your representation, if any alongwith 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 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](http://incometaxindiaefiling.gov.in)**

**Please refer to the above**

**2 The Income Tax return for A.Y 2013-frwas filed on 30.09.2013 declaring income of Rs. 1,45,04,688/-. The case was selected into Compulsory Scrutiny through Computer Aided Scrutiny selection system.**

**3. The assessment u/s 143(3) was completed on 10.03.2016 at income of Rs 1,46,90,610/-. During the assessment, addition of Rs 1,85,922/- ( Assessed income Rs. 1,46,90,610/- minus Returned income Rs. 1,45,04,688/-) was made.**

4. Thereafter, the case was reassessed u/s 143(3)/147 on 18.12.2018 at income of Rs. 3,58,66,970/- after recalculating the capital gain taking the full value of sale consideration as per Section 50C of the Income Tax Act. During the reassessment, addition of Rs. 2,11,76,360/- was made on account of capital gain.

5. On perusal of case record, it has been found that in assessment order u/s 143(3)/147, the cost of the land as well as building was wrongly taken on the basis of collector rate (Rs. 5,15,12,628/-) at the time of purchase as mentioned in purchase deed. The cost of land as well as building was required to be taken on the basis of actual cost (Rs. 2,70,25,208/-) at the time of purchase. This resulted in lowering of capital gain.

6. The above facts clearly show that the AO has not made proper inquiry and verification. The assessment order passed by the Assessing Officer in respect of A.Y. 2013-14 is erroneous in so far as it is prejudicial to the interests of the revenue as the AO has passed the assessment order without making inquiries or verification which should have been made during the assessment proceedings. Therefore, I intend to initiate proceedings u/s 263 of the Income Tax Act and pass a suitable order.

**Section 263 of the Income Tax Act 1961 states that**

**“ The Principal Commissioner or] Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the**

*circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.*

*Explanation.*

*Explanation 2.- For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner:*

- 1. the order is passed without making inquiries or verification which should have been made;*
- 2. the order is passed allowing any relief without inquiring into the claim;*
- 3. the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or*
- 4. the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.”*

*In this connection, you are required to show cause as to why the assessment may not be reframed u/s 263 of the I.T. Act, 1961. You may send your reply on or before 26.03.2021 (12:00PM). Due to Covid-19 pandemic, no person hearing will be taken.”*

10. The assessee responded to the afore-mentioned notice and filed detailed reply categorically bringing to the notice of the PCIT that an appeal has been filed before the CIT(A) on 08.01.2019, which is pending for disposal.

11. It was further brought to the notice of the PCIT that the matter was discussed before the CIT(A) on various dates i.e. on 13.06.2019, 27.06.2019, 23.08.2019, 27.01.2020 and 09.03.2020. The ld. CIT(A) directed the Assessing Officer to send the matter for valuation in order to arrive at fair market value of the property by the Valuation Officer of the department.

12. It was emphasized that the issues on which jurisdiction has been assumed u/s 263 of the Act are pending for disposal before the CIT(A) and it was requested not to invoke provisions of section 263 of the Act.

13. After considering the facts and submissions and disregarding the fact that an appeal is pending for disposal before the ld. CIT(A), the PCIT passed the impugned order remitting the matter to the Assessing Officer for fresh decision with a direction to examine the purchase price of the property as per actual cost to the assessee and recompute

capital gains accordingly. The Assessing Officer was further directed to verify various expenses claimed by the assessee.

14. After giving thoughtful consideration to the factual matrix mentioned hereinabove, we are of the considered view that the quarrel relating to the computation of capital gains was pending before the Id. CIT(A) and while the appeal is pending, the PCIT assumed jurisdiction u/s 263 of the Act is not only an act of usurping the power of the Id. CIT(A), but also blatant misuse of power conferred by provisions of Section 263 of the Act.

15. In our understanding of the law, power u/s 263 of the Act is not exercisable under certain circumstances. In this regard, we refer to section 263(1) Explanation 1(c) which reads as follows:

***“(c) Where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal, filed on or before or after the 1st day of June, 1988, the powers of the Commissioner under this Sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.”***

16. The above explanation makes it clear that when the appeal is pending before the Commissioner [Appeals], the exercise of jurisdiction under Section 263 of the Act is barred.

17. As mentioned elsewhere, the reasons for reopening the completed assessment relates to the provisions of section 50C of the Act, which assessment has been completed on 18.12.2018 and applicability of provisions of section 50C are under challenge before the Id. CIT(A). Therefore, following observation of the PCIT in his order is incorrect:

*“It may be noted that the assessee has raised appeals with the Id. CIT(A) on a different issue that the Assessing Officer had computed the capital gain taking the circle rate as sales price, while the assessee had shown lesser amount as sales price. The Assessing Officer had completed assessment as per provisions of section 50C of the Act.”*

18. A perusal of the notice issued u/s 263 of the Act mentioned elsewhere clearly shows that even the PCIT has invoked the provisions of Section 50C of the Act while remitting the matter to the file of the Assessing Officer.

19. An identical issue was considered by the Hon'ble High Court of Madras in the case of Smt Renuka Philip 409 ITR 567 and by the Hon'ble Allahabad High Court in the case of Vam Resorts & Hotels Pvt Ltd 418 ITR 723.

20. In both the decisions of the Hon'ble High Courts, it has been held that when an appeal is pending before the Id. CIT(A), exercise of jurisdiction u/s 263 of the Act is barred.

21. Considering the facts of the case in totality, we set aside the order of the PCIT dated 30.03.2021 and restore that of the Assessing Officer dated 18.12.2018 framed u/s 143(3) r.w.s 147 of the Act.

22. In the result, the appeal of the assessee in ITA No. 806/DEL/2021 is allowed.

The order is pronounced in the open court on 25.11.2022.

**Sd/-**

**[KUL BHARAT]  
JUDICIAL MEMBER**

**Sd/-**

**[N.K. BILLAIYA]  
ACCOUNTANT MEMBER**

Dated: 25<sup>th</sup> November, 2022.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,  
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	