

आयकर अपीलीय अधिकरण, कोलकाता पीठ “सी”, कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH: KOLKATA
श्री राजेश कुमार, लेखा सदस्य एवं श्री संजय शर्मा न्यायिक सदस्य के समक्ष
[Before Shri Rajesh Kumar, Accountant Member & Shri Sonjoy Sarma, Judicial Member]

I.T.A. No. 510/Kol/2022
Assessment Year: 2016-17

Suresh Agarwal (PAN: ADAPA 1912 G)	Vs.	PCIT, Kolkata-9
Appellant / (अपीलार्थी)		Respondent / (प्रत्यर्थी)

Date of Hearing / सुनवाई की तिथि	28.03.2023
Date of Pronouncement/ आदेश उद्घोषणा की तिथि	21.04.2023
For the Appellant/ निर्धारिती की ओर से	Shri Subash Agarwal, Advocate
For the Respondent/ राजस्व की ओर से	Shri Subhrajyoti Bhattacharjee, CITDR

ORDER / आदेश

Per Rajesh Kumar, AM:

This is the appeal preferred by the assessee against the order of the Ld. Principal Commissioner of Income Tax-Kolkata-9 (hereinafter referred to as the Ld. PCIT”) passed u/s 263 of the Income Tax Act, 1961 (hereinafter referred to as the Act) dated 15.02.2021 for the AY 2016-17.

2. The only issue raised by the assessee in various grounds of appeal is that the jurisdiction exercised by PCIT u/s 263 is invalid on the ground that on the same issue the appeal was pending before the Ld. CIT(A).

3. Facts in brief are that the assessee had booked a residential flat at 22/1, Belvedere Road, Kolkata-700027 during FY 2009-10 for a consideration of Rs. 4,08,95,000/- from M/s Jain Space Infra Ventures Ltd. The assessee has also paid Rs. 1,00,00,000/- as part payment against the said flat. The said allotment of flat was also confirmed by the builder in reply to the notice issued u/s 133(6) of the Act by the AO. The assessee subsequently transferred the allotment of the said flat to Roop Mohini Sarees Pvt. Ltd. on 12.05.2015 for total consideration of Rs. 7,70,00,000/- out of which his share was only Rs. 4,24,35,000/- and was received accordingly and balance was paid/transferred to M/s Jain Space Infra Ventures Ltd. The assessee computed the long term capital loss by taking the value of flat Rs. 4,24,35,500/- and after indexing the cost of purchase of Rs. 4,08,95,000/- thereby taking the indexed cost at Rs. 6,99,48,568/- and calculated the long term capital loss of Rs. 2,75,13,068/-. The AO recomputed the capital gain by taking sale consideration at the same amount which the assessee had taken however the indexation was allowed only on 1,00,00,000/- with indexation cost at Rs. 1,52,09,580/- and a capital gain was computed at Rs. 2,72,25,920/-. The AO after allowing deduction u/s 54EC of the Act of Rs. 50,00,000/-, a net capital gain of Rs. 2,22,25,920/- was computed and after further allowing the brokerage of Rs. 7,70,850/-, net capital loss and Rs. 2,14,55,070/- was computed. The AO initiated penalty proceedings in furnishing inaccurate particulars of income by computing tax on long term capital gain of Rs. 2,14,55,070/- and imposed penalty of Rs. 48,61,719/-.

4. The said order was assailed before the Ld. CIT(A) and the appeal was filed on 22.10.2019 which is pending for disposal. The assessee has gone into VSVS scheme and finally the issue was settled under the said scheme on 05.01.2022 a copy of Form 5 is placed at page 27 of the PB. The PCIT, in the mean time, invoked the revisionary jurisdiction u/s 263 of the Act vide show cause notice dated 20.01.2021 issued u/s 263 of the Act and finally cancelled the penalty order passed on 15.02.2021 during the pendency of appeal before ld CIT(A).

5. The Ld. Counsel at the outset submitted that the jurisdiction invoked by the PCIT is wrong and against the provision of Act. The Ld. Counsel submitted that when the issue is sub-judice before the appellate authority, the PCIT has no jurisdiction to invoke the revisionary jurisdiction by referring to the provisions of clause (c) of Explanation 1 to Section 263 of the Act which provides that when the appeal is pending before the Commissioner of Income Tax (Appeals) on same issue, the exercise of jurisdiction u/s 263 of the Act on the said issue is not available to the Ld. PCIT. The Ld. A.R in defense of the said argument relied on the decision of Co-ordinate Bench in the case of Rabi Pal vs. ITO in ITA No. 193/Kol/2022 for AY 2017-18 dated 05.09.2022 wherein the similar issue has been decided in favour of the assessee. The Ld. A.R therefore prayed that the revisionary jurisdiction exercised by PCIT may kindly be quashed.

6. The Ld. D.R on the other hand relied heavily on the order of PCIT.

7. After hearing the rival parties and perusing the material on record, we find that on the date of invoking the revisionary jurisdiction on 20.01.2021, the matter was sub-judice before the first appellate authority. The Ld. PCIT initiated the proceedings u/s 263 of the Act on 15.02.2021 and the penalty order was cancelled by passing an order u/s 263 of the Act when the appeal was also pending before the appellate authority which was filed on 22.10.2019. We also note that the assessee has gone into VSVS scheme on 5.1.2022 and form 5 has also been issued to the assessee a copy of which is filed at page 27 of PB. Considering all the facts, we are of the view that the revisionary jurisdiction has been wrongly invoked by the PCIT in violation of Clause (c) Explanation 1 to Section 263 as the issue was pending before the Commissioner of Income Tax (Appeal). The case of the assessee find support from the decision of Co-ordinate Bench in Rabi Pal (supra) the operative part is reproduced as under:

“5. After hearing the rival contentions and perusing the materials as placed before us, we note that the said assessment order as framed originally u/s 143(3) of the Act dated 04.12.2019 has been challenged by the assessee before the First Appellate Authority and appeal is pending for adjudication. In the light of these facts, we are unable to understand as to how the jurisdiction of the Ld. PCIT u/s 263 of the Act is maintainable on this issue. The provisions of clause (c) of Explanation (1) to Section 263 provides that when the appeal is

pending before the Commissioner of Income Tax(Appeals) on some issue, the exercise of jurisdiction u/s 263 of the Act on the said issue is not available to the ld PCIT. In the present case also the ld. Commissioner of Income Tax (appeals) is seized of the issue and therefore jurisdiction u/s 263 of the Act has been invalidly exercised by the Ld. PCIT. The case of the assessee finds support from the several decisions of various High Courts namely Smt. Renuka Philip vs. ITO reported in [2018] 409 ITR 567 (Mad), decision of Hon'ble Allahabad High Court in the case of CIT vs. Vam Resorts and Hotels Pvt. Ltd. [2019] 418 ITR 723 (All). In both the above decisions of the Hon'ble High Courts has held that when the appeal is pending before the Commissioner(appeals), the exercise of jurisdiction u/s 263 of the Act is not available to the Ld. PCIT. Accordingly, we are inclined to quash the order passed u/s 263 of the Act."

Considering the facts of the case in the light of the above decision, we are inclined to quash the order passed u/s 263 of the Act as being invalid and nullity in the eyes of law.

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

Order is pronounced in the open court on 21st April, 2023

Sd/-

Sd/-

(Sonjoy Sarma /संजय शर्मा)
 Judicial Member/न्यायिक सदस्य

(Rajesh Kumar/राजेश कुमार)
 Accountant Member/लेखा सदस्य

Dated: 21st April, 2023

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- Suresh Agarwal, 3E, Saket, 2, Ho Chi Minh Sarani, Kolkata-700071
2. Respondent – PCIT, Kolkata-9
3. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
 ITAT, Kolkata Benches, Kolkata