आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ

IN THE INCOME TAX APPELLATE TRIBUNAL,
'' D'' BENCH, AHMEDABAD

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
Ms MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं**./ITA No. 200/AHD/2021**

निर्धारण वर्ष/Asstt. Year: 2012-2013

Atul Hiralal Shah, 8, Amrashirish Bungalows, Near Prahladnagar Garden, Prahladnagar, Ahmedabad-380015. **PAN: ALJPS4966M**	Vs.	D.C.I.T, Central Circle-1(2), Ahmedabad.

(Applicant)		(Respondent)

Assessee by	:	Written Submission
Revenue by	:	Dr. Darsi Suman Ratnam, CIT. DR

सुनवाई की तारीख**/Date of Hearing : 18/03/2024**
घोषणा की तारीख **/Date of Pronouncement: 10/04/2024**

आदेश/O R D E R

PER WASEEM AHMED ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Principal Commissioner of Income Tax, Ahmedabad (in short "Ld. PCIT") arising in the matter of assessment order passed under s. 263 of the Income Tax Act 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2012-13.

2. The assessee has raised following grounds of appeal:

1. Ld. PCIT (Central) erred in law and on facts in revising assessment order which is neither erroneous nor prejudicial to the interest of revenue.

Tax Effect: N.A. being a technical ground.

2. Ld. PCIT (Central) erred in law and on facts in revising order which is merged with order of CIT (A) and accordingly revision action is without jurisdiction as per Explanation 1(c) to Section 263 of the Income Tax Act, 1961.

Tax Effect: N.A. being a technical ground.

3. Ld. PCIT (Central) erred in law and on facts in revising order ignoring fact that during assessment proceedings the issue of revision has been scrutinize by AO and accordingly revision proceedings is on account of difference of opinion which is not permissible as there is no prejudice to the interest of revenue and accordingly revisional order is required to be quashed.

Tax Effect: N.A. being a technical ground.

4. Ld. PCIT (Central) failed to point out failure on part of AO to make proper inquiries and accordingly revision order is required to be quashed.

Tax Effect: N.A. being a technical ground.

5. The order passed by PCIT (Central) is required to be quashed as same is bad in law and without jurisdiction.

Tax Effect: N.A. being a technical ground.

Your appellant craves leave to add, amend, alter, edit, delete, modify, or change all or any of the grounds of appeal before the appeal is heard and decided.

3. The only effective issue raised by the assessee is that the learned PCIT under section 263 of the Act erred in revising the assessment order passed under section 143(3) r.w.s. 153A of the Act.

4. The facts in brief are that the assessee is an individual and part of the Barter/accommodation entry provider group which was subject to search proceedings under section 132 of the Act dated 4th December 2014 and concluded on 03rd February 2015 as the last of the authorization of search was executed on said date. Accordingly, the proceedings under section 153A of the Act were

initiated in the case of the assessee for the year under consideration i.e. A.Y. 2012-13. Finally, the assessment under section 143(3) r.w.s. 153A of the Act was completed on 09th March 2018 after making various additions to the return income declared by the assessee of Rs. 10,26,020/- only.

5. Subsequently, the learned PCIT (central) Ahmedabad on examining the assessment records noticed that the assessee during the year under consideration entered a MOU with M/s Eyelid Infrastructure Pvt Ltd for the purchase of property for a consideration of Rs. 3 crores out of which an amount of Rs. 2.5 crores were paid in cash. The AO during the assessment proceedings failed to verify/consider the source of such cash payment of Rs. 2.5 crores against the property deal. Therefore, the learned PCIT by exercising the power conferred under section 263 of the Act set aside the assessment order by holding same as erroneous insofar prejudicial to the interests of revenue for the limited issue of cash payment of Rs. 2.5 crores discussed above.

6. Being aggrieved by the order of the learned PCIT the assessee is in appeal before us.

7. The assessee through written submissions running pages 1 to 12 contended that the assessment order under section 143(3) r.w.s. 153A of the Act which was subject to revision under section 263 of the Act is invalid as the same was passed beyond the time limit provided under section 153B of the Act. The assessee before us contented that the time limit of completing the assessment u/s 153B of the Act was reduced from 1st June 2016 from two years to 21 months only, as the order was passed by the AO after 01-06-2016. Therefore, the time limit for completion of assessment is 21 months and not 24 months from the end of the financial year in which the last of the authorizations for search under section 132 of the Act has been executed. As the last of the authorization for search under section 132 of the Act has been executed dated 3-2-2015 i.e. financial year ending as on 31st March 2015, meaning thereby, the period of 21

months expires on 31 December 2016 for passing the assessment order under the provisions of section 153A read with section 143(3) of the Act. As the reference has been made for the exchange of information under the provisions of section 90/90A of the Act and therefore the maximum period of 1 year has to be excluded while framing the assessment from first of the reference made for exchange of information. As per, the assessee, the 1st reference was made by the AO dated 30-01-2015 and maximum time to be excluded i.e. one year expires 29-01-2016 yet the time was available for framing the assessment for 11 months which is more than 60 days as provided in the proviso to explanation under section 153B of the Act. Therefore, even after making reference for exchange of information with FT & TR, the time limit to pass assessment order section 153A r.w.s. 143(3) of the Act expires on 31st December 2016.

8. However, the assessee has filed an application under section 245C of the Act before the settlement commission dated 20-12-2016 which was rejected under section 245D(1) of the Act vide order dated 02-01-2017. As per the provision of explanation (v) to section 153B of the Act, the period from 20-12-2016 to 02-01-2017 shall be excluded from limitation and after the exclusion of said period the time available for the AO under normal circumstances to finalize assessment after first application before settlement commission was expiring on 04-03-2017 i.e. after the extension of 60 days. The assessee made a second application before settlement commissioner dated 27-02-2017 which was rejected on 10-03-2017 i.e. second application rejected in 12 days. Therefore, after exclusion 12 days taken in second application, the time limit to frame assessment was expiring on 17-03-2017 whereas the order was passed as on 9th March 2018 which is far beyond the time limit prescribed. Hence, the order passed beyond the specified time limit is not a valid order and once the assessment order itself is invalid, the same cannot be revised under section 263 of the Act. It was also contended that order passed in the group member of the assessee namely Shri Jignesh Hiralal Shah was also held time barred by the ITAT in ITA No. 106/Ahd/2021. It was further submitted that third proviso below the explanation to section 153B of the Act was introduced

vide Bill Act 2017 and at the time when the second application under section 245C of the Act was rejected by the learned settlement commissioner, third proviso was not even in the statute book and also the same is effective only from 1st April 2017 meaning thereby, the provisions contained under third proviso are only applicable in case of search proceedings carried out after 1st April 2017. In this regard reference was also made to the judgment of Hon'ble Gujarat High Court in case of Anil Kumar Gopikishan Aggarwal vs. ACIT in special civil appeal no. 12825 of 2018.

9. On the other hand, the learned DR before us filed a paper book running from pages 1 to 12 and contended that the issue on the validity of the assessment under section 153A r.w.s. 143(3) of the Act is pending before the ld. CIT-A, so such should not be taken in the proceedings under section 263 of the Act. The ld. DR also referred the remand report submitted by the AO during the proceeding before the CIT(A) in connection with issue of time baring and vehemently submitted that the order has been framed within the statutory time limit.

10. We have heard the ld. DR and perused/ considered the materials available on record including the written submission filed by the assessee. Admittedly, the assessee was subject to search proceedings under section 132 of the Act dated 4th December 2014 and accordingly the assessment under section 143(3) read with section 153A of the Act was made vide order dated 9th March 2018 making huge addition to the total income of the assessee. The assessee against the assessment order filed an appeal before the commissioner appeal being first appellate authority challenging the merit of the addition as well the validity of the assessment order on account of limitation which is pending. In the meantime, the learned PCIT revised the assessment order under section 263 of the Act by holding that the assessing officer failed to consider an addition on account of cash investment in property for Rs. 2.5 crores. Against the order under section 263 of the Act, the assessee is appeal before us and challenged the validity of the assessment being time barred while the appeal filed before the learned CIT(A) on the same is still pending. Now the first controversy arises before us whether the

assessee can raise the legal contention before the tribunal against the order passed under section 263 of the Act while the same is raised by the assessee before the first appellate authority which is still pending. In this regard, we note the issue of time barring of assessment is directly linked to valid jurisdiction of framing assessment and consequently the same is linked with legality/sustainability of the assessment order. Therefore, the legal ground which goes to the very root/validity of the any proceeding can be raised by the assessee at any stage or before the higher authority for the first time. Further, the facts regarding the issue of limitation for finalizing assessment under section 153B of the Act was on record and assessee even has raised such issue before the learned CIT(A) in the appeal filed against the original assessment order. Meanwhile, the assessment order was revised by the learned PCIT for limited issue by exercising the power conferred under section 263 of the Act and the assessee in the appeal filed before us against the order under section 263 of the Act and raised the same issue before us while the appeal before learned CIT(A) is still pending. It is also not the case where the issue raised requires production of new material or evidence. Therefore, in our considered opinion the present assessee cannot be prohibited to raise legal ground challenging the validity of the assessment order which was subject to revision under section 263 of the Act in the given facts and circumstances. In holding so we draw support and guidance from the order of Kolkata ITAT in case of PILCOM vs. ITO reported in [2001] 77 ITD 218 (Calcutta) where it was held as under: '

> *An additional ground on a legal issue can be taken up by either party at any stage of the appellate proceeding provided it does not require production of new material or evidence. Hence, the additional ground was to be admitted.*

11. We also draw support and guidance from the judgement of Hon'ble Bombay High Court in the case of Peter Vaz vs. CIT reported in 128 taxmann.com 180 where an assessment order under section 153C of the Act was made against the assessee. The appeal was filed appeal before the ld. CIT(A) and succeeded. Subsequently, the revenue filed appeal before the tribunal and the assessee during proceedings before the tribunal in revenue appeal without filing cross

objection or separate appeal raised the issue of legality and validity of jurisdiction acquired under section 153C of the Act. The Tribunal rejected the contention of the assessee regarding validity of jurisdiction assumed under section 153C of the Act. On further appeal by the assessee, the Hon'ble Bench of Bombay High Court after referring to various judicial pronouncement held that legal ground raised by the assessee on the fulfilment of jurisdictional parameters even without filing cross objection should have been allowed. The relevant finding of the bench reads as under:

> ***38.*** *In the present case, it is not as if the issue of non-fulfillment of jurisdictional parameters of Section 153C was raised but rejected by the CIT (Appeals). Such an issue was not raised before the CIT (Appeals). Having regard to the provisions of Rule 27 of the Appellate tribunal Rules, 1963 as also the provisions of section 260A(7) read with Order XLI Rule 22 of CPC as interpreted by the Hon'ble Supreme Court in S. Nazeer Ahmed (supra) we think that the ITAT should not have precluded the assessee from raising the issue in the appeals instituted by the Revenue, even without the necessity of filing any cross-objections. Accordingly, the additional substantial question of law is required to be answered in favor of the Appellants/assessees and against the Revenue.*

11.1 In view of the above, we hold that the assessee is within his rights challenging the validity of the assessment order passed under section 153A r.w.s. 143(3) of the Act in the proceedings carried out under section 263 of the Act.

11.2 Now coming to question before us whether the assessment order under section 143(3) r.w.s. 153A of the Act dated 9th March 2018 was passed within the time limit specified under the provision of section 153B of the Act. The provision of section 153B(1) of the Act as amended by Finance Act 2016 provides that the assessment under section 153A of the shall be made within a period of 21 month from the end of the financial year in which the last of the authorization of the search was executed. In this case a search was conducted on 4th December 2014 and the last authorizations of search was also executed on 3rd February 2015. Hence, the search was conducted and concluded in financial year ending on 31st March 2015. At the time of hearing, the contention was raised by the learned DR that the search was conducted before the amendment brought by the Finance Act 2016 reducing the assessment period from 24 months to 21 months, therefore in the case of present assessee, time limit available to the AO under section 153B(1)

of the Act was for 24 month. In this regard, we note the provision of subsection (3) of section 153B of the Act has direct bearing on the issue which reads as under:

> *(3) The provisions of this section, as they stood immediately before the commencement of the Finance Act, 2016, shall apply to and in relation to any order of assessment or reassessment made before the 1st day of June, 2016:*
>
> *[1][**Provided** that where a notice under section 153A or section 153C has been issued prior to the 1st day of June, 2016 and the assessment has not been completed by such date due to exclusion of time referred to in the Explanation, such assessment shall be completed in accordance with the provisions of this section as it stood immediately before its substitution by the Finance Act, 2016 (28 of 2016).]*

11.3 In the case on hand, the notice under section 153A of the Act was issued on 22nd July 2015 and assessment order was passed on 9th March 2018 i.e. notice under section 153A of the Act was issued before the commencement of amendment brought in by the Finance Act and here also a case of exclusion of time as referred in explanation was involved. Therefore, in our considered the limitation period provided under section 153B(1) of the Act before the amendment will be applicable i.e. 24 months from the end of financial year in which last of authorization of search was executed and accordingly the last date to finalize the assessment order was expiring on 31st March 2017 without exclusion of time as provided under different clauses in the explanation to section 153B of the Act.

11.4 Moving ahead, we note that in the case of the assessee, multiple references were made for exchange of information in different countries through FT & TR. The provision of clause (ix) of the explanation to section 153B of the Act reads as under:

> *Explanation.—In computing the period of limitation under this section—*
> **********
> *(ix) the period commencing from the date on which a reference or first of the references for exchange of information is made by an authority competent under an agreement referred to in section 90 or section 90A and ending with the date on which the information requested is last received by the Principal Commissioner or Commissioner or a period of one year, whichever is less; or*
> *******
> *shall be excluded:*
>
> ***Provided** that where immediately after the exclusion of the aforesaid period, the period of limitation referred to in clause (a) or clause (b) of this sub-section available to the Assessing Officer for making an order of assessment or reassessment, as the case may be, is less than sixty days, such remaining period shall be extended to sixty days and the aforesaid period of limitation shall be deemed to be extended accordingly:*

11.5 From the above provision, it is transpired that period commencing from the reference or first of the reference made to the date on which last of information received or 12 month whichever is less shall be excluded. As per the list provided in the case of the present assessee, the first reference for exchange of information under section 90 or 90A of the Act was made on 12th January 2015 to UAE authority whereas last reference was made on 16th May 2017 with competent authority of Bermuda. Now the question arises from which date the period of exclusion for making reference for exchange of information shall be computed. In this regard, we find the provision for exclusion of time on account of reference for exchange information through FT&TR was first brought through Finance Act 2011 w.e.f. 1st June 2011 where it was provided that the period commencing from the date of reference to the date on which last information received shall be excluded. Subsequently, the dispute arose for calculating the period where there were multiple references made in different countries. In this regard, the legislator vide Finance Act 2013, amended the said clause of the explanation by adding the phrase "reference or first of the refences" and clarified that the exclusion period shall be calculated form the date on which first reference was made. In this regard the memorandum explaining the provision to Finance Act 2013 reads as under:

> ***EXCLUSION OF TIME IN COMPUTING THE PERIOD OF LIMITATION FOR COMPLETION OF ASSESSMENTS AND REASSESSMENTS***
> *The existing provisions of section 153, inter alia, provide the time limit for completion of assessment and reassessment of income by the Assessing Officer.*
> *Explanation to section 153 provides that certain periods specified therein shall be excluded while computing the period of limitation for the purposes of the said section.*
> *Under the existing provisions of clause (iii) of Explanation 1 to section 153, the period commencing from the date on which the Assessing Officer directs the assessee to get his accounts audited under sub-section (2A) of section 142 and ending with the last date on which the assessee is required to furnish a report of such audit, is excluded in computing the period of limitation for the purposes of assessment or reassessment.*
> *However, the existing provision does not provide for exclusion of time in case the direction of the Assessing Officer is set aside by the court.*
> *It is proposed to amend clause (iii) of Explanation 1 to section 153 so as to provide that the period commencing from the date on which the Assessing Officer directs the assessee to get his accounts audited under sub-section (2A) of section 142 and ending with the last date on which the assessee is required to furnish a report of such audit under that sub-section; or where such direction is challenged before a court, ending with the date on which the order setting aside such direction is received by the Commissioner, shall be excluded in computing the period of limitation for the purposes of section 153.*

Similarly, the existing provisions contained in clause (viii) of Explanation I to section 153 provide for exclusion of the period commencing from the date on which a reference for exchange of information is made by an authority competent under an agreement referred to in section 90 or section 90A and ending with the date on which the information so requested is received by the Commissioner or a period of one year, whichever is less, in computing the period of limitation for the purposes of section 153.

At times more than one reference for exchange of information is made in one case and the replies from the foreign Competent Authorities are also received in parts. In such cases, there will always be a dispute for counting the period of exclusion i.e. whether it should be from the date of first reference for exchange of information made or from the date of last reference. Similar dispute may also arise with regard to the date on which the information so requested is received.

With a view to clarify the above situation, it is proposed to amend the aforesaid clause (viii) so as to provide that the period commencing from the date on which a reference or first of the references for exchange of information is made by an authority competent under an agreement referred to in section 90 or section 90A and ending with the date on which the information requested is last received by the Commissioner or a period of one year, whichever is less, shall be excluded in computing the period of limitation for the purposes of section 153.

Similar amendments are also proposed in the Explanation to section 153B of the Income-tax Act relating to time limit for completion of search assessment.

These amendments will take effect from 1st June, 2013.

11.6 Thus, from the above memorandum explaining the provision, it is clear that in the case of the assessee, the exclusion period on account of reference made through FT &TR shall be computed from 12th January 2015 and even taking maximum period of 12 month the exclusion period ends on 11th January 2016. The first proviso to explanation provides that in case where after exclusion of the period as per explanation the time available with the AO for making assessment as per clause (a) or (b) of the section 153B(1) is less than 60 days then such period shall be extended by 60 days and it should be deemed that exclusion period has been extended. In the case of the assessee even after excluding 1 year on account of reference made to FT& TR the assessing officer was having more than a year to finalize the assessment within the time limit prescribed under clause (a) or (b) of section 153A of the Act i.e. 31st March 2017. Hence, in our considered opinion the AO will not get any benefit of time on account of reference to FT& TR in the given facts and circumstances.

11.7 Now coming to the exclusion of time on account of the application made by the assessee before the settlement commissioner under section 245C of the Act. The clause of (v) of the explanation of section 153B of the Act provides that the period beginning with the date on application made under section and ending with the date on which order under section 245D(1) of the Act rejecting the application was received by the by PCIT or CIT subject to 60 days as provided under first proviso below to the explanation shall be excluded. In the case of the assessee there were two applications made by the assessee under section 245C of the Act and both came to be rejected by the settlement commission under section 245D(1) of the Act. The last application was made by the assessee on 27th February 2017 which came to be rejected by the settlement commissioner as on 10th March 2017. Assuming that the order under section 245D(1) of the Act was received by the PCIT or CIT on same day, the 12 days starting from 27th February 2017 to 10th March 2017 shall be excluded. Ater excluding the said period the time limit expiring under normal circumstances as per subsection (1) of section 153B of the Act is less than 60 days hence the same will extended for 60 days as per first proviso and accordingly the time limit expires on 9th May 2017 whereas the assessment has been framed under section 153A r.w.s. 143(3) of the Act dated 9-3-2018 beyond the statutory time.

11.8 The learned DR before us has contended that as per the 3rd Proviso below to explanation to section 153B of the Act provides that if proceeding before settlement commissioner abate under section 245HA of the Act and period of exclusion for computation of limitation as provided under section 4 of section 245HA is less than 1 year then same shall be deemed to have extended for 1 year. In the case of the assessee, the proceeding before the settlement commission has been abated on 10th March 2017 and the exclusion period is less than one year hence the same shall deemed to be extended for one year i.e. 31st March 2018. Accordingly, the learned DR contended the assessment order dated 9th March 2018 is well within the time limit prescribed under section 153B of the Act. In this regard, we note that the impugned proviso in relation to abatement of proceeding

before settlement commission was brought under section 153B of the Act vide Finance Act 2017 and made applicable w.e.f. 1st April 2017 whereas in the case of the present assessee search under section 132 of the Act and consequent proceeding under section 153A of the Act was initiated long before the impugned proviso inserted and made applicable. Hence, the same will not be made applicable in the present case before us. In holding so, we draw support and guidance from the judgment of Hon'ble Delhi High Court in case of Rohit Kumar Gupta vs. PCIT reported in [2019] 109 taxmann.com 257 (Delhi) where it was held as under:

> ***61.*** *It must be noted here that by the Finance Act 2017, with effect from 1st April 2017, the following further proviso was added to Section 153 B:*
> *"**Provided also** that where a proceeding before the Settlement Commission abates under section 245HA, the period of limitation available under this section to the Assessing Officer for making an order of assessment or reassessment, as the case may be, shall, after the exclusion of the period under sub-section (4) of section 245HA, be not less than one year; and where such period of limitation is less than one year, it shall be deemed to have been extended to one year."*
> ***62.*** *Correspondingly with effect from the same date, Clause (v) to Explanation 1 to Section 153 of the Act got amended to delete the reference therein to Section 153 B of the Act. Till this change was made, the provision that was required to be referred to for determining the limitation for completing the assessment under Section 153 A, where there had been an abatement of the proceedings before the ITSC, was Clause (v) to Explanation 1 to Section 153 of the Act and not Section 153 B of the Act which made no reference to abatement of the proceedings before the ITSC by virtue of an order passed under Section 245 D (4) of the Act. The change brought about by the Finance Act 2017 does not apply to the case on hand where the proceedings under Section 153 A of the Act commenced long prior to the said amendment.*

11.9 Thus, in view of the above detailed discussion, we find that the time limit for making assessment under section 143(3) r.w.s. 153A of the Act in the given facts and circumstances was expiring as on 9th May 2017 whereas the assessment order was made as on 9th March 2018. Hence the same was done beyond the statutory time limit. Therefore, the assessment in the case on hand is invalid due to limitation. It is settled position of law that an assessment order which is not valid/maintainable under the provisions of the Act, cannot be revised by the CIT/PCIT under the provision of section 263 of the Act. Therefore, we hereby quash the order passed under section 263 of the Act as not maintainable. Accordingly, we also refrain ourselves from adjudicating the issue raised in the

appeal against the order passed under section 263 of the Act. Hence, the grounds of appeal raised by the assessee are hereby allowed.

12. In the result, the appeal of the assessee is hereby allowed.

Order pronounced in the Court on 10/04/2024 at Ahmedabad.

Sd/-	**Sd/-**
(MADHUMITA ROY)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 10/04/2024

Manish