

IN THE INCOME TAX APPELLATE TRIBUNAL
“PATNA BENCH, PATNA
VIRTUAL HEARING AT KOLKATA

श्री संजय गर्ग, न्यायिक सदस्य एवं श्री मनीष बोराड, लेखा सदस्य के समक्ष
Before Shri Sanjay Garg, Judicial Member and Dr. Manish Borad, Accountant Member

I.T.A. No.02/Pat/2022
Assessment Years: 2015-16

Vibhuti Bhushan Sinha.....Appellant
C-601, Shivam Apartment,
Virmeshwar Nagar,
Dwarka, Gujrat-361335.
[PAN: AIGPS7118D]

vs.

ITO, Ward-6(2), Patna..... Respondent

I.T.A. No.03/Pat/2022
Assessment Years: 2016-17

Sonam Raj.....Appellant
W/O Shri Deepak Verma,
2nd Floor, House No.101,
Pocket-52, Chittaranjan Park,
New Delhi – 110019.
[PAN: DFSPS6397E]

vs.

ITO, Ward-6(2), Patna..... Respondent

Appearances by:

Shri Sudipta Sannigrahi, CA, appeared on behalf of the appellant.
Shri Sushil Kr. Mishra, JCIT-DR, appeared on behalf of the Respondent.

Date of concluding the hearing : May 28, 2024

Date of pronouncing the order : August 12, 2024

आदेश / ORDER

संजय गर्ग, न्यायिक सदस्य द्वारा / Per Sanjay Garg, Judicial Member:

The captioned appeals have been preferred by two different assesseees against the separate orders dated 30.04.2021 & 01.03.2021 of the National Faceless Appeal Centre [hereinafter referred to as ‘CIT(A)’] passed u/s 250 of the Income Tax Act (hereinafter referred to

as the 'Act') respectively. Since the facts and issues involved in both the appeals are identical and the same were heard together and are being disposed of by this common order. I.T.A. No.02/Pat/2022 is taken as lead case for the purpose of narration of facts.

2. **I.T.A. No.02/Pat/2022** – The appeal is time-barred by 263 days. A separate application has been filed for condonation of delay, wherein, it has been pleaded that the appellant could not file the appeal in time due to the Covid Pandemic, therefore, considering the application, the delay in filing the present appeal is hereby condoned.

3. The assessee in this appeal has taken the following grounds of appeal:

“1. For that, on the fact & circumstances of the case, the Initiation of reassessment proceeding U/s. 147 by the learned Assessing Officer, Ward - 6(2), Patna is without any valid Jurisdiction and as such the assessment order U/s. 144 is also not legal & valid.

2. For that, on the fact & circumstances of the case, the learned Assessing Officer failed to disclosed in the assessment order on which provision of the Act, the case of the appellant is transferred to the ITO, Ward-6(2), Patna from his regular exiting jurisdiction ITO, Ward-1, Dwarka, Jamnagar, Gujrat. As a result, the reassessment proceeding and also the assessment order both are without jurisdiction and as such, not legal, proper & valid.

3. For that, on the fact & circumstances of the case, the learned Assessing Officer initiate the reassessment proceeding U/s. 147 of the Income Tax Act. 1961 only upon a mere change of opinion without any fact reason. The learned Assessing Officer disclosed in point no 3 in the order that the assessee has not filed any return of income and not made any Compliance after several reference without giving any date of reference. The original regular return was filed by the assessee with the regular jurisdiction on 25.08.2015. In view of the above fact and circumstances. the notice U/s. 148 after recording reason is not constitutional. When section 147 of the Act does not postulate conferment of power upon the learned Assessing Officer to initiate reassessment

proceeding on his mere change of opinion. If reasons to believe of the learned Assessing Officer is founded on an information which might have been received by the learned Assessing Officer after completion of assessment. Therefore, the action of the learned Assessing Officer, Ward-6(2), Patna is not valid & without any proper jurisdiction.

4. For that, on the fact & circumstances of the case, the learned Assessing Officer failed to prove the date of service of notice U/s. 148 to the assessee in his order. Until & unless the learned Assessing Officer proved the service of notice and its validity, the learned Assessing Officer cannot initiate the reassessment proceeding. Issue of notice as shown in the assessment order dated 26.10.2018 is not the proof of service of notice to the assessee. Until & unless it is proved by the learned Assessing Officer that the said notice was validly served on the assessee. The issue of notice alone will not give any power to the learned Assessing Officer for initiating the reassessment proceeding.

5. For that, on the fact & circumstances of the case, the learned Assessing Officer failed to appreciate the fact & circumstances of the case when he himself admitted that his reasons to believe for escapement of income and after obtaining the required approval from the competent authority to bring the income escaped from assessment to tax pertaining to capital gain arising out of the transaction of the land development agreement in the hand of the assessee to tax. The learned Assessing failed to appreciate the fact that registration of JDA is not a transaction, rather a Memorandum of understanding for future plan of action, learned Assessing Officer mis-appreciated the provision of law that the capital gain (short term/long term) arises as per provision of the Income Tax Act, 1961 when there is a holding period. In the instant case, the purchase of land by the appellant by a registered sale deed and also the Joint Development Agreement (JDA) both were registered on the same day i.e. 17.11.2014 having no holding period in the hand of the appellant. Therefore, the reason to believe for escapement of income that too capital gain is baseless assumption of fact by the learned Assessing Officer for reopening the assessment. Hence, it is evident that there is no scope of capital gain U/s. 45 on a transaction of land in between the previous land owner and by the appellant and the JDA entered into in between the appellant and developer both are on the same day having no holding period in the appellant hand. As such, the reason to believe as recorded if any and approved by the higher authority totally a presumption of situation which is not existed on the same day in the instant case.

6. For that, on the fact & circumstances of the case, the learned Assessing Officer's reason to believe is based on his own suspicion and suspect and not enough to form belief for the purpose of action U/s. 147 [Citation: ITO VS. Lakhmani Mewal Das (1976) 3 ITR 437 (SC)] Therefore, the assessment U/s. 144/147 is ab-initio void assessment or a nullity for want of valid jurisdiction.

7. For that, on the fact & circumstances of the case, the learned Assessing Officer was absolutely wrong in determining the taxation of long term capital gain on the presumption of deemed transfer of 55% of the land in favour of the developer as per the scheme of the memorandum of agreement as JDA executed on the application of section 2(47)(v) of the Act in the computation of taxable income without assigning proper and valid reason and justification. The learned Assessing Officer have mis-construed the fact by mis-reading /ignoring the provision governing and reckoning of deemed transfer. Computation of long term capital gain in the order on various facets was wrong, erroneous, unjustified, incorrect and not sustainable in law. As such, the wrong addition of long term capital gain may please be cancelled and the demanded tax may also be waived on cancellation.

8. On the fact & circumstances of the case, the learned Assessing Officer failed to appreciate the clauses of the JDA and its term & condition for the exchange of transaction. According to the learned Assessing Officer, the assessee will get from a multi-story residential complex 45% of constructed area in exchange of 55% of an area on the date of agreement of JDA when no construction is possible on the land of the appellant by the developer. Until & unless the Conditions of registered IDA is fulfilled before getting any permission of local authority by approval on map of the building on the land by the developer including licence to entered the land for construction, The learned Assessing Officer failed to appreciate that this registered JDA will come into operation only when the local authorities approved the plan of the multi-story residential complex and memorandum of partition is entered into by & between the landowners and developer as per the said JDA, a copy of which is in the possession of the learned Assessing Officer before initiation of reassessment proceeding. Therefore, arbitrary decision for presumed income cannot be brought to the purview of income i.e. capital gain as per the terms of registered JDA.

9. For that, on the fact & circumstances of the case, the lower authorities failed to appreciate the provision of section 2(47)(v) of the Act would not

be applicable as actual transfer of property as per section 53A of the Transfer of Property Act and not been taken place on registration of the JDA as because the JDA is mere agreement to develop the property in future without transferring the ownership till completion of the proposed development. Above all capital gain is taxable mount of gain not on estimated presumed amount which the lower authorities considered that the estimated capital gain on the basis of proposed area to be transfer after Completion of construction shall be taxed on the date of registration of JDA on the basis of estimated hypothetical Income which is yet to be accrued only on completion of development project as per registered development agreement. It is also a fact that the basic conception of the lower authorities for deciding the matter of capital gain is that appellant must have acquire right to receive the income. For that there must be debt owed to him by somebody. Both the authorities failed to appreciate that income tax is a levy on actual income but not hypothetical income. It is a fact that Income Tax Act taxed income in two points of time at which the liability of tax is attracted, viz. the accrual of income or its receipt but substance of matter is the income not hypothetical income. If income does not result at all, there cannot be a tax. Therefore, the hypothetical taxation by the learned Assessing Officer & accepted by the learned Commissioner of Income Tax (Appeals) is not legal, proper & valid. As such, the re-assessment order U/s. 144/147 is fit to be cancelled ab-initio.

10 For that, the appellant craves, leave to add, modify and amend any of the grounds of the appeal at the time of hearing.”

4. The brief facts of the case are that the assessee owned a land/plot at Patna, Bihar. The assessee entered into a development agreement for the development of the said land/plot. As per the development agreement, the assessee was entitled to a share out of the developed property. The Assessing Officer treated the said Joint Development Agreement ('JDA') as transfer of the property u/s 2(47) of the Act. He, therefore, reopened the assessment of the assessee u/s 147 of the Act. However, the assessee did not reply any of the notices issued to the assessee, therefore, the Assessing Officer passed an ex parte best

judgment assessment order u/s 144 of the Act and made the impugned additions.

5. The ld. CIT(A) confirmed the addition so made by the Assessing Officer.

6. Being aggrieved, the assessee has come in appeal before us. The only contention raised by the ld. counsel for the assessee before us is that the Assessing Officer at Patna i.e. ITO, Ward-6(2), Patna did not have jurisdiction to pass the impugned assessment order. The ld. Counsel in this respect has invited our attention to the relevant para 3 of the assessment order to submit that the Assessing Officer at Patna has noted that the assessee did not file any return for the year under consideration. He has further submitted that the assessee, however, had filed return of income for the year under consideration. Our attention has been drawn to page 133 of the paper-book, which is the copy of ITR acknowledgement for the year under consideration i.e. A.Y 2015-16. The ld. Counsel has further submitted that the assessee is a resident of Dwarka, Gujarat and that the PAN number of the assessee is AGIPS7118D. That as per the Income Tax Portal, the current PAN jurisdiction of the assessee is at Dwarka. He has further invited our attention to the ITR acknowledgement, wherein, the address of the assessee has also been mentioned as that of Virmeshwar Nagar, Dwarka, Gujarat. The ld. Counsel, therefore, has submitted that neither the assessee has been resident of Patna nor the PAN jurisdiction was lying at that time with the ITO, Ward-6(2), Patna, therefore, the assessment framed by the ITO, Ward-6(2), Patna is bad in law.

7. The ld. DR however referring to section 124(3) of the Act has submitted that since no objection as to the territorial jurisdiction was taken by the assessee before the Assessing Officer within the stipulated

time period, therefore, the assessee is estopped from raising dispute over the territorial jurisdiction of the Assessing Officer to frame the impugned assessment.

7.1 The Id. AR in rebuttal has submitted that the assessee was residing at Dwarka and that no notice was ever issued or served by the Assessing Officer at Dwarka. That the address of the assessee was available with the Department as the PAN jurisdiction could have been verified by the Assessing Officer at Dwarka. That any notice issued by the concerned Assessing Officer at Patna address was never served upon the assessee. That since the assessee was not aware of the reopening of the assessment or pendency thereof, therefore, there was no opportunity available to the assessee to file such objections either against the territorial jurisdiction or against the reopening of the assessment.

8. We have considered the rival submissions and gone through the record. Section 124(1) of the Act describes the jurisdiction of the Assessing Officer, the relevant part of which is reproduced as under:

Jurisdiction of Assessing Officers

124.¹*[(1) Where by virtue of any directions or order issued under sub-section (1) or sub-section (2) of section 120, the Assessing Officer has been vested with jurisdiction over any area, with the limits of such area, shall have jurisdiction –*

(a) in respect of any person carrying on a business or profession, if the place at which he carries on his business or profession is situate within the area, or where his business or profession is carried on in more places than one, if the principal place of his business or profession is situate within the area, and

(b) in respect of any other person residing within the area.”

8.1 As per the aforesaid provisions, firstly, where a person carries a business or profession, the Assessing Officer of the place/area at which he carries business or profession will have jurisdiction over such persons. In respect of any other person, the jurisdiction over such person will be of the Assessing Officer of the area in which such person resides. In the case of the assessee, the assessee has filed the ITR in ITR-1, which is generally for individuals having salary income or income from house property and income from other sources etc., which means that the assessee is not carrying on any business or profession, therefore, the provisions of section 124(1)(b) of the Act will be attracted in the case of the assessee for ascertaining territorial jurisdiction of the Assessing Officer. No doubt, the assessee in its original ITR for A.Y 2015-16 has mentioned his address at Virmeshwar Nagar, Dwarka, Gujarat. As per the Income Tax portal, the PAN address of the assessee also lies at Dwarka. However, the point which is to be considered here is that the ITO, Ward-6(2), Patna has assumed jurisdiction to frame the assessment from perusal of the registered JDA, which has been placed at pages 96 to 118 of the paper-book. A perusal of the said registered JDA reveals that the address of the assessee has been mentioned as Shri Vibhuti Bhusan Sinha, S/O Shri Bedwrat Sinha, Mohalla Majar Gali, Shekhpura, Shastri Nagar, Patna. The Assessing Officer, under the circumstances, was of the view that the assessee was resident of the aforesaid address of Shastri Nagar, Patna. Though the PAN jurisdiction of the assessee was at Dwarka, however, as per the Income Tax Act, 1961, the jurisdiction of the Assessing Officer over an assessee is not to be determined as per PAN, rather, as per the statutory provisions of the Income Tax. Therefore, the Assessing Officer at Patna, under the circumstances, assumed the jurisdiction by noting the address of the assessee from the registered JDA. The assessee, for the reasons best

known to him has mentioned his address in the JDA as that of Patna, hence, under the circumstances, the Assessing Officer at Patna, assumed the jurisdiction. However, the facts on the file are that the assessee in his return of income has duly mentioned his address as that of Dwarka and the assessee has also been residing at Dwarka though he owned a plot/land at Patna. In view of this, since no notice of the reopening of the assessment and further notices issued during the assessment proceedings were never served upon the assessee, therefore, the assessee was prevented from filing objections against the reopening of the assessment as well as relating to the territorial jurisdiction of the Assessing Officer. In view of the above facts and circumstances, the impugned order of the Assessing Officer is set aside and the matter is restored to the file of the Assessing Officer at Patna. The assessee if so desire, may file objection before the Assessing Officer regarding territorial jurisdiction etc. and if such objection is received by the Assessing Officer, the Assessing Officer will refer the matter to the competent authority as mentioned in section 124 of the Act and the concerned Commissioner/competent authority then will decide the jurisdiction issue and will transfer accordingly the proceedings and record to such Assessing Officer having jurisdiction over the assessee. Thereafter, the concerned jurisdictional Assessing Officer will frame the assessment afresh after giving due opportunity to the assessee to present his case. The assessee will have the right to contest his case on of facts as well as legal. Thereafter, the concerned jurisdictional Assessing Officer will pass the assessment order afresh in accordance with law. No other argument either on facts or law advanced before us. In view of our observations made above, the appeal of the assessee is treated as allowed for statistical purposes.

9. **I.T.A. No.03/Pat/2022** – In the case in hand, the facts and circumstances are identical except that the address of the assessee in the ITR acknowledgment form has been mentioned as that of 2nd Floor, House No.101, Pocket-52, Chittaranjan Park, New Delhi-110019 and whereas, the return has been filed with Assessing Officer i.e. ITO, Ward-26(3)(4), Mumbai. The PAN jurisdiction of the Assessing Officer has been mentioned as Ward-41(1)(3), Mumbai and whereas the address of the assessee in the JDA has been mentioned as Smt. Sonam Raj, C/o-Shri Deepak Verma, 302, Nutan Mahalaxmi Complex, Rajendra Path, Gandhi Maidan, Patna. The Assessing Officer has issued notices at the address mentioned in the JDA. In view of our observations and findings given above while deciding the ITA No.02/Pat/2022, the impugned assessment order in this case is also set aside and the matter is restored to the file of the Assessing Officer with the identical directions as given above in ITA No.02/Pat/2022. This appeal of the assessee is also treated as allowed for statistical purposes.

10. In the result, both the appeals are treated as allowed for statistical purposes.

Kolkata, the 12th August, 2024.

Sd/-
[डॉक्टर मनीष बोरड /**Dr. Manish Borad**]
लेखा सदस्य /**Accountant Member**

Sd/-
[संजय गर्ग /**Sanjay Garg**]
न्यायिक सदस्य /**Judicial Member**

Dated: 12.08.2024.

RS

Copy of the order forwarded to:

1. (i) Vibhuti Bhushan Sinha
(ii) Sonam Raj
2. ITO, Ward-6(2), Patna
3. CIT (A)-

4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches