

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'B': NEW DELHI  
BEFORE  
SHRIPRADIP KUMAR KEDIA, ACCOUNTANT MEMBER  
AND  
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER**

**ITA No.4585/Del/2019, A.Y.2012-13)**

Mr. Sharwan Kumar Sethi Esskay Farm, 19, Oak Drive, Sultanpur Road, Mehrauli, New Delhi-110030 PAN : AAUPS5020L	Vs.	The Pr. Commissioner of Income-Tax-17, Room No. 1402, 14 <sup>th</sup> Floor, E-2 Block Dr. S.P.Mukherjee, Civic Centre New Delhi- 110002
<b>(Appellant)</b>		<b>(Respondent)</b>

Appellant by	Sh. Manish Malik, Advocate and Sh. Vinod Gupta, CA
Respondent by	Shri Surender Pal, CIT-DR

Date of Hearing	07/10/2024
Date of Pronouncement	10/10/2024

**ORDER**

**PER YOGESH KUMAR U.S., JM:**

This appeal is filed by the Assessee against the order of Learned Pr. Commissioner of Income Tax[“Ld. Pr. CIT”, for short], dated 22/03/2019 for the Assessment Year 2012-13.

2. Grounds taken in this appeal are as under:

*“1. The Learned Pr. CIT erred in invoking section 263, in view of the fact at the time of examination of the records by her, the order passed by the Assessing Officer u/s 143(3) of the I.T.Act, 1961 was not erroneous or prejudicial to the interests of revenue.*

*2. The Learned Pr. CIT erred in directing the Assessing officer to initiate penalty proceedings u/s 271(1)(c), if the capital gain is treated as a long term capital gain.”*

3. Brief facts of the case are that the Assessee filed return of income declaring an income of Rs. 1,72,48,137/-. The case was selected for scrutiny under CASS. An order under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) came to be passed on 18.03.2015 by ACIT, Circle 51(1), New Delhi by assessing the income of the Assessee at Rs. 1,91,61,670/-. During the year under consideration, the Assessee sold a Flat in Essencia Residential Plot No. E-2040, Sector-67, Sushant Lok-IV, Gurgaon and treated it as Long Term Capital Gain and adjusted it against the Long Term Capital Loss of Rs. 10,80,752/-. The Ld. A.O. after passing the Assessment Order, on perusal of the record that the Assessee purchased a said plot on 10.08.2010 and sold it on 13.05.2011 i.e. holding of the said plot less than 36 months and further found that instead of claiming Short Term Capital Gain, the Assessee has treated it as Long Term Capital Gain therefore, Ld. AO passed rectification order under section 154 of the Act on 11.07.2016 wherein added Rs. 9,48,911/- to the income of the Assessee treating the same as Short Term Capital Gain. The Ld. PCIT exercising power conferred under section 263 of the Act, on perusal of the record found that the issue as to whether holding of asset for 36 months or for less than 36 months is not debatable issue and the same is not error apparent on record, thus, invocation of Section 154 of the

Act may not take appropriate by the A.O., accordingly a notice under section 263 of the Act has been issued by the PCIT in following manners: -

*“Assessment in your case for A.Y. 2012-13 was completed u/s 143(3) of the Income Tax Act, 1961 by the ACIT, Circle-51(1), New Delhi on 18.03.2015 at Rs. 1,91,61,670-. Further an order u/s 154 of the Act was passed on 11.07.2016 at Rs.2,01,10,580/-. The assessment record for the impugned order was called and examined. From perusal of record, it appears that the Assessing Officer has passed the orders without making enquiries or verification which he should have made while investigating your case. Since the proper enquiry has not been done, it is erroneous order prejudicial to the interest of revenue. The order passed by the AO is required to be set aside*

*The property situated at Essencia Residential bearing Plot No. E-2040, Sector-67, Sushant Lok-IV, Gurgaon was purchased by you on 10.08.2010 and sold on 13.05.2011. The said property was under your possession for less than 36 months and income from the sale/transfer of this property should have been treated as Short term Capital Gain rather than Long Term Capital loss as claimed by you as well as assessed by the AO.*

*Failure on part of Assessing Officer in making proper enquiry and verification which he was required to do in your case has rendered the assessment order erroneous in so far as it is prejudicial to the interest of revenue.”*

3.1 In response to the above notice, the Assessee submitted reply as under: -

*“Kindly refer to your letter F. No. Pr. CIT-17/263/2018-19/2553 dated 31st January, 2019 issued u/s 263 of the I.T. Act, 1961 (hereinafter referred to as the Act). In terms of the said notice, it is your esteemed inference that the order passed u/s 143(3) of the Act dated 18.03.2015 at Rs. 1,91,61,670/- is erroneous and prejudicial to the interest of revenue for want of making proper enquiries or verification and also for the assessment of Long term capital gains*

*computed by the Assessing Officer. It is respectfully pointed out that the Assessing Officer himself noticed the error regarding the claim of the Assessee of Long Term Capital Gains was erroneous as the property in question was under the possession of the assessee for less than thirty six months. Taking this into consideration and ascertaining other details, the assessing officer has recalculated the capital gains holding the same to be short term capital gains. A copy of the calculation of capital gains by the assessing officer in his order passed u/s 154/143(3) of the Act is enclosed for your kind perusal. It is clear from the order that the assessee committed error in the capital gain stands rectified and, therefore, there is no prejudice cost to the indicated in your notice u/s 263 of the Act. The second to n against the rectification order, a certified copy whereof had been received try him."*

4. The Assessee claimed before the Ld. PCIT that an appeal has been filed by the Assessee but no proof has been submitted before the PCIT. Thus, the Ld. PCIT set aside the order passed under section 154 of the Act with following direction: -

- "1. Re-compute capital gain in accordance with provision of the Act,*
- 2. Check that income has been properly disclosed with reference to amounts shown in Form 26 QB in ITR, and*
- 3. To initiate penalty proceedings u/s 271(1)(c) (If provisions of I.T. Act allowed in this) if the capital gain is treated as Long Term Capital Gain."*

5. Aggrieved by the order of the Ld. PCIT dated 23.02.2019, the Assessee preferred the present appeal on the grounds mentioned above.

6. The Ld. Counsel for the Assessee submitted that after passing the assessment order, an order under section 154 of the Act has been passed by the AO by rectifying 'the error' committed in the assessment order considering the fact that period of holding of property is less than 36 months, the capital gain calculated by the Assessee has not been accepted as long term capital gain / loss and recomputed the short term capital gain. Thus, the department of revenue cannot have any grievance and the invocation of the provision of Section 263 of the Act as is uncalled for and the same is erroneous. Thus, sought for allowing the appeal.

7. Per contra, Ld. Departmental Representative (hereinafter referred to as 'the Ld. DR') submitted that the question as to whether holding of asset was for 36 months or less than 36 months cannot be mistake apparent from record and the invocation of provision of Section 154 of the Act by the A.O. is erroneous. Further submitted that the Ld. PCIT was right in initiating the proceedings u/s 263 of the Act and has rightly invoked the provision of Section 263 of the Act, therefore, sought for dismissal of the appeal.

8. We have heard the parties and perused the material available on record. It is not in dispute that the Assessee had purchased a Flat in Essencia Residential Plot No. E-2040, Sector-67, Sushant Lok-IV, Gurgaon on

10.08.2010 and sold the same on 13.05.2011 and the period of holding the said plot is less than 36 months however, during the assessment proceedings under section 143(3) of the Act Id. AO allowed the claim of the Assessee of Long Term Capital Gain. However, the AO himself noticed 'the error' committed by him regarding the claim of the Assessee of Long Term Capital Gain was erroneous as a property in question was under the possession of the Assessee for less than 36 months and thus calculated the capital gain holding the same as Short Term Capital Gain and passed the order under section 154 / 143(3) of the Act.

9. It is a fact on record that after passing the above rectification order by the A.O., the case of the Assessee was reopened u/s 148 of the Act. The very same addition has been made treating the sale consideration as Short Term Capital Gain vide order dated 27/12/2019 passed u/s 143(3) read with Section 147 of the Act. Pursuant to the order passed u/s 143(3) read with Section 147 of the Act, a penalty proceeding has been initiated u/s 271(1)(c) of the Act wherein the A.O. has dropped the penalty proceedings as there is no default has been found against the Assessee to attract the provision of Section 271(1)(c) of the Act. The said order passed u/s 147 and the order of penalty made u/s 271(1)(c) has also reached finality and it is not in dispute that the Assessee has also paid the tax on the income computed in the proceedings initiated u/s 147 of the Act wherein the amount received under the sale

transaction has been treated as Short Term Capital Gain, thus there is no revenue loss to the Department.

10. Considering the above facts and circumstances, we are of the view that the Ld. PCIT has committed an error in invoking the provision of Section 263 and passing the order impugned. Accordingly, we set aside the impugned order of the Ld. PCIT.

11. In the result, the appeal filed by the Assessee is allowed.

Order pronounced in open Court on 10<sup>th</sup> October, 2024

Sd/-

Sd/-

**(PRADIP KUMAR KEDIA)**  
**ACCOUNTANT MEMBER**

**(YOGESH KUMAR U.S.)**  
**JUDICIAL MEMBER**

Dated: 10/10/2024  
*Binita/R.N, Sr. PS*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT, NEW DELHI

