

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'A' NEW DELHI
BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
AND
MS MADHUMITA ROY, JUDICIAL MEMBER**

ITA No. 1843/DEL/2024

Assessment Year: 2018-19

ANIL DUA F-13, KAILASH COLONY, NEW DELHI-110048	Vs.	PCIT -10 NEW DELHI-110002
PAN :AACPD8370L		
(Appellant)		(Respondent)

Assessee by	Shri Salil Agarwal, Sr. Adv., Shri Sailesh Gupta, Adv and Shri Madhur Agarwal
Department by	Issues clarified by the Ld. AR, hence heard

Date of hearing	04.09.2024
Date of pronouncement	07.11.2024

ORDER

PER MADHUMITA ROY, JUDICIAL MEMBER

The instant appeal filed by the assessee is directed against the order dated 29.03.2024 passed by the Learned. PCIT, Delhi-10 under Section 263 of the Income Tax Act, 1961(hereinafter referred to as "the Act") for Assessment Year 2018-19 whereby and whereunder the order passed by the Learned Assessing Officer dated 19.04.2021 has been set aside for modification in the absence of conducting enquiries holding the same erroneous in so far as it is prejudicial to the interest of the Revenue.

2. The brief facts of the case are that the case of the assessee was selected for Limited Scrutiny on the following issues;

- i) Capital Gains/Income on Sale of Property
- ii) Capital Gains Deduction Claimed

3. The assessee, an individual filed its income on 25.09.2018 declaring total income at Rs.28,15,430/- which was processed under Section 143(1)(a) of the Act and finalized accepting the return of income. Subsequently, when the case was selected for Limited Scrutiny notice under Section 143(2) of the Act dated 28.09.2019 was issued and served upon the assessee in respect of capital gains and deduction under Section 54 of the Act. The reply whereto was submitted by the assessee on 03.10.2019 along with copy of each of the agreement for development and construction dated 05.03.2013, the sale deed dated 26.02.2018 evidencing the second floor was sold by the developers wherein the assessee was the confirming party. Thereafter on 07.02.2020 the notice under Section 142(1) was raised by the Learned AO along with 13 queries on the issue of capital gain and deduction claimed thereto under Section 54 of the Act by the assessee whereupon by and under the reply dated 22.02.2020, copy of each of the sanction letter dated 23.07.2013 of the property in question lying and situated at Plot No. 13, 1st Floor, Kailash Colony, New Delhi, the assessee's bank account and the registered valuer's report dated 09.05.2016 in regard to such property were submitted. Upon examination of the entire documents, the Assessment was finalized under Section 143(3) of the Act dated 19.04.2021. Further important fact reveals from the record that on 06.03.2024 a notice under Section 154 of the Act was issued by the Learned AO and served by the assessee proposing rectification of the Assessment

made under Section 143(3) of the Act appearing at pages 123-124 of the Paper Book filed before us whereupon a reply dated 08.03.2024 was duly filed by the assessee appearing at pages 125-127 of the Paper Book filed before us which is still pending adjudication before the Learned A.O.

4. Relevant to mention that the issue under scrutiny was in respect of capital gain and deduction claimed thereto under Section 54 of the Act wherein in the capacity of an owner of plot of land and building thereon, the assessee entered into an agreement for development and construction with a developer namely APSA Infrastructure on 05.03.2013. Such property initially acquired by the assessee on 28.09.1995.

5. However, upon issuance of show cause notice under Section 263(1) of the Act, dated 18.03.2024 by the PCIT the proceeding under Section 263 of the Act has been claimed to have been initiated and the same was duly served as further claimed by the department.

6. At the time of hearing of the matter, the Senior Ld. Counsel Mr. Salil Agarwal appearing for the assessee joins issue here and submitted before us, that the issuance of the show cause notice came to the knowledge of the assessee when it appeared in the web portal dated 05.04.2024 subsequent to passing of the impugned order under Section 263 of the Act dated 29.03.2024. The Learned A.R contended that the impugned order passed by the PCIT is gross violation of the principles of natural justice as no opportunity of being heard before passing such order was given and therefore, the impugned order is not sustainable in the eyes of law, illegal and not valid and liable to be quashed. On this ground he has relied upon the judgment passed by the Hon'ble Apex Court in the case of R.B.

Shreeram Durga Prasad & Fatehchand Nursing Das Vs. Settlement Commission (SC), reported in 176 ITR 169.

7. He further argued that once the notice dated 06.04.2024 under Section 154 of the Act was issued by the AO and the rectification proceeding, since, never withdrawn, and is pending adjudication, the initiation of impugned proceeding under Section 263 of the Act is invalid, pre-mature. On this score alone, the order is liable to be quashed. In this regard he has relied upon the judgment passed by Hon'ble Apex Court in the case of S.M. Overseas Pvt. Ltd. Vs. CIT, reported in 450 ITR 1 (SC).

8. It was further contended by the Senior Counsel appearing for the assessee that when the Assessing Officer during the course of assessment proceedings issued detailed questionnaire to the assessee and reply thereto were duly filed by the assessee, no enquiry conducted by the AO in respect of the issue involved in the matter of scrutiny proceeding particularly the same issue in reopening assessment in respect of capital gain out of the income on sale of property and deduction under Section 54 claimed thereon does not and cannot arise at all. On revision order passed under Section 263 of the Act is, therefore, not legally sustainable and liable to be quashed. The judgment passed by the Hon'ble High Court at Delhi in the case of PCIT Vs. Clix Finance India P. Ltd., reported in 298 Taxman 217 (Del) and also the judgment passed by the Hon'ble Delhi High Court in the case of PCIT Vs. Trojan Developers (P) Ltd, reported in 297 Taxman 177 (Del) were relied upon by the Learned AR on this aspect of the matter. On the other hand the Learned DR relied upon the order passed by the Learned PCIT.

9. We heard the rival submissions made by the respective parties and we have also perused the relevant materials available on record.

10. So far as non-service of the notice under Section 263 of the Act dated 18.03.2024 appearing at page 128 of the paper book filed before us is concerned, it is the case of the assessee that the same for the first time appeared in the web portal on 05.04.2024 i.e. admittedly, after the date of passing of the impugned order dated 29.03.2024. The impugned order under Section 263 was served upon the assessee through email but the show cause notice dated 18.03.2024 was never issued and served on the assessee within time neither was sent through email of the assessee. Such submissions made by the Ld. Senior Counsel appearing for the assessee has not been able to be controverted by the Ld. D.R.

11. Under this facts and circumstances of the matter, we have therefore, considered the judgment relied upon by the Ld. A.R in the case of R.B. Shreeram Durga Prasad & Fatehchand Nursing Das Vs. Settlement Commission (SC), reported in 176 ITR 169 at page 194. In this particular matter on 12.08.1977 the CIT(A) objected to the proposal of the appellant under Section 245D(1) of the Act. The CIT(A) objected to Settlement Commission for Assessment Years 1948-49 and 1959 -60 but agreed to settlement for later years. Commission issued an order, accordingly on 24.08.1977 rejecting the application for settlement for the Assessment Years 1948-49 and 1959-60 recalling application whereof was made by the appellant as the order had been made without furnishing any opportunity of hearing to the appellant.

11(i). Thereafter, by and under the Finance Act 1979 sub-section (1A) to the amended provision of Section 245D empowered the Settlement Commission to overrule the objection of the Commissioner. Even after the long gap, the recalling application of the order dated 24.08.1977 was

pressed and the same was accepted holding that the applicant was entitled to rehearing since the order dated 24.08.1977 had been made in violation of principle of natural justice. Subsequent final order dated 07.08.1987 passed by the commission was therefore, set aside and the Court remanded the matter to the Settlement Commission for rehearing and to dispose of the same with certain directions.

11(ii). Under this facts and circumstances of the matter the order dated 24.08.1977 was found to be nullity as it was in violation of principle of natural justice.

11(iii). The Hon'ble Apex Court the principle enunciated in the matter of State of Orissa Vs. Binapani Dei, reported in AIR 1967 SC 1269 took into consideration; further relied upon the observation in Administrative Law by H.W.R. Wade, 5th Edition, page 310-311 where it has been observed that the Act in violation of the Principle of Natural Justice or a quasi-judicial Act in violation of Principle of Natural Justice is void or of no value. Apart from other important judgments the landmark judgment passed in the matter of Ridge Vs. Baldwin, reported in 1964 AC 40 where the House of Lord of England made it clear that breach of injustice nullifies the orders made in breach was duly considered. The relevant observation made by the Hon'ble Apex Court is reproduced herein below:

"7. We are definitely of the opinion that on the relevant date when the order was passed, that is to say, 24-8-1977 the order was a nullity because it was in violation of principles of natural justice. See in this connection, the principles enunciated by this Court in State of Orissa Dr. Hinapani Dei AIR 1967 SC 1269. (1967) 2 SCR 625, (1967) 2 SCR 625 (1965) 2 LLJ 266 as also the observations in Administrative Law by HWR Wade, 5th Edn, pp. 310-311 that the act in violation of the principles of natural justice or a quasi-judicial act in violation of the principles of natural justice is void or of no value. In Ridge v. Baldwin 1964 AC 40 (1963) 2 WLR 935, (1963) 2 All ER 66 and Anisminic Ltd. v. Foreign Compensation Commission (1969) 2 AC 147, (1969) 2 WLR 163, (1969) 1 All ER 208 the House of Lords in England has made it clear that breach of natural justice nullifies the order made in breach. If that is so then the order made in violation of the principles of natural justice was of no value. If that it so then the application made for the settlement under Section 245-C was still pending before the Commission when the amendment made by Finance Act of 1979 came into effect and the said amendment being procedural, it would govern the pending

proceedings and the Commission would have the power to overrule the objections of the Commissioner. Dr. V. Gauri Shankar, appearing for the revenue, did not seriously contest that position. He accepted the position that the law as it is, after the amendment authorises the Commission to consider and overrule the Commissioner's objection. He also very fairly, in our opinion and rightly accepted the position that the appellant was entitled to be heard on the Commissioner's objections. It appears to us, therefore, if that is the position then, in our opinion, the appellant was entitled to be heard on the objections of the Commissioner. As mentioned hereinbefore, the only short ground which was sought to be canvassed before us was a whether after the amended Act the order had been rightly set aside and whether the appellant had a right to be heard on the objections of the Commissioner. Mr. Harish Salve, counsel for the appellant contends that it had a right to be heard. On the other hand Dr. V Gauri Shankar, learned counsel for the respondents submitted that the order proceeded on the assumption that the objections had been heard. He did not, in fairness to him it must be conceded, contest that in a matter of this nature the appellant had a right to be heard. Reading the order, it appears to us, that though the appellant had made submissions on the Commissioner's objections but there was no clear opportunity given to the appellant to make submissions on the Commissioner's objections in the sense to demonstrate that the Commissioner was not justified in making the objections and secondly, the Commission should not accede to the objections in the facts and circumstances of the present case. We are of the opinion that in view of the facts and circumstances of the case and in the context in which these objections had been made, it is necessary as a concomitant of the fulfilment of natural justice that the appellant should be heard on the objections made by the Commissioner. It is true that for the relevant orders for the years for which the Commissioner had objected the concealment had been upheld in the appeal before the appropriate authorities. But it may be that in spite of this concealment it may be possible for the appellant to demonstrate or to submit that in disclosure of concealed income for a spread over period settlement of the entire period should be allowed and not bifurcated in the manner sought to be suggested for the Commissioner's objections. This objection the appellant should have opportunity to make. In exercise of our power of judicial review of the decision of the Settlement Commission we are concerned with the legality of procedure followed and not with validity of the order. See the observations of Lord Hailsham in *Chief Constable of the North Wales Police v Evans* (1982) 1 WLR 1155. Judicial review is concerned not with the decision but with the decision making process.

8. We therefore allow the appeal. We set aside the order of 7-8-1987 and remand the matter back to the Settlement Commission to hear and dispose of the settlement petition made by the appellant dated 22-1-1977 taking into consideration objections made by the Commissioner and the objections made by the appellant to the Commissioner's objections and after giving the appellant an opportunity of showing reasons and causes why the Commissioner's objections should not be accepted by the Commission. After considering the said objections of the Commissioner as well as the objections to the Commissioner's objections made by the appellant, the Settlement Commission would be free to pass such orders as it considers fit and proper in accordance with the law. Since the matter is pending for a long time, we do hope that the Settlement Commission will dispose of the matter at expeditiously as possible. It is not necessary for us in this appeal to express any opinion on the correctness or otherwise of the Commissioner's objections or on the validity of the appellant's objections to the Commissioner's objections."

12. It is an admitted position that in the instant case the show cause notice dated 18.03.2024 has not been served upon the assessee neither through email and only reflected in web portal on 05.04.2024 i.e. subsequent to passing of the impugned order dated 29.03.2024 under Section 263 of the Act which fact has not been controverted by the Ld. D.R. Thus, the impugned order is found to be gross violation of the principle of natural justice as the assessee has never been given an opportunity to represent its case before the PCIT to counter/object in proposing to cancel the assessment order culminating in holding the order dated 19.04.2021 under Section 143(3) of the Act erroneous so far as it is prejudicial to the interest of revenue. In that view of the matter, respectfully, relying upon the order passed by the Hon'ble Apex Court, the impugned order is found to be bad in law and therefore, liable to be quashed.

13. The assessee has further contended that during the assessment proceedings in respect to the disputed issue raised in the impugned order under Section 263 of the Act, detailed questionnaire were issued to the assessee by the Ld. AO and reply thereto along with documents were duly submitted. Upon examination of the same the assessment order was ultimately framed on 19.04.2021 under Section 143(3) of the Act. It appears from the record that while the matter was selected for limited scrutiny in order to substantiate the claim of capital gains and deduction made thereon under Section 54 of the Act, the assessee found to have filed the reply on 03.10.2019 before the Ld. AO copy whereof is appearing at pages 58 to 60 of the paper book filed before us. The annexures thereto being the development agreement dated 05.03.2013 and the sale deed dated 26.02.2018 established the fact of 2nd floor being sold by the developers wherein the assessee was made a confirming party is duly reflected, appearing at page 68 to 80 of the paper book filed before us by the appellant. Apart from that, notice under Section 142(1) dated 07.02.2020 was issued to the assessee raising 13 questionnaire in respect

to the capital gain on sale of the property and the deduction claimed thereon appearing at pages 82 to 85 on the paper book filed before us. The assessee duly filed reply dated 22.02.2020 along with the documents appearing at pages 88 & 89 being sanction letter dated 23.07.2013, the assessee's bank statement and the report of the registered valuer dated 09.05.2016 in respect to the property in question being F-13, Kailash Colony, Delhi. These are annexed to the paper book appearing from pages 90 to 116. The relevant portion of the reply dated 22.02.2020 is reproduced herein below:

BEFORE THE ADDITIONAL/JOINT/DEPUTY/ASSISTANT COMMISSIONER
OF INCOME TAX, NATIONAL E-ASSESSMENT CENTRE, DELHI.

Sub: Assessment proceedings for a.y.2018-19 in case of Shri Anil Dua, 37/38 UB
Block, Jawahar Nagar, Delhi – PAN: AACPD8370L.

Your ref: ITBA/AST/F/142(1)/2019-20/102480510(1) dated 07.02.2020.

With reference to your notice u/s 142(1) of the Act dated 7.2.2020, we have been instructed by the abovenoted assessee to submit as under ad-seritum:-

Para 3(1) The sale consideration of Rs.2.75 cr received by the builder has been disclosed underhead capital gain by the assessee in his hands in the return of income filed by him.

2. The cost of acquisition of the property was explained in para 1 of communication dated 3.10.2019.

The indexed cost of acquisition was worked out as under: -

Cost including stamp duty as per sale deed dated 28.9.1995 as on 1.4.2001.	1,40,40,000
Index for F.Y.2001-02	100
Index for F.Y.2017-18	272
Indexed cost of acquisition	3,81,88,800
Proportionate cost of 2 nd floor	95,47,200

3. The value of property sold (2nd floor) as per stamp valuation authority was worked out at Rs.2,53,16,440/- as per annexure 2 of sale deed of the said floor already placed on record under cover of letter dated 3.10.2019. The property was constructed by the builder for the assessee under collaboration agreement which has already been placed on record.

4. Copy of sanction letter of building plan alongwith details of area covered is enclosed.

5. The amount of Rs.1 cr given to by the builder to the assessee was included in the capital gain worked out by the assessee at Rs.1,10,77,800/- under para 4 of communication dated 3.10.2019.

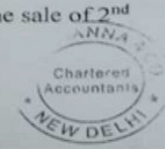
The taxable capital gain as shown by the assessee at Rs.2,10,77,800/- included the said sum of Rs.1 cr received by him under the said agreement.

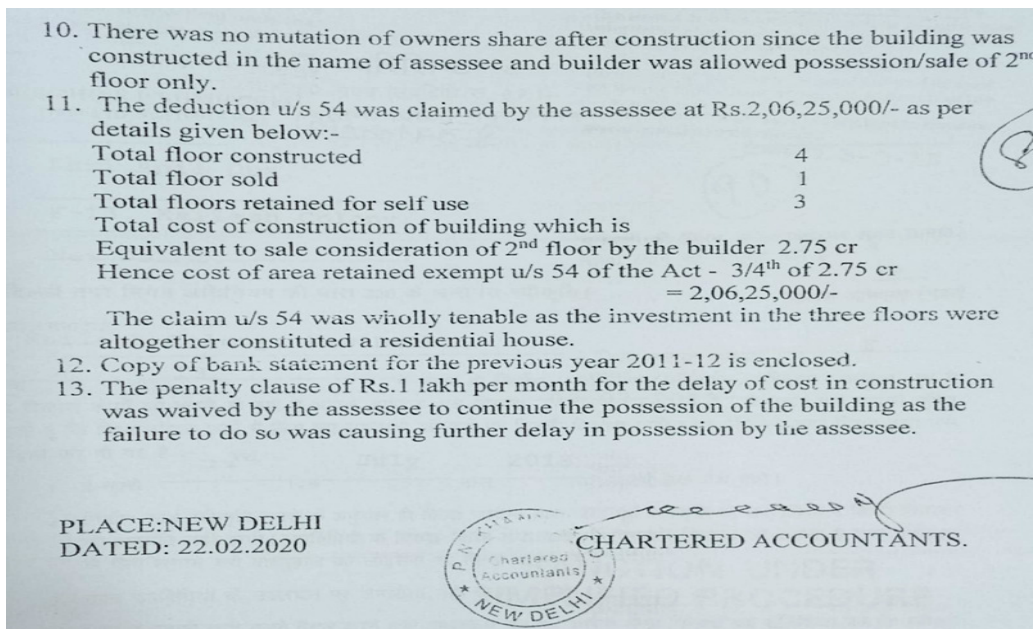
6. Bank statement showing receipt of Rs.1 cr after TDS is enclosed herewith. No amount was paid by the assessee to the builder at any time during the construction period except loan of Rs.10 lakh given to the builder for the completing the project. Copy of letter in this respect is enclosed.

7. No bill was received from the builder M/s.APSA Infrastructure for construction of building.

8. Copy of sanctioned plan is enclosed.

9. The stamp valuation certificate adopted by the sub-registrar for the sale of 2nd floor is already furnished under para 3.





14. After considering the said reply the assessment was finalized under Section 143(3) r.w.s 144B of the Act dated 19.04.2021; the returned income of the assessee dated 25.09.2018 at Rs.28,15,430/- was accepted without making any modification on the issue in scrutiny proceeding. Thus, it appears that the finding made by the Ld. PCIT in the order impugned that relief has been allowed to the assessee without making proper inquiries/verification rendered the assessment order erroneous, in so far as it is prejudicial to the interest of revenue is not found to be correct. In this regard, we have considered the judgment as relied upon by the Ld. AR passed by the Delhi High Court in the case of PCIT Vs. Clix Finance India P. Ltd. and the judgment of PCIT Vs. Trojan Developers (P) Ltd.

15. In the case of Clix Finance India Ltd., the PCIT upon exercising power of revision under Section 263 of the Act quashed the assessment order and remitted the matter to the file of the Assessing Officer for de novo adjudication in the absence of proper inquiry made by the Ld. Assessing Officer to the issue of deduction on account of provision for non performing assets and loss of interest rate swap. The Hon'ble Delhi High Court upheld the order passed by the ITAT as the questionnaire manifested assessing

officer had asked for allowability of claim in respect to the issue in question which was consequently replied by the assessee, the same cannot be held to be case of no inquiry whatsoever had been conducted by Assessing Officer with respect to claim under consideration and the revision order, thus passed under Section 263 was found to be not sustainable.

16. In the case of PCIT vs. Trojan Developers P Ltd. the ITAT concluded that assessing officer made an inquiry in respect of shares issued at high premium on the basis of details of shares allotted and copies of certificate issued by the assessee and therefore, the Commissioner had committed an error in exercising powers under Section 263 of the Act holding the assessing officer failed to make inquiry with regard to shares issued at high premium. The view has been upheld by the Hon'ble Delhi High Court in revenue's appeal while dismissing the same.

17. Similarly, in the case in hand upon considering the entire records of the matter, it is found that adequate inquiry has been conducted by the Assessing Officer during the limited scrutiny proceeding by raising questionnaire to the assessee whereupon the assessee duly replied the same along with all relevant materials in support of the claim under Section 54 of the Act. Thus, while exercising revisional power under Section 263 of the Act by the PCIT holding the same having no inquiry on the same issue is admittedly found to be incorrect and thus, the revisional order impugned dated 29.03.2024 is void and liable to be quashed.

18. It was further contended by the Ld. Counsel appearing for the assessee that on 06.03.2024 notice under Section 154 of the Act was issued by the Assessing Officer proposing rectification of the assessment made under Section 143(3) of the Act reply thereto dated 08.03.2024 was duly filed by the assessee and since the rectification proceeding under Section 154 of the Act was never withdrawn and pending, neither culminated in any final order, the order passed invoking revisional power under Section 263 of the Act by the PCIT setting aside the Assessment

Order dated 19.04.2021 at this stage is invalid. We have perused the notice under Section 154 of the Act dated 06.03.2024 at pages 123 & 124 annexed to the paper book and further reply dated 08.03.2024 made by the assessee appearing at pages 125 to 127 of the paper book filed before us. Needless to mention that rectification has been proposed by the Ld. A.O in respect of exemption claimed under Section 54 of the Act as was the same issue raised in the order impugned under Section 263 of the Act by the PCIT before us. There is nothing to show that the said rectification proceeding was withdrawn neither any final order has been passed. The above fact has not been able to be controverted by the Ld. D.R. Under this facts and circumstances of the matter the judgment relied upon by the Ld. A.R in the case of S.M. Overseas Pvt. Ltd. passed by the Hon'ble Apex Court has been considered by us. In that particular case reopening of assessment was found to be not permissible during the pendency of proceedings for rectification particularly when such rectification proceeding has not been shown to have been withdrawn. Thus, having regard to this particular aspect of the matter reopening of assessment has been quashed by the ITAT has been restored. Considering the ratio laid down by the Hon'ble Apex Court the case made out by the assessee that the reopening of assessment upon invoking the revisional power under Section 263 of the Act by the PCIT during the pendency of the rectification proceeding under Section 154 of the Act before the assessing officer proposing rectification of the scrutiny assessment on the same issue raised in the revisional order impugned is, thus, found to be not sustainable, premature, and therefore, liable to be quashed.

19. Having regard to the entire aspect of the matter, therefore, in all 3 counts as argued by the Ld. Senior Counsel Mr. Salil Agarwal is found to be acceptable as per the records available before us particularly documents filed by the appellant before the Assessing Officer in support of the claim made by him while replying on 22.02.2020 to the questionnaire dated 07.02.2020 on the issue raised in the impugned order under Section 236

of the Act which genuinely establishes that adequate inquiry has been conducted by the Assessing Officer with regard to the claim under consideration the order impugned invoking revisional power under Section 263 of the Act by the PCIT on the plea of no inquiry conducted by the Assessing Officer renders the assessment order erroneous so far as it is prejudicial to the interest of the revenue is found to be incorrect. The impugned order, therefore, on the basis of wrong finding of fact is also invalid, unsustainable in the eyes of law and, therefore, liable to be quashed. With the aforesaid observation, we thus, quash the order impugned before us.

20. In the result, the appeal of the assessee is, thus, allowed.

Order pronounced in the open court on 7th November, 2024.

**Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER**

**Sd/-
(MADHUMITA ROY)
JUDICIAL MEMBER**

Dated: 7th November, 2024

dp

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi