आयकर अपीलीय अधिकरण, ''बी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
' B' BENCH : CHENNAI

श्री चंद्र पूजारी, लेखा सदस्य एवं
श्री धुव्वुरु आर.एल रेड्डी न्यायिक सदस्य के समक्ष

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND Shri Duvvuru RL Reddy, JUDICIAL MEMBER

आयकर अपील सं./**I.T.A.No.112/Mds/2016**
निर्धारण वर्ष /Assessment year : 2011-12

Shri Ravi Kannan, L & T Eden Park 0A4 0801 MR Radha Nagar, Siruseri Chennai 603 103 **[PAN AENPR 4937 G]** **(अपीलार्थी/Appellant)**	**Vs.**	The Asstt. Commissioner of Income-tax Business Circle –IV Chennai **(प्रत्यर्थी/Respondent)**

अपीलार्थी की ओर से/ Appellant by	:	Shri R.Sivaraman,Advocate
प्रत्यर्थी की ओर से /Respondent by	:	Shri Jairam Raipura, CIT DR

सुनवाई की तारीख/Date of Hearing	:	28-12-2016
घोषणा की तारीख /Date of Pronouncement	:	17-02-2017

आदेश / O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER

This appeal of the assessee is directed against the order of the Principal Commissioner of Income-tax, Chennai, dated 27.11.2015 in C.No.6119(14)/PR CIT-6/2014-15 passed u/s 263 of the Income-tax Act, 1961, for assessment year 2011-12.

2. The assessee has raised the following grounds for our adjudication.

1. The order of the Principal Commissioner of Income Tax (PCIT) dated 27.11.2015 for the assessment year 2011-12 is erroneous, contrary to law, equity, facts and circumstances of the present case and the materials available on record.
2. The learned PCIT erred in setting aside the assessment order of the Assessing Officer (A.O) dated holding that the a ment framed by the A.O for the present assessment year 2011-2 is erroneous and prejudicial to the interests of the Revenue
3. The learned PCIT erred in directing the A.O to examine as to whether the eligibility under Section 54Fof the Act provided to the Appellant is to be disqualified on the ground that the residential property was not completed before the due date, even though the said direction does not pertain to this assessment year
4. The learned PCIT failed to consider that for an assessee to claim exemption under Section 54F, it is sufficient to show to the A.O that he has deposited the capital gains amount arising out of transfer of long term capital asset to a capital gains scheme account and has started the process of construction of the residential house.
5. The learned PCIT erred in holding that the A.O had failed to make necessary verification and enquiry with respect to the sale consideration of the shares as per RBI Notifications and that it wasn't in accordance with the Capital Gains Scheme of the Central Government.
6. The learned PCIT failed to realize that the transaction pertaining to shares was between the Appellant, who is an individual and a Company and therefore the SEBI guidelines will not apply.
7. The learned PCIT failed to appreciate that the present case is not one of 'less sufficient enquiry' by the A.O but it is a case of

'no enquiry' as all the materials were available with the A.O during the initial assessment under Section 143(3) of the Act.

8. The learned Principal Commissioner of income Tax fails to understand that in the instant case having accepted that entire capital gains were not deposited in capital gain scheme for the relevant case, ought to have seen that the appellant had complied with the provisions of Sub-Section (4) of Section 54F and therefore the assessment order is neither prejudicial nor erroneous to invoke the jurisdiction u/s. 263 of the Act. The Principal Commissioner of Income Tax ought to have appreciated that the entire case was revised only under the instructions of AUDIT Party Report and therefore it is liable to be set-aside.

3. The facts of the case are that the assessee is an individual, deriving income from Investment in Shares and Mutual Funds. For assessment year under consideration, the assessee had returned an income of ₹ 6,00,47,572/-. The income return from the long term capital gains was ₹ 5.80 crores whereas the "income from other sources" was reflected at ₹ 20.15 lakhs. On examination of records, it was noticed by the CIT that during the year under consideration, the assessee had sold in the capacity of an Indian Resident, total number of 4,25,117 shares of Tutor Global Private Ltd.,(Company) to a non-resident M/s.Pearson (Singapore) Pvt Ltd. at a price of ₹ 372.20 per share during financial year 2010-11 and total value of ₹ 15.76 crores. The assessee claimed deduction of ₹ 9.96 crores u/s.54F of the Act on the ground that an amount of ₹ 10 crores out of long term capital

gains was deposited in the Capital Gain Account Scheme with the Bank of Maharashtra and UCO Bank before the due date of filing the return. It was further noticed that he had spent a sum of ₹7.31 crores out of this capital gains account towards purchase of land at Muthukadu and the construction was said to be in progress. It was claimed during the course of assessment proceedings that once the construction is complete, the assessee will pay the capital gains tax for the unutilized portion of capital gains, if any, while filing the return for assessment year 2014-15 as three year period lapsed on 01.01.2014. The balance amount was invested in the Mutual Fund. The AO had accepted the claim without any discussion, in two simple paragraphs which is reproduced as under:-

> *"3. The Authorised Representative of assessee was required to produce investment details, bank account details and proof regarding sales of shares (i.e. share certificates). The Authorized Representative of assessee provided the same and verified by me (AO). The Authorized Representative of assessee also clarified that the assessee has started the construction of a residential house in the purchased land and will be completed before the year end.*
>
> *4. Though verification of all the above details, it is found correct. Thus, the assessment is completed by accepting the return of income."*

As the assessment order passed by the AO is cryptic and also without any kind of discussion relating to valuation of sale value of the shares sold etc., the ld. CIT issued a show cause notice u/s.263 of the Act on 27.10.2015 and a further reminder on 14.09.2015. In response, the ld.A.R filed written submissions challenging the assumption of jurisdiction u/s.263 of the Act. In the Show cause notice, it is clearly pointed out the assessment so framed by the AO was erroneous and prejudicial to the interest of the revenue as a proper verification was not carried out and was simply accepted the assessee's claim u/s.54F of the Act without any discussion.

3.1. Further, the Ld. CIT observed that the AO had neither applied his mind nor caused an enquiry as to whether the conversion of money into Fixed Deposit in the Bank account is as per the related Act. After examining the records, it is also seen that the assessee had purchased Agricultural land measuring 54,000 sqft for a consideration of Rs.7.31 Crore on 21-10-2011. A Sworn Statement was recorded by the AO on 13-08-2014 after the assessment order was passed and the assessee had admitted that the three years period to construct a residential house lapsed on 21-01-2014 and the Completion Certificate was not obtained from the Muthukadu Villag Panchayat on or before the Due date. According to ld. CIT, the land purchased was agricultural land and the asessee was not aware whether the Muthukadu Panachayat had given approval for construction of a residential house on this agricultural. Further, Ld. CIT observed that these facts

narrated above do not pertain to the assessment year in question and the allowable deduction u/s54F of the Act will pertain to the AY 2015-16. Therefore,the AO is directed to examine this point in the relevant assessment year as to whether the eligibility for the claim uls 54F of the Act is disqualified on the ground that the residential property was not completed before the due date and take necessary remedial measures on this count.

3.2 Further, ld. CIT observed that the AO had failed to apply his mind and cause necessary verification and an enquiry with respect of the value of sale consideration of the shares as per the RBI Notification, whether the amount deposited in the Bank of Maharashtra was transacted in accordance with the capital gains scheme of the Central Government. According to CIT, the Sale process did not follow the SEBI Guidelines in force and copies of Agreements entered into were also not disclosed. Such transactions require approval of SEBI/RBI and the same has not been examined by the AO. Ld. CIT following the principles laid down by various High courts/Supreme Court observed that the assessment so framed by the AO is erroneous and prejudicial to the interests of revenue, set aside the assessment order with a direction to redo the assessment on the specific issues highlighted in the order u/s.263 of the Act. Against this, the assessee is in appeal before us.

4. We have heard both the parties and perused the material on record. The Ld.A.R submitte that at the time of assessment proceedings, the AO issued a questionnaire vide letter dated 26.06.2013 wherein the AO asked various queries and this was duly replied by the assessee on 03.10.2013 and

the AO passed the order after adequate enquiry, even if there is inadequate enquiry, that would not by itself give occasion to the CIT to assume jurisdiction u/s.263 of the Act, merely because he has a different opinion in the matter. According to ld.A.R, Ld. CIT can do this only when there is a lack of enquiry by the AO. According to ld.A.R, in the present case the assessment order may not be a detailed one and the AO has not put all the details of enquiry caused and he passed a short order, that itself cannot be a reason for assuming jurisdiction u/s.263 of the Act. Further, he contended that on perusal of the record, CIT was of the opinion that assessment was made at lower side and had it left to the Commissoner, he would have assessed the income at a higher figure, then the one determined by the AO that would not lead to the Commissioner with a power to revise the assessment, as the AO has exercised quasi juridical power vested in him. According to him, the ld. Assessing Officer arrived at a conclusion, which cannot be deemed as erroneous. Simply because the CIT does not still satisfy with the conclusion reached by the AO. Accoridng to the ld.A.R assessee had given a detailed explanation on the issue dealt by the CIT before the AO and after due examination, the claim of assessee was allowed by the assessee and he has satisfied with the explanation offered by the assessee. Such decision of the AO cannot be held to "erroneous" simply because in his order did not make an elaborate discussion in that category. Furhter, he submitted that if the assessee completed the construction of new house within the fixed period of three years, from the date of transfer of the original capital asset, the exemption u/s.54F to be given and capital

gains had to be charged in the previous year after the expiry of three years from the date of transfer of capital asset. For this purpose, he relied on the order of Visakhapatnam Tribunal in the case of Vegesina Kamala Vs. ITO (157 ITD 457)(Visakhapatnam). He also relied on the judgement of Delhi High Court in the case of CIT Vs. Sunbeam Auto Ltd. reported in [2011] 332 ITR 167(Delhi) .

4.1 In our opinion, the order passed by the AO in this case is very cryptic. The AO being a quasi judicial authority cannot take a view, either against or in favour of assessee /Revenue, without making proper enquiry and without proper examination of the claim made by the assessee in the light of facts on record. The Commissioner has empowered to initiate the suo moto proceedings u/s.263 of the Act either when the AO takes a wrong decision without considering the material available on record or he takes a decision without making an enquiry into matter where such enquiry was prima facie warranted. In our opinion, arbitrariness in decision making would always need correction regardless of whether it causes prejudices to the assessee or the Revenue.

4.2 The scheme of the IT Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. If due to erroneous order of the assessing officer, the Revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interest of the revenue. As held in the case of Malabar Industries Co. Ltd., (243 ITR 82(SC)), the Commissioner can

exercise revision jurisdictional u/s 263 if he is satisfied that the order of the assessing officer sought to be revised is (i)erroneous; and also (ii) prejudicial to the interests of the revenue. The word 'erroneous' has not been defined in the Income Tax Act. It has been however defined at page 562 in Black's Law Dictionary (seventh Edition) thus';

'erroneous, adj. Involving error, deviating from the law'.

4.2.1 The word 'error' has been defined at the same page in the same dictionary thus:

'error No. 1 : A psychological state that does not conform to Objective reality; a brief that what is false is true or that what is true is false'.

At page 649/650 in P. Ramanatha Aiyer's Law Lexicon Reprint 2002, the word 'error' has been defined to mean

'Error: A mistaken judgement or deviation from the truth in matters of fact, and from the law in matters of judgement 'error' is a fault in judgement, or in the process or proceeding to judgement or in the execution upon the same, in a Court of Record; which in the Civil Law is called a Nullityie" (termes de la ley).

Something incorrectly done through ignorance or inadvertence S.99 CPC and S.215 Cr.PC.

'Error, Fault, Error respects the act; fault respect the agent, an error may lay in the judgement, or in the conduct, but a fault lies in the will or intention."

4.2.2. At page 650 of the aforesaid Law Lexicon, the scope of Error, Mistake, Blunder, and Hallucination has been explained thus:

"An error is any deviation from the standard or course of right, truth, justice or accuracy, which is not intentional. A mistake is an error committed under a misapprehension of misconception of the nature of a case. An error may be from the absence of knowledge, a mistake is from insufficient or false observation. Blunder is a practical error of a peculiarly gross or awkward kind, committed through glaring ignorance, heedlessness, or awkwardness. An error may be overlooked or atoned for, a mistake may be rectified, but the shame or ridicule which is occasioned by a blunder, who can counteract. Strictly speaking, Hallucination is an illusion of the perception, a phantasm of the imagination. The one comes of disordered vision, the other of discarded imagination. It is extended in medical science to matters of sensation, whether there is no corresponding cause to produce it. In its ordinary use it denotes an unaccountable error in judgement or fact, especially in one remarkable otherwise for accurate information and right decision. It is exceptional error or mistake in those otherwise not likely to be deceived."

4.3 In order to ascertain whether an order sought to be revised under Section 263 is erroneous, it should be seen whether it suffers from any of the aforesaid forms of error. In our view, an order sought

to be revised under Section 263 would be erroneous and fall in the aforesaid category of "errors" if it is, inter alia, based on an incorrect assumption of facts or an incorrect application of law or non-application of mind to something which was obvious and required application of mind or based on no or insufficient materials so as to affect the merits of the case and thereby cause prejudice to the interest of the revenue.

4.4 Section 263 of the Income-tax Act seeks to remove the prejudice caused to the revenue by the erroneous order passed by the Assessing Officer. It empowers the Commissioner to initiate suo moto proceedings either where the Assessing Officer takes a wrong decision without considering the materials available on record or he takes a decision without making an enquiry into the matters, where such inquiry was prima facie warranted. The Commissioner will be well within his powers to regard an order as erroneous on the ground that in the circumstances of the case, the Assessing Officer should have made further inquiries before accepting the claim made by the assessee in his return. The reason is obvious. Unlike the Civil Court which is neutral in giving a decision on the basis of evidence produced before it, the role of an Assessing Officer under the Income-tax Act is not only that of an adjudicator but also of an investigator. He cannot remain passive in the face of a return, which is apparently in order but

calls for further enquiry. He must discharge both the roles effectively. In other words, he must carry out investigation where the facts of the case so require and also decide the matter judiciously on the basis of materials collected by him as also those produced by the assessee before him. The scheme of assessment has undergone radical changes in recent years. It deserves to be noted that the present assessment was made under Section 143(3) of the Income-tax Act. In other words, the Assessing Officer was statutorily required to make the assessment under Section 143(3) after scrutiny and not in a summary manner as contemplated by Sub-section (1) of Section 143. Bulk of the returns filed by the assessees across the country is accepted by the Department under Section 143(1) without any scrutiny. Only a few cases are picked up for scrutiny. The Assessing Officer is therefore, required to act fairly while accepting or rejecting the claim of the assessee in cases of scrutiny assessments. He should be fair not only to the assessee but also to the Public Exchequer. The Assessing Officer has got to protect, on one hand, the interest of the assessee in the sense that he is not subjected to any amount of tax in excess of what is legitimately due from him, and on the other hand, he has a duty to protect the interests of the revenue and to see that no one dodged the revenue and escaped without paying the legitimate tax. The Assessing Officer is not expected to put blinkers on his eyes and mechanically

accept what the assessee claims before him. It is his duty to ascertain the truth of the facts stated and the genuineness of the claims made in the return when the circumstances of the case are such as to provoke inquiry. Arbitrariness in either accepting or rejecting the claim has no place. The order passed by the Assessing Officer becomes erroneous because an enquiry has not been made or genuineness of the claim has not been examined where the inquiries ought to have been made and the genuineness of the claim ought to have been examined and not because there is anything wrong with his order if all the facts stated or claim made therein are assumed to be correct. The Commissioner may consider an order of the Assessing Officer to be erroneous not only when it contains some apparent error of reasoning or of law or of fact on the face of it but also when it is a stereo-typed order which simply accepts what the assessee has stated in his return and fails to make enquiries or examine the genuineness of the claim which are called for in the circumstances of the case. In taking the aforesaid view, we are supported by the decisions of the Hon'ble Supreme Court in Rampyari Devi Saraogi (supra), Smt. Tara Devi Aggarwal v. CIT [1973] 88 ITR 323 (SC), and Malabar Industrial Co. Ltd's (supra).

4.5. In Malabar Industrial Co. Ltd. case (supra) the Hon'ble Court has held as under:

"There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall the orders passed without applying the principles of natural justice or without application of mind.

4.6 In our humble view, arbitrariness in decision-making would always need correction regardless of whether it causes prejudice to an assessee or to the State Exchequer. The Legislature has taken ample care to provide for the mechanism to have such prejudice removed. While an assessee can have it corrected through revisional jurisdiction of the Commissioner under Section 264 or through appeals and other means of judicial review, the prejudice caused to the State Exchequer can also be corrected by invoking revisional jurisdiction of the Commissioner under Section 263. Arbitrariness in decision-making causing prejudice to either party cannot therefore be allowed to stand and stare at the legal system. It is difficult to countenance such arbitrariness in the actions of the Assessing Officer. It is the duty of

the Assessing Officer to adequately protect the interest of both the parties, namely, the assessee as well as the State. If he fails to discharge his duties fairly, his arbitrary actions culminating in erroneous orders can always be corrected either at the instance of the assessee, if the assessee is prejudiced or at the instance of the Commissioner, if the revenue is prejudiced. While making an assessment, the ITO has a varied role to play. He is the investigator, prosecutor as well as adjudicator. As an adjudicator he is an arbitrator between the revenue and the taxpayer and he has to be fair to both. His duty to act fairly requires that when he enquires into a substantial matter like the present one, he must record a finding on the relevant issue giving, howsoever briefly, his reasons therefor. In S.N. Mukherjee v. Union of India AIR 1990 SC 1984, it has been observed by the Hon'ble Supreme Court as follows:

> *"Reasons, when recorded by an administrative authority in an order passed by it while exercising quasi-judicial functions, would no doubt facilitate the exercise of its jurisdiction by the appellate or supervisory authority. But the other considerations, referred to above, which have also weighed with this Court in holding that an administrative authority must record reasons for its decision are of no less significance. These considerations show that the recording of reasons by an administrative authority serves a salutary purpose, namely, it excludes chances or arbitrariness and ensures a degree of fairness in the process of decision-making. The said purpose would apply equally to all*

decisions and its application cannot be confined to decisions which are subject to appeal, revision or judicial review. In our opinion, therefore, the requirement that reasons be recorded should govern the decisions of an administrative authority exercising quasi-judicial functions irrespective of the fact may, however, be added that it is not required that the reasons should be as elaborate as in the decision of a court of law. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage. The appellate or revisional authority, if it affirms such an order, need not give separate reasons if the appellate or revisional authority agrees with the reasons contained in the order under challenge."

4.7 Similar view was earlier taken by the Hon'ble Supreme Court in Siemens Engg. & Mfg. Co. of India Ltd. v. Union of India AIR 1976 SC 1785. It is settled law that while making assessment on assessee, the ITO acts in a quasi-judicial capacity. An assessment order is amenable to appeal by the assessee and to revision by the Commissioner under Sections 263 and 264. Therefore, a reasoned order on a substantial issue is legally necessary. The judgments on which reliance was placed by the learned Counsel for the assessee also points to the same direction. They have held that orders, which are subversive of the administration of revenue, must be regarded as

erroneous and prejudicial to the interests of the revenue. If the Assessing Officers are allowed to make assessments in an arbitrary manner, as has been done in the case before us, the administration of revenue is bound to suffer. If without discussing the nature of the transaction and materials on record, the Assessing Officer had made certain addition to the income of the assessee, the same would have been considered erroneous by any appellate authority as being violative of the principles of natural justice which require that the authority must indicate the reasons for an adverse order. We find no reason why the same view should not be taken when an order is against the interests of the revenue. As a matter of fact such orders are prejudicial to the interests of both the parties, because even the assessee is deprived of the benefit of a positive finding in his favour, though he may have sufficiently established his case.

5. In view of the foregoing, it can safely be said that an order passed by the Assessing Officer becomes erroneous and prejudicial to the interests of the Revenue under Section 263 in the following cases:

(i) The order sought to be revised contains error of reasoning or of law or of fact on the face of it.

(ii) The order sought to be revised proceeds on incorrect assumption of facts or incorrect application of law. In the same category fall orders

passed without applying the principles of natural justice or without application of mind.

(iii) The order passed by the Assessing Officer is a stereotype order which simply accepts what the assessee has stated in his return or where he fails to make the requisite enquiries or examine the genuineness of the claim which is called for in the circumstances of the case and assume jurisdiction u/s.263 by the CIT is justified.

6. Now, coming to the facts of the present case, the claim of assessee regarding the consideration received on sale of shares was accepted by the AO. The AO neither enquired nor applied his mind to the notification applicability on sale of shares of resident to non-resident. The guidelines contained in notification issued by the RBI was not at all seen to say whether it is applicable or not. As per the notification, shares of an Indian companies are not listed on a recognized stock exchange in India, the transfer of shares shall be at a price not less than the fair value to be determined by a SEBI registered category-1- Merchant Banker or a Chartered Accountant as epr the discounted free cash flow method. Further, the claim of assessee regarding granting of exemption u/s.54F also and was also not examined by the AO. It is also to be noted that applicability of provisions regarding S.54F, no enquiry as to whether this amount was

properly deposited in capital gains scheme or not, whether the condition laid down in Sec.54F was complied with or not seen by the AO. In view of this, the CIT by invoking the provisions of the section 263 of the Act, directed the AO to examine the issue raised by him in his order afresh and decide in accordance with law. In this finding of the CIT, we do not find any infirmity and he action of Ld. CIT is confirmed. Hence, the AO would examine the issue raised by the Ld. CIT in his order u/s.263 and decide the issue in accordance with law.

7. In the result, the appeal of the assessee is dismissed.

Order pronounced on 17th February, 2017, at Chennai.

Sd/-	Sd/-
(धुव्वुरु आर.एल रेड्डी)	**(चंद्र पूजारी)**
(**DUVVURU RL REDDY**))	**(CHANDRA POOJARI)**
न्यायिक सदस्य/JUDICIAL MEMBER	**लेखा सदस्य /ACCOUNTANT MEMBER**

चेन्नई/Chennai
दिनांक/Dated: 17th February, 2017.
K S Sundaram

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant	3. आयकर आयुक्त (अपील)/CIT(A)	5. विभागीय प्रतिनिधि/DR
2. प्रत्यर्थी/Respondent	4. आयकर आयुक्त/CIT	6. गार्ड फाईल/GF