

IN THE INCOME-TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
SHRI BIJAYANANDA PRUETH, ACCOUNTANT MEMBER
आयकर अपील सं./ITA No.452/SRT/2024

Assessment Year: (2018-19)
(Physical Hearing)

Railesh Naik, 6/215, Tewar Faliyu, Gothan Gam, Sayan, Olpad, Surat - 394130	Vs.	The PCIT – 1, Surat
स्थायीलेखासं./जीआइआरसं./PAN/GIR No: AMHPN1884A		
(Appellant)		(Respondent)

Appellant by	Shri Rasesh Shah, CA
Respondent by	Shri Ritesh Mishra, CIT-DR
Date of Hearing	14/11/2024
Date of Pronouncement	20/11/2024

आदेश / O R D E R

PER BIJAYANANDA PRUETH, AM:

This appeal by the assessee emanates from the order passed under section 263 of the Income-tax Act, 1961 (in short, 'the Act') dated 04.03.2024 by the Principal Commissioner of Income Tax – 1, Surat [in short, 'PCIT'] for the assessment year (AY) 2018-19.

2. The grounds of appeal raised by the assessee are as under:

"1. On the facts and in circumstances of the case as well as law on the subject, the learned Pr. CIT has erred in passing ex-parte order u/s. 263 without giving reasonable and sufficient opportunity of being heard.

2. On the facts and in circumstances of the case as well as law on the subject, the learned Pr. CIT has erred in passing the revision order u/s. 263, although the assessment order passed u/s. 147 r.w.s. 144B of the I.T. Act, 1961 was neither erroneous nor prejudicial to the interest of the revenue.

3. On the facts and in circumstances of the case as well as law on the subject, the learned Pr. CIT has erred in passing the revision order u/s. 263 without generating the DIN while passing the said order.

4. On the facts and circumstances of the case as well as law on the subject, the learned Pr. CIT has erred in giving direction to assessing officer in para no 5.1.2 and 5.1.3 of the revision order to make the addition of Rs. 41,46,938/- assessed u/s. 56(2) (vii) (b) being difference between sale price and fair market value of two immovable properties purchased by assessee.

5. On the facts and circumstances of the case as well as law on the subject, the learned Pr. CIT has erred in setting aside the order passed u/s. 147 r.w.s. 144B with a direction to the assessing officer as per para no. 7 of the revision order to pass fresh assessment order after taking into consideration, the issues as may be considered together with the issues discussed in order. Accordingly, PCIT has erred in setting aside the assessment order making it wide open instead of restricting the issues raised in show cause notice.

6. It is therefore prayed that above order passed by Pr. CIT u/s. 263 may please be quashed or set aside as your honours deems it proper.

7. Appellant craves leave to add, alter or delete any ground(s) either before or in the course of hearing of the appeal."

3. Brief facts of the case are that assessee had not filed his returned of income for AY.2018-19. Specific information was flagged as per Risk Management Strategy of CBDT under the head "non-filing of return (NMS) cases" that assessee had purchased an immovable property of Rs.30,00,000/- and sold another immovable property for Rs.51,90,200/-. After following the due procedure, order u/s 148A(d) was passed on 31.03.2022. In response to notice u/s 148 dated 31.03.2022, assessee filed return declaring total income at Rs.72,590/-. The Assessing Officer (in short, 'AO') issued several notices as per table in para 2 of the assessment order u/s 147 r.w.s. 144B of the Act. The synopsis of the submission of the assessee is at para 3.1 of the above order. The assessee had given reasons as to why no variation is required

which is extracted at para 3.3 of the above order. The finding of the AO is at page 4 & 5 of the order where he has stated that assessee had filed requisite information and explained the sale and purchase of the property. The assessee had sold agricultural land which is beyond prescribed limit of Municipal Corporation and hence no capital gain arises. Keeping in view the replies filed by assessee, no adverse view was formed and return income was accepted. The AO accepted the returned income of Rs.72,590/- in the order u/s 147 r.w.s. 144B of the Act.

3.1 The PCIT, Surat – 1, Surat verified the records including the assessment order and the submission made by the assessee during the assessment proceedings. He noted that assessee had purchased two immovable properties for Rs.30,00,000/- and Rs.22,00,000/- respectively whose market value as per Stamp Valuation Authority (SVA) were Rs.53,06,122/- and Rs.40,40,816/-. Accordingly, the difference between the sale price and fair market value (FMV) was Rs.23,06,122/- and Rs.18,40,816/- respectively totalling to Rs.41,46,938/-. This was required to be taxed u/s 56(2)(vii)(b) of the Act. In view of these facts, the PCIT found that the AO passed the order without verification / inquiry, application of mind and correct provisions of the Act on the above issue. Hence, he issued show cause notice on 05.02.2024, which is page nos.3 and 4 of 263 order. At para 3.1 (page 5), the PCIT noted that the assessee did not furnish any explanation / submission / reply / evidence till the date of passing 263 order on 04.03.2024. He, accordingly, inferred that assessee has no explanation to offer on the issues

raised against him. Thereafter, he has referred to provisions of section 263 of the Act and referred to the decisions of Hon'ble Supreme Court in case of Malabar Industries Ltd. vs. CIT, 243 ITR 83 (SC) and held that the difference between the sale price and FMV of Rs.41,46,938/- was required to be taxed u/s 56(2)(vii)(b) of the Act. Thus, the assessment order of the AO is erroneous. At page 10 of his order, he calculated the short levy of tax at Rs.12,44,081/- and held that the order is also prejudicial to the interests of revenue. Thereafter, he has discussed various decisions of Hon'ble Court at para 5.2 to 5.4.1 and held that the order is erroneous in so far as it is prejudicial to the interests of revenue. Accordingly, he set aside the order of AO with a direction to pass fresh assessment order taking into consideration the issues discussed in his order, after granting reasonable and sufficient opportunity of being heard to the assessee.

4. Aggrieved by the order of PCIT, the assessee has filed appeal before the Tribunal. The Learned Authorised Representative (Ld. AR) of the assessee filed two paper books, i.e., (i) giving details of notices and replies/documents submitted to the lower authorities and (ii) paper book containing various decisions in favour of assessee. He submitted that the assessee is an agriculturist and he does not have any other source of income except agricultural activity. He was having agricultural income and bank interest income which was below taxable limit prescribed under the Act. Hence, he did not file return of income. He also submitted that during the year under consideration, he had sold agricultural land and purchased new land. He

further submitted that no addition was made on the issues on which the case was reopened and therefore, addition could not be made on any other issue. Therefore, the order of AO could not be said to be erroneous. Since the order was not erroneous, the PCIT could not have invoked provisions of section 263 of the Act. He also submitted that the show cause notice issued by the PCIT was not served on the assessee due to which the assessee could not furnish any reply and the required documents/evidences. Hence, the order was passed without giving the assessee proper opportunity of being heard, which is specifically provided in section 263 of the Act.

5. On the other hand, Learned Commissioner of Income-Tax - Departmental Representative (Ld. CIT-DR) of the Revenue supported the order of the PCIT.

6. We have heard both the parties and perused the materials available on record. We have also deliberated on the decisions relied upon by the parties. The Ld. AR submitted that no notice of hearing was served on the assessee by the PCIT. Therefore, the order u/s 263 of the Act has been passed without hearing the assessee. This is clear violation of the provisions of section 263 of the Act. The Ld. CIT-DR has not rebutted the contention of the Ld. AR that the order u/s 263 was passed without serving any show cause notice to the assessee by the PCIT. It is seen from the order that the PCIT issued show cause notices on 05.02.2022 and 14.02.2024 and passed the order on 04.03.2024 based on material on record because of non-compliance by the assessee. After considering the facts, we are of the opinion that

adequate opportunity of hearing was not given to the assessee before passing the order u/s 263 of the Act. This is more so because the show cause notice was not served on the assessee and order was passed rather hurriedly within a month of the issue of the first notice. Such an order is not in accordance with the provisions of section 263 of the Act. For ready reference, the relevant part of the section is reproduced below:

*“263. (1) The [Principal Chief Commissioner or Chief Commissioner or Principal Commissioner] or] Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the [Assessing] Officer [or the Transfer Pricing Officer, as the case may be,] is erroneous in so far as it is prejudicial to the interest of the revenue, he may, **after giving the assessee an opportunity of being heard** and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, [including,-*

- (i) An order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment; or*
- (ii) An order modifying the order under section 92CA; or*
- (iii) An order cancelling the order under section 92CA and directing a fresh order under the said section].” (emphasis supplied)*

6.1 It is clear from bare reading of the provisions that opportunity of hearing to the assessee is a *sine qua non* before passing an order u/s 263 of the Act. We also find that there is clear violation of the principles of natural justice in the instant case because the case was decided fastening substantial tax liability on the assessee without hearing the assessee. As stated earlier, the first notice was issued on 05.02.2024 and the order u/s 263 was passed within a month on 04.03.2024. Therefore, reasonable and sufficient opportunity was not granted to the assessee. Opportunity of being heard is not a mere formality. Without giving a proper opportunity to assessee,

revision proceedings u/s 263 of the Act cannot be finalized as provisions of section 263 of the Act mandates that the PCIT may pass such order after giving opportunity of being heard. Accordingly, we set aside the order u/s 263 passed by the PCIT and restore it back to file of the PCIT to pass fresh order after giving reasonable and sufficient opportunity of hearing to the assessee.

7. In the result, appeal of the assessee is allowed for statistical purpose.

Order is pronounced in the open court on 20/11/2024.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Surat

दिनांक/ Date: 20/11/2024

SAMANTA

Copy of the Order forwarded to:

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

Sd/-
(BIJAYANANDA PRUSETH)
ACCOUNTANT MEMBER

By Order

// TRUE COPY //

Assistant Registrar/Sr. PS/PS
ITAT, Surat