IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A": HYDERABAD
(THROUGH VIRTUAL CONFERENCE)

BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

ITA No. 1204/H/2017 Assessment Year: 2009-10		
Mamatha Divakar Shetty, Hyderabad. PAN – ABNPS 7395G	Vs.	Income-tax Officer, Ward – 4(2), Hyderabad.
(Appellant)		(Respondent)

Assessee by:	Shri Pawan Kumar Chakrapani
Revenue by:	Smt. Nivedita Biswas
Date of hearing:	23/02/2021
Date of pronouncement:	30/09/2021

ORDER

PER L.P. SAHU, A.M.:

This appeal filed by the Assessee is directed against Pr. CIT - 1, Hyderabad's order dated 31/03/2017 for AY 2009-10 involving proceedings u/s 263 of the Income Tax Act, 1961 ; in short "the Act.

2. We notice at the outset that assessee's instant appeals suffer from 36 days delay in filing before the ITAT.
To this effect, the assessee filed an a petition for

condonation of delay along with an affidavit wherein it was inter-alia, affirmed that due to delay in taking advice from the counsel whether to appeal before the ITAT against the order passed by the Pr. CIT or not, caused the impugned delay in filing of the instant appeal. Case law Collector Land Acquisition vs Mst. Katiji & Ors, 1987 AIR 1353 (SC) and University of Delhi Vs. Union of India, Civil Appeal No. 9488 & 9489/2019 dated 17 December, 2019, hold that such a delay; supported by cogent reasons, deserves to be condoned so as to make way for the cause of substantial justice. We accordingly hold that assessee's impugned delay is neither intentional nor deliberate but due to the circumstances beyond its control. The same stands condoned. Case is now taken up for adjudication on merits.

3. The assessee has raised 13 grounds of appeal in this appeal, the sum and substance of which is against the action of the Pr. CIT revising the order passed by the AO.

4. Briefly the facts of the case are that the assessee had originally filed his return of income for the A.Y. 2009-10 on 28. 03.2011 admitting income under head 'House property' and 'other sources' amounting to Rs. 8,27,280/- and after claiming deduction u/s 54F, 'Capital gain' as 'Nil'. Later, it came to the notice of the AO that during the F.Y. 2008-09, assessee along with 3 others had sold immovable property and the Market value of the property for stamp duty was

more than the sale consideration stated in the conveyance deed. Hence, a notice u/s.148 was issued as there was an escapement of LTCG in view of the provisions of Sec. 50C of the Act. During Hie reassessment proceedings, the assessee submitted that she invested the sale proceeds in purchase of flat at Lodha Constructions as per the sale agreement dated 30.07.2010 and filed return of income for the A.Y. 2012-13 disclosing unutilized amount of sale consideration of Rs. 26,08,001/- as Capital gain computed in accordance with the provisions of Sec.50C. Accordingly, the reassessment for the A.Y. 2009-10 was made u/s143(3) rws 147 on 29.05.2014 accepting the income returned of 8,27,280/-.

4.1 The Pr. CIT exercising the powers vested u/s. 263 of the I.T. Act, called for the assessment record of the assessee for the assessment year under consideration and found from the computation statement of total income that the LTCG was calculated by adopting the Market value at Rs.9,44,98,000/- and assessee being the 1/4th beneficiary at Rs. 2,09,62,515/· and after claiming deduction u/s. 54F towards investment in a flat an amount of Rs.26,08,20l/· was offered as capital gain for the A.Y, 2002-03. However, as verified from the records of Joint Sub-Registrar, Government of Telangana, the Market value of the above cited property was of Rs. 9,75,22.000/- and not Rs.9,44,98,000/- adopted by the assessee. Hence, the sale

consideration was short considered to the extent of Rs.30,24,000/ and the assessee being 1/4th beneficiary. LTCG was admitted short by Rs.7,56,000/- However, the AO had not considered this amount for addition while finalizing the assessment for the year.

4.2 Further, he observed that the amount deposited In CGAS was of Rs. 1,34,00,000/- as against the deemed consideration of Rs. 2,43,80,500/- (1/4th of Rs.9,75,22,000/-). Therefore, uninvested amount of 1,09,80,500/- is not eligible for deduction from capital gains for the A.Y. 2009-10 now under consideration. Another aspect noticed is that though assessee legal expenses of Rs.20,00,000/- in relation to transfer of the property has nor submitted any evidence during the assessment proceedings to substantiate the claim of expenses. Hence, 1/4th of legal expenses of Rs. 5,00,000/-needs to be disallowed.

4.3 In view of the above observations, the Pr. CIT held that the assessment order u/s 143(3) rws 147 of the IT Act dated 29/05/2014 passed is held to be erroneous and prejudicial to the interests of revenue and therefore, set aside the assessment order and directed the AO to bring i) the differential capital gain of Rs. 7,56,000/- and ii) the remaining sale consideration of Rs. 38,39,500/- not deposited in CGAS on or before the specified date, to tax

under the head LTGC in addition to the income already assessed in the assessment order dated 29/05/2014 and modify the assessment order accordingly.

5. Aggrieved by the order of the Pr. CIT, the assessee is in appeal before the ITAT.

6. Before us, the ld. AR of the assessee submitted that the Pr. CIT invoking the provisions of section 263 set aside the order passed by the AO u/s 143(3) rws 147 of the Act and he grossly erred in revising the order without appreciating that there is no error and, therefore, is ultra vires to the scope of section 263 and required to be cancelled under the facts and circumstances of the case of the assessee. He contended that he raised the same issues which were clearly examined by the AO and reasons were also recorded on the same issues, to which, the AO examined all the issues, on the basis of which, reopening was done and no addition was called and the AO accepted the returned income. . He, therefore, contended that once the AO has formed his opinion, the Pr. CIT could not have examined the same issue. He submitted that the assessee had computed capital gains as per section 50C of the Act and, therefore, there is no room left for Pr. CIT to examine the issue. He further submitted that the AO had examined legal expenses and accepted the claims made by the Assessee and the AO has clearly mentioned in the order that

the AO submitted evidences/entries for the expenditure claimed, which has been accepted while computing assessed income of the assessee. The very same issue has again been raised by the Pr. CIT, which is not required to be examined again. In support of his arguments, he relied on many judgments, which are placed in the written synopsis filed by the assessee.

7. The ld. DR, on the other hand, relied on the order of Pr. CIT and submitted that the assessee has wrongly shown the value of the property at Rs. 9,44,88,000/- whereas the SRO value of the same property is at Rs. 9,75,22,000/-. He therefore submitted that Pr. CIT was justified in setting aside the order of AO. He further submitted that the claim made by the assessee is also wrong as the entire amount of
Rs. 2,43,80,500/- was not deposited in capital gains scheme account or did not invest in any new asset within the stipulated time and the return of income was also not filed within the stipulated time. He further submitted that the claim of legal expenses was also not substantiated by the assessee before the Pr. CIT. Therefore, he submitted that the Pr. CIT considering all the issues held that the order passed by the AO u/s 143(3)/147 was erroneous and prejudicial to the interests of revenue by exercising the power u/s 263 of the act.

8. In the rejoinder, the ld. AR submitted that the assessee was invested the amount received on the sale of capital assets, but, not the entire value determined as per section 50C of the Act. He submitted that the assessee deposited in the capital gain account scheme on 29th July, 2009 to the tune of Rs. 1.34 crores and on 29th July, 2010 payment was made to the builder for purchase of residential house of Rs. 35,73,562/- and on 29th March, 2011 an amount of Rs. 7,79,771/- was paid to the builder. That means, the total amount was invested to the tune of Rs. 1,77,53,333/-. The actual consideration received by the assessee was of Rs. 1,72,39,500/-, which is 1/4th share of total sale consideration received of Rs. 6,89,58,000/- as shown in the sale deed. He submitted that the total investment made by the assessee is more than the actual amount received on sale of capital assets. He, therefore, contended that the assessee is fully entitled to make claim of exemption u/s 54F of the Act. In support of his submissions, he relied on various judgments, which are placed in the paper book.

9. We have considered the rival submissions and perused the material on record as well as gone through the orders of revenue authorities. The AO passed the assessment order u/s 143(3)/147 and, thereafter, the Pr. CIT exercising his jurisdiction u/s 263 of the Act passed order on 17/03/2017 on the very same issues, which were

examined and decided by the AO by issuing notice u/s 148 of the Act. In the statement of LTCG, the assessee had not adopted the market value/SRO value as sale consideration as per section 50C of the Act. In AY 2012-13, the assessee computed LTCG by adopting market value of Rs. 9,44,98,000/- and the assessee being 1/4th share beneficiary of Rs. 2,09,62,515/-, claimed deduction u/s 54F of Rs. 1,83,54,514/- against the investment in residential house and the amount of Rs. 26,08,201/- was offered as capital gain. But, later on, Pr. CIT verified from the record of the office of SRO and found that the market value of the above said property of Rs. 9,75,22,000/- and not Rs. 9,44,98,000/-, as adopted by the assessee. The 1/4th share of the assessee, which was sought to be admitted by the assessee at Rs. 7,56,000/- and before the Pr. CIT, the assessee admitted that there was a short of income of Rs. 7,56,000/- for the AY 2009-10. Further, on going through the latest amendments made by the Finance Act, in section 50(C)(1), 3rd proviso, where the value adopted or assessed or assessable by the same valuation authority does not exceed 10% of the consideration received or accruing as a result of transfer of consideration so received or accruing as a result of the transfer shall for the purpose of section 48 deemed to be the full value of the consideration. As per the above proviso, it is clear that if there is variation of 10% of stamp duty value adopted by the SRO or the value shown by the assessee for computation of capital gains, in such a

case, the value offered for tax by the assessee is to be adopted and section 50C does not apply to the case of the assessee. This amendment take effect as retrospective in nature and this view is supported by the decisions of the coordinate benches of ITAT, which are as under:

1. Maria Fernandes Cheryl Vs. ITO, [2021] 123 Taxmann.com 252 (Mumbai – Trib.)

2. Amrapali Cinema Vs. ACIT, [2021] 127 Taxmann.com 376 (Delhi – Trib.)

9.1. The assessee in AY 2012-13, has taken the value of Rs. 9,44,98,000/- whereas Pr. CIT adopted the value of Rs. 9,75,22,000/-, which is less than 10% as per the amended provision. Considering the above judgments, we are of the view that the order passed by the AO is not erroneous and prejudicial to the interests of revenue, as held by the Pr. CIT.

9.2 In view of the above observations, we are of the view that once the AO has taken a view on the issue, on which two views are possible, the view which is taken by the AO, if Pr. CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the Income-tax Officer is unsustainable in law, as per the ratio laid down by the Hon'ble Supreme Court in the case of Malabar Industries ltd. Vs. CIT, 2000 (243) ITR 83, wherein it has been held as under:

"The unsuccessful assessee is the appellant in this appeal, by special leave, which arises from the Judgment and Order of the Division Bench of the High Court of Kerala in I.T.R.No.15 of 1990 passed on October 22, 1991. By the impugned order the High Court answered the following two questions, referred to it at the instance of the appellant, in the affirmative that is against the appellant and in favour of the Revenue:- (1) Whether, on the facts and in the circumstances of the case, that Tribunal was justified in holding that there was evidence before the Commissioner of Income-tax that the assessment order was erroneous and prejudicial to revenue?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that Rs.3,66,649 was a taxable receipt for the assessment year 1983-84?

The facts giving rise to these questions may be noticed here. The case relates to the assessment year 1983-84 for which the accounting period of the appellant ended on February 28, 1983. The appellant is a public limited company. It entered into an agreement for sale of the estate of rubber plantation measuring acres 699 of land for consideration of Rs.210 lakhs with M/s. Supriya Enterprises (for short the purchaser) on July 18, 1982. The Agreement provided, inter alia, for payment of the consideration in instalments as scheduled therein. However, the purchaser could not adhere to the schedule and on his request the parties agreed to extension of time for payment of the instalments on condition of his paying compensation/damages for loss of agricultural income and other liabilities in a sum of Rs.3,66,649. Accordingly, the appellant passed a resolution also to that effect on September 25, 1983 and the purchaser paid the said amount. In the annexure to the return filed by it for the assessment in question the amount was noted as compensation and damages for loss of agricultural income. By Order dated

October 31, 1985, the Income-tax Officer accepted the same and endorsed nil assessment for that year. The Commissioner of Income-tax having examined the records of the assessment found that the nil assessment order passed by the Income-tax Officer was erroneous and it was prejudicial to the interests of the revenue. He issued notice to the appellant, under Section 263 of the Income Tax Act (for short the Act), to show cause why the order of assessment should not be set aside and Rs.3,66,649 should not be assessed under the head income from other sources. After the appellant filed its reply the Commissioner, by order dated February 8/9, 1988, concluded that the said amount was unconnected with any agricultural operation activity and was liable to be taxed under the head income from other sources. Dissatisfied with the Order of the Commissioner, the appellant filed an appeal before the Income-tax Appellate Tribunal, which was dismissed on August 5, 1988. On the application of the appellant under Section 256(1) of the Act, the aforementioned questions were referred to the High Court of Kerala at Ernakulam. Mr. Roy Abaraham, learned counsel for the appellant, urged the very same two contentions which were argued before the High Court, namely, (i) that the exercise of jurisdiction by the Commissioner under Section 263(1) of the Act was not only unwarranted but also illegal; he contended that mere loss of tax could not be treated as prejudicial to the interests of the revenue and that only when the order of the Assessing Officer would affect the administration of the revenue that it could be treated as prejudicial to the revenue; (ii) that the amount of Rs.3,66,649 was in reality agricultural income and, therefore, ought not to have been brought to tax. Mr. Anoop G. Choudhary, learned senior counsel for the respondent, asserted that the Income-tax Officer passed the order without application of mind and inasmuch as it resulted in loss of tax it was also prejudicial to the interests of the revenue, therefore, the exercise of jurisdiction under Section 263(1) of the Act by the Commissioner was justified and legal. He

further submitted that the second contention was not open to the appellant as the basic facts found by the Appellate Tribunal were not questioned before the High Court. To consider the first contention, it will be apt to quote Section 263(1) which is relevant for our purpose:- 263. Revision of orders prejudicial to revenue
- (1) The 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 is erroneous insofar as it is prejudicial to the interests 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 an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment."

Explanation - x x x A bare reading of this provision makes it clear that the prerequisite to exercise of jurisdiction by the Commissioner suo moto under it, is that the order of the Income-tax Officer is erroneous insofar as it is prejudicial to the interests of the revenue. The Commissioner has to be satisfied of twin conditions, namely, (i). the order of the Assessing Officer sought to be revised is erroneous; and

(ii) it is prejudicial to the interests of the revenue. If one of them is absent -- if the order of the Income-tax Officer is erroneous but is not prejudicial to the revenue or if it is not erroneous but is prejudicial to the revenue

-- recourse cannot be had to Section 263(1) of the Act. 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 orders passed without applying the principles of

natural justice or without application of mind. The phrase prejudicial to the interests of the revenue is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not confined to loss of tax. The High Court of Calcutta in Dawjee Dadabhoy & Co. Vs. S.P. Jain and Another [31 ITR 872], the High Court of Karnataka in Commissioner of Income- tax, Mysore Vs. T. Narayana Pai [98 ITR 422], the High Court of Bombay in Commissioner of Income-tax Vs. Gabriel India Ltd. [203 ITR 108] and the High Court of Gujarat in Commissioner of Income-tax Vs. Smt. Minalben S. Parikh [215 ITR 81] treated loss of tax as prejudicial to the interests of the revenue. Mr. Abaraham relied on the judgment of the Division Bench of the High Court of Madras in Venkatakrishna Rice Company Vs. Commissioner of Income-tax [163 ITR 129] interpreting prejudicial to the interests of the revenue. The High Court held, In this context, it must be regarded as involving a conception of acts or orders which are subversive of the administration of revenue. There must be some grievous error in the Order passed by the Income- tax Officer, which might set a bad trend or pattern for similar assessments, which on a broad reckoning, the Commissioner might think to be prejudicial to the interests of Revenue Administration. In our view this interpretation is too narrow to merit acceptance. The scheme of the 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 an erroneous order of the Income-tax Officer, the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the revenue. The phrase prejudicial to the interests of the revenue has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an Income- tax Officer adopted one of the courses permissible in law and it has resulted in loss

of revenue; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the Income-tax Officer is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the revenue. Rampyari Devi Saraogi Vs. Commissioner of Income-tax [67 ITR 84] and in Smt. Tara Devi Aggarwal Vs. Commissioner of Income-tax, West Bengal [88 ITR 323]. In the instant case, the Commissioner noted that the Income-tax Officer passed the order of nil assessment without application of mind. Indeed, the High Court recorded the finding that the Income-tax Officer failed to apply his mind to the case in all perspective and the order passed by him was erroneous. It appears that the resolution passed by the board of the appellant- company was not placed before the Assessing Officer. Thus, there was no material to support the claim of the appellant that the said amount represented compensation for loss of agricultural income. He accepted the entry in the statement of the account filed by the appellant in the absence of any supporting material and without making any inquiry. On these facts the conclusion that the order of the Income-tax Officer was erroneous is irresistible. We are, therefore, of the opinion that the High Court has rightly held that the exercise of the jurisdiction by the Commissioner under Section 263(1) was justified. The second contention has to be rejected in view of the finding of fact recorded by the High Court. It was not shown at any stage of the proceedings, the amount in question was fixed or quantified as loss of agricultural income and admittedly it is not so found by the Tribunal. The further question whether it will be agricultural income within the meaning of Section 2(1A) of the Act as elucidated by this Court in

Commissioner of Income-tax, West Bengal, Calcutta Vs. Raja Benoy Kumar Sahas Roy [32 ITR 466] does not arise for consideration. It is evident from the Order of the High Court that findings recorded by the Tribunal that the appellant stopped agricultural operation in November 1982 and the receipt under consideration did not relate to any agricultural operation carried on by the appellant, were not questioned before it. Though, we do not agree with the High Court that the said amount was paid for breach of contract as indeed it was paid in modification/relaxation of the terms of the contract, we hold that the High Court is justified in concluding that the said amount was a taxable receipt under the head income from other sources. We find no merit in the appeal and dismiss the same with costs."

9.3 One of the categorical finding of the Hon'ble Supreme Court in the above judgement is, every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the Income-tax Officer is unsustainable in law. Therefore, in the case under consideration, the view which has been taken by the AO is one of the courses permissible in law, which cannot be brushed aside by the Pr. CIT u/s 263 of the Act. In view of the above observations, we set aside the order of the Pr.

CIT passed u/s 263 of the Act, and restore the order of the AO. Accordingly, the grounds raised by the assessee on this issue are allowed.

10. In the result, appeal of the assessee is allowed in above terms.

11. We lastly acknowledge that although the instant appeals, except for the AY 2014-15, are being decided after a period of 90 days from the date of hearing as per Rule 34(5) of the IT(AT) Rules 1963, the same however, does not apply in the covid lockdown situation as per hon'ble apex court's recent directions dated 27-04-2021 in M.A.No.665/2021 in SM(W)C No.3/2020 'In Re Cognizance for extension of limitation' making it clear that in such cases where the limitation period (including that prescribed for institution as well as termination) shall stand excluded from 14th of March, 2021 till further orders.

Pronounced in the open court on 30th September, 2021.

Sd/-	**Sd/-**
(S.S. GODARA)	**(L. P. SAHU)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Hyderabad, Dated: 30th September, 2021.

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Copy to :

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