IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F", MUMBAI

BEFORE SHRI D. KARUNAKARA RAO, ACCOUNTANT MEMBER
AND SHRI VIVEK VARMA, JUDICIAL MEMBER

ITA No. 2939/Mum/2011
(Assessment year : 2006-07)

Vinay Pratap Thacker, 40, Jamnabai Narsee School, Narsee Munjee Bhavan, N.S. Road No. 7, JVPD Scheme, Mumbai -400 049 PAN: **AAAPT 4611 L**	**Vs**	Commissioner of Income-tax Officer –City 21, Mumbai
(Appellant)		(Respondent)
Appellant by	:	Mr. F.V. Irani, Senior Advocate
Respondent by	:	Mr. A.P. Singh (CIT-DR)

Date of Hearing : 18-02-2013
Date of Pronouncement : 27-02-2013

O R D E R

PER VIVEK VARMA, JM:

The appeal is filed by the assessee, challenging the validity of action taken by the CIT under section 263 of the Income-tax Act, 1961, wherein, the CIT, set aside the order under section 143(3), passed by the ACIT -21(2), Mumbai, dated 15.12.2008.

2. The brief facts of the case are that the assessee is a $1/3^{rd}$ owner of a plot, along with his mother, Mrs. Anjali Pratap Thacker, who is owner with $2/3^{rd}$ share. The assessee along with his mother, the other co-owner, entered into a development agreement with M/s Reheja Universal Pvt. Ltd., who would construct the building on the land owned by the two co-owners. According to this agreement, the assessee along with the other co-owners shall retain 40% of the developed portion and 60% rights shall go to the developer. In accordance with the agreement, the total compensation received by the

two co-owners was Rs. 6,17,50,000/- along with two flats on 6th & 7th floor.

3. The assessee, being 1/3rd shareholder, received Rs. 2,05,83,887/-, as the compensation against his share. The assessee deposited Rs. 1,00,00,000/- with NABARD under section 54EC and balance Rs. 17,18,283/- he offered to tax as LTCG.

4. The case was picked up for scrutiny and details were called for, which were furnished by the assessee, explaining the LTCG and its deployment.

5. As seen in the order under section 263, the CIT in para 3 says, *"A proposal was received on 10.06.2010 from the AO under section 263, pointing out some discrepancies/ shortcomings in the assessment order."*

6. It is observed that the impugned proceedings were triggered as a consequence of Audit Objection dated 06.01.2010, which was supplied to the assessee by the AO, wherein the computation of LTCG was worked out. In accordance with this Audit Objection note, the CIT, issued a show cause notice (SCN) dated 22.10.2010, on the assessee. This SCN, according to the AR is verbatim of the Audit Objection Note.

7. The AR submitted that on the impugned issue, a detailed reply was submitted to the AO in regular assessment proceeding, dated 08.09.2008, the assessee, once again submitted its reply on the Audit Objection Report, dated 25.03.2010, giving complete sequence of events and also tried to satisfy the CIT vide letters dated 16.11.2010 and 22.01.2011, pleading to drop the revision proceedings under section 263, as the regular assessment was framed with proper application of mind and after taking into consideration, all the details, that were necessary to adjudicate on the impugned issue.

8. In these letters, the assessee cited a number of case laws pertaining to the legality and applicability of provisions of section 50C on lease hold property, applicability of exemption under section 54 on the receipt and adjustment of Rs. 64,00,000/-.

9. At the time of hearing before us, the AR based his arguments on:

01. No independent application of mind;

02. Order is not borne out and in accordance with the SCN, and superseding the same.

03. Merits, whether provisions under section 50C could be made applicable on a leased property.

01. No independent application of mind: The AR referred to the case of ICICI Home Finance Co. Ltd. vs ACIT, in WP No. 430 of 2012, wherein there was a challenge against the issue of notice under section 148. The Hon'ble Bombay High Court observes,

> *"In fact, the Supreme Court in the matter of India Eastern Newspaper vs. Commissioner of Income Tax, New Delhi, reported in 119 ITR page 996 has held that whether an assessment has escaped assessment or not must be determined by the Assessing Officer himself. The Assessing Officer cannot blindly follow the opinion of an audit authority for the purpose of arriving at a belief that income has escaped assessment. In the present facts, it would be noticed that the reasons for which the assessment for the assessment year 2006-2007 is sought to be reopened by communication dated 12.10.2011 are identical to the objection of the audit authority dated 29.12.2009. The reasons do not rely upon any tangible material in the audit report but merely upon an opinion and the existing material already on record. This itself indicates that there was not independent application of mind by the Assessing Officer before he issued the impugned notice. On this ground alone, the assumption of jurisdiction by the Assessing Officer can be faulted".*

The AR, submitted that in the instant case as well, the facts are identical that SCN was verbatim with the Audit Objection. The Hon'ble Bombay High Court observes, the AO cannot blindly follow the opinion of the audit authority, and later on, it was observed that there was no independent application of mind by the AO. The AR submitted that in the present case, there was no independent application of mind by the CIT, invoking the revision proceedings under section 263.

10. The AR, further submitted that the CIT faulted in travelling beyond the SCN and supported his arguments by referring to the decision of Geometric Software Solutions Co. Ltd. vs. ACIT, reported in 32 SOT 428 (Mum), in ITA No. 3464/Mum/2008, it was held,

> *"The Commissioner had revised the assessment order under section 143(3) by issuing show-cause notice only with regard to not reducing the expenditure incurred in the foreign currency from the total export turnover while computing the deduction under section 10A, but in the revision order, the assessment was set aside on another ground also that some of the sale proceeds were yet to be received by the assessee. The revision under section 263 is not like the reopening of the assessment where once the assessment is reopened, entire assessment is open before the Assessing Officer to be reconsidered in accordance with law. In the revision proceedings, the Commissioner cannot travel beyond the reasons given by him for revision in the show-cause notice. Therefore, the revision on the ground that part of the sale proceeds were yet to be received by the assessee was not tenable".*

11. The AR also referred to the case of Mrs. G.K. Sekhon vs ITO, in ITA No. 443/Chd/1980, reported in 14 TTJ 330 (Chd.),

> *"The assessee had treated the land as agricultural and had given it on lease for agricultural purposes. The ITO had discussed the matter with the assessee's counsel, as noted in his order, and the lease deed was before the ITO. The Commr. had no material to assume that the order of the ITO was erroneous. The reason given in the notice under section 263 was different from the reason stated in the order of the Commr. While setting aside the assessment as in the show cause notice, the Commr. expressed that the amount of Rs. 80,000 was assessable as income from other sources. On this ground also, the order of the Commr. was not sustainable. The Commr.'s order is, therefore, set aside".*

The AR also referred to the case of Sharma Engineering Co. vs ITO, ITA No. 523/Alld./1985, reported in 26 TTJ 629 (All).

12. With regard to applicability of section 50C on leasehold properties, the AR referred to the case of ITO vs. Sh. Prem Rattan Gupta, ITA no. 5803/Mum/2009 and Atul G. Puranik vs ITO reported in 11 ITR (Trib.) 120, Mumbai, wherein it was held,

> *"(iv) That under section 50C the deeming fiction of substituting adopted or assessed or assessable value by the stamp valuation authority as full value of consideration is applicable only in respect of land or building or both. If the capital asset under transfer cannot be described as "land or building or both", section 50C will not apply. The lease rights in a plot of land are neither "land or building or both" nor can they be included within the scope of "land or building or both".*

13. The AR also referred to the case of Max India Ltd. reported in 295 ITR 282 (SC), wherein the Hon'ble Supreme Court of India held,

> *"When the Assessing Officer took a possible view, while passing an order of assessment, the Commissioner exceeded his jurisdiction in seeking recourse of his power under section 263. At the least, it must be held that the question as to whether the liability of the assessee had ceased in the previous year relevant to the Assessment Year 1982-83, was an issue on which a possible view was that there was no final or irrevocable remission or cessation of liability, within the meaning of section 41(1) of the Act, during Assessment Year 1982-83 – order of CIT and ITAT reversed".*

14. He also referred to the case of Malabar Industries Ltd., reported in 243 ITR 83, wherein the Hon'ble Supreme Court held,

> *"An order of assessment passed by an ITO should not be interfered with only because another view is possible; when a statute provides for different hierarchies, providing for forums in relation to passing of an order as also appellate or original order; by no stretch of imagination a higher authority can interfere with the independence which is the basic feature of any statutory scheme involving adjudicatory process.*
> *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 the 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… ".*

15. It was also pointed out that both these cases were followed by Hon'ble Madras High Court in the case of CIT vs Sak Soft Ltd., in the order dated 13.06.2007 (extract taken by the assessee in the written submission placed before the CIT).

16. The AR, referring to the case, submitted that the ratio laid down in all the cases are that invocation of section 263 was not valid and was stuck down. The AR submitted that all the details were filed by the assessee to the specific query raised by the AO and the AO, after taking into consideration the replies of the assessee, took a decision. Having taken a definite stand on an issue ousts the revision jurisdiction of the CIT under section 263. The AR, therefore, submitted

that the jurisdiction invoked by the CIT was therefore bad in law and hence should be held to be invalid.

17. The DR on the other hand submitted that the decisions quoted by the AR on non application of mind are not on the issue of 263 but on 148 and hence they are distinguishable on basic facts and therefore, cannot be relied upon.

18. With regard to the objection that directions under section 263 are not in consonance with that of the SCN, the DR submitted that the issue of application of section 50C on the impugned property was always there and since there was no application of mind by the AO and there being no adequate enquiry on the same, invocation of section 50C under section 263 was valid.

19. The third issue with regard to the receipt and payment of 64,00,000/- was also there and not adjudicated, hence, the CIT was correct in taking the issue in revision proceedings under section 263.

20. The DR, therefore, pleaded that the CIT was correct in setting aside the order passed under section 143(3) and giving directions to the AO for reframing the assessment order.

21. In the rejoinder, the AR once again touched upon all the points and reiterated the submissions made. The AR, countering the arguments on receipt and payment of 64,00,000/-, submitted that it was an adjustment made by the two contracting parties, which is an accepted financial principal and squarely covered by the decision of J.B. Boda & Co. Ltd. vs CBDT, reported in 223 ITR 271, wherein the Hon'ble Supreme Court held,

> *"A two-way traffic is unnecessary. To insist on a formal remittance first and thereafter to receive the commission from the foreign reinsurer, will be an empty formality and a meaningless ritual, on the facts of this case".*

22. We have heard the contentions of both the parties and have also perused the material placed before us, including the case laws cited by either side. On going through the submissions of the assessee, SCN and Audit Objection, we find that the issue had been dealt with by the AO in regular assessment proceedings and thereafter an audit objection was raised, which was used by the AO to convince the CIT to invoke his jurisdiction under section 263. When we read the section, which reads, as,

> *"(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 in so far 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".*

This clearly shows, that the CIT must himself come to a conclusion, after applying his own mind, because, the words used in the section are,*"..... <u>and if he considers</u> .....",* here, application of his own mind becomes important. It is important to examine the similarity of the expression used under section 147(1) and 263(1). Under section 147(1), the expression used is *"has reason to believe"* and under section 263(1), the expression used is *"if he considers"*. Though the expressions used are not verbatim *pari materia*, but the meaning which is to be drawn in both the expressions are *pari materia*, i.e., *an independent, unpolluted* and *unadopted application* of mind by the officer, invoking the provision.

23. We have seen from the impugned order of the CIT, dated 11.02.2011, the CIT admits, *"A proposal was received on 10.06.2010 from the AO under section 263 of the Income Tax Act, 1961, pointing out some discrepancies/short comings in the assessment order".* This clearly shows that in so far as the CIT was concerned, he did not apply

his own mind, which the Hon'ble Supreme Court of India has said in ICICI Bank *(supra)* that there should be an independent application of mind.

24. On perusal of the SCN and the impugned order, we find that there is a departure from the reasons taken to invoke the provisions under section 263, this also finds favour with the arguments advanced by the AR and get covered by the decisions cited by him.

25. We also have to accept the arguments of the AR with respect of applicability of section 50C on lease hold properties, because, this is an undisputed fact that the impugned property was a leased property, even though, it is a long lease, but the title of the same shall always remain with the actual owner, in the present case, BMA. Though the issue is squarely covered by the cited decisions, but going by the submissions of the DR that it is a case of deemed ownership, itself creates a doubt that whether there has to be an application of section 50C or not. This doubt, in our considered opinion is fatal to invocation of provisions of section 263, because provision of section 263 cannot be invoked where the issue becomes debatable, because if the issue is debatable it goes out of the scope of administration provisions but would fall in the realm of judicial provisions, which is not the purpose and context of section 263, which, in our opinion is to deal only on two realms simultaneously, i.e. whether the order passed by the AO is *erroneous* in so far as *it is prejudicial to the interest of revenue.*

26. In the instant case, the CIT, by invoking the jurisdiction under section 263 stepped on the correctness and questioned the applicability of section 50C on leased property in the SCN, he, therefore transgressed into the judicial territory, which he cannot.

27. We are aware of the decision of Hon'ble Bombay High Court in the case of Gabrial India Ltd., reported in 203 ITR 108, wherein, the Hon'ble Bombay High Court held, *"CIT cannot revise order merely because he disagrees with the conclusion arrived at by the ITO"*. We are also aware of the case of CIT vs Sunbeam Auto Ltd., reported in 227 CTR 133, wherein the Hon'ble Delhi High Court drew a distinction between *"Lack of inquiry"* and *"inadequate enquiry"* and held that in the case of inadequate enquiry, provisions under section 263 cannot be invoked. In our opinion, in the instant case, this is neither the case of inadequate enquiry nor lack of enquiry at the regular assessment stage.

28. Taking into consideration the entire gamut of facts and judicial decisions, placed before us, we are of the considered opinion that the *CIT could not have invoked the jurisdiction under section 263 without his own independent application of mind; on otherwise debatable issues and by merely disagreeing on the view taken by the AO.*

29. In the result, we set aside the order of the CIT dated 11.02.2011, passed under section 263 and annul the initiation of revision proceedings and as a consequence, we restore the order passed by the AO, under section 143(3) dated 15.12.2008.

30. The appeal is therefore allowed.

Order pronounced on 27th day of February, 2013.

Sd/-	**Sd/-**
(D. KARUNAKARA RAO)	**(VIVEK VARMA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai: **27th February, 2013**

Copy to:

1) The Appellant
2) The Respondent
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4) The Add. CIT/CIT –Range 21(2), Mumbai.
5) The DR, “F” Bench Mumbai.
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By Order

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Asst. Registrar,
ITAT, Mumbai

*Chavan