

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'D' : NEW DELHI)**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

(THROUGH VIDEO CONFERENCE)

**ITA No.87/Del./2020
(ASSESSMENT YEAR : 2016-17)**

DCIT (IT), Circle 2(2)(3),
New Delhi. vs. Dr. (Mrs.) Kusum Nangia,
C/o M/s. P.N. Khanna & Co.,
14 – 15F, Connaught Place,
New Delhi – 110 001.

(PAN : ACYPN2552N)

**ITA No.94/Del./2020
(ASSESSMENT YEAR : 2016-17)**

Dr. (Mrs.) Kusum Nangia,
C/o S.K. Bindal & Co.,
B – 153, Sector 51,
Noida – 201 301 (U.P.) vs. DCIT (IT), Circle 2(2)(3),
New Delhi.

(PAN : ACYPN2552N)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri V.K. Bindal, Advocate
Shri Sanjiv Bindal, Advocate,
Shri Rinky Sharma, Advocate

REVENUE BY : Shri Vijay Choudhary, Senior DR

Date of Hearing : 13.01.2021

Date of Order : 22.01.2021

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Present cross appeals filed by the assessee as well as by the revenue are being disposed off by way of composite order to avoid repetition of discussion.

2. Appellant, DCIT (IT), Circle 2(2)(2), New Delhi (hereinafter referred to as 'the Revenue') by filing the present appeal sought to set aside the impugned order dated 31.10.2019 passed by the Commissioner of Income-tax (Appeals)-43, New Delhi qua the assessment year 2016-17 on the grounds that :-

“1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in computing the cost of acquisition as on 01.04.1981 on the basis of data provided by Ministry of Urban Development instead of relying on the documents (sale deed) provided by the Department of Archives for (land cost, Cost of construction and cost of improvement) in vicinity of Kalkaji itself.

2. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has failed to appreciate the fact that the cost of Construction of the property in the hands of the assessee should have been taken at NIL.

3. Whether on the facts and circumstances of the case in law, the Ld. CIT(A) erred in holding that number of residential units in a residential building is not relevant for granting exemption U/S 54 ignoring the specific amendment made by Finance Act, 2014.”

3. Appellant, Dr. (Mrs.) Kusum Nangia (hereinafter referred to as 'the assessee') by filing the present appeal sought to set aside the impugned order dated 31.10.2019 passed by the Commissioner of Income-tax (Appeals)-43, New Delhi qua the assessment year 2016-17 on the grounds that :-

“1. The CIT (Appeals) erred in law and on facts in recomputing the additions made for Long Term and Short Term Capital Gains at Rs.54,04,128/- and Rs.58,45,500/- respectively without appreciating that neither any property was sold during the relevant previous year by the appellant nor was the alleged sale consideration of Rs. 4.85 crore ever received by her. Thus, capital gains so computed must be deleted.

2. The CIT (Appeals) erred in law and on facts by not appreciating the fact that capital gain, though at Nil, was erroneously declared in the return of income for AY 2016-17 by the appellant on the advice of her counsel whereas factually no such gain arose to her since no 'transfer' of asset took place; and also by ignoring the judgment of the Hon'ble Apex Court in Pr.CIT Vs. Lalitaben Govindbhai Patel (2019) 103 taxman.com 10, placed on his record in this regard. Thus, capital gain so computed must be deleted.

3. The CIT (Appeals) otherwise also erred in law and on facts in rejecting the valuation of land as on 1st April, 1981 obtained by the appellant from a government approved registered valuer and decreasing it without referring the matter to DVO, the competent authority, which is mandatory; and also without affording an opportunity to the appellant to rebut the same. Thus, the addition for capital gain so made without any authority of law must be deleted.

4. The CIT (Appeals) erred in law and on facts in recomputing the additions made for Long Term and Short Term Capital Gains at Rs.54,04,128/- and Rs.58,45,500/- respectively in AY 2016-17, while ignoring that the only consideration for 'transfer of development rights' of the property received by the appellant from the builder was Rs. 25 lakhs and that too in the period relevant to the A Y 2014-15, hence could be taxable in that year only. Thus, the additions made for capital gains in AY 2016-17 must be deleted.”

4. Briefly stated the facts necessary for adjudication of the controversy at hand are : Assessee, being a non-resident Indian, held a property situated at R-6, Nehru Enclave, Kalkaji, New Delhi consisting of a freehold plot measuring 866 sq.yds. with a

residential house built thereon. Assessee entered into a collaboration agreement dated 22.05.2013 with Shri Ved Prakash Israni, builder, for developing the said property. The builder was required to redevelop the existing structure on the property on behalf of the owner by utilizing his own funds and resources and the entire cost of construction was to be borne by the builder. In accordance with the agreement, the assessee received an amount of Rs.25,00,000/- from the builder. AO during scrutiny proceedings called upon the assessee to show cause as to why the cost of construction of remaining building borne by the builder should not be included in computation of sale consideration. Declining the contentions raised by the assessee, AO made addition of Rs.6,47,14,523/- by way of declining exemption u/s 54 of the Income-tax Act, 1961 (for short 'the Act') claimed by the assessee and added the amount to the total income of the assessee as long term capital gain. AO also made addition of Rs.1,36,03,950/- on account of short term capital gain on sale of flats.

5. Assessee carried the matter before the Id. CIT (A) by way of filing the appeal who has partly allowed the appeal. Feeling aggrieved by the order passed by the Id. CIT (A), both assessee as

well as the Revenue has come up before the Tribunal by way of filing the present cross appeals.

6. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

7. At the very outset, Id. AR for the assessee contended that the AO passed the impugned assessment order without any jurisdiction and as such, same is void ab initio and liable to be quashed. He has also moved application raising additional grounds to the following effect :-

“1. The AO erred in law and on facts in passing the impugned assessment order

i) by expanding scope of his enquiry and investigation beyond the reason for selecting the case for scrutiny on defined issues, as mentioned in the notices u/s 143(2) of the Act and in the impugned assessment order,

ii) without obtaining mandatory prior permission of the Pr.CIT for expanding the scope as per the notice issued u/s 142(1) of the Act in accordance with the directions of the CBDT, is void ab-initio, bad in law and needs to be quashed.

2. The impugned assessment order is bad in law and void ab-initio because the first two notices u/s 143(2) of the Act issued within the prescribed limitation period were only by the non-jurisdictional assessing officers when correct jurisdiction over the case of the assessee (an old NRI lady above 80 years) being Non-Resident under the provisions of the Act and filing returns as NRI for the last number of years was with the AO (International Taxation), New Delhi. Though the assessment has finally been completed by the appropriate AO, but he

never issued any notice u/s 143(2) neither within statutory period nor even later, which makes the assessment order bad in law. Thus, the assessment order must be quashed.”

8. Ld. DR for the Revenue opposed the application raising additional grounds for the reason that the assessee has duly participated in the assessment as well as first appellate stage proceedings and prayed for dismissal of the application.

9. We are of the considered view that additional grounds raising legal issue can be entertained by the quasi-judicial authority at any stage of the proceedings and our view is fortified by the decision rendered by the Hon'ble Supreme Court in case of **National Thermal Power Co. Ltd. vs. CIT (1998) 229 ITR 383 (SC)**. Moreover, by accepting the legal ground, no fresh investigation qua facts is required and issue is to be decided on the basis of material already available on record, hence application for additional ground is allowed.

10. First of all, it would be expedient to decide the legal grounds raised by the assessee by way of filing additional grounds. Ld. AR for the assessee challenging the assumption of jurisdiction by the AO/ACIT, Circle International Tax 2(2)(2) contended that when the assessee is a non-resident Indian residing in the USA, which is evident from the Income-tax return filed by the assessee for the year under assessment available at pages 74 to 76 of the paper

book, notice u/s 143 (2) of the Act in this case was issued by ITO, Ward 52(2), Delhi which was required to be issued by ITO, (International Taxation) and as such, the entire assessment proceedings are void ab initio. However, on the other hand, ld. DR for the Revenue relied upon the order passed by the AO as well as ld. CIT (A) so far as jurisdiction is concerned and contended that when assessee has duly participated in the assessment proceedings, he has no right to challenge the jurisdiction at this stage.

11. To proceed further, impugned notice issued u/s 143(2) of the Act to initiate the assessment proceedings is extracted for ready perusal as under :-

“GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
OFFICE OF THE INCOME TAX OFFICER
WARD 52(5), DELHI

TO, KUSUM NANGIA C/O M/S P N Khanna and Co. C/o. M/s P N Khanna and Co., Shivam House 14-15 F Con. Place 110001, Delhi India	
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PAN : ACYPN2552N	AY: 2016-17	Notice No. ITBA/AST/S/143(2)/ 2017-18/1005043075 (1)	Dated : 24/07/2017
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Notice under section 143(2) of the Income Tax Act, 1961
Limited Scrutiny (Computer Aided Scrutiny Selection)

Sir/Madam/M/s.,

This is for your kind information that the return of income for Assessment Year 2016-17 filed vide ack. No. 183080090310516 on 31/05/2016 has been selected for Scrutiny.

Following issue(s) have been identified for examination:

1. Whether deduction from capital gains has been claimed correctly.

2. In view of the above, I would like to give you an opportunity to produce any evidence/ information which you feel is necessary in support of the said return of income on or before 09.08.2017 at 12:30 PM.

3. The above mentioned evidence/ information is to be furnished online electronically in 'E-Proceeding' facility through your account in e-filing website of Income-tax Department. Further proceedings shall also be conducted electronically(*). A brief note on salient features of 'E-Proceeding' is enclosed.

4. In case you do not wish to produce any evidence/information, as mentioned in para 2, you are requested to intimate the same electronically on or before 09/08/2017.

5. Specific questionnaires/requisition of information or documents would be sent subsequently, if required.

6. Para(s) (2) to (4) are applicable if you have an account in e-Filing website of Income-tax Department. Till such an account is created by you, assessment proceedings shall be carried out either through your e-mail account or manually (if e-mail is not available).

(* Subject to exceptions as per the enclosed note

Sd/-

**Kalicharan Prasad,
Income Tax Officer,
Ward 52 (5),
Room No.1508,
15th Floor, E-2 Block,
Pratyaksh Kar Bhawan,
Civic Centre,
New Delhi-110 002."**

12. Undisputedly, assessee being non-resident Indian has been filing her return of income as a non-resident Indian and in any case, assessment is required to be framed by the ITO (International Taxation). It is also not in dispute that notice in this case u/s 143(2) of the Act has never been issued by the jurisdictional ITO to the assessee. Perusal of the notice issued u/s 143 (2) of the Act extracted in the preceding para goes to prove that the same has been issued by the Income-tax Officer, Ward 52(5), New Delhi who had no jurisdiction to issue the same. On the basis of notice issued u/s 143 (2) (supra) by the non-jurisdictional AO, the subsequent assessment proceedings on the basis of which assessment order dated 30.12.2018 was framed by the jurisdictional ITO are void ab initio and bad in law. Particularly when AO in para 3 of the assessment order has himself admitted that assessee is a non-resident Indian living in USA.

13. Now, the question arises for consideration is :-

“as to whether issuance of notice u/s 143(2) is a mere irregularity curable u/s 292BB of the Act or an illegality making the entire assessment proceedings bad in law?”

14. We are of the considered view that by now, it is settled principle of law that assuming wrong jurisdiction by issuing notice u/s 143 (2) by a non-jurisdictional AO and then framing the

assessment by jurisdictional AO is an illegality which is not curable under the law and makes the entire assessment proceedings void ab initio. As per instructions issued by the Central Board of Direct Taxes (CBDT), ITO, International Taxation, Ward 2(2)(2) have the jurisdiction u/s 143 (2) and not the ITO, Ward 52 (5). CBDT issued instructions pursuant to the provisions contained under section 119 of the Act for completion of the assessment by ITO/ACITs & DCITs, as the case may be, and in view of the instructions, assessment has to be completed by the jurisdictional ITO only. When notice under section 143 (2) was issued by the non-jurisdictional ITO and assessment was framed by the jurisdictional ITO, the assessment order framed in this case is void ab initio and bad in law.

15. Hon'ble Supreme Court in case of **Sardar Baldev Singh vs. CIT (1960) 40 ITR 605 (SC)** while deciding the identical issue held as under :-

“A pari materia provision, i.e., section 34 under old Indian Income Tax Act, 1922 (hereinafter referred to as “Act, 1922”) was considered and it was held that A.O. having power to issue notice should be a particular A.O. having jurisdiction over Assessee at the time of issue of requisite notice. If notice issued by any other A.O. or notice is bad for any reason, than such like assessment would be illegal.”

16. Hon'ble High Court of Punjab & Haryana in case of **Lt. Col. Paramjit Singh vs. CIT (1996) 220 ITR 446 (Punjab)** held that,

“a notice for reassessment can be issued only by AO who had concluded the proceedings.”

17. Hon’ble Supreme Court in case of **State of Gujarat vs. Rajesh Kumar Chimanlal Barot & Anr. AIR 1996 SC 2664** held that, *“If an order is passed by a judicial or quasi judicial authority having no jurisdiction, it is an obligation of Appellate Court to rectify the error and set aside order passed by authority or forum having no jurisdiction.”*

18. Coordinate Bench of the Tribunal in case of **Ranjeet Singh vs. ACIT (2009) 120 TTJ 517 (Delhi)** while deciding the identical issue held that, *“when notice u/s 148 was issued by the ITO, Ghaziabad whereas the assessee is being assessed at Delhi and ITO, Ghaziabad on the date of issuance of notice had no jurisdiction to assess the assessee, notice itself was invalid.”*

19. In view of what has been discussed above and following the decisions rendered by Hon’ble Supreme Court, Hon’ble High Court and coordinate Bench of the Tribunal (supra), we are of the considered view that in the instant case, notice issued by non-jurisdictional ITO, Ward 52 (5) being quasi-judicial authority and assessment framed by jurisdictional ITO, Ward 2(2)(2) is not a mere regularity curable u/s 292BB of the Act because issuance of

notice u/s 143 (2) of the Act is a foundational step to initiate and complete the assessment proceedings, so when foundation is missing subsequent assessment framed in this case is not sustainable in the eyes of law being void ab initio, hence liable to be quashed. Consequently, without entering into the merits of this case, additional ground raised by the assessee in this case is decided in favour of the assessee and thereby assessment order framed in this case is hereby quashed. Consequently, the appeal filed by the assessee is allowed and the appeal filed by the Revenue has become infructuous, hence dismissed.

Order pronounced in open court on this 22nd day of January, 2021.

Sd/-
(N.K. BILLAIYA)
ACCOUNTANT MEMBER

sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Dated the 22nd day of January, 2021
TS

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-43, New Delhi.
- 5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.