

**IN THE INCOME TAX APPELLATE TRIBUNAL
AGRA BENCH, AGRA**

**BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER AND
SHRI A.L. GEHLOT, ACCOUNTANT MEMBER**

**ITA No.233/Agr/2012
Assessment Year: 2002-03**

Shri Sudhir Kumar Agarwal, vs. Commissioner of Income Tax-II,
939, Mohammad Mah, Agra.
Shikohabad, Firozabad.
(PAN: AAWPA 2377 C)

**ITA No.234/Agr/2012
Assessment Year: 2002-03**

Smt. Bina Agarwal vs. Commissioner of Income Tax-II,
939, Mohammad Mah, Agra.
Shikohabad, Firozabad.
(PAN: ACMPA 0841 R)
(Appellants) (Respondent)

Appellants by : Shri Deependra Mohan, C.A.
Respondent by : Shri Waseem Arshad, Sr. D.R.

Date of Hearing : 13.12.2012
Date of Pronouncement of order : 11.01.2013

ORDER

PER A.L. GEHLOT, ACCOUNTANT MEMBER:

These are appeals filed by the assesseees against two different orders, both dated 28.03.2012 passed by the Id. CIT-II, Agra for the Assessment Years 2002-03.

2. The facts raised in both the appeals are based on identical set of facts, therefore, for the sake of convenience; both the appeals are decided by this common order.

3. The grounds raised by the assesseees in both the appeals are in respect of invoking section 263 of the Income Tax Act, 1961 ('the Act' hereinafter) by the CIT. Since the facts are identical, and facts lead to the case of Shri Sudhir Kumar Agarwal, ITA No.233/Agr/2012, both the appeals are heard on the basis of the facts in the case of Sudhir Kumar Agarwal and the same are decided accordingly.

4. The brief facts of the case are that on examination of assessment records the CIT noticed that the assessment under section 143(3)/148 was completed by the A.O. on 29.12.2009. The assessment was completed at an income of Rs.9,70,934/- in case of Shri Sudhir Kumar Agarwal and Rs.7,48,324/- in case of Smt Bina Agarwal. Notice under section 148 of the Act was issued after recording reasons that Gupta & Gupta, New Delhi has given accommodation entry of Rs.7,19,244/- on 09.08.2001 to the assessee vide cheques/DD no.506288 of Jai Laxmi Co-operative Bank, Fatehpur. In case of Smt. Bina Agarwal, the accommodation entry was of Rs.6,19,349/- vide cheques/DD No.255551 of Jai Laxmi Co-operative Bank, Fatehpur. The A.O. accepted the Long Term Capital Gain of Rs.7,02,415/- on sale of shares through broker M/s. JRD Stock Brokers Pvt. Ltd. of 3500 shares

of M/s. Goyal Achal Samapati VN Limited @ Rs.200/- on 02.05.2001 which was purchased @ Rs.4.65 on 03.04.2000 through broker M/s. Online Securities (P) Ltd. The CIT, after considering assessee's submissions, found that the A.O. has not carried out any investigation during the assessment proceedings and completed the assessment simply by accepting the claim of LTCG disclosed by the assessee in his return of income. The A.O. did not apply his mind correctly while framing the assessment order, thereby resulting in an order which is erroneous in so far it is prejudicial to the interest of Revenue. The CIT(A) set aside the Assessment Order and directed the A.O. to make assessment afresh after providing opportunity of hearing to the assessee.

5. Ld Authorised Representative drew our attention on various pages of Paper Book i.e. page nos 27, 28, 16, 17, 18, 40, 41, 42, 25, 15, 30, and others. The ld. Authorised Representative submitted that the A.O. invoked section 148 of the Act of which copy have been placed at page no.17 of the Paper Book. M/s. Gupta & Gupta, New Delhi has been creating bogus Stock Brokers Agency and is involved in giving accommodation entries in the shape of share money, share application money, long term capital gain and short term capital gain etc. The A.O. has reason to believe that income to the tune of Rs.7,19,244/- has been escaped assessment. In response to the notice, the assessee furnished reply which is appearing at page no.18 of assessee's Paper Book. The assessee vide letter dated 20.05.2009 stated

that the assessee did not receive any cheque/DD from M/s. Gupta & Gupta as per the cheques number indicated in the notice. However, it was confirmed by the assessee that he has sold shares for Rs.7,19,244/- and the same has been shown in the books of accounts and computation of total income originally filed by the assessee. The said original return filed may be treated as return filed in response to notice under section 148 of the Act. The assessee has shown LTCG on sale of said shares.

6. The Id. Authorised Representative demonstrated that the assessee has shown LTCG of Rs.7,02,615/- on sale of shares. Copy of computation has been placed at page no.28 of assessee's Paper Book. Id. Authorised Representative further submitted the assessee via letter dated 11.12.2009, of which copy has been placed at page no.42 & 43 of the assessee's Paper Book where the assessee submitted the explanation in response to notice under section 142(1) of the Act in paragraph no.3 which is reproduced as under :-

“3. It is noticed that a sum of Rs.7,19,244/- were received by you through cheque/DD No.506288 of Jai Laxmi Co-operative Bank, Fatehpur, Delhi on 09.08.2001. You are required to explain the nature of receipt including confirmation from the persons from whom the same was received including the bank account in which the proceeds of this instrument were credited.”

7. The Id. Authorised Representative further submitted that the assessee has furnished affidavit before the A.O. at the time of original assessment proceeding of

which copy has been placed at page no.15 of assessee's Paper Book. Contents of the affidavit pointed out by the Ld. Authorised Representative are reproduced as under:-

"1. I had not received any draft bearing serial no.505082 dated 04.08.2001 from M/s Gupta & Gupta issued from Jai Laxmi Co-operative Bank, Delhi of Rs.519454.00.

2. I had also not received any draft of Rs.719244.00 bearing serial no.506288 dated 09.08.2001 issued from Jai Laxsmi Co-operative Bank, Delhi from M./s Gupta & Gupta but the amount of Rs.719249.00 is the sale proceeds of Shares sold by me through JRD Stock Brokers Pvt. Ltd. and received Rs.717450.00 vide draft no.251477 from State Bank of Indore, Chandani Chowk, Delhi after deducting of draft charges Rs.1794.00 and deposit in my saving bank account no.01190179152 and also shown as computation in capital given in my return for A.Y. 2002-2003.

3. I do not know any entity in the name of M/s. Gupta & Gupta and I heard this name for the first time in your office.

4. I do not have any bank account other than State Bank of India Account No.01190179152 at Shikohabad or any where else."

8. The Id. Authorised Representative further submitted that the A.O. has considered all the submissions made by the assessee. He has also considered all the available material before passing the Assessment Order. The Ld. Authorised Representative pointed out the relevant observations and findings of the A.O referring page number two of the assessment order.

9. The Id. Departmental Representative, on the other hand, relied upon the order of CIT and submitted that the A.O., without examining the complete facts of the case and passing the Assessment Order, he simply dropped the proceedings under section 148 of the Act. Ld. Departmental Representative submitted that therefore, order of A.O. is prejudicial to the interest of Revenue and CIT has rightly invoked section 263 of the Act.

10. We have heard the Id. Representatives of the parties and records perused. The issue under consideration is pertaining to section 263 of Income Tax, 1961.

The said section reads as under:-

“263. (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.

[Explanation.—For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,—

(a) an order passed [on or before or after the 1st day of June, 1988] by the Assessing Officer shall include—

(i) an order of assessment made by the Assistant Commissioner [or Deputy Commissioner] or the Income-tax Officer on the basis of the directions issued by the [Joint] Commissioner under section 144A;

(ii) an order made by the [Joint] Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions

issued by the Board or by the Chief Commissioner or Director General or Commissioner authorised by the Board in this behalf under section 120;

(b) “record” [shall include and shall be deemed always to have included] all records relating to any proceeding under this Act available at the time of examination by the Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal [filed on or before or after the 1st day of June, 1988], the powers of the Commissioner under this sub-section shall extend [and shall be deemed always to have extended] to such matters as had not been considered and decided in such appeal.]

[(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.]

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, [National Tax Tribunal,] the High Court or the Supreme Court.

Explanation.—In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded.”

10.1 From a reading of sub-section (1) of section 263, it is clear that the power of suo motu revision can be exercised by the Commissioner only if, on examination of the records of any proceedings under this Act, he considers that any order passed therein by the Income-tax Officer is “erroneous in so far as it is prejudicial to the interests of the Revenue”. It is not an arbitrary or unchartered power. It can be exercised only on fulfillment of the requirements laid down in sub-section (1).

The consideration of the Commissioner as to whether an order is erroneous in so far as it is prejudicial to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. The power of suo motu revision under sub-section (1) is in the nature of supervisory jurisdiction and the same can be exercised only if the circumstances specified therein exist. Two circumstances must exist to enable the Commissioner to exercise power of revision under this subsection, viz.(1)the order is erroneous; (2) by virtue of the order being erroneous prejudice has been caused to the interests of the Revenue. It has, therefore, to be considered firstly as to when an order can be said to be erroneous. We find that the expressions “erroneous”, “erroneous assessment” and “erroneous judgment” have been defined in Black's Law Dictionary. According to the definition, “erroneous” means “involving error; deviating from the law”. “Erroneous assessment” refers to an assessment that deviates from the law and is, therefore, invalid, and is defect that is jurisdictional in its nature, similarly, “erroneous judgment” means “one rendered according to course and practice of court, but contrary to law, upon mistaken view of law, or upon erroneous application of legal principles”.

10.2 An order cannot be termed as erroneous unless it is not in accordance with law. If an Income tax Officer acting in accordance with law makes an assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the AO should have made thorough enquiry and order should have been written more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order, unless the decision is held to be erroneous. Cases may be visualised where the Income-tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some changes. The Commissioner, on perusal of the records, may be of the different opinion than the opinion of the Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and express different opinion. It is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at a conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. It may be said in such a case that in the opinion of the Commissioner the order in question is prejudicial to the interests of the Revenue. But that by itself will not be enough to vest the Commissioner with the power of suo motu revision because the first requirement, viz., that the order is erroneous, is absent.

10.3 In the light of above discussion, if we consider the facts under consideration, we find that at the time of original assessment, the A.O. has made the necessary enquiries and called for the necessary explanation and material from the assessee. The Id. Authorised Representative has demonstrated as discussed in submission of the Id. Authorised Representative above that the A.O. has made the assessment after considering all relevant records and materials. The relevant observations and finding of the A.O noted from the order of the A.O. are reproduced as below:-

(Page No.2)

“2.1 In response vide written submission dated 18.12.2009, it was explained that the relevant accounting period assessee had received a demand draft bearing number 251477 dated 09.08.2001 for Rs.7,17,450/- only which represented the sale proceeds of shares sold by him in the said period. The details of shares sold were also filed. It was also the submission of assessee that a long term capital gain worked out on the sales of shares amounting to Rs.7,02,615/- was duly disclosed in the return of income for the assessment year 2002-03 which was filed within the time permitted u/s 139(1) of the Act. Regarding the receipt of demand draft no.506288 amounting to Rs.7,19,244/- referred to in the reasons recorded for initiation for proceedings u/s 147, it was explained that no such demand draft was received by him. It was also submitted that the name of entity named as Gupta & Gupta from the account of which stated to be maintained with Jai Laxmi Co-operative Bank, Fateahpur, Delhi above draft was issued was not heard by him before the same came for discussion in the course of present re-assessment proceedings. It was categorically submitted that he did not know any such person and therefore the question of receipt of demand draft from it does not merit any consideration. The assessee filed an affidavit dated 23.12.2009 wherein these facts were deposed in unequivocal terms. In the affidavit it was also deposed that the assessee indemnify the Government of India from any loss caused to revenue if the submissions made by him were found to be incorrect.”

3. *After considering the facts available on records the assessment is completed at an income of Rs.9,70,934/-. Issue notice of demand and Challan.”*

10.4 On perusal of the A.O.'s order and material on record, we find that the CIT invoked section 263 of the Act because the CIT did not feel satisfy with the conclusion made by the A.O not on account of that the order of the A.O. was erroneous. The CIT invoked section 263 of the Act simply on account that the A.O. did not carry out the investigation of the case on the line of investigation as CIT wants. The CIT has wrongly observed that the A.O. has not applied his mind particularly under the circumstances and facts which have demonstrated by the Ld. Authorised Representative before us that the A.O. has taken action under section 148 of the Act, reasons were recorded necessary explanation was asked from the assessee before completing the original assessment. The assessee furnished all relevant information. The assessee has also filed affidavit in support of his contention before the A.O. at the time of assessment. The A.O. has also recorded all these facts in his order as evident from the relevant portion of the A.O.'s order reproduced above. The A.O. before coming to the conclusion considered all the relevant facts. Under the facts and circumstances, we are of the considered view that the order of the A.O. is not erroneous. The CIT has wrongly invoked section 263 of the act. Therefore, order of the CIT is quashed.

11 The learned Representatives of the parties submitted that facts of both the cases are similar and their arguments made in the case of Shri Sudhir Kumar Agarwal, ITA No.233/Agr/2012 are also similar in case of Smt. Bina Agarwal, ITA No.234/Agr/2012 and be considered accordingly. There is no dispute regarding the facts that facts of the case of Shri Sudhir Kumar Agarwal and facts of the case of Smt. Bina Agarwal are similar. Since the facts of the case in Smt. Bina Agarwal are identical to the case of Shri Sudhir Kumar Agarwal, therefore, in the light of above discussion made in the case of Shri Sudhir Kumar Agarwal, the order of the CIT in the case of Smt. Bina Agarwal is also quashed.

12. In the result, both the appeals filed by the assesseees are allowed.

(Order pronounced in the open Court)

Sd/-
(BHAVNESH SAINI)
Judicial Member

Sd/-
(A.L. GEHLOT)
Accountant Member

PBN/*

Copy of the order forwarded to:

1. Appellant
2. Respondent
3. CIT (Appeals) concerned
4. CIT concerned
5. D.R., ITAT, Agra Bench, Agra
6. Guard File.

By Order
Sr. Private Secretary
Income-tax Appellate Tribunal, Agra
True Copy