IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A" NEW DELHI

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

I.T.As. No.4736/DEL/2017
Assessment Years: 2009-2010

M/s. Anant Raj Ltd., E-2, ARA Centre, Jhandelwalan Extn., New Delhi.	vs.	Deputy Commissioner of Income Tax, Circle-2(2), New Delhi.
TAN/PAN: AABCA3972B		
(Appellant)		(Respondent)

ITAs No.5237 & 5238/DEL/2017
Assessment Years 2009-10 & 2012-13

Asst. Commissioner of Income Tax, Circle-2(2), New Delhi.	vs.	M/s. Anant Raj Ltd., E-2, ARA Centre, Jhandelwalan Extn., New Delhi.
TAN/PAN: AABCA3972B		
(Appellant)		(Respondent)

Appellant by:	Shri Sanjay Goel, CIT-DR		
Respondent by:	Shri Vinod Kumar Bindal, CA; Ms. Sweety Kothari CA; and Rinky Sharma ITP		
Date of hearing:	28	10	2020
Date of pronouncement:	27	11	2020

O R D E R

PER AMIT SHUKLA, JM:

The aforesaid appeals have been filed by the Revenue as well as by the Assessee against the impugned order dated 05.05.2017 for the quantum of assessment passed u/s.148/143(3) for the Assessment Year 2009-10 and; appeal for the Assessment Year 2012-13 has been filed by the

Revenue against impugned order dated 08.05.2017 for the quantum of assessment passed u/s.143(3), passed by Ld. Commissioner of Income Tax (Appeals)-I, New Delhi.

2. We will first take up the Revenue's appeal in ITA No.5237/Del/2017 for the Assessment Year 2009-10.

- In the first ground, the Department has challenged the quashing of the assessment order passed by the AO u/s 147 /143(3) of the Act where the CIT (A) held that there was a change of opinion as all the facts were on record and had been examined by the AO while passing the original assessment order.
- In the second ground, the Department has challenged the deletion of an addition of Rs. 98,60,63,613/- made by the AO by holding the claimed long term capital gain arising on sale of a property being 2 contiguous plots of land and building thereon as short term capital gain u/s 50 of the Act.
- In the third ground, the Department has challenged the deletion of disallowance of depreciation of Rs. 2,42,48,977/- made by the AO as the WDV of the relevant block of assets which in his opinion had become nil in terms of the provision of the section 50 of the Act.

3. The facts in brief are that the assessee filed its original return of income for the AY 2009-10 on 29/09/2009. The return of income was subject to scrutiny and income-tax assessment was completed u/s 143(3) on 28/12/2011 at the

returned income. Thereafter, a notice 148 of the Act was issued on 30/03/2015 for reopening the assessment on the reason that the assessee had incorrectly declared LTCG instead of STCG and claimed incorrect depreciation on the block of building. AO has framed his reason to believe on the basis of the declaration of the said property by the assessee in the block of assets during the relevant period though in the earlier years the same had been declared separately in the returns of income where no depreciation at all on the said property was claimed.

4. The assessee company had sold one built up property built on the two contiguous plots of land falling in two adjacent villages to M/s International Institute of Planning and Management (P) Ltd. **(IIPM)** which was later known as Centre for Vocational and Entrepreneurship **(COVS)** vide two sale deeds dated **24/09/2008**. The details of property were as under: -

i. Plot of land with Motel built thereon in Khasra nos. 2, 3, 4, 5, Village Shahurpur, Tehsil Main Chhatarpur Road, District Hauz Khas, New Delhi sold for **Rs. 130 Crores**;
ii. Plot of land in Khasra no. 584/2, 585, Village Satbari, Tehsil Hauz Khas, New Delhi sold for Rs. **21 Crores.**

5. The said property was purchased by the assessee in the F.Y. 2005-06. Admittedly, as per the records the assessee never claimed any depreciation on the said property as the

same was never used for its business but was let out from the day one to the purchaser IIPM itself. Accordingly, the assessee declared LTCG of Rs. 143,85,67,404/- on sale of the said property after taking benefit of the indexation as per law in its original return of income.

6. IIPM paid Rs. 21 crores against the sale deed for the property at Plot of land in Khasra no. 584/2, 585, Village Satbari, Tehsil Hauz Khas, New Delhi; and paid Rs. 12 Crores out of Rs. 130 Crores against the sale deed for the Plot of land with Motel built thereon in Khasra nos. 2, 3, 4, 5, Village Shahurpur, Tehsil Main Chhatarpur Road, District Hauz Khas, New Delhi; and the balance payment of Rs. 118 crores by way of postdated cheques. Possession of the property was also handed over to the buyer IIPM alongwith the sale deeds on 24/09/2008 as such, because the IIPM was already in possession of the property as tenant. In order to secure the postdated cheques, a mortgage deed dated 24/09/2008 was also executed. However, the purchaser IIPM was unable to meet the financial obligation of those postdated cheques and therefore, a supplementary mortgage deed dated 28/08/2009 was executed and the due payment was rescheduled. But again, IIPM failed to honour its obligations even as per the supplementary mortgage deed.

7. Due to failure of IIPM to make the payments, the assessee filed a suit before the Hon'ble Delhi High Court,

which was referred for mediation and conciliation by the Hon'ble High Court. After deliberations in the mediation proceedings, a settlement deed dated 30/05/2015 was executed between the assessee and IIPM. In view of the settlement deed, the Hon'ble Delhi High court passed the decree vides its order dated 05/06/2015 cancelling the aforementioned sale deeds. Cancellation deeds giving effect to the said cancellation of those sale were also executed on 06/06/2015 between the assessee and IIPM.

8. The AO recorded his reasons for reopening the assessment which have been incorporated on page nos. 1-3 of the assessment order. The AO in his reasons has stated that, a perusal of the records shows that the asset on which the assessee declared LTCG during AY 2009-10 formed part of the block of assets on which depreciation had been claimed. A perusal of the record of AY 2009-10 shows that the treatment of sale of one asset was not made as per the provision of section 50 of Income-tax Act as per which excess between full value of consideration and WDV of the block of asset shall be deemed to be capital gain arising from the transfer of a short-term capital asset. The full value of consideration of asset sold was Rs. 151 Crores, whereas the total value of the block of assets after adjustment of the additions and deletions was Rs.46,29,29,064/- and therefore, the value of the entire block of building shown shall be reduced to 'Nil'. The AO also stated that it is seen from the

assessment records that the assessee was claiming depreciation on the block of asset which should have been reduced to 'NIL' as per the provisions of the Act. Thus, as per him the assessee failed to disclose the material facts truly and fully as to the fact that the asset on which long term capital gain was declared in AY 2009-10 was included in the block of assets on which depreciation was claimed and thus, the case was reopened by the AO by issuing notice u/s 148 of the Act by recording reasons to believe that income has escaped assessment as short term capital gain taxable @ 30% was taxed as Long term capital gain @ 20% and excess depreciation was claimed.

9. The assessee submitted a letter dated 20/04/2015 to treat the original return of income as return of income filed in response to the notice u/s 148 of the Act.

10. However, during the course of reassessment proceedings when the sale of above property through 2 separate sale deeds as above stood cancelled by the Hon'ble Delhi High Court's order dated 05/06/2015, the assessee revised its return of income filed in response to the notice u/s 148 of the Act and filed with it a letter dated 29/02/2016. The assessee explained the sequence of events and submitted all the documents to explain its case in the said letter which has been placed at page nos. 14-20 of the PB. The assessee explained that there arose no capital gain at all to the

assessee in the year under consideration as the sale deeds have been cancelled by a decree order of the Hon'ble Delhi High Court. Since the assessee had already declared long term capital gain on the said sale in its original return of income, the same was to be excluded as it was not at all chargeable to income-tax.

11. The assessing officer held the return of income filed with a letter dated 29/02/2016 as null and void by holding that the assessee is not entitled to revise the return of income filed in response to the notice u/s 148 of the Act.

12. The assessing officer held that the depreciation was charged on the property sold. The said asset was included in the block of assets on which depreciation was charged and treatment of sale of the said asset was not made as per provision of Section 50 of the Act. Since depreciation was charged on the asset sold and the sale consideration was more than the WDV of the block of assets, the excess was held by him as a short-term capital gain chargeable u/s 50 of the Act. Further, the assessing officer held that since the sale consideration was more than the WDV of the block of assets, the WDV of the block was reduced to 'nil' and therefore, no depreciation was allowable on the same, whereas the assessee had claimed depreciation of Rs. 2,42,48,997/- on this block of assets and therefore, the AO disallowed the said depreciation also.

13. As regards the reopening, the CIT(A) held that on going through the computation of assessable income for the AY 2006-07 to 2009-10 and other record with the AO, it was seen that the said property consisting of plots of land and building had been given on rent to IIPM after its purchase by the assessee in the year 2005. The assessee had also declared rental income from the said property as under:

A.Y.	Rental Income from the said property:
2006-07	Rs. 1,65,00,000/-
2007-08	Rs. 3,72,52,000/-
2008-09	Rs. 2,92,50,000/-
2009-10	Rs. 2,60,00,000/-

14. The CIT(A) further stated that in the depreciation chart, the value of said property was shown at Rs. 6,10,00,000/- which was the purchase value of the said property and the same was reflected in the balance sheet. This shows that no depreciation at all was charged on the said property in the periods relevant to the AY 2006-07, 2007-08, 2008-09 and 2009-10.

15. He further observed that, all the said information was available and verified by the assessing officer during the original assessment proceedings from his record. No new

information was received by the department for reopening the assessment and reopening was done merely on the basis of change of opinion of the AO on same set of facts which is not permissible in the law. Therefore, the CIT(A) relying on the judgment of the Hon'ble Apex Court in the case of **CIT Vs Kelvinator India Ltd. 320 ITR 560** held that reopening is invalid and quashed the same.

16. As regards the revised return, the CIT(A) held that the section 147 has been incorporated in the Act for taxing the income which has escaped the assessment and not for giving benefit to an assessee. Therefore, the claim of the assessee that the sale of the said property be treated as null and void and necessary income-tax paid on the declared capital gain on the said property and so assessed should be refunded cannot be accepted under reopening proceedings. By relying upon the judgment of the Apex court in Sun Engineering Works (P) Ltd. 198 ITR 297, the CIT(A) held that the benefit claimed by the assessee through the revised return is not maintainable.

17. As regards the depreciation, the CIT(A) held that the property being the plots of land and building which was the subject matter of sale and transfer was included in the block of assets but it was neither used for purpose of business nor any depreciation at all was claimed on it under the Act. Rental income received from the said property had also been

offered in the returns of income for taxation. Further, the value of the said property remained the same at Rs. 6,10,00,000/- since its purchase and the same was reflected year after year in the balance sheets, ledger accounts and depreciation charts. Since, no depreciation had been claimed on the said property, there is no question of invoking section 50 of the Act on sale of the said property comprising plots of land and building built thereon. Thus, the CIT(A) held that the assessee was justified in treating the capital gain arising on sale of the said property as long term capital gain by relying on the decision in the case of **Divine Construction Company Vs ACIT (2011) 138 TTJ 72 (ITAT-Mum)** where the ITAT held that if depreciation is not claimed then sale of such assets cannot be computed as per the provisions of section 50 of the Act.

18. The learned CIT DR vehemently presented the case of the revenue and submitted that the assessee did not disclose fully and truly all the material facts necessary for that assessment and therefore, the reopening action was valid. The CIT DR placed reliance on the following decisions:

a) Multiscreen Media (P.) Ltd. vs. Union of India, [2010] 324 ITR 54 (Bombay) – High Court of Bombay

b) New Delhi Television Ltd. vs. Deputy Commissioner of Income-tax, [2017] 84 taxmann.com 136 (Delhi), High Court of Delhi

c) Consolidated Photo & Finvest Ltd. vs. Assistant Commissioner of Income-tax, [2006] 151 Taxman 41 (Delhi), High Court of Delhi

d) Jayant Security & Finance Ltd. vs Assistant Commissioner of Income-tax, [2018] 91 taxmann.com 181 (Gujarat), High Court of Gujarat

e) Multi Commodity Exchange of India Ltd. vs. Deputy Commissioner of Income tax, [2018] 91 taxmann.com 265 (Bombay), High Court of Bombay

f) Aradhna Estate (P.) Ltd. vs. Deputy Commissioner of Income-tax, [2018] 91 taxmann.com 119 (Gujarat), High Court of Gujarat

g) Nickunj Eximp Enterprises (P.) Ltd. vs. Assistant Commissioner of Income-tax, [2014] 49 taxmann.com 10 (Bombay), High Court of Bombay

h) Siemens Information Systems Ltd. vs. Assistant Commissioner of Income-tax, [2012] 20 taxmann.com 666 (Bom.), High Court of Bombay

i) Sumeru Soft (P.) Ltd. vs. Income Tax Officer, [2017] 82 taxmann.com 5 (Chennai - Trib.), in the ITAT Chennai Bench 'A'

19. The CIT DR submitted that the principle of a mere change of opinion cannot be basis for reopening completed assessment, would be applicable only to the situation where the Assessing Officer had applied his mind and had taken a conscious decision on a particular matter in the issue. It

would have no application where the order of the assessment does not address itself to the aspect which was the basis for reopening of the assessment.

20. The ld. AR on behalf of the assessee, Mr. Bindal submitted that the assessment of the AY 2009-10 was completed u/s 143(3) vide order dated 29/12/2011. The assessment was reopened on 30/03/2015, i.e., beyond the period of four years from the end of the relevant assessment year. As per the *proviso* to section 147 of the Act, the assessment can be reopened after four years from the end of the relevant assessment year in case of assessment completed u/s 143(3) of the Act only if the income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment.

21. In this case, the assessee sold the property during the relevant previous year and which undisputedly was held by the assessee for more than three years. Therefore, the assessee declared the gain arising on sale of the said property as long term capital gain after taking indexation benefit and due applicable income-tax thereon was paid. The said property was let out to IIPM, since the date it was acquired and rental income was duly recorded in the books of account as well as offered for taxation in the returns of income of the 4 assessment years. Since the said property was let out, no

depreciation was claimed on the same under the Income-tax Act since the date of its acquisition. The value of the said property remained the same in the books and the depreciation chart. Details of the assets and depreciation claimed thereon are mentioned in the return of income. Thus, all the facts regarding rental income, no depreciation thereon and the long-term capital gain were properly declared in the returns of income and were mentioned in the computation of income and depreciation chart attached with the tax audit report. No discrepancy was pointed out by the assessing officer in the information filed by the assessee in its return of income for all the assessment years since the property was acquired and which were part of the assessment record of the revenue.

22. The assessee submitted details of rental income to show that the rent was received on the said property and also submitted the depreciation chart prepared as per the Income-tax Rules and the relevant portion of the returns of income, showing details of depreciation to show that no depreciation was claimed or allowed on the said property and the value of the said property remained the same at Rs. 6,10,00,000/- in the depreciation chart as per the Income-tax Rules. These documents clearly show that the assessee had never claimed depreciation on the said property till the date of its sale and the property was held for more than three years which has not also been disputed by the revenue. Thus, the assessee

had truly and fully disclosed the particulars regarding sale of the said property and depreciation thereon. Even the CIT(A) also verified all these documents himself and came to the conclusion that no depreciation was claimed on the said property.

23. The AR also further submitted that no new information came on the record of the assessing officer. He referred to the reasons recorded for reopening and pointed out that the assessing officer has referred to the record and computation of the AY 2009-10 for forming its opinion regarding escapement of income. The said record and computation of income was already on the record of the assessing officer while passing the assessment order u/s 143(3) of the Act. Thus, it was clearly a change of opinion on the same facts which were already on the record of the assessing officer earlier and therefore the reopening of assessment was invalid as has been held by the Apex Court in the case of **CIT Vs Kelvinator India Ltd. 320 ITR 560**.

24. He also submitted that it is not necessary that the assessing officer should mention each and everything verified by him in the assessment order. What the AO has verified has to be seen from the entire assessment record. He further submitted that in the cases relied upon by the DR, some new information or fresh material had come to the notice of the assessing officer or there was no full and true disclosure by

the assessee. However, in the case of the assessee there was full and true disclosure by the assessee and no new information came on the record of the assessing officer and thus, these cases are not applicable to the facts of the case. Thus, he argued that the reopening of the assessment is invalid and should be quashed.

25. We have heard the rival submissions and have perused the paper book, written submissions and synopsis placed on record. The assessee filed its original return of income on 29/09/2009 for the AY 2009-10 which was subject to assessment u/s 143(3) of the Act vide order dated 29/12/2011. The said assessment was reopened by issuing a notice u/s 148 of the Act on 30/03/2015, i.e., beyond the period of four years from the end of the relevant assessment year. Ostensibly, as per *proviso* to the section 147 of the Act, the assessment can be reopened after four years in case of the assessment completed u/s 143(3) of the Act when there was a failure on the part of the assessee to fully and truly disclose the particulars of income.

26. On perusal of the computation of assessable income for the AY 2009-10 placed at page nos. 1-4 of the paper book, it is seen that the assessee had declared long term capital gain of Rs. 143,85,67,404/- on sale of the said property. On perusal of the details of rental income from AY 2006-07 to 2009-10 placed at page nos. 242, 250, 258, 262 of the paper

book, it is observed that the rental income from the said property was received by the assessee. On perusal of the returns of income filed with the department mentioning details of the depreciation claimed and depreciation chart prepared under Rule 5 of the Income-tax Rules for the AYs 2006-07 to 2009-10 placed at pages 243-244, 246, 251-252, 254, 259-260, 261, 264-265 of the PB, it was observed that no depreciation was claimed on the said property.

27. Thus, the assessee has also placed on record all these evidences to show that the information submitted by it were correct, property was held for a period of more than three years, rent was received on the said property and no depreciation at all was claimed on the said property under the Income-tax Act and that the value of the said property remained the same at Rs. 6,10,00,000/- in the Asset chart submitted as per the Income-tax Rules in all the returns of income. All these documents were part of the returns of income and tax audit report filed before the Revenue. Thus, these evidences clearly show that the assessee had made a true and full disclosure of the facts regarding the sale of the asset and depreciation thereon and which were very much part of the assessment records and had also been examined by the assessing officer in the original assessment proceedings.

28. Neither the assessing officer in the assessment order nor the DR during the hearing pointed out any discrepancy in the above mentioned information submitted by the assessee to the Revenue authorities nor they brought any evidence on record to show that the said information was incorrect or to show that depreciation was actually allowed under the Income-tax Act on the said property but incorrectly shown by the assessee.

29. Further, on perusal of the reasons recorded, the contention of the assessee has been found correct. The assessing officer has referred to the record and return of income filed for the AY 2009-10 for recording his reasons which were very much available with the assessing officer at the time of framing the assessment u/s 143(3) of the Act. The AO has not referred to any fresh material or new information in the assessment order. Even the learned CIT DR did not point out to any new material which was there to record the reasons for escapement of income.

30. It is a settled law that the assessment cannot be reopened on the basis of mere change of opinion on the same set of facts on record. The Ld. DR relied on various case laws as referred above. On perusal of the same, it is seen that in those cases either new material had come to the notice of the assessing officer or there was some incorrect disclosure by the assessee in his return of income. Thus, the said cases are

clearly distinguishable from the facts of the assessee and cannot be applied in this case.

31. We agree with the contention of the assessee that the assessment order cannot contain each and every fact verified by the assessing officer. What has been verified by him forms part of the assessment record. All the information regarding long term capital gain, depreciation, sale of asset was part of the return of income as well as the assessment record which only was later on referred to by the assessing officer to record reasons of escapement of income. Thus, the said facts were on the record of the assessing officer and verified by him. Further, the CIT(A) also verified the said information as has been mentioned in its order. Even, we have verified the said information from the documents placed in the paper book and have come to a conclusion that no depreciation was ever claimed or allowed on the land of building under consideration. Undisputedly, the said property was held by the assessee for more than three years as it was receiving the rent on the said property w.e.f. 1/5/2005 and no depreciation, was claimed thereon. Thus, there was true and full disclosure of the facts and no new information came to the knowledge of the assessing officer. On these facts and material already on record, the reopening of the assessment was invalid and the assessment so made on the basis of an invalid notice was correctly quashed by the CIT(A). Thus, ground no. 1 of the department is hereby dismissed.

32. Since the reopening of the assessment has been held invalid and no reassessment can be made, ground nos. 2 and 3 become infructuous. However, on merits, Section 50 is applicable only on the block of assets which are used for business and on which depreciation has been claimed under the Income-tax Act / Rules. As mentioned above, the documentary evidence clearly shows that the property in question was let out since the date of its acquisition and was never used for the purpose of business by the assessee. On perusal of the returns of income filed for the AY 2006-07 to 2009-10 and the depreciation charts submitted under Rule 5 of the Income-tax Rules, it is clearly evident that no depreciation was ever claimed on the said property since the date of its acquisition. Since no depreciation was claimed by the assessee and allowed by the department on this property, the provisions of section 50 cannot be invoked in this case. Hence, there would not be any change in the value of the block of assets as shown by the assessee as on 31/03/2009. Hence, the action of the assessing officer to assess the said surplus as Short-Term Capital Gain against the law and otherwise is not sustainable and the assessee is entitled to depreciation claimed on value of the block of assets as declared and the disallowance of depreciation is hereby deleted because this property was never part of the said block of assets eligible for depreciation. Thus, the ground nos. 2

and 3 of the revenue are dismissed. Accordingly, the appeal of the revenue is dismissed.

Appeal No. 5237/D/2017 for the AY 2009-10

33. This is appeal is consequential to disallow the depreciation claimed on the block of assets by following the assessment order for the AY 2009-10. Since we have dismissed the appeal of the revenue for the said assessment year as above, by following the order in the said appeal, this appeal of the revenue is also dismissed.

Assessee's appeal no. 4736/Del/2017

34. Now we will take up assessee's appeal. The first four grounds of appeal were to challenge the action of the assessing officer in not considering the revised return of income filed by the assessee on 29/02/2016 excluding the amount of long term capital gain on sale of the property being the plots of land and building for which the sale was cancelled by an order dated 05/06/2015 of the Hon'ble Delhi High Court.

35. As discussed above, the assessee filed a revised return of income during the course of assessment proceedings initiated by the AO u/s 148 of the Act but which was treated by the AO as invalid by holding that the assessee is not entitled to revise the return of income filed in response to the notice issued u/s 148 of the Act. The CIT(A) held that not only the said notice

issued u/s 148 of the Act was invalid but also held that the return of income filed in response to the notice issued u/s 148 of the Act cannot be revised by relying upon the **CIT v. Sun Engg. Works (P.) Ltd. [1992] 198 ITR 297 (SC)** where it was held that the section 147 of the Act has been incorporated for the benefit of the revenue and not of the assessee.

36. The CIT DR placed reliance on the following judgments in support of his contention that the assessee cannot be permitted to convert the reassessment proceedings as his appeal or revision to seek relief in respect of the items earlier rejected or claim relief in respect of items not claimed in the original assessment proceedings unless relatable to the escaped income and therefore cannot re-agitate the concluded matters:

a) Sun Engineering Works 198 ITR 297 (SC)

b) K.Sudhakar S. Shanbhag Vs ITO (2000) 241 ITR 865 (Bom) that t.

c) Metro Ispat (P) Ltd. in ITA no. 2553/Mum/2010 -

37. We have considered the submissions and arguments made by the assessee and the CIT DR. Since we have already held that the reopening of the assessment u/s 147 of the Act for this assessment year as invalid and have confirmed the cancellation of the reassessment order, the return filed cannot be considered as revised return as the entire

proceedings are *void-ab-initio* and therefore, grounds of appeal raised on this score are dismissed.

38. Grounds no. 5 and 6 are general in nature and do not call for any adjudication.

39. The assessee raised two alternative additional ground being ground no. 7 and 8 vide letter dated 19/03/2020 which read as under:

> "7. *Alternatively, the authorities below erred in law and on facts in not considering that the cancellation of sale deed by the consent decree duly confirmed by the Hon'ble jurisdictional Delhi High Court, tantamount to a mistake apparent on record which must have been rectified u/s 154 of the Act by following the judgment and for which necessary directions must be issued:*
>
> *a) M. K. Venkatachalam, ITO vs Bombay Dyeing & Mfg. Co. Ltd [1958] 34 ITR 143 (SC).*
>
> *b) L.HridayNarain vs ITO [1970] 78 ITR 26 (SC)*
>
> *c) CIT vs K. N. Oil Industries [1983] 142 ITR 13 (MP)*
>
> *d) NavNirman(P) Ltd vs CIT [1988] 174 ITR 574 (MP)*
>
> *e) KilKotagiri Tea & Coffee Estates Co Ltd vs ITAT [1988] 174 ITR 579 (Ker)*
>
> *f) CIT vs ArunaLuthra [2001] 252 ITR 76 (Punj. &Har.)*
>
> *g) CIT vs Ram Lal Babu Lal [1998] 148 CTR (Punj. &Har.) 643*

h) Omega Sports & Radio Works vs CIT [1982] 134 ITR 28 (All.)

i) Gammon India Ltd vs CIT [1995] 214 ITR 50 (Bom)

j) Maharana Mills (P) Ltd vs ITO [1959] 36 ITR 350 (SC)

k) Addl. CIT vs Kanta Behan [1983] 140 ITR 187 (Delhi)

l) Rastriya Ispat Nigam Ltd vs ACIT [2016] 74 taxmann.com 112 (AP)

m) ACIT vs Hughes Services (FE) Pte Ltd [2005] 93 ITD 77 (Delhi)(TM)

8. Further, the learned Assessing Officer also erred in law and on facts in ignoring the fact that the Revenue can only charge tax as per law as has been held by the Hon'ble Supreme Court of India in the case of CIT vs Shelly Products (2003) 261 ITR 367 (SC) and NTPC Ltd vs CIT 229 ITR 383 (SC)."

Admission of additional grounds

40. The Ld. AR on behalf of the assessee submitted that the additional grounds are legal issue which goes to the very root of the taxability of LTCG in wake of decree passed by the Hon'ble Delhi High Court and should be admitted and these grounds do not involve any fresh investigation into facts are arising out of facts already on record. The assessee also submitted that grounds of appeal on a matter of law can be raised any time and even for the first time before the Hon'ble

ITAT. The assessee placed reliance on **NTPC Vs CIT (1998) 229 ITR 383 (SC)** and various other judgments.

41. The CIT DR objected vehemently against the admission of additional ground.

42. We have perused the material placed on record qua the additional grounds raised. Since this is purely a legal issue which goes to the very root of taxability of LTCG and whether in light of the judgment of Jurisdictional High Court passed in the assessee's own case tantamount to mistake apparent from record and should be rectified u/s 154 of the Act or otherwise can be allowed, therefore, we are admitting the same for adjudication.

43. The AR of the assessee submitted that the assessee vide letter dated 20/04/2015 requested that the original return filed be treated as filed in response to the notice u/s 148 of the Act. The cancellation deeds cancelling the sale of properties by a consent decree of the Hon'ble Delhi High Court were executed on 06/06/2015, i.e., two months after filing the return of income in response to the notice u/s 148 of the Act. Thus, the sale transaction got cancelled and the assessee intimated the said fact for rectification with a detailed note supported with the relevant evidence to the assessing officer by way of a revised return of income on 29/02/2016 in view of this subsequent event and

repossession of the said property already sold during the relevant period.

44. The AR also submitted that the return of income can be revised u/s 139(5) of the Act only when the assessee discovers omission/wrong statement in the original return. In this case, no omission or wrong statement was discovered in the return of income filed in response to the notice issued u/s 148 of the Act. Thus, the said revised return was not filed u/s 139(5) of the Act but it was filed on the basis of events happened beyond the prescribed time limit u/s 139(5) of the Act and also beyond control of the assessee due to a decree order passed by the Hon'ble Jurisdictional Delhi High Court.

45. The assessee submitted that this revised return filed on the basis of equity, justice and the well settled law that only tax due can be collected as ingrained by the Constitution. The assessee placed its reliance on the judgment of the Hon'ble Supreme Court in **Dalmia Power Ltd [2019] 112 taxmann.com 252 (SC)/[2020] 420 ITR 339 (SC)** wherein it was held that the revised returns filed after the due date due to delay in sanction of scheme by the NCLT has to be accepted by the department and assessments have to be completed thereon. In Dalmia Power (supra), the NCLT order was the occasion to revise return but in the present case, the consent decree of the Hon'ble Jurisdictional Delhi High Court was the reason to revise the return of income. Further, it was

improbable for the assessee in both the circumstances to file the revised return in time as event occasioned the said revision happened later and beyond prescribed limitation period. The Hon'ble Apex Court decided the matter on the basis of demand of justice. Ld. AR also relied on the judgment of the Hon'ble Apex Court in the case of **National Thermal Power Corporation Ltd v CIT (1998) 229 ITR 383 (SC)** holding that if as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, there is no reason why the assessee should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of the item.

46. It is well established law that when a transfer of property becomes null and void for reasons of subsequent events, no capital gains can accrue thereon. In support, reliance was placed on **Vithalbhai P. Patel 236 ITR 1001 (Guj)** and **Anant Chunilal Kate v. ITO [2004] 267 ITR 482 (Bom) followed by Narang Overseas (P.) Ltd 111 ITD 1 (Mumbai) (SB).** Accordingly, he submitted when no capital gain accrues, then no tax is payable thereon.

47. The Ld. AR further submitted that it is the duty and power of this Court to take into consideration all the subsequent events in the interest of justice and placed reliance on undernoted authorities:

(a) MoumitaPoddar v. Indian Oil Corporation Ltd. (2010) 9 SCC 291

(b) KedarNath (2004) 8 SCC 76

(c) Judgment of the Hon'ble Supreme Court in Shipping Corporation of India Ltd vs Machado Brothers &Ors on 25 March, 2004 in CASE NO.: Appeal (civil) 1855-1856 of 2004

d) Pasupuleti Venkateswarlu vs. The Motor & General Traders (1975 1 SCC 770 at para 4)

e) J. M. Biswas vs. N. K. Bhattacharjee & Ors. (2002) (4) SCC 68.

48. Even, the Act itself provides for rectification when there occur changes in the quantum of capital gains in sub-sections 7B, 10A, 11,15&16 of the section 155 in this regard. In support of this contention, reliance was placed on the judgment of **Shah VrajlalMadhavji [1974] 95 ITR 614 (KER.)** holding that the quantum of capital gain can be altered by way of rectification on subsequent change in sale consideration by High Court. Thus, he submitted that, this revised return, in essence, amounted to an application u/s 154 of the Act to correct the mistake apparent on record due to the later judgment of the Hon'ble Jurisdictional Delhi High Court in the case of the assessee cancelling the sale deed executed earlier. In case of the assessee, non-acceptance of the revised return in any manner even as an application u/s 154 of the Act would tantamount to taxing an income which

never accrued/ received. Though the Act has multiple provisions to mitigate hardship and unlawful taxation against an assessee, but the Legislature cannot provide for all possible and peculiar situations and it is mandatory upon the authorities to consider such situations keeping other provisions, equity and justice in consideration.

49. The Ld. AR submitted that the original assessment order u/s 143(3) of the Act was passed on 28/12/2011. Section 154(7) of the Act provides for a rectification within four years from the end of the financial year in which the order u/s 143(3) of the Act was passed which in this case was by 31/03/2016. The assessee filed the letter revising the computation of income on 29/02/2016 with which, the cancellation of the sale deed and consequently, non-accrual of the capital gains was also very well brought to the notice of the AO within the time prescribed by the law. The said letter has to be considered as an application u/s 154 of the Act to give effect to the cancellation of sale deeds of the property resulting into the assessed LTCG as there is no prescribed form of such application.

50. The assessee further submitted that once copies of the cancellation deeds of the sale of the property along with the consent decree of the Hon'ble Jurisdictional Delhi High Court was brought on record which established that the sale transactions were cancelled and capital gains on sale of the

said property which had already been declared in the return of income by the assessee was not taxable at all, the mistake in the assessment order became apparent and glaring. The AO was bound to rectify the said mistake by excluding the amount of capital gain from the taxable income and should have allowed the relief on its own as it is his paramount duty to charge tax per legal provisions. It is trite law that relief to assessee is not dependent upon claim made by the assessee but the authorities are judicially bound to render justice at their own as has been held by the Apex Court in **Anchor Pressings (P.) Ltd. [1986] 161 ITR 159 (SC).** The Hon'ble ITAT, relying on the judgment of Anchor Pressings (Supra) has held in the case of **Container Corporation of India ltd. Vs DCIT (2005) 92 ITD (Delhi)** that if an assessee is entitled to relief on the basis of material on record, it would constitute mistake apparent from record and consequently, such relief cannot be denied merely because the assessee has omitted to claim the same.

51. The assessee also placed its reliance on the judgment of Madras High court in **Dr. Rajah Sir M.A. Muthiah Chettiar 238 ITR 505** wherein a Supreme Court decision was the cause for rectification. **It was held that if allowing an application for rectification would be in accordance with the substantive charging provisions of the Act then such exercise is a permissible exercise of power to rectify the mistake u/s 254(2) of the Act.**

52. The AR also submitted that the Article 265 of the Constitution mandates that no tax can be levied or collected except by an express authority of law, which means that tax collected contrary to law has to be refunded. The purpose of assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. The right of the revenue to receive and collect tax under the said Act is limited to what is properly due and payable as tax. The amounts collected in excess thereof are not to be treated as tax and retained by the State. That amount is required to be refunded to the person from whom or on whose behalf it had been collected. Reliance was placed on the undernoted authorities:

a) The Constitutional Bench decision of 9 Judges of Hon'ble Supreme Court in Mafatlal Industries versus Union of India, (1997) 5 SCC 536 / (2002-TIOL-54-SC-CX)

b) CIT Vs Shelly Products [2003] 261 ITR 367 (SC)

c) R. Seshammal Vs ITO 237 ITR 185 (Madras)

d) Sudhir Sareen v CIT 239 ITR 440 Delhi

e) DCIT vs Lab India Instruments (P) Ltd., 93 ITD 120ITAT-PUNE

f) Lustre Tiles Ltd. Vs ACIT 2007-TIOL-132-ITAT-JAIPUR

g) Smt. Sneh Lata Jain v CIT [2004] 140 Taxman 156 J&K High Court

h) Sunflag Iron & Steel Co. Ltd. LTD 2016-TIOL-2729-HC-MUM-IT

i) Tiam House Service Ltd. 242 ITR 539(Mad)

k) CIT Vs Vali Brothers 282 ITR 149(ALL)

l) Smt. Jiby Mathew vs DCIT Kottayam in ITAT no. 523/Coch/2019 vide order dated 09/03/2020

53. The AR also submitted that the procedure should not be the handmaid and not the mistress of legal justice and cause of justice should not be subservient to the rules of procedure and placed reliance on the following judgments:

a) Kailash v. Nankhu [2005] 4 SCC 480; State of Punjab v. ShamlalMurari [1976] 1 SCC 719

b) Sushil Kumar Sen v. State of Bihar, (1975) 1 SCC 774 are pertinent: (SCC p. 777, paras 5-6

c) State of Punjab v. ShamlalMurari, (1976) 1 SCC 719

d) GhanshyamDass v. Dominion of India, (1984) 3 SCC 46,

e) SardarAmarjit Singh Kalra v. Pramod Gupta, [2003] 3 SCC 272.

54. The AR further submitted that if this matter is decided on mere technicalities, the assessee would be left with payment of huge taxes on alleged capital gains which never accrued as the impugned transfer of the capital asset failed and the said property is still under possession of the assessee. When substantial justice and technical consideration are pitted

against each other, the cause of substantial justice deserves to be preferred. Injustices cannot be legalized on technical grounds when the Tribunal is capable of removing injustice and to do justice. The AR further submitted when the substantive law confers a benefit on the assessee under a statute, it cannot be taken away by the adjudicatory authority on mere technicalities. The AR also submitted that too hyper-technical or legalistic approach should be avoided in looking at a provision which must be equitably interpreted and justly administered. Further, reliance is placed on the undernoted authorities:

a) Collector, Land Acquisition v. Mst. Katiji and Ors. (167 ITR 471) 2002-TIOL-444-SC-LMT.
b) Saroj Aggarwal v CIT 156 ITR 497 SC
c) S.R. Koshti v. CIT [2005] 146 Taxman 335/276 ITR 165
d) CIT Vs BehariLall-Ramchandra 5 ITR 417 OUDH
e) *CIT Vs Relcom [2015] 62 taxmann.com 190 (Delhi)*
f) CIT Vs Vali Brothers 282 ITR 149(ALL)
g) CIT Vs Lata Mangeshkar Medical Foundation [2019] 410 ITR 347 (Bombay)

55. The assessee further submitted that even in reassessment proceedings, income has to be computed as per the provisions of Act**.** Reliance was placed on the following authorities:

a) United Educational Society [2019] 107 taxmann.com 127 (Delhi - Trib.

b) Padinjarekara Agencies (P.) Ltd. [2014] 52 taxmann.com 441 (Cochin - Trib.)

56. It is well accepted law that the Courts have inherent powers to further the cause of substantive justice and make such orders as may be necessary to meet the end of justice or to prevent the abuse of the process of the Court. The Tribunals are also vested with these inherent powers as has been held in the undernoted authorities:

a) Ajay Gandhi vs B. Singh [2004] 134 Taxman 537 (SC)[DoD: 05/01/2004]

b) CIT Vs Walchand & Co 65 ITR 381(SC)

c) Mafatlal Securities Ltd. [2009] 119 ITD 444 (Mum.)

d) Rojer Mathew vs South Indian Bank Ltd And Ors Chief ... on 13 November, 2019 Civil Appeal No. 8588 of 2019 [Arising out of Special Leave Petition (Civil) No.15804 of 2017]

57. The assessee further submitted that the it has been held by the Hon'ble Bombay High Court in CIT Vs Lata Mangeshkar Medical Foundation [2019] 410 ITR 347 (Bom) that the period of limitation should not come as an hindrance to do substantial justice between the parties.

58. The assessee further placed reliance on a recent decision of the ITAT in **Futura Polyster Ltd. *v* ITO [2020]118 taxmann.com 243 (Mumbai - Trib.) (Dated 16/07/2020)**

and submitted that the situation in the said case was akin to the present case. In Futura (supra), the assessee entered into an agreement to sell a piece of land and the assessee filed its return declaring certain amount as long term capital gain from sale of land. In the appellate proceedings, the assessee raised a new plea that the agreement to sell was subsequently cancelled and, thus, in absence of any valid transaction relating to sale of land in existence, nothing could be brought to tax as long-term capital gain. It was held that tax cannot be levied on a hypothetical income.

59. The assessee submitted that there is no estoppel against the statutory provisions. When, the AO became aware that the transfer / sale of property had already been cancelled as per the consent decree of the Hon'ble Delhi High Court, he had no other option but to hold that no capital gain accrued on the impugned sale during the relevant period. When no capital gain had arisen in absence of a transfer of the property which even today the assessee holds, non-taxable income should not be just taxed on technicalities. The original assessed income must be rectified as a mistake u/s 154 of the Act due to subsequent order of the jurisdictional High Court.

60. The assessee further submitted that the power of the ITO to amend the assessment order in consequence to a decision in an appeal or an order of the Jurisdictional High Court or Supreme Court is inherent and traceable to the

section 143(3) itself and the limitation contained in section 154(7) of the Act would not apply. Reliance was placed on the following authorities:

a) Peninsula land Ltd. Vs CIT (2008) 175 Taxman 58 (Bombay)

b) L Alagusundaram Chettiar Vs CIT (1994) 210 ITR 614 (Mad)

61. The exercise of power to rectify an error apparent from record is not discretionary and if the conditions for its exercise are shown to exist, ITO cannot decline to exercise the said power as has been held in the case of L. Hirday Narain Vs ITO (1970) 78 ITR 26 (SC).

Arguments of the CIT DR

62. The learned CIT DR submitted that u/s 154, only arithmetical mistakes can be rectified, whereas it is a matter of writing off of long-term capital gain on account of order of the Hon'ble Jurisdictional Delhi High Court. The assessee has submitted that the Hon'ble Delhi High Court approved the scheme of cancellation of earlier sale deeds and therefore, the LTCG admitted earlier should be written off whereas these cancellation deeds were mutually agreed deeds between the assessee and the purchaser with no role played by the Hon'ble Delhi High Court in approving these cancellation deeds. The CIT DR submitted that the Hon'ble Delhi High Court has merely approved an out of court settlement which

was arrived at between the parties without any intervention of the High Court. Thus, these cancellation deeds cannot be made the basis for rectifying the assessment order passed earlier u/s143(3) of the Act by invoking provisions of the section 154 of the Act.

63. Further, there is no whisper in the settlement agreement as to what happened to the previous part payments received by the assessee and how the same was to be treated. Thus, the assessee has enriched itself by those payments and the tax treatment of all those payments received by the assessee has to be seen.

64. This transaction involves complex factual issues of determining the exact quantum of income to be taxed within the meaning of section 154 of the Act which takes it outside the purview of section 154 of the Act.

65. The CIT DR also submitted that even if it is presumed that the matter could be rectified u/s 154 of the Act, then this benefit could be allowed as per the procedure laid out in the statute which involves time limit. The assessee sought to rectify the order dated 28.12.2011 passed u/s 143(3) of the Act and thus, the rectification application could be filed within four years from the end of FY 2011-12 i.e. by 31/03/2016. However, there is no such claim for rectification filed by the assessee till 31/03/2016 and thus, the time limit

has already expired. The revised return filed by the assessee could not be considered as rectification application in any manner because if the assessee wanted to file a rectification application u/s 154, it should have clearly mentioned therein as a rectification application.

66. In the rejoinder, the AR of the assessee submitted that the assessee had already offered an interest income of more than Rs 95.70 crores on the outstanding principal sale consideration amount in different years on the amounts remaining receivable from the buyer and also paid income-tax thereon and no reversal of the same has been claimed by the assessee even after cancellation of the sale deeds. It was stated that a sum of Rs 56 crores only was received out of sale consideration of Rs 151 crores. Further, a sum of Rs 20 crores was also refunded by the assessee to the buyer at the time of registration of the cancellation deed out of Rs 56 crores leaving just Rs 36 crores with assessee. This fact was very much mentioned in the settlement deed duly decreed by the Hon'ble jurisdictional Delhi High Court vide its order dated 05/06/2015 and placed on record before the Assessing Officer and the CIT(A) and has also filed before us in the paper book.

67. The amount of Rs 36 crores as above remained with assessee in pursuance to the cancelled sale deeds was in the nature of mesne profit for adversely affecting the title on the

property of the assessee for almost 7 years being capital in nature, i.e., since September, 2008 when the sale deeds was registered and the possession of the property was handed over to the buyer till cancellation of the sale deeds on 05/06/2015 by the Hon'ble Delhi High Court for which no compensation in any manner was received by the assessee from the buyer. The assessee did not have the property including its title for almost seven years and no benefit arose to it for the same. The assessee relied on the Special Bench decision of the Hon'ble Tribunal in the case of ***Narang Overseas (P) Ltd vs ACIT [2008] 111 ITD 1 (Mumbai) (SB) [DoD: 20/02/2008]*** where the Hon'ble Tribunal held that mesne profits are capital receipts where it has also been held that a consent decree order of the High Court holds the same force as any other order of the High Court and the contrary contention of the revenue has no strength.

68. The AR further submitted that the section 56(2)(ix) of the Act introduced w.e.f. AY 2015-16 is otherwise not applicable to the facts of the case as any amount therein can be taxed only when the twin conditions mentioned therein are applicable. The said section reads as below:

> *(ix) any sum of money received as an* ***advance*** *or otherwise* ***in the course of negotiations*** *for transfer of a capital asset, if, -*
>
> *(a) such sum is forfeited;* ***and***

(b) the negotiations do not result in transfer of such capital asset;

69. The AR submitted that in this case no money was received as an advance or otherwise in the course of negotiation for transfer of capital asset where **the negotiations did not result in transfer of such capital asset** because in this case, **the assessee had already transferred the capital asset in Sept 2008 by registered conveyance deeds and also handed over the possession of the property to the buyer**. Thus, in this case the money remained with the assessee was not on account of the conditions stipulated in the said section because, firstly, the money was not received as an advance but it was the sale consideration of a duly completed transaction by virtue of the registered conveyance deeds; and secondly, the same was also not received in the course of negotiation where the negotiations did not result in transfer of such capital asset as the same had already been transferred.

70. The AR further submitted that the clauses (a) and (b) of the section 56(2)(ix) of the Act are not mutually exclusive since the word **"and"** has been used in between. Thus, to attract the said provision both the clauses (a) and (b) should be satisfied together. Further, no amount at all was forfeited as is required in the clause (a) above. The amount remained with the assessee was on account of a settlement duly

decreed by the Hon'ble jurisdictional Delhi High Court and not for forfeiture which is unilateral act of the recipient where consent of the payer is not taken before forfeiting. Moreover, this amount was left with the assessee as mesne profit by the buyer to compensate the assessee for deprivation of use of the property for almost 7 years which had already been transferred to the buyer in the year 2008 through registered conveyance deeds and who used it for the said period. Second clause (b) is also not applicable at all on facts as the sale with possession had already been completed.

71. He also stated that this is a peculiar situation and happens rarely and therefore, the legislature has not made any provision for the same as it could not comprehend the same or all such probabilities. It was never a forfeited amount nor was received in the course of negotiation for transfer of a property which was never transferred but a compensation in the nature of mesne profit and a capital receipt.

72. It was further submitted that the Hon'ble ITAT is seized with the appeal for the AY 2009-10 and the settlement was arrived at in the period relevant to the AY 2016-17 which is not under consideration and no direction can be given by the Hon'ble ITAT in respect of any other assessment year.

DECISION

73. We have heard the rival contentions and perused the material on record and duly considered the factual matrix of the case.

74. The only issue remains for consideration here is, whether the long-term capital gain on sale of two properties declared by the assessee in its return of income has to be excluded from taxable income of the assessee for this assessment year in view of the cancellation of sale deeds of the said property in pursuance of the decree order passed by the Hon'ble Delhi High Court.

75. The assessee had filed a letter dated 29/02/2016 before the assessing officer during the reassessment proceedings **(placed at pages 14-20 of the PB)** wherein the assessee filed a revised return as well as computation of income and reasons for revising the return. The assessee placed all the documentary evidences being the sale deeds, mortgage deeds, suit filed by the assessee against buyers, settlement deeds, decree issued by Delhi High Court, and cancellation deeds of the properties executed in pursuance of the settlement agreement and Delhi High court order on record to establish that the sale of the property under consideration had been cancelled and therefore, no capital gain accrued on the sale of the said property to the assessee. Therefore, the assessee

excluded the amount of long-term capital gain declared on the sale of the said property in its revised computation of income.

76. However, the lower authorities rejected this relief to the assessee on the ground that a revised return cannot be filed during the reassessment proceedings and thus, ignored all the evidences placed on record and therefore, the assessee is before us claiming that not excluding the long term capital gain on sale of the said property from the taxable income is highly unjust and the same should be rectified.

77. Admittedly, all these documentary evidences establishing the cancellation of sale deeds of the said property were brought on the record of the assessing officer during the course of reassessment proceedings. Even the assessing officer has referred to this letter in the impugned assessment order. On perusal of the settlement agreement dated 30/05/2015, we observe that the said agreement was entered into between the assessee and purchaser before the Hon'ble jurisdictional Delhi High Court Mediation and Conciliation Centre of the Hon'ble jurisdictional Delhi High Court on the directions of the Hon'ble Delhi High Court only. Then, the Hon'ble jurisdictional Delhi High Court passed the decree in terms of the settlement made between the parties. The Cancellation deeds dated 06/06/2015 were registered in pursuance of this High Court decree dated 05/06/2015. Once a decree is passed by the High Court under its

signature, the settlement gets approved by the High Court and has to be reckoned as an order passed by the Hon'ble High Court for all purposes. Hon'ble Bombay High Court in the case of **Anant Chunilal Kate v. ITO [2004] 267 ITR 482 (Bom)** has held as under:

> *"The tribunal did not at all treat the compromise decree as a lawful decree. The tribunal was under the impression that the rights and liabilities of the parties were not determined after applying the mind to the contents of the contract and after appreciation of evidence. The tribunal had made a distinction between the decree passed after considering various contentions raised and case law referred to by the parties and a decree passed in accordance with compromise reached by the parities outside the court. The tribunal's decision in that regard was contrary to the well- settled legal position.* ***A decree in terms of settlement arrived at by the parties before the court has the same binding force as any other decree."***

78. Thus, it is established beyond doubt that the cancellation deeds were executed as per the decree of the Hon'ble jurisdictional Delhi High Court and under its approval resulting into cancelling the sale of the said property. Even, the AO or the CIT DR did not challenge the authenticity of these documents nor can it be challenged.

Once the sale transaction is reversed and the asset is owned and held by the assessee being the seller, ostensibly no capital gain can be said to have accrued to the assessee at all. The Hon'ble Gujarat High Court has observed in the case of **CIT vs. Vithalbhai P. Patel (1999) 102 Taxman 36 (Guj)** as under:

> *"Admittedly, the purported sale was null and void under the provisions of section 4 of the Gujarat Vacant Lands in Urban Areas (Prohibition of Alienation) Act, 1972. Under section 4 it was provided that no who owned any vacant land, shall, on or after the appointed day, alienate such land by way of sale, gift, exchange, mortgage other than simple mortgage lease or otherwise or effect a partition or create a trust of such land and any alienation made or partition effected or trust created in contravention of the said provision shall be null or void. Therefore, the transaction in question was null and void ab initio and it was so declared by an order of the collector. Further, the same wad not challenged.*
>
> *Thus, since there was no sale transaction in the eye of law, there could be no capital gain arising out of null and void transfer of such land. Hence, the Tribunal was right in coming to the conclusion that no capital gain had accrued to the assessee. "*

79. In the present case, the sale deeds of the property were executed and LTCG was declared in the return of income

and taxes were paid thereon. The sale of the property was cancelled on 06/06/2015 and therefore, the very basis to exclude the LTCG from taxable income was not available at the time of filing the return of income and in fact, it became available on account of the change in circumstances during the course of hearing in the reassessment proceedings itself. It is also a trite law that it is the duty and power of the Court to take into consideration the subsequent events in the interest of justice as has been held in the case of **Moumita Poddar v. Indian Oil Corporation Ltd. (2010) 9 SCC 291, Kedar Nath (2004) 8 SCC 76 and Shipping Corporation Of India Ltd vs Machado Brothers &Ors in Appeal (civil) 1855-1856 of 2004**.

8. A similar issue came up in the case of **Futura Polyster Ltd. Vs ITO (2020) 118 taxman.com 243 (Mum-Trib.)**, where the assessee entered into an 'agreement to sell dated 19/12/2012' for transfer of a property and declared long term capital gain on that basis in its return of income. However, later on the agreement to sell was cancelled vide cancellation deed dated 28/09/2017 when the appeal was going on before the CIT(A). The assessee raised this issue before the CIT(A) who remanded the matter back to the AO. The AO having rejected the plea of the assessee brought long term capital gain to tax. In view of these facts, the Hon'ble Mumbai ITAT Bench observed as under:

"As a matter of fact, the lower authorities had failed to place on record any material which would rebut the aforesaid claim of the assessee. In fact, it is not even the case of the revenue that the deed of cancellation, dated 28-9-2017 is a sham or a fabricated document. In fact, the subsequent sale of part of the land by the assessee in the period relevant to A.Y 2018-19 and A.Y 2019-20, further fortifies the veracity of the aforesaid claim of the assessee. ***At this stage, we may herein observe that the revenue by assessing the LTCG in the hands of the assessee had sought to tax a hypothetical income, which finds its roots in a transaction which had never fructified into a sale transaction. As observed by the Hon'ble Apex Court in the case of CIT v. Shoorji Vallabhdas and Co., [1962] 46 ITR 144 (SC), income-tax is a levy on income. No doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt, but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a hypothetical income', which does not materialize. As observed by the Hon'ble High Court, where the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain***

circumstances, have been made in the 'books of account'. On the basis of our aforesaid observations, we are unable to persuade ourselves to concur with the view taken by the lower authorities*, and therein vacate the addition towards LTCG made by them, on the basis of the MOU, dated 19-12-2012."*

81. In Futura Polyster (supra) as well as in the present case, the assessee declared long term capital gain on sale of properties in their returns of income. In both these cases, the sale of properties got cancelled much later. In both these cases, the ground raised by the assessee to exclude the long-term capital gain from the taxable income was not available at the time of filing the original return of income. Both the assessees raised their issues before the departmental authorities during the proceedings going on at the relevant time, i.e., before the CIT(A) in case of Futura and before the AO in the reassessment proceedings in case of the assessee. However, the departmental authorities did not accept the claim of the assessee ignoring all the evidences placed on record. Considering all the facts, the Hon'ble ITAT allowed relief and directed to exclude the long-term capital gain from taxable income for the property whose sale had been cancelled. In our opinion, the decision of Futura Polyster (supra) squarely applies to the facts of the case and the long-term capital gain declared on the sale of two properties under

consideration cannot be taxed in the hands of the assessee at all.

82. The AO as well as the Ld. CIT(A) did not grant the claimed relief of excluding the impugned LTCG from taxable income for the A.Y. 2009-10 to the assessee merely on a technical issue that the assessee filed the claim in form of revised return which is not permissible in reassessment proceedings. When the assessee contended that the said letter should be considered as a rectification application u/s 154 of the Act which has been filed in time, i.e., within 4 years from the end of the financial year in which the assessment order u/s 143(3) was passed. The Ld. CIT DR contended that this letter does not mention to be an application u/s 154 of the Act and therefore, cannot be considered as an application u/s 154 of the Act. The Ld. CIT DR further contended that even if it is presumed that this can be rectified u/s 154 of the Act, then no application u/s 154 was filed by the assessee within the prescribed time. Thus, the issue arises as to whether the relief can be allowed to the assessee in the above mentioned circumstances.

83. A lot of emphasis has been placed by the Ld. CIT DR on the technical issue that the letter filed on 29/02/2016 cannot be considered as a revised return or an application u/s 154 of the Act. It is a trite law that when substantial justice and technical consideration are pitted against each other, the

cause of substantial justice deserves to be preferred. When the substantive law confers a benefit on the assessee under a statute, it cannot be taken away by the adjudicatory authority on mere technicalities. In holding so, we draw strength from the judgment of the Apex Court in the case of Collector, Land Acquisition v. Mst. Katiji and Ors. (167 ITR 471) 2002-TIOL-444-SC-LMT and Saroj Aggarwal v CIT 156 ITR 497 SC, wherein it has been observed by the Apex Court that too hyper-technical or legalistic approach should be avoided in looking at a provision which must be equitably interpreted and justly administered.

84. Section 154 of the Act provides for rectification of a mistake apparent from record. "Any mistake apparent from the record" covers all mistakes discoverable from a perusal of the whole evidence in the case, or from an omission to apply certain provisions of the Act to the facts of the case, or a mistake due to an overlooking of certain aspects of the case, or a mistake arising on account of a wrong construction of any provisions of the Act. The error may be either of fact or error of law. Thus, we don't agree with the contention of the CIT DR that the section 154 of the Act can be undertaken only to rectify arithmetical errors. Further, there is no format prescribed under the law for filing a rectification application u/s 154. What is relevant that a mistake is brought to the knowledge of the AO and here in this case assessee has filed a very detail letter alongwith all the relevant documents to

prove that sale stands finally cancelled and as LTCG on sale of such asset is not taxable and asset remains with the assessee and there is no transfer. Such a letter has to be reckoned as rectification of original assessment order passed u/s 143(3), which is within the period of 4 years from the end of the financial year when the order was passed. Even otherwise also AO is empowered to rectify suo-motto when mistake is brought in his knowledge or is discovered by him from the records.

85. We find that what is material u/s 154 of the Act is that there is a mistake, a mistake which is clear, glaring and which is incapable of two views being taken. The expression 'record' has to be construed and understood in which it appears and in context of expression 'apparent from the record' in section 154; 'record' would mean the record of the entire proceedings of the case including the documents and material produced by the assessee and taken on record by the authorities, which were available at the time of passing of the order. All documents establishing the cancellation of sale deeds were placed on the record of the assessing officer who ignored the Jurisdictional Delhi High Court order and cancellation deeds passed in pursuance of the said Delhi High Court order and did not exclude the long-term capital gain while computing the assessed income. Thus, the assessing officer deliberately omitted to take into consideration the Delhi High Court's order as well as other evidences regarding

the cancellation of sale deeds and reversion of the possession of the property to the assessee.

86. It is a well establish law that, if on the basis of material on record, the assessee is entitled to a relief, then it would constitute a mistake apparent from record which can be rectified u/s 154 of the Act and such relief cannot be denied even if the assessee omitted to claim the same by mistake. The Hon'ble Supreme Court in the case of **Anchor Pressings (P) Ltd. Vs CIT (1986) 161 ITR 159 (SC)** held that the jurisdiction u/s 154 to rectify the mistake is much wider than provided in Order XLVII, rule 1 of the CPC, 1908, and therefore, relief could be allowed in the rectification proceedings if all the factual material necessary for allowing the relief were available on record and such relief could not be denied merely because the assessee omitted to claim the same. This view has been upheld in the case of **Lustre Tiles Ltd. Vs. Addl. CIT (2007) 108 ITD 35** where reliance has been placed on **Container Corporation of India Ltd. Vs DCIT (2005) 92 ITD 333 (Delhi)** wherein the ITAT, Delhi Bench, after discussing several decisions of the Court including that of **Anchor Pressings (P) Ltd. Vs CIT (1986) 161 ITR 159 (SC)** held that the jurisdiction u/s 154 can be assumed if there is a mistake apparent from record. If on the basis of material on record, the assessee is entitled to a relief which has remained to be allowed, then it would constitute a mistake apparent from record and consequently, such relief

cannot be denied merely because the assessee omitted to claim the same by mistake.

87. All the documents to establish that the sale of the said property had been cancelled were on the record of the assessing officer. The long-term capital gain on the said property was not at all taxable in the hands of the assessee in view of cancelled sale transaction. Thus, in view of the settled position of law, the assessing officer was duty bound to allow relief to the assessee even if the assessee did not claim so. Even if the letter dated 29/02/2016 is not considered as revised return but certainly it is an application to the AO to claim the relief, and in that case, the AO himself was legally obliged to exclude the amount of long-term capital gain on sale of the said property on the basis of material available on record.

88. The Article 265 of the Constitution of India lays down that no tax shall be levied except by authority of law. Hence, only legitimate tax can be recovered and even a concession or acquiescence by an assessee does not give authority to the tax collector to recover more than what is due from him under the law. For this proposition, we rely on judicial precedent from the judgment of the Constitutional Bench of 9 Judges of Hon'ble Supreme Court in **Mafatlal Industries versus Union of India, (1997) 5 SCC 536 / (2002-TIOL-54-SC-CX),** and from **CIT Vs Shelly Products [2003] 261 ITR 367 (SC), R.**

Seshammal Vs ITO 237 ITR 185 (Madras), CIT Vs Vali Brothers 282 ITR 149(ALL), TiamHouse Service Ltd. 242 ITR 539(Mad). The Hon'ble Delhi in **Sudhir Sareen v CIT 239 ITR 440 Delhi** has observed as under:

> *"An income which is liable to be taxed should not escape. An income not taxable, erroneously or unwittingly caught in the net of taxability, should be allowed to escape. The tax collector should not hesitate in extending a helping hand to anyone who genuinely intends to pay the tax."*

89. Thus, an income liable to be taxed has to be worked out in accordance with the law in force. In this process, it is not open to the Revenue authorities to take advantage of the ignorance of the assessee and tax cannot be levied on an assessee at a higher amount merely because the assessee did not claim the relief due to some error or ignorance. It can only be levied when it is authorized by law as is the mandate of the Article 265 of the Constitution of India. A sense of fair play by the field officers towards the tax payers is not an act of benevolence by the filed officers but it is call of duty in a socially accountable governance. In view of the above settled position of law, we are of the opinion that if a legitimate and bona fide claim is available to the tax payer then it cannot be ignored or be taxed in the absence of any authority.

90. In this regard an old **circular no. 14(XL35) dated 11th April 1955** issued by the CBDT in the context of refunds and

reliefs due to the assessee can be referred to wherein CBDT has instructed that, " .....Officers of the department should not take advantage of the ignorance of an assessee as to his rights. It is one of their duties to assist taxpayer in every reasonable way, particularly in the matter of claiming and securing any relief and in this regard the Officers should take initiative in guiding the tax payer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would in the long run benefit the Department for it would inspire confidence in him that he may be sure of getting a square deal from government....."

91. Such a guidance to the field officers by the CBDT is to earn taxpayer's confidence and trust. An action or inaction which erodes any taxpayer's faith in Indian tax and judicial system does not do any of us any good. The well- meaning advice given by the CBDT must be implemented to the fullest extent. As to the binding nature of this advice, we may only refer to section 119 of the Act and Hon'ble Supreme Court's judgment in the case of UCO Bank Vs CIT (1999) 237 ITR 889(SC). Hon'ble Supreme Court has time and again held that the circulars of CBDT are legally binding on the Revenue. The advice contained in the circular is also legally binding on all the field officers.

92. It is equally well-accepted law that the Tribunal has inherent powers to further the cause of substantive justice and make such orders as may be necessary to meet the end of justice as has been held in the case of *Ajay Gandhi vs B.*

Singh [2004] 134 Taxman 537 (SC)[DoD: 05/01/2004] and CIT Vs Walchand & Co 65 ITR 381(SC). If in the course of hearing any legal claim based on facts and law is brought to the notice of the Tribunal alongwith supporting evidence/ records, then Tribunal in light of various judgements as cited above has the power to entertain and decide such claim which otherwise is permissible in law.

93. In view of overall facts and legal position, we are of the opinion that substantive justice must be rendered to the assessee to meet both the ends of law and justice. Thus, we hereby hold that the AO has made a grave error apparent from record by ignoring the documentary evidences including the Hon'ble jurisdictional Delhi High Court's order placed on his record for cancellation of the sale even though the same was brought to his notice by the assessee and thereby including the long term capital gain on sale of the property in the taxable income of the assessee. The letter dated 29.02.2016 filed before the AO is to be treated an application u/s 154 to rectify the assessment order passed u/s 143(3) on 28.12.2011 as the application has to be considered in respect of LTCG assessed therein, because the said application was within 4 years as held above. We hold that the long- term capital gain of Rs. 143,85,67,404/- on sale of the said property is not at all taxable in the hands of the assessee as the sale deeds were cancelled. We hereby direct the assessing officer to exclude the long term capital gain on sale of the said property from the computation of taxable income for the A.Y.

2009-10 by passing an order u/s 154 of the Act within a period of three months from the receipt of this order to avoid undue harassment to the assessee and to refund the income-tax paid thereon as per law. Thus, the issue raised in these grounds is decided in favour of the assessee.

94. Further, as regards the taxability of the amount of Rs.36 crores remained with assessee after cancellation of the said sale in terms of the decree order of the Hon'ble jurisdictional Delhi High Court, we agree that the same was in the nature of mesne profit and beyond the provisions of section 56(2)(ix) of the Act. Moreover, as explained by the Ld. AR, the said section is also not applicable as the twin conditions mentioned therein have not been met on the facts, because as per the contention of the AR the said amount was in the nature of liquidated damages for affecting the title of the assessee on the property for nearly 7 years.

95. The appeal is allowed partly as indicated above.

Order pronounced in the open Court on 27th November, 2020

Sd/-	Sd/-
[PRASHANT MAHARISHI]	**[AMIT SHUKLA]**
[ACCOUNTANT MEMBER]	**JUDICIAL MEMBER**

DATED: 27/11/2020

PKK: