

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 2435 OF 2017

Mr. Pramod R. Agrawal)
residing at A-1, 123/B, Shah & Nahar)
Industrial Estate, Sitaram Jadhav)
Marg, Lower Parel, Mumbai 400 013) ...Petitioner

Vs.

1. Principal Commissioner of)
Income Tax-5)
Room No.515, 5th floor, Aayakar)
Bhavan, Mahrshi Karve Road,)
Mumbai 400 020)

2. The Union of India)
Through the Secretary, Ministry of)
Finance, Government of India,)
North Block, New Deli 110 001)

3. Income Tax Officer – 5(1)(1))
Room No.570, 5th floor, Aayakar)
Bhavan, Mahrshi Karve Road,)
Mumbai 400 020) ...Respondents

Mr. Dharan V. Gandhi a/w Ms Aanchal Vyas and Mr. Darshan Gajra for
Petitioner.
Mr. Akhileshwar Sharma for Respondents.

CORAM : K.R. SHRIRAM &
RAJESH S. PATIL, JJ
DATED : 13th OCTOBER 2023

ORAL JUDGMENT (PER K. R. SHRIRAM J.) :

1 Petitioner is aggrieved by an order dated 22nd March 2017 passed by
respondent no.1 rejecting an application dated 18th January 2016 filed by
petitioner under Section 264 of the Income Tax Act, 1961 (the Act).

2 Petitioner, is a resident individual and filed his return of income for
A.Y.-2007-08 on 21st August 2007 declaring a total income of Rs.8,49,118/-.

The said income comprised of long term capital gain arising from sale of flat in Mumbai. Petitioner inherited the flat alongwith three other persons on the death of his father which took place in the year 2002. Petitioner was therefore, a co-owner of the said flat to the extent of 25%. In the return of income, petitioner had offered Rs.8,83,763/- as capital gain arising from the sale of the said flat. The said figure was arrived at without considering the allowance of indexed cost of improvement in respect of renovation expenses incurred in September 1990 amounting to Rs.2,95,859/-.

3 Petitioner's return was selected for scrutiny and in the assessment proceedings vide order dated 30th November 2009, addition under Section 50C of the Act was made by respondent no.3 (the assessing officer) by taking the stamp duty value as full value of consideration while computing the capital gains arising from the sale of the said flat to the extent of Rs.6,05,765/-. No adjustment was made to the allowances claimed from the full value of consideration to determine the capital gains. An appeal was filed before the Commissioner of Income Tax (Appeals) (CIT). The exparte order that came to be passed on 21st September 2010 directed respondent no.3 to refer the property for valuation to the Department's Valuation Officer under Section 50C(2) of the Act and then decide the issue in light of the valuation available in accordance with the provision of Section 50C of the Act.

4 Respondent no.3 referred the matter to Department's Valuation Officer who, in his report dated 23rd May 2011 ascertained the fair market

value to be Rs.1,57,21,000/- as against the stamp duty value of Rs.1,69,23,060/-. Accordingly, a relief of Rs.3,00,515/- was granted to petitioner. Against the order giving effect to the order of the CIT(A), petitioner preferred another appeal before the CIT(A) disputing the value of flat as arrived at by Department's Valuation Officer. This appeal came to be dismissed by the CIT(A) by an order dated 13th August 2013. It is petitioner's case that petitioner was not aware about the appeal having been dismissed for default and only when petitioner received a recovery notice for demanding a sum of Rs.2,21,992/- towards tax arrears of Rs.1,53,494/- and penalty of Rs.64,498/- that petitioner consulted another Chartered Accountant, who advised petitioner that the other co-owner of the property had claimed a deduction of entire renovation expenses of Rs.4,15,000/- incurred in September 1990 in respect of the flat after indexing the same and petitioner should have also done the same while computing his share of capital gains. Petitioner was also informed that the claim of Rs.4,15,000/- towards cost of improvement made by other co-owner, was not accepted but the assessing officer had allowed 1/4th share of that claim since the other co-owner had only 1/4th share in the property.

5 Petitioner was advised that in the case of another co-owner, who had also claimed renovation expenses of Rs.2,95,859/- from the full value of consideration of computing her share of capital gains, the assessing officer of the other co-owner had added a sum of Rs.93,000/- to the total income which, on an application filed under Section 154 of the Act, was reduced.

6 Petitioner was, therefore, advised to file an application under Section 154 of the Act to respondent no.3 which petitioner made on 4th November 2015. In the said application, petitioner explained the entire history of the case and also referred to the orders passed in favour of the other co-owners and requested respondent no.3 to rectify the previous orders passed by him by allowing the deduction of indexed cost of improvement of Rs.2,95,859/-, being renovation expenses incurred in the year 1990. Petitioner had claimed in the application that the allowance of the said cost was not claimed in the original return of income and the same should be allowed as it was rectifiable defect under Section 154 of the Act..

7 This application of petitioner was rejected by respondent no.3 by an order dated 8th December 2015. The rejection was on the ground that such claim was made first time in the application under Section 154 of the Act and it was never brought to the notice of respondent no.3 earlier or CIT(A). Aggrieved by the said order of respondent no.3 passed under Section 154 of the Act petitioner filed the application under Section 264 of the Act before respondent no.1. Petitioner elaborately explained its case and the same came to be rejected by an order dated 22nd March 2017, which is impugned in this petition.

8 Mr. Gandhi submitted that the impugned order requires to be quashed and set aside and the matter be remanded to respondent no.1 because respondent no.1 has not really appreciated the scope of Section 264 of the Act. Mr. Gandhi submitted that Section 264 of the Act confers wide

jurisdiction on the commissioner and proceedings under Section 264 are intended to meet the situation faced by an aggrieved assessee who is unable to approach the appellate authority for relief and has no other alternate remedy available under the Act. Mr. Gandhi submitted that even though there might be an embargo on the assessing officer, there is no such embargo on the power of the appellate authority or as in the case of revisional authority. Mr. Gandhi submitted that the power under Section 264 of the Act is intended to prevent miscarriage of justice and courts have consistently taken a view that conferment of the powers under Section 264 of the Act is to enable the Commissioner to provide relief to assessee, where the law permits the same. This power would even cover the situation, where assessee because of error has not put forth a legitimate claim at the time of filing the return and the error is subsequently discovered and is raised for the first time in an application filed under Section 264 of the Act. In the case at hand, error was discovered and raised before respondent no.3 in the application filed under Section 154 of the Act. Mr. Gandhi relied upon the following judgments; *Hindustan Diamond Company Pvt Ltd. Vs. CIT*¹, *Smita Rohit Gupta Vs. CIT*,² *Asmita A. Damale Vs. CIT*³, *Selvamuthukumar Vs CIT & Anr.*⁴, *Shah Brothers Vs. CIT*,⁵ and *Vijay Gupta Vs. CIT*.⁶

9 Mr. Suresh Kumar submitted that the assessing officer-respondent

1. (2003) 175 Taxation 91 (Bombay)

2. Judgment dated 28th August 2023 in Writ Petition No.6964 of 2022

3. Order dated 9th May 2014 in Writ Petition No.676 of 2014

4. (2017) 394 ITR 247 (Mad)

5. (2003) 259 ITR 741 (Bombay)

6. (2016) 386 ITR 643 (Delhi)

no.3 was justified in rejecting the application under Section 154 of the Act because assessee could not take recourse to his ignorance. Assessee should have been aware that other co-owners have also made such claim for improvement cost and in any event should have been aware that such improvement cost have been incurred and claimed it in the return of income. Assessee could have claimed this even in two appeals he had filed before the CIT(A). Mr. Suresh Kumar further submitted that the assessing officer could have rectified a mistake which was apparent from the record or rectify any order passed under the provisions of the Act. But the power under Section 154 is not extended to a situation when it is not apparent from the record because the claim was never made before the assessing officer while the scrutiny was going on and the assessment order under Section 143(3) of the Act was passed. Therefore, the assessing officer was correct in rejecting the application filed by assessee under Section 154 of the Act.

Moreover, since assessee had already filed an appeal against the assessment order, assessee could not have filed an application under Section 264 of the Act. Further, the application under Section 264 of the Act was filed more than one year after the order under Section 143(3) of the Act was passed and, therefore, there was no infirmity in the order impugned in this petition.

10 We would agree with Mr. Gandhi that there was no delay in filing the application under Section 264 of the Act because the application under

Section 264 of the Act was against the order passed under Section 154 of the Act and not Section 143(3) of the Act. The order under Section 154 of the Act was passed on 8th December 2015 and the application under Section 264 of the Act was filed on 18th January 2016, within one year.

11 The other submission of Mr. Suresh Kumar also cannot be accepted in view of the wide powers conferred on respondent no.1 under Section 264 of the Act. As held by this court in *Smita Gupta* (Supra), Section 264 confers wide jurisdiction on the Commissioner. The proceedings under Section 264 of the Act are intended to meet a situation faced by an aggrieved assessee, who is unable to approach the Appellate Authorities for relief and has no other alternate remedy available under the Act. The Commissioner is bound to apply his mind to the question whether petitioner was taxable on that income and his powers are not limited to correct the error committed by the subordinate authorities but could even be exercised where errors are committed by assessee. It would even cover situation where assessee because of an error has not put forth legitimate claim at the time of filing the return and the error is subsequently discovered and is raised for the first time in an application under Section 264 of the Act. Paragraphs 7 and 8 of *Smita Gupta* (Supra) read as under:

“7. The provisions of Section 264 and the power available to the Commissioner to exercise under Section 264 of the Act came up for consideration before the Division Bench of this Court in Hindustan Diamond Company Pvt. Ltd. v. CIT 2 . The Division Bench was pleased to observe that exercise of power under Section 264 was not subject to the power of the Assessing Officer to make adjustment under Section 143(1) of the Act. The Court held that power of the Commissioner under Section 264 is rather wide and even the errors

committed could be rectified. Paragraph 6 of the Hindustan Diamond Company Pvt. Ltd. (Supra) reads as under:

“6. Having heard the Counsel on both sides, we are of the opinion that the Commissioner was not justified in rejecting the revision application of assessee. As rightly contended by Mr. Inamdar, Section 264 confers wide jurisdiction on the Commissioner. Proceedings under Section 264 are intended to meet the situation faced by an aggrieved assessee who is unable to approach the appellate authority for relief and has no other alternate remedy available under the Act. In the light of the decision of the Apex Court in the case of Bharat Earth Movers (supra), the provision for Leave Encashment being a current liability assessee is entitled for deduction of that amount. The Assessing Officer had accepted the return, ignoring the request of assessee for deduction of the above amount. Therefore, the relief which was not granted by the Assessing Officer could be granted by the Commissioner under Section 264. Before allowing such deduction if any further enquiry was required to be done, the Commissioner could have either himself enquired or directed the Assessing Officer to do the needful. However, the Commissioner has declined to exercise power under Section 264 because of amendment to Section 143(1) by Finance Act, 1999. Powers of the Assessing Officer to make prima facie adjustments under Section 143(1), done away with by Finance Act, 1999 (with effect from 1st June, 1999) does not in any way effect the right of the Commissioner under Section 265 of the Act to grant relief to assessee if available to assessee as per the decision of the Apex Court. Exercise of powers under Section 264 is not subject to the power of the Assessing Officer to make adjustments under Section 143(1) of the Income-tax Act. Therefore, relief can be granted to assessee under Section 264 even if the power of adjustment under Section 143(1) is taken away from the Assessing Officer.”

(emphasis supplied)

8. Section 264 of the Act also came up for consideration before the Hon'ble Delhi High Court in Vijay Gupta v CIT Delhi-III 3 where paragraph 35 reads as under:

“35. From the various judicial pronouncements, it is settled that the powers conferred under Section 264 of the Act are very wide. The Commissioner is bound to apply his mind to the question whether the petitioner was taxable on that income. Since Section 264 uses the expression “any order”, it would imply that the section does not limit the power to correct errors committed by the subordinate authorities but could even be exercised where errors are committed by assessees. It would even cover situations where assessee because of an error has not put forth a legitimate claim at the time of filing the return and the error is subsequently

discovered and is raised for the first time in an application under Section 264. ” (emphasis supplied)

12 In *Asmita Damle* (Supra) also the court held that the Commissioner while exercising revisionary powers under Section 264 of the Act has to ensure that there is relief provided to assessee where the law permits the same. Paragraphs 3 and 4 read as under:

“3 In view thereof, assessee filed the application under Section 154 for rectification of the assessment order. This application was rejected. Against that order, the petitioner filed a revision under Section 264 of the Act to the Commissioner of Income Tax, for refund. The Commissioner of Income Tax, by the impugned order held that there was no mistake apparent from record. He held that the provisions of Section 264 were not attracted.

4 There is no dispute regarding the petitioner's entitlement to the benefit. The only question is whether the petitioner is entitled to enforce that remedy in the manner in which she has done. In a similar matter, a Division Bench of this Court in the case of Devdas Rama Mangalore v/s The Commissioner of Income Tax²⁶ and Ors in writ petition no.2422 of 2013 dated 15 th January 2014, granted complete relief, including an order of refund. The only difference between this case and that case is that, in that case, the petitioner had made an application for condonation of delay under Section 119 (2) (b) of the Income Tax Act, which was rejected, in view of the circular issued by the CBDT. In the case before us, the course adopted was under Section 264 of the Act. In view of the judgment of the Division Bench of this Court in Hindustan Diamond Company Pvt Ltd v/s Commissioner of Income Tax reported in (2003) 175 Taxation 91(Bom), the course adopted by the petitioner in the facts and circumstances of the present case was valid.”

13 In *Selvamuthukumar* (Supra) paragraphs 6 to 11 and 13 read as under:

“6. The language of section 264 provides ample powers to the Commissioner of Income Tax to make or cause such inquiry to be made as he thinks fit in dealing with an application for Revision under section 264. This would include taking into consideration relevant material that would have a bearing on the issue for consideration, which, in this case, includes the order under section 144A of the Act dated 31.12.2007.

7. Mr. Swaminathan would object on the ground that the inquiry contemplated under section 264 is restricted to the record of any proceeding under this Act and has, necessarily to refer to the specific assessee alone. He would also refer to Section 263 dealing with

revision of orders prejudicial to the revenue and to the explanation thereto wherein 'Record' is defined as being all records relating to any proceeding under this Act available at the time of examination by the Principal Commissioner or Commissioner. In the absence of such definition in section 264, he would urge that 'record' for the purpose of section 264 would be limited to such records as were available at the time of assessment. We are not impressed with the distinction. The necessity for the insertion of a definition of 'record' by the Finance Act 1988 has been explained in a Circular issued by the Central Board of Direct Taxes No. 528 dated 16.12.1998 to the following effect.

39.1 Under the existing provisions of section 263 of the Income-tax Act, the Commissioner of Income-tax is empowered to call for and examine the record of any proceeding and if he considers that the order passed by the Assessing Officer is erroneous insofar as it is prejudicial to the interest of revenue, he may pass an order enhancing or modifying the assessment or cancelling the same with a direction to make it afresh. The provisions as presently worded have given rise to two areas of controversy. The first is relating to the interpretation of the word "record" and the second is regarding the issue relating to merger of the order of the Assessing Officer with the order of the appellate authority. Courts have held in some cases that the word 'record' occurring in section 263 could not mean the record as it stood at the time of examination by the CIT but the record as it stood at the time when the order was passed by the Assessing Officer. Limiting the power of the CIT only to the situation that was existing at the time of making the assessment is to make the provision too restrictive, as many times information comes on record from various sources which indicate that the order of the Assessing Officer is erroneous and prejudicial to the interests of revenue. The above interpretation of the term "record" by some court besides being against the legislative intent also defeats the very objective sought to be achieved which is to revise the orders on the basis of records as is available to the CIT at the time of examination. With a view to clarifying the legislative intent of the term "record", a definition of the term "record" has been inserted in the Explanation to sub-section (1) of section 263 by the Finance Act to include all records relating to any proceedings under the Act available at the time of examination by the CIT. This has been carried out for removal of doubts." (emphasis supplied)

8. Useful reference can also be made to a judgment of the Supreme Court in the case of Commissioner of Income Tax v. Sri. Manjunathesware Packing Products and Camphor Works (231 ITR 53), wherein the Supreme Court, while considering the import of the word 'record' in section 263 of the Act states as follows:—

'If the material, which was not available to the Income-tax

Officer when he made the assessment could thus be taken into consideration by the CIT after holding an enquiry, there is no reason why the material which had already come on record though subsequently to the making of the assessment cannot be taken into consideration by him.'

9. The view of the department as reflected in the above Circular is thus to the effect that what constitutes 'record' cannot be limited to the return of income or order of assessment, but should be extended to include information from other sources that would impact the issue in question.

10. Mr. Swaminathan would refer to the judgment of the Division Bench of the Andhra Pradesh High Court in M.S Raju v. Deputy Commissioner of Income Tax (298 ITR 373) which has expressed a view to the effect that the import of the word 'record' as set out in the Circular (supra) would be restricted to the power under section 263 only and not section 264. The distinction noted by the Division Bench in that case was that the power of revision under section 263 of the Act was intended to be exercised in cases where the interests of revenue were prejudiced and it was for this reason that the inquiry of the Commissioner of Income Tax was not limited only to material available before the assessing officer, but also material obtained subsequently. The power under section 264 of the Act is, in fact as wide a power, and one that is intended to prevent miscarriage of justice. Courts have consistently taken a view that the conferment of powers under section 264 of the Act is to enable the Commissioner to provide relief to an assessee, where the law permits the same. Reference may be made to the decisions of the Gujarat High Court in C. Parikh and Co. v. Commissioner of Income Tax (122 ITR 610); Ramdev Exports v. Commissioner of Income Tax (251 ITR 873); Kerala High Court in Parekh Brothers v. Commissioner of Income Tax and Calcutta High Court in Smt. Phool Lata Somani v. Commissioner of Income Tax (276 ITR 216). In this view of the matter, we see no reason to take a different view on the interpretation of the word 'record' occurring in section 264 of the Act from that expressed by the Central Board of Direct Taxes in the Circular extracted above. The order under section 144A dated 31.12.2007 is thus part of the record and ought to have been taken into consideration in deciding the petition under section 264 of the Act.¹

11. In fact the objection raised by the Department is hyper technical and runs counter to the stand taken by it in the assessment of this appellant in the three earlier assessment orders. Thus even applying the principles of consistency the treatment accorded to an issue arising in a continuing transaction should be consistent for the entire period in question.

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13. Mr. Swaminathan would submit that the appellant ought to have filed a revised return under section 139(5) since there was sufficient time available and not having done so, he cannot seek remedy under section 264 of the Act. He would urge that both reliefs cannot run concurrently and one can be availed of only when the other is exhausted as otherwise an assessee who misses the time limit for

filing a revised return would take recourse to the provisions of section 264 and seek a revision.”

14 At this stage, Mr. Suresh Kumar submitted that assessee should produce documents to prove his share of the indexed renovation expenses of Rs.2,95,859/-. In our view, it is not required because in the assessment order dated 30th December 2010 passed under Section 143(3) of the Act in the case of Ravi R Agarwal, the other co-owner of the flat, the assessing officer has accepted the amount of Rs.2,95,859/- as the cost of renovation of indexation. Therefore, this figure has to be accepted as correct and suitable allowance should be made while arriving at the long term capital gain.

15 In the circumstances, we hereby quash and set aside the impugned order dated 22nd March 2017 and remand the matter to respondent no.1 for denovo consideration. Before passing any order, personal hearing shall be given, notice whereof shall be given atleast five working days in advance. The order to be passed shall be a reasoned order dealing with all submissions of assessee. The application under Section 264 of the Act shall be disposed within 8 weeks from today. Mr. Gandhi assures the court that so long as five working days notice is given, petitioner shall not seek any adjournment on any ground.

16 Petition disposed.

(RAJESH S. PATIL, J.)

(K.R. SHRIRAM, J.)