HIGH COURT OF JUDICATURE AT BOMBAY
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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO.6096 OF 2021

Aafreen Fatima Fazal Abbas Sayed]
9/A, Ground Floor, Palm Land CHS]
Old Cottage, Mumbai 400 050.] .. Petitioner.

v/s.

1. Assistant Commissioner of Income]
Tax, Circle 23(1), having office]
at Room No.113, 1st Floor, Matru]
Mandir, Tardeo Road,]
Mumbai 400 007.]

2 Principal Commissioner of Income]
Tax-19, Mumbai having office at]
Room No. 228, 2nd Floor, Matru]
Mandir, Tardeo Road,]
Mumbai 400 007.] .. Respondents.

Mr. K. Gopal with Ms. Neha Paranjpe, for the Petitioner.
Mr. Sham Walve, for the Respondents.

CORAM: SUNIL P. DESHMUKH &
ABHAY AHUJA, JJ.
DATE : 8th APRIL, 2021.

JUDGEMENT (PER ABHAY AHUJA J.):-

This petition has been filed under article 226 of the Constitution of India, 1950, whereby Petitioner is challenging the order dated 12 February 2021 passed by the Respondent No. 2- Principal Commissioner of Income Tax, rejecting the revision petition filed by Petitioner under section 264 of the Income Tax Act, 1961 (the “Income Tax Act”).

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2 Brief facts leading to the petition are as under:

For the assessment year under consideration i.e. A.Y 2018–19, petitioner who is an individual, received income from house property of Rs.12,69,954/- and income from other sources of Rs.14,35,692/- making the total income to Rs. 27,05,646/- and after claiming deductions and set off on account of TDS and Advance Tax, the refund was determined at Rs.34,320/-. However, while filing return of income on 20th July 2018 for A.Y 2018 – 19, the figure of long term capital gains of Rs.3,07,60,800/- was purported to have been wrongly copied by Petitioner's Accountant from the return of income filed for the earlier assessment year i.e. A.Y 2017–18, which had arisen on surrender of tenancy rights by the Petitioner for that year. It is submitted that the assessment for A.Y 2017–18 was completed under section 143 (3) of the Income Tax Act vide Assessment Order dated 24 December 2019. Petitioner submits that she has not transferred any capital asset and there can be no capital gains in the assessment year under consideration and therefore no tax can be imposed on such non-existent capital gains for A. Y. 2018-19.

3 It is submitted that the returns filed by the petitioner for A.Y 2018 – 19 were processed under section 143 (1) of the Income Tax Act vide order dated 2nd May 2019 and a total income of Rs.3,34,66,446/- including long term capital gains of Rs.3,07,60,800/- purported to have been inadvertently shown in the return of income thereby raising a tax demand of Rs.87,40,612/-.It is the case of Petitioner that the Central Processing Centre ("CPC") of the Income Tax Department at Bengaluru accepted the aggregate income for the year under consideration at Rs.25,45,650/- as presented in column 14, however the taxes were computed at Rs.87,40,612/- on the total income of Rs.3,33,06,450/- as described above. It is submitted that upon perusal of the order under section 143 (1) dated 2nd May, 2019, Petitioner realized that the

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amount of Rs.3,07,60,800/- towards long-term capital gains had been erroneously shown in the return of income for the year under consideration.

4 Realizing the mistake, Petitioner filed application under section 154 of the Income Tax Act before the 1st Respondent on 25th July 2019, seeking to rectify the mistake of the mis-recording of long-term capital gains in the order under section 143 (1) of the Income Tax Act as being in an inadvertent error as the same had already been considered in the return for the A. Y. 2017-18, assessment in respect of which had already been completed under section 143 (3) of the Income Tax Act. It is submitted that the application for rectification is still pending and Respondent No.1 has not taken any action with respect to the same, though it appears that the same has been rejected as per the statement in the Respondent's affidavit in reply.

5 In the meantime, Petitioner also made the grievance on the e-filing portal of the CPC on 4th October 2019 seeking rectification of the mistake where the tax payer was requested to transfer its rectification rights to AST, after which Petitioner filed letters dated 17th October 2019, 20th February 2020 and 24th November 2020 with Respondent No. 1, requesting him to rectify the mistake under section 154 of the Income Tax Act.

6 In order to alleviate the misery and bring to the notice of higher authorities the delay being caused in the disposal of the rectification application, Petitioner approached Respondent No. 2 under section 264 of the Income Tax Act on 27th January 2021, seeking revision of order dated 2nd May 2019 passed under section 143 (1) narrating aforementioned facts and requesting the Respondent No. 2 to direct Respondent No.1 to recalculate tax liability for A.Y 2018 – 19 after

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reducing the amount of long-term capital gains from the total income of Petitioner for said year.

7 However, instead of considering the application on merits, vide order dated 12th February, 2021, the Respondent No. 2 Principal Commissioner of Income Tax – 19 dismissed the application filed by Petitioner on the ground that, the same was not maintainable on account of alternate effective remedy of appeal and that assessee had also not waived right of appeal before the Commissioner of Income Tax (Appeals) as per provisions of section 264 (4) of the Income Tax Act.

8 Being aggrieved by the order of rejection of the application under section 264 of the Income Tax Act, Petitioner is before us seeking the following reliefs:

"(a) That this Hon'ble Court may be pleased to issue under Article 226 of the Constitution of India an appropriate direction order or a writ including a writ in the nature of 'Certiorari' to call for the records of the application filed by the Petitioner under section 264 and the order passed thereon dated 12.02.2021 and quash the same and direct the Respondent No.2 to decide the application filed under section 264 of the Act on merits afresh and grant relief prayed for in the application after appreciating facts of the case and submissions made by the Petitioner.

(b) That this Hon'ble Court may be pleased to issue under Article 226 of the Constitution of India appropriate writ or order or direction including a writ in the nature of 'Mandamus' to quash the order dated 12.02.2021 and direct the Respondent No.2 to decide the application of the Petitioner filed under section 264 afresh on merits and grant relief prayed for in the said application filed under section 264 of the Act.

(c) The Petitioner submits that this Hon'ble Court may be pleased to issue under Article 226 of the Constitution of India an appropriate writ or order or direction including a writ in the nature of 'Prohibition' restraining the Respondent No.1 from recovering the outstanding demand of Rs.87,40,610/- raised in the order dated 02.05.2019 under section 143(1) of the Act."

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9 Learned Counsel for Petitioner, Mr K Gopal, would submit that Respondent No. 2 has misconstrued the provisions of section 264 of the Income Tax Act while declining to interfere with the order dated 2nd May 2019 passed under section 143 (1) of the Income Tax Act. He would submit that Petitioner did not file any appeal under section 246 A of the Income Tax Act against the order dated 2nd May 2019 and the time limit for filing the appeal before CIT (Appeals) had also expired at the time of filing of the revision application under section 264 of the Income Tax Act. He, therefore, submits that the case of the Petitioner would not fall within the exception in section 264 (4) as, though an appeal against the 143 (1) order would lie before the Commissioner (Appeals) but Petitioner had chosen not to file the same and the time limit for making the same has also expired nor is there any order pending on an appeal before Deputy Commissioner (Appeals) nor the order has been made the subject of an appeal to Commissioner (Appeals) or to the Appellate Tribunal. He, therefore, submits that Respondent No. 2 - Principal Commissioner ought to have considered the revision application on merits and directed 1st Respondent to recalculate tax liability for the A.Y 2018–19 after reducing the amount of long-term capital gains from the total income of petitioner for the said year.

10 Mr Gopal, learned Counsel refers to the decision of the Delhi High Court in the case of ***Vijay Gupta v/s. Commissioner of Income Tax [2016] 386 ITR 643 (Delhi)*** wherein the Delhi High Court decided the issue of maintainability of revision application against the order passed under section 143 (1) of the Income Tax Act. He has relied upon paragraphs 35 to 40, which are quoted as under:

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"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 the 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.

36:- An assessee is liable to tax only upon such receipt as can be included in his total income and is assessable under the Income Tax Act. There is nothing in section 264, which places any restriction on the Commissioner's revisional power to give relief to the assessee in a case where the assessessee detracts mistakes because of which he was over-assesseed after the assessment was completed. Once it is found that there was a mistake in making an assessment, the Commissioner had power to correct it under section 264(1). 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. It is settled proposition of law that no tax can be levied or recovered without authority of law. Article 265 of the Constitution of India and section 114 of the State Constitution imposes an embargo on imposition and collection of tax if the same is without authority of law.

37:- The Commissioner further erred in rejecting the application under Section 264 holding that intimation under section 143(1) could not be regarded as an order and was thus not amenable to re visionary jurisdiction under section 264 of the Act. The intimation under Section 143(1) is regarded as an order for the purposes of section 264 of the Act. He failed to appreciate that the petitioner was not only impugning the intimation under section 143(1) but also the rejection of the application under section 154 of the Act.

38:- In the present case, as per the petitioner, in his return of income, he has erroneously offered to tax gains arising on sale of shares as short-term capital gains instead of same being long-term capital gains exempt from tax. Subsequently, the petitioner on January 14, 2011 filed the application under section 154 of the Act.

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The Assessing Officer on February 21, 2011 partly rectified the intimation and computed the tax on capital gains at 1- per cent as against 30 per cent computed in the intimation issued under section 143(1) of the Act. The Assessing Officer, however, refused to accept the application under Section 154 filed by the petitioner. When the Assessing Officer could rectify the intimation on February 21, 2011, he could also consider the prayer of the petitioner made in the rectification application under section 154 of the Act, which was already pending before him on that date.

39:- When the Commissioner was called upon to examine the revision application under section 264 of the Act, all the relevant material was already available on the record of the Assessing Officer, The Commissioner instead of merely examining whether the intimation was correct based on the material then available should have examined the material in the light of the Circular No.14(XL-35) of 1955, dated April, 1955 and article 265 of the Constitution of India. The Commissioner has erred in not doing so and in failing to exercise the jurisdiction vested in him on mere technical grounds.

40:- In view of the above, the impugned order dated November 20, 2012 is set aside. The revision application under section 264 of the Act is restored to the file of the Commissioner. The Commissioner is directed to consider the same afresh on merits and dispose the same within a period of eight weeks from today. The writ petition is disposed of leaving the parties to bear their own costs."

11 Mr Gopal also refers to the decision of this court in the case of ***Universal Packaging and Others v/s. Commissioner of Income Tax [2013] 352 ITR 398 (BOM)*** to submit that in almost similar circumstances, this court has held that such an order passed by the Commissioner of Income Tax is a non-speaking order as it does not consider Petitioner's case on merits who had dismissed the same on the ground of alternate remedy of filing an appeal. In support he quotes the following paragraph from placetum 6 at page 401 as under:

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" ....
It is well settled position in law that one of the basic principles of natural justice is that the authority concerned must pass a speaking order, so as to enable a party to know the reasons, as to why his application is being either accepted or rejected. This giving of reasons also ensures due application of mind to the facts by the authority concerned. The order dated March 26, 2012, is bereft of reasons and, therefore, quashed and set aside.

We direct the Commissioner of Income-tax to dispose of the petitioner's revision application under section 264 of the Act, after giving the petitioner a personal hearing and considering all the relevant contentions raised by the petitioner.

The petition is disposed of in the above terms. No order as to costs."

12 Mr Gopal, submits that therefore, the order dated 12th February, 2021 deserves to be set aside and the revision application under section 264 of the Income Tax Act needs to be restored to the file of the Principal Commissioner and the Principal Commissioner be directed to consider the same afresh on merits and dispose of the same within a stipulated time frame.

13 On the other hand, Mr. Sham Walve, relies on the affidavit in reply dated 31st March 2021 to submit that as per the provisions of section 264 (4) of the Income Tax Act, the assessee's right of appeal exists as against the order under section 143 (1), and petitioner's right of appeal is not yet extinguished. He submits that petition under section 264 of the Income Tax Act has been filed by Petitioner without exhausting all his avenues. It is submitted that the appeal can still be filed along with application for condonation of delay before CIT (Appeals) and therefore there is an effective alternate remedy. Learned Standing Counsel would submit that therefore provisions of section 264 (4) would come into play and the Commissioner has rightly rejected the said application as not maintainable. He refers to the Supreme Court decision of ***Dwarka Nath***

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v/s. Income Tax Officer and another 57 ITR 349 .

14 We have heard Learned counsel for the parties and with their assistance we have perused the papers and proceedings in the matter.

15 This is a case where, in the Petitioner's return for the Assessment Year A.Y 2018 – 19, the figure of long term capital gains of Rs. 3,07,60,800/- on surrender of tenancy rights in respect of earlier A.Y 2017-18 had inadvertently been copied by petitioner's accountant from the return for A. Y. 2017-18. The assessment for A.Y 2017 – 18 was completed under section 143 (3) of the Income Tax Act vide Assessment Order dated 24th December 2019. In the financial year corresponding to A.Y 2018-19, Petitioner received income from house property of Rs.12,69,954/- and income from other sources Rs.14,35,692/- making the total income to Rs.27,05,646/- and after claiming deductions and set off on account of TDS and advance tax, a refund of Rs.34,320/- was determined. No capital asset transfer had taken place during A. Y. 2018-19, therefore no tax on capital gains can be imposed. The error had crept in through inadvertence. There is neither any fraud nor malpractice alleged by the Revenue. The rectification application u/s 154 filed earlier is stated in the Respondent's affidavit to have been rejected. The application under section 264 has been dismissed/rejected on the ground that application is not maintainable as alternate effective remedy of appeal is available and there is no waiver of appeal by the assessee. Since the basic facts are not in dispute, it would be in the fitness of things for us to come straight to the provisions of section 264 of the Income Tax Act.

16 Coming to the decisions cited by Petitioner's counsel. In the case of *Vijay Gupta (supra),* the assessee, in his return of income had

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erroneously offered to tax gains arising on sale of shares as short-term capital gains, instead of the same being offered as long-term capital gains exempt from tax, where Section 154 application of the assessee was refused to be accepted and when the assessee filed a revision application under section 264, the same was rejected on the ground that section 143(1) intimation was not an order and was not amenable to the revisionary jurisdiction under section 264. The Delhi High Court negatived these contentions of the Revenue and further held in paragraph 39 as under:-

> *"39:- When the Commissioner was called upon to examine the revision application under section 264 of the Act, all the relevant material was already available on the record of the Assessing Officer, The Commissioner instead of merely examining whether the intimation was correct based on the material then available should have examined the material in the light of the Circular No.14(XL-35) of 1955, dated April, 1955 and article 265 of the Constitution of India. The Commissioner has erred in not doing so and in failing to exercise the jurisdiction vested in him on mere technical grounds."*

In the facts of the present case, Commissioner has failed to exercise jurisdiction vested in him on fallacious grounds which cannot be sustained.

17 With respect to the decision of this court in the case of *Universal Packaging and Others (supra)*, we note that in that case, by mistake the taxable income was declared in the return at Rs.13.27 lakhs instead of Rs.7.44 lakhs in the return for Assessment Year 2007– 08; it was the first time that from Assessment Year 2007– 08, the procedure of filing return of income was changed from manual to e–filing. An application for rectification under section 154 was rejected by the Assessing Officer. Upon the revision application being filed under

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section 264 of the Income Tax Act, the Commissioner rejected the application stating that the assessing officer had rejected the assessee's application under section 154. The assessee had an option of filing appeal before the Commissioner of Income Tax (Appeals) and therefore there was no reason to revise the order under section 154 passed by the Assessing Officer. Holding the said order to be a nonspeaking order, not considering the petitioner's case on merits by dismissing the same on the ground of alternate remedy of filing appeal, this court quashed and set-aside the said order of the Commissioner stating that the same was in violation of the basic principles of natural justice. In the facts of the present case also the Commissioner has not considered Petitioner's case on merits and simply on the ground of alternate remedy of filing appeal has rejected the application under section 264 of the Income Tax Act. Therefore on the basis of this decision also the Commissioner's order is liable to be set-aside.

18 For the sake of convenience section 264 of the Income Tax Act is quoted as under:-

> *"264. Revision of other orders*
>
> *(1) In the case of any order other than an order to which section 263 applies passed by an authority subordinate to him, the Commissioner may, either of his own motion or on an application by the assessee for revision, call for the record of any proceeding under this Act in which any such order has been passed and may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit.*
> *(2) The Commissioner shall not of his own motion revise any order under this section if the order has been made more than one year previously.*
> *(3) In the case of an application for revision under this section by the assessee, the application must be made within one year from the date on which the order in question was communicated to him or the date on which he otherwise came to know of it, whichever is earlier: Provided that the Commissioner may, if he is satisfied that the assessee was prevented by sufficient cause from making the application within that period, admit an application made after the expiry of that period.*
> *(4) The Commissioner shall not revise any order under this section in the*

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following cases-
(a) where an appeal against the order lies to the Deputy Commissioner (Appeals)] or to the Commissioner (Appeals)] or to the Appellate Tribunal but has not been made and the time within which such appeal may be made has not expired or, in the case of an appeal to the Commissioner (Appeals) or] to the Appellate Tribunal, the assessee has not waived his right of appeal; or
(b) where the order is pending on an appeal before the Deputy Commissioner (Appeals)]; or
(c) where the order has been made the subject of an appeal to the Commissioner (Appeals) or] to the Appellate Tribunal.
(5) Every application by an assessee for revision under this section shall be accompanied by a fee of twenty- five rupees
(6) On every application by an assessee for revision under this sub-section, made on or after the 1st day of October, 1998, an order shall be passed within one year from the end of the financial year in which such application is made by the assessee for revision.
(7) Notwithstanding anything contained in sub-section (6), an order in revision under sub-section (6) may be passed at any time in consequence of or to give effect to any finding or direction contained in an order of the Appellate Tribunal, the High Court or the Supreme Court."

19 What is relevant for our purposes is section 264 (4)(a) of the Income Tax Act. Under this section, the Principal Commissioner is mandated not to revise any order in two situations: first where an appeal that lies to the Commissioner (Appeals) but has not been made and the time within which such appeal may be made has not expired or second, where the assessee has not waived his right of appeal. What emerges is that in a situation where there is an appeal that lies to the Commissioner appeals and which has not been made and the time to make such an appeal has not expired in that case the Principal Commissioner or Commissioner cannot revise any order in respect of which such appeal lies. The language is quite clear that the two conditions are cumulative viz: there should be an appeal which lies but has not been made and the time for filing such appeal has not expired in such a case the Principal Commissioner cannot revise. However, if the time for making such an appeal has expired then it would be imperative that the Principal Commissioner would exercise his powers of revision under section 264. The other or second situation is when the Petitioner assessee has not

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waived his right of appeal; even in such a situation the Commissioner cannot exercise his powers of revision under section 264 (4) (a). In clause (a) of section 264 (4), in the language between filing of an appeal and the expiry of such period and the waiver of the assessee to his right of appeal there is an *"or"* thereby meaning that there is an option i.e either the assessee should not have filed an appeal and the period of filing the same should have expired or he should have waived such right. Therefore, there are two situations which are contemplated in said sub-section (4) (a) of section 264. The section cannot be interpreted to mean that for the Principal Commissioner to exercise his powers of revision under section 264 not only that the time for filing the appeal should have expired but also that the assessee should have waived his right of appeal. We are afraid that, that is not how the section can be read. In the facts of the case, Petitioner has not filed appeal against order under section 143 (1) under section 246-A of the Income Tax Act and the time of 30 days to file the same has also admittedly expired. In our view, once such an option has been exercised, a plain reading of the section suggests that it would not then be necessary for Petitioner to waive such right. That waiver would have been necessary if the time to file the appeal would not have expired.

20 Also the argument of the Revenue to say that the Petitioner can still file the appeal by filing an application for condonation of delay, is in our view, not proper and would be a fallacious proposition as after the period of 30 days, there is no right of appeal but an appeal would rest on the discretion of the Appellate Authority to condone delay upon sufficient cause being shown. We are also afraid that we are unable to agree with the reliance of the learned counsel for the Revenue on the case of *Dwarkanath (supra)*, inasmuch as that was a case where no appeal lay

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against the order of the Income Tax Officer to the Appellate Commissioner and therefore the Commissioner certainly had power to revise the said order. The said decision is clearly distinguishable on facts. In this case though an appeal lay before the Commissioner (Appeals), Petitioner has chosen not to file the same and the time to file the same has already expired. Therefore in our view the decision in the case of *Dwarkanath (supra)* has no application to the facts of this case.

21 Before parting, we would also like to observe that in matters like these, where the errors can be rectified by the authorities, the whole idea of relegating or subjecting the assessee to the appeal machinery or even discretionary jurisdiction of high court, in our view, is uncalled for and would be wholly avoidable. The provisions in the Income Tax Act for rectification, revision under section 264 are meant for the benefit of the assessee and not to put him to inconvenience. That cannot and could not have been the object of these provisions. We do not find any statement either in the impugned order or in the reply to state that the case of the Petitioner seeking remedy of the purported error was not bona fide.

22 In the light of the above discussion, we find that the order dated 12th February 2021 passed by the 2nd Respondent- Principal Commissioner is unsustainable and deserves to be set-aside.

23 The order dated 12th February 2021 passed by Respondent No.2 is set aside. We direct Respondent No. 2 to decide the application filed by petitioner under section 264 afresh on merits and after hearing the Petitioner, pass a reasoned/speaking order in line with the aforesaid discussion for grant of relief prayed for in the said application.

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24 Petition is allowed in the above terms. No order as to costs.

25 Parties to act on a copy of the of the order authenticated by the associate of this court.

(ABHAY AHUJA,J.) **(SUNIL P. DESHMUKH,J.)**

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