IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD ' A ' BENCH, HYDERABAD.

BEFORE SHRI S.S. GODARA, JUDICIAL MEMBER AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER
(Through Virtual Hearing)

ITA No.1560 & 1597/Hyd/2019 **(Assessment Year : 2014-15)**		
Shri Ashok Reddy Cheruvu, Plot No.18, Card Master Enclave, 205, Akbar Road, Bowenpally, Secunderabad-9 PAN AATPC 4089N	**Vs.**	Dy. Commissioner of Income Tax-1, International Taxation, Hyderabad.
Appellant		Respondent/Cross-Appellant

Assessee By : Shri P. Murali Mohan Rao.
Revenue By : Shri Sunil Kumar Pandey (D.R.)

Date of Hearing : 23.02.2021.
Date of Pronouncement : 26.032021.

O R D E R

Per Shri S.S. Godara, J.M. :

These assessee's and Revenue's cross appeals for Asst. Year 2014-15 arise from the Commissioner of Income Tax (Appeals)-10, Hyderabad's order dt.26.08.2019 passed in case No.0220/CIT(A)-10/2016-17, in proceedings under Section 143(3) of Income Tax Act, 1961 ('the Act').

Heard both the parties. Case file perused.

2. The assessee's appeal ITA 1560/Hyd/2019 following substantive grievances in Ground Nos.1 to19 as under :

" 1. The order of the Ld. Commissioner of Income Tax(Appeals) is erroneous both on facts and in law to the extent the order General is prejudicial to the interest of the appellant ground.
2. The Ld. Commissioner of Income Tax(Appeals) has erred in upholding the order of the A.O. on the issue of bringing to tax the capital gains in the hands of the appellant basing Factual on the un-accomplished Joint Development Agreement Ground entered with MI s. Sumathura Infracon Pvt Ltd on behalf of M/s. Vasavi Holdings.
3. The Ld. Commissioner of Income Tax(Appeals) has erred by not properly appreciating the factual position that the above original asset (Land) has been transferred by the assessee to M/s. Vasavi Holdings vide registered sale deed in Doc. No.8408 on 27.08.2014 by way of a sale, basing on the agreement of sale already entered on dt: 09.05.2013.
4. The Ld. Commissioner of Income Tax(Appeals) has erred in upholding the assessment order of the A.O in the matter of workup of the capital gain basing on cost of estimation of the flats allotted to the appellant and not basing on the market value of land transferred.

5. The Ld. Commissioner of Income Tax(Appeals) ought to have directed the AO for adopting the value admitted or the market value of the land on sale of the above asset to M/s. Vasavi Holdings.
6. The Ld. Commissioner of Income Tax(Appeals) has erred in not holding that the assessment officer has erred in not adopted the market value of land or sale consideration admitted by assessee for the purpose of working out the capital gains tax.
7. The Ld. Commissioner of Income Tax(Appeals) ought to have directed the AO to take the market value of the land for the purpose of working out capital gains to tax u/s.48 of the Act.

8. The Ld. Commissioner of Income Tax(Appeals) has erred in not holding that the A.O is wrong in taxing the entire amount of sale consideration in 2014-15 alone without taking into account, the portion of capital gains already admitted by appellant in 2015-16, even before the assessment was made.

9. The Ld. Commissioner of Income Tax(Appeals) ought to have directed the AO to reduce the amount of Capital Gain admitted by appellant in 2015-16 while working out capital gain in 2014-15 from the transaction of land in question.

10. The Ld. Commissioner of Income Tax(Appeals) ought to have well appreciated that taxing up the capital gain entirely in 2015-16 without considering the portion of capital gain will lead to taxing up twice a single element of income.tal gain admitted in 2015-16.

11. Without prejudice to the other grounds, the Ld.AO while passing the consequential order erred in not allowing deduction u/s. 54F for a sum equivalent to the investment made for a sum of Rs.4,15,26,440/ - but restricting the same to Rs.2,99,24,880 as was claimed by assessee originally in AY 2014-15.

12. The Ld. Commissioner of Income Tax(Appeals) ought to have fairly appreciated the factual position that, basing on the sale deed dt: 27.08.2014, the liability to capital gain tax arose to the assessee in A Y 2015-16 and that the assessee had admitted capital gains tax and paid taxes in the A Y 2015-16, which was filed on 30.08.2015 before the present assessment was passed on 31.12.2016.

13. The Ld. Commissioner of Income Tax(Appeals) ought also to have fairly appreciated that the beneficiary of the Joint Development Agreement with M/s. Sumathura Infracon Pvt Ltd, is M/s. Vasavi Holdings, who is the beneficial owner of the land transferred under Joint development and not the impugned appellant.

14. The Ld. Commissioner of Income Tax(Appeals) ought to have held that there is no capital gain tax liability to assessee in AY 2014-15, as it has actually arisen in FY 201415 and that as the assessee has already admitted capital gain in the

relevant year 2015-16 on the sale of property to M/ s. Vasavi Holdings and that therefore, there can be no tax liability to the assessee in AY 2014-15.

15. The Ld. Commissioner of Income Tax(Appeals) ought to have well appreciated the legal precedence that no single element of income can be taxed on a person twice in two years and/ or on two taxable entities, simultaneously and that therefore having suffered capital gain tax in~-16, this cannot be taxed in 2014-15.

16. The Ld. Commissioner of Income Tax(Appeals) ought to have well appreciated that since entire sale consideration has been taxed in the AY 2014-15,the income of a and taxes paid for the A Y 2015-16 should be adjusted in the A Y 2014-15,as the same cannot be taxed twice in the hands of the assessee.

17. The Ld CIT (A) ought to have held that Assessing officer erred in taxing the same income for two assessment years which tantamount to double taxation.

18. The Ld CIT (A) ought to have given directions to the assessing officer that assessee has admitted the capital gains for the Assessment year 2015-16 and the same cannot be taxed again in the assessment year 2014-15.

19. The appellant craves leave to add, alter or modify or substitute any other point to the Grounds of appeal at any time before or at the time of hearing of the appeal."

3. The Revenue's cross appeal ITA 1597/Hyd/2019 canvases the following grievances :

" 1. The ld. CIT(A) erred in directing the Assessing Officer to allow assessee's claim of deduction u/s. 54F in respect of property acquired in USA.

2. The ld. CIT(A) erred in allowing the assessee's grounds relating to claim made with regard to allowing the deduction u/s. 54F in respect of property acquired in USA.

The deduction u/s. 54F can only be made with respect of property acquired constructed in India.

4. Any other ground that may be raised at the time of hearing."

4. The assessee has also filed its petition dt.18.12.2021 seeking to raise the following additional ground Nos.20 to 23 :

" 20. As per the ratio laid down by the Hon'ble Supreme Court of India in the case of National Thermal Power Co. Ltd vs. CIT (1998) 229 ITR 383 (SC) the IT AT has jurisdiction to examine the I General Ground question of law though not arisen before the CIT (A) but has arisen before the ITAT for the first time.
21. The Ld. CIT(A) ought to have appreciated the fact that revised return filed on 16.11.2015 replaces the original return filed on 31.07.2014 and notice u/s 143(2) should be issued on the revised return filed.
22. The Ld. CIT (A) ought to have appreciated the fact that notice u/s 143(2) of the Act is mandatory and it can be issued only upon examination of return filed and since no notice u/s 143(2) was issued within time prescribed, assessment is liable to be annulled.
23. The CIT(A) ought to have appreciated the fact that the notice u/s 143(2) is issued in respect of a particular return of income and not for a particular assessment year."

5. Learned AR submitted during the course of hearing that these additional grounds raise a purely legal issue on validity of the assessment going to the root of the matter and therefore, it deserves to be admitted as per going by the decision National Thermal Power Co. Ltd. Vs. CIT 229 ITR 383 (SC). He further submitted

that the assessee had agitated corresponding substantive ground Nos.7 to 9 before the CIT(A) to this effect as well and therefore, relevant facts qua this legal issue are already on record not requiring any such factual verification.

6. Learned DR strongly objected to the assessee's foregoing reasons seeking to raise additional substantive ground Nos.20 to 26 on the issue of validity of notice u/s. 143(2) of the Act at this belated stage.

7. We have given our thoughtful consideration to rival hearings qua assessee's petition dt.18.02.2021 seeking to raise the impugned additional grounds. It is not in dispute that he had canvassed the corresponding substantive ground Nos.7 to 9 before the CIT(A) to the very effect. It is thus clear that the impugned issue duly emanates form the lower appellate order not requiring any afresh factual examination. Coupled with this, learned co-ordinate bench decision in ITA No.22/Mds/2016 & CO No.56/Mds/2016 M/s. Yes & Yes Hitech Premier Homes India Pvt. Ltd. Vs. ITO Dt.19.06.2017; after considering honourbale apex court judgment in NTPC Ltd Vs. CIT (supra), holds that we can very well entertain such a pure question of law provided the relevant facts are already on record so as to determine the correct tax liability of an assessee. We adopt very reasoning to admit the assessee's foregoing additional grounds.

8. We stay back in the assessee's additional grounds going to the root of the matter and notice that the CIT(A) has dealt with this issue of validity of impugned assessment as under :

> *" 7. The grounds of appeal no.7 to 9 relate to the validity of the scrutiny assessment order passed u/s. 143(3) of the IT. Act.*
>
> *7.1 The original return of income was filed on 04.07.2014 and the same was selected for scrutiny assessment. Later, revised return of Income was filed on 16.11.2015. Even if the revised return of income is a valid return, the scrutiny assessment proceedings, initiated by duly serving the necessary notices u/s.143(2) and 142(1), with reference to the original return of income, continue to be valid and such legal proceedings will have to be taken to their logical conclusion. There is nothing in law which states that the pending proceedings, in respect of the original return, shall abate or will automatically get invalidated with the filing of the revised return, by the appellant. If the argument of the appellant is accepted, then, the same will lead to an absurd proposition and to defeat the pending legal proceedings, all that the assessee will have to do is to file a revised return and say that the revised return has substituted the original return and, therefore, the pending scrutiny assessment proceedings initiated, on the basis of the original return, no longer survive.*

7.2 As the revised return is filed within the due date and valid, it completely substitutes the original return filed u/s.139(1). The meaning of this is that both the returns merge and the proceedings set in motion, on the basis of the original return, will have to be taken forward. As the proceedings are initiated, in accordance with the law, and on the basis of the original return (filed by the appellant), no prejudice is caused to the appellant.

7.3 The decision in the case of Himgiri Foods Limited, cited by the appellant, is not applicable to the facts in the case of the appellant. In that case, issue relates to intimation ul s. 143(1)(a) and processing of the revised return of the income. The decision in the case of Mangalore Chemicals and fertilizers Limited actually goes against the argument of the appellant. The revised return has to be taken into account for the purpose of making assessment. There is no dispute on this. But, it has not been said that the legal proceedings, validly initiated with reference to the original return, will get invalidated with the filing of the revised return of income. The enabling provision of sec. 139(5) provides an opportunity to the assessee to file revised return if the assessee discovers any omission or any wrong statement in the original return filed vi]«. 139(1). Having utilized such opportunity, the appellant cannot turn back and argue that the scrutiny assessment proceedings, initiated on the basis of the original return, do not survive.

7.4 Similarly, the other decisions in the cases of Niranjan Lal Ram Chandra and Machine Tool Corporation of India Limited, cited by the appellant, do not support the argument made by the appellant. Nowhere it is said that the validly initiated pending legal proceedings, on the basis of the original return, will die a natural death with the filing of the revised return.

7.5 As the scrutiny assessment proceedings were already pending (based on original return), there was no legal requirement to once again initiate the proceedings, separately, with reference to the revised return. Legally, the AO was required to logically conclude the pending scrutiny assessment proceedings. Also, to treat the revised return as a valid return and consider the same for the purpose of making assessment. Both of these have been done.

7.6 In view of the discussion made, as above, the grounds of appeal no.7 to 9 are dismissed."

9. Mr. Pandey vehemently supported the CIT(A) order findings under challenge that Section 143(2) of the Act notice had been duly issued to the assessee well before the filing of his revised Return dt.16.11.2015 and therefore, the said earlier notice validates the impugned assessment. And also that Section 143(2) proviso applies case of a return filed u/s. 139(1) of the Act and not qua a revised return u/s. 139(5) of the Act.

10. We have given our thoughtful consideration to rival pleadings against and in support of the correctness of the impugned assessment. We make it clear that there is no dispute between the parties about the assessee having filed the original return on 4.7.2014 followed by Section 143(2) notice, revised return dt.16.11.2015 and the subsequent section 143(2) notice dt.18.11.2016; respectively, in seriatum. Mr. Pandey fails to dispute that the Assessing Officer notice u/s. 143(2) dt.18.11.2016 turns out to be beyond the statutory period of six months from the end of the financial year in view of the revised return dt.16.11.2015. This period of six months has to be counted from 31.03.2016 therefore. We go by this analogy and find that this latter section 143(2) notice dt.18.11.2016 is not a valid notice since issued beyond the said period of six months. Now coming to the next important question as to whether the Assessing Officer must issue afresh section 143(2) notice; going by the assessee or by the earlier notice issued before the assessee's revised return dt.16.11.2015 shall continue to hold the field, we find that the same is no more res integra as per learned co-ordinate bench's decision (supra) is no more res integra as per learned co-ordinate bench's decision (supra) as under :

> " 3. It was fairly agreed by the Ld.AR that in the Cross Objection No.56/Mds/2016, the same was in support of the order of the Ld.CIT(A). It was further submitted by the Ld.AR that the assessee is in the business of construction of multi storied buildings and sale of

plots. It was a submission that the AY 2012-13 was the first year of business of the assessee. It was a submission that the assessee had filed original return of income u/s.139(1) on 13.09.2012. There was a survey u/s.133A on 02.11.2012. The assessee had filed a revised return u/s.139(5) on 30.11.2012 disclosing an income of Rs.5,67,630/-. It was a further submission that subsequently the second revised return was filed by the assessee on 26.02.2014 declaring Nil income. It was a submission that the AO had issued notice u/s.143(2) on 12.09.2013 in response to the return filed by the assessee on 30.11.2012. It was a submission that no notice u/s.143(2) was issued by the AO in respect of the revised return filed on 26.02.2014. It was a submission that once revised return was filed the earlier returns stands effaced. It was a submission that as no notice u/s.143(2) had been issued in respect of the return filed on 26.02.2014, the assessment was liable to be annulled. It was a submission that the assessment was getting time barred on 31.03.2015. It was a further submission that the factum of non-issuance of notice u/s.143(2) was also brought to the attention of the AO vide letter dated 27.03.2015 in response to the show cause notice issued by the AO dated 23.03.2015. It was submitted by the Ld.AR that in the Assessment Order, the AO recognized the existence of the revised return filed on 26.02.2014 by e-filing at Page No.4 Para No.6 of the Assessment Order. It was a further submission that at Page No.33 Para No.14, the AO considered the objection of the assessee in respect of non-issuance of notice u/s.143(2). It was a submission that the AO did not reject the revised return filed by the assessee on 26.02.2014 but has considered the data disclosed in the revised return filed on 26.02.2014 but had rejected on merits, the results admitted and the method of accountancy adopted in the said return. It was a submission that the notice u/s.143(2) having not been issued in respect of the return filed on 26.02.2014, the assessment was liable to be annulled.

4. In reply, Ld.DR submitted that the assessee had objected to the non-issuance of notice u/s.143(2) only on 27.03.2015 which is also extracted by the AO in Page No.27 of this order. It was a further submission that the assessee having been granted substantial opportunities as has been extracted by the AO in Page No.6 of this Order, it was a submission that the assessment was liable to be upheld.

5. We have considered the rival submissions. Admittedly, the last revised return filed by the assessee on 26.02.2014. This was admittedly a valid revised return. The AO has also not rejected the revised return. The assessee has also given his Explanation for filing the said revised return. In fact, after the said revised return was filed, notice u/s.142(1) has been issued on 10.12.2014 and show cause notice have been issued on 23.12.2014 and on 12.03.2015. In response to the show cause notice issued by the AO on 23.03.2015, intimating the assessee to provide his response by 27.03.2015, the assessee has intimated that the notice u/s.143(2) has not been issued on the assessee within the prescribed time. In fact, before the show cause notice being issued by the AO, the assessee never had an opportunity to intimate the AO that notice u/s.143(2) had not been issued. A perusal of the provisions of Sec.143(2) shows that the said notice is not assessment year

specific but it is return specific. Its time limit is computed from the end of the financial year in which the return is furnished. It is mandatory for the issuance of notice u/s.143(2) in the event that the AO proposes to make assessment u/s.143(3). In the present case, the AO having not issued notice u/s.143(2) in respect of a valid revised return filed on 26.02.2014 and more so, the said return have not been treated as invalid, the consequential assessment is bad in law, in view of the principles laid down in the Hon'ble Supreme Court in the case of ACIT vs. Hotel Blue Moon reported in 321 ITR 362 (SC). Further, in view of the position in law that if a revised return is filed u/s.139(5) and if such return is a valid return then the assessment can be completed only on the basis of such revised return as has been held by the Hon'ble High Court of Orissa in the case of Orissa Rural Housing Development Corporation Ltd. reported in 343 ITR 316, the assessment is liable to be annulled.

6. In these circumstances, as notice u/s.143(2) has not been issued in respect of the valid revised return filed by the assessee u/s.139(5) on 26.02.2014, the consequential Assessment Order u/s.143(3) dated 30.03.2014 for the AY 2012-13, in the case of the assessee is bad in law and stands annulled.

7. In the result, the appeal filed by the assessee in ITA No.22/Mds/2016 is stands allowed, the appeal filed by the Revenue in ITA No.351/Mds/2016 is stands dismissed and the CO No.56/Mds/2016 filed by the assessee is stands dismissed."

Learned co-ordinate bench has held in other words that such an issuance of fresh section 143(2) notice is a condition precedent going by the honourable apex court land mark decision in Hotel Blue Moon case (supra). We adopt the very reasoning mutatis mutandis to accept the assessee's additional substantive grounds 20 to 25. The impugned assessment stands annulled therefore. Ordered accordingly. All other rival pleadings in assessee's and Revenue's cross appeals on merit are rendered infructuous as the necessary corollary.

10. The assessee's appeal ITA 1560/Hyd/2019 is allowed and Revenue's cross appeal ITA 1597/Hyd/2019 is dismissed. A copy of this order be placed in respective case files.

Order pronounced in the open court on 26th March, 2021.

Sd/-	Sd/-
(LAXMI PRASAD SAHU)	**(S.S. GODARA)**
Accountant Member	Judicial Member

Hyderabad, Dt. 26.03.2021.

* Reddy gp

Copy to :

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2.	DCIT-I, International Taxation, Hyderabad.
3.	C I T (IT & TP), Hyderabad.
4.	CIT(Appeals)-10, Hyderabad.
5.	DR, ITAT, Hyderabad.
6.	Guard File.

By Order

Sr. Pvt. Secretary, ITAT, Hyderabad.