IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "E", MUMBAI

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER AND

SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No.530/Mum/2016 (Assessment Year- 2011-12)

Mr. Sharad Bhagwant Tembwalkar, Flat No. 1501, Adonis Building, Raheja Acropolis, Near Telecom Factory, Govanid, Mumbai -400088 **PAN:ADVPT6884B**	**Vs.**	Principle Commissioner of Income-tax -27 Mumbai.
(Appellant)		(Respondent)

Assessee by	:	Sh. Dhiren P. Talati (AR)
Revenue by	:	Sh. Manjunatha Swamy (CIT-DR)
Date of hearing	:	17.04.2018
Date of Pronouncement	:	20.04.2018

Order Under Section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by assessee under section 253 of Income Tax Act ('the Act') is directed against the order of Ld. Pr. Commissioner of Income-Tax -27, Mumbai, [for short the ld. PCIT] passed under section 263 of the Act, dated 17.12.2015 for Assessment Year 2011-2012. The assessee has raised the following grounds of appeal:

> "1. In the facts and in the circumstances of the case and in law, Ld. Pr. Commissioner of Income Tax has erred in disallowing the amount paid under release deed for release of her right, title and interest in the property of Rs. 55,00,000/- from the capital receipt on sale of parental property.
>
> 2. In the facts and in the circumstances of the case and in law, Ld. Pr. Commissioner of Income Tax has erred in treating the amount paid under release deed to sister as her right in the parental property as gift.
>
> 3. In the facts and in the circumstances of the case and in law, Ld. Pr. Commissioner of Income Tax has failed to appreciate that assessing officer after carefully verifying the amount paid under release deed to his sister as her right, title

and interest in the parental property as deductible expenses from the sale proceeds of the property assets for the purpose of calculating long term capital gains tax.

4. In the facts and in the circumstances of the case and in law, Ld. Pr. Commissioner of Income Tax has failed to appreciate the difference between the release deed and gift deed.

5. In the facts and in the circumstances of the case and in law, Ld. Pr. Commissioner of Income Tax has failed to appreciate that the person who has money is not under control of appellant.

2. The assessee vide its application dated 05.02.2018 has raised the following additional grounds of appeal:

Looking to the facts and circumstances of the case and in Law the learned Pr. Commissioner of Income Tax is not justified and has erred:

7. in passing an order under section 263 of the LT. Act 1961, as the provisions of the said section are not attracted.

8. in passing an order under section 263 of the I.T. Act 1961 as the order passed by the AO cannot be deemed to be erroneous in so far as it is prejudicial to the interest of the revenue as the order is neither passed without making enquiries or verifications which should have been made nor is the order passed allowing any relief without inquiring into the claim.

WITHOUT PREJUDICE

9. in merely directing the Assessing Officer to disallow the claim of deduction from the capital receipt on sale of property, the amount of Rs.55 Lakhs paid by the assessee under Release Deed, without simultaneously directing the Assessing Officer to recalculate the deduction u/s 54F of the I.T. Act, 1961 as per Law and allow consequential higher deduction u/s 54F as, deduction u/s 54F is based in proportion to the capital gains and the net sales consideration which he has directed to increase by Rs.55 Lakhs.

3. Brief facts of the case are that the assessee is an individual, filed his return of income for relevant Assessment Year on 10.03.2012 declaring total income of Rs. 3,05,600/-. The return was selected for scrutiny. During the scrutiny assessment the assessee filed revised return of income on 10.01.2014 declaring total income at Rs. 64,63,870/-. In the revised return of income the assessee included Long Term Capital Gain, earned on sale of immovable property at Rs.

5,25,35,472/- registered on 29.11.2010. The said property was inherited by assessee from his Mother. The assessee also claimed to have paid a sum of Rs.5,00,000/- to broker and Rs.55,00,000/- to his sister due to his love and affection on release of her share in favour of assessee. The assessee shown Capital Gain of Rs. 1,92,88,490/- and claimed exemption under section 54F on purchase of new residential property at Rs.96,76,900/-. The assessment was completed under section 143(3) on 18.03.2014 determining total income at Rs1,63,94,120/-. While passing the assessment, the Assessing Officer allowed proportionate exemption under section 54F and added the Long Term Capital Gain (LTCG) of Rs. 1,60,88,518/-.

4. The assessment was revised by Ld. PCIT vide its order dated 17.12.2015. The learned PCIT issued show cause notice under section 263 dated 20 October 2015. In the notice the learned PCIT mentioned that on verification of record it was noted that while passing assessment order the assessing officer allowed deduction under section 48 for Rs. 55,00,000/- as a share of sister, whereas in the release deed, it is mentioned that it was paid out of love and affection due for blood relation, which is actually a gift to the sister as per section 47 (iii) of the Act. The assessee filed his reply on 3rd November 2015. In the reply the assessee contended that his sister relinquished her right in the property, on the sale of which long-term capital gain was earned. The assessee also contended that in fact the sister of assessee released her share by way of release date and it was not a gift. The contention of the assessee was not accepted by learned PCIT. The

assessee was directed to file the income tax return of his sister in case by taking a view that if the contention of the assessee is accepted the releaser is also liable for Capital Gain. The learned PCIT on observing that the assessee is not bring any material on record to short as to what treatment has sister has given or whether any tax has been paid on the amount of Rs. 55 lakh received by her. The learned PCIT concluded that the money given out of love and affection cannot be allowed as a cost of asset under section 48, and by allowing such cost the assessing officer passed the order which is erroneous and prejudicial to the interest of revenue. The learned PCIT further concluded that the sister of assessee had not paid any tax which show that she treated the money received as a gift and directed the assessing officer to disallow deduction of Rs. 55 lakh, claimed by the assessee under section 48 of the Act while computing the capital gain, therefore, modified the assessment order accordingly. Thus, aggrieved by the order of Ld. PCIT, the assessee has filed the present appeal before us.

5. We have heard the Ld. Authorized Representative (AR) of the assessee and Ld. Departmental Representative (DR) for the Revenue and perused the material available on record. The Ld. AR of the assessee argued that during the assessment proceeding, the Assessing Officer raised the necessary queries regarding the allowance/disallowance of LTCG. The assessee furnished necessary reply and substantiated his claim. The Assessing Officer applied his mind and passed the assessment order. The assessment order is neither erroneous nor prejudicial to the interest of Revenue. The Ld. PCIT while exercising the

power under section 263 cannot be allowed to substitute his finding, if he is on different opinion. The Ld. PCIT is precluded to examine the issue which was examined by the A.O. and pass the assessment order on the issue examined by him. The Ld. PCIT is only entitled to exercise his jurisdiction in case of "No enquiry, inadequate enquiry, lack of enquiry by Assessing Officer". Merely because the Ld. PCIT has different opinion in the matter/issue, the power under section 263 cannot be exercised. In support of his legal submission, the Ld. AR of the assessee relied upon the following decision:

1. CIT Vs. Fine Jewellery (I) Ltd. (Bombay High Court).
2. CIT Vs. Max India Ltd. 295 ITR 282 (SC).
3. Idea Cellular Ltd. Vs. CIT 301 ITR 407 (Bom. High Court)
4. Malabar Industrial Co. Ltd. Vs. CIT 243 ITR 83 (SC).
5. CIT Vs. Gabriel India Ltd. 203 ITR 108 (Bom. High Court).
6. Grasim Industries Ltd. Vs. CIT 321 ITR 92 (Bom. High Court).
7. CIT Vs. Sunbeam Auto Ltd. 332 ITR 167 (Del. High Court).
8. Narayan Tatu Rane Vs. ITO (ITA No. 2690 & 2691) (Mum ITAT).
9. PCIT Vs Delhi Airport Metro Express Pvt. Ltd. (ITA No. 705) (Del. High Court).
10. Amira Pure Foods (P.) Ltd. Vs PCIT (ITA No. 3205) (Del. ITAT).

6. On the other hand, the Ld. DR for the Revenue supported the order of Ld. PCIT. The Ld. DR for the Revenue further submits that order passed by Assessing Officer is erroneous and so far as prejudicial to the interest of Revenue.

7. We have considered the rival submission of the parties and gone through the orders of Assessing Officer as well as order passed by Ld. PCIT. We have also considered the various case law cited before us. First we may refer the settled legal position regarding the powers of CIT/ PCIT under section 263, in view of leading case of the Hon'ble Apex Court in case of Malabar Industrial Co. Ltd

(243 ITR 83 SC). The relevant part of the ratio of this leading case is referred below;

> *"A bare reading of section 263 of the Act 1961, makes it clear that the prerequisite for the exercise of jurisdiction by the CIT suo moto under it, is that the order of ITO is erroneous, so far as it is prejudicial to the interest of revenue. The CIT has to be satisfied twin conditions, namely (1), the order of AO sought to be revised is erroneous and (2) it is prejudicial to the interest of revenue. If one of them is absent- if the order of ITO is erroneous but is not prejudicial to the revenue or if it is not erroneous but is prejudicial to the revenue – recourse cannot be had to section 263 (1) of the Act. The provision cannot be invoked to correct each and every type of mistake or error committed by the AO, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of fact or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category falls orders passed without applying the principle of natural Justice or without application of mind. The 'phrase prejudicial to the interest of revenue' is not an expression of art and is not defined in the Act. Understood it is ordinary meaning it is of wide import and is not confined to loss of tax. The scheme of the act is to levy and collect tax in accordance with the provision of the act and this task is entrusted to the revenue. If due to an erroneous order of the ITO, the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interest of revenue. The phrase prejudicial to the interest of revenue has to be read in conjunction with an erroneous order passed by the AO. Every loss of revenue as a consequence of an order of AO, cannot be treated as prejudicial to the interest of revenue, for example, when an ITO, adopted one of the course permissible in law and it has resulted in loss of revenue, or where two views are possible and the ITO has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of revenue. Unless the view taken by ITO is unsustainable in law."*

A reference may also be made to the decision of Hon'ble Jurisdictional High Court in case of CIT Vs Gabrial India Ltd 203 ITR 108 (Bom), wherein it was held that;

> *"The power of suo moto revision under subsection (1) of section 263 of the Act is in the nature of supervisory direction and can be exercised only if the*

circumstances specified therein exist. Two circumstances must exist to enable l the CIT to exercise the power of revision under this sub section viz (1) the order should be erroneous and (2) by virtue of the order being erroneous prejudice must have been caused to the interest of the revenue. And order cannot be termed as erroneous unless it is not in accordance with law. If ITO. Act in accordance with law. Make certain assessment; the same cannot be branded as erroneous by the CIT simply because according to him, the order should have been written more celebratory. This section does not visualise a case of substitution of the judgement of the CIT for that of the ITO, who passed the order, unless the decision is held to be erroneous. This is may be visualised where the ITO while making the assessment examines the accounts, makes enquiries, applied his mind to the facts and circumstances of the case and determine the income either by accepting the accounts for by making some estimate himself. The CIT on perusal of records, may be of opinion that the estimate made by the officer concerned was on the lower side and left to the CIT, he would have estimated the income at a higher figure than one determine by the ITO. That would not vest the CIT with power to re-examine the accounts and determine the income himself at the higher figure. This is because ITO has exercised the quasi-judicial power vested in him in accordance with law and arrived at a conclusion and such a conclusion cannot be termed to be erroneous, simply because the CIT does not feel satisfied with the conclusion. It may be said in such a case that in the opinion of the CIT the order in question is prejudicial to the interest of revenue. But that by itself would not be enough to vest the CIT with the power to suo moto revision because the first requirement, namely that the order is erroneous, is absent. Similarly, if an order is erroneous but not prejudicial to the interest of the revenue, then the power of suo moto revision cannot be exercised. And every erroneous order cannot be subject matter of revision because the second requirement must be fulfilled. There must be some prima facie material on record to show that tax which was lawfully eligible has not been imposed or that by the application of the relevant statue, on an incorrect or incomplete interpretation, a lesser tax than what was just has been imposed. When exercise of statutory power is dependent upon the existence of certain objective facts, the authority before exercising such power must have material on record to satisfy in that regard. If the action of the authorities challenged before the court, it would be open to the courts to examine whether relevant objective factors were label from the records called for and examined by such authority".

8. In view of the above stated legal position we shall examine the facts of the case in hand. We have noted that during the assessment proceeding, the Assessing Officer asked the assessee to furnish the working of LTCG on the basis of agreement value and the market value and the working of capital gain vide show-cause notice dated 18.02.2014 and further on 10.03.2014. The assessee filed its reply dated 20.02.2014. The assessee also explained that he has paid Rs.55,00,000/- out of sale consideration to his sister Smt. Sulabha Ramesh Ambre. The said amount was paid through banking channel. The Assessing Officer assessed the market value on the basis of report of Government Approved Valuer and worked out the working of LTCG while passing the assessment order. We have noted that the Assessing Officer has made sufficient and adequate enquiry and passed the order accordingly. Admittedly, the Ld. PCIT has not invoked the Explanation 2 of section 263. The observation of Ld. PCIT was related to the treatment given on the receipt of Rs. 55,00,000/- as gift. According to the Ld. PCIT, the transaction cannot be treated different view in the hand of assessee.

9. We have seen that the assessee has filed on record the release deed dated 23rd November 2010 and copy of declaration cum indemnity. From the perusal of these documents it is revealed that Smt. Bharati Bhagwant Tembwalkar (Mother of assessee) was the owner of flat bearing survey no. 26, Hissa No. 2 (pt) admeasuring 2175 sq. yard at village Deonar, Govandi, District-Bandra, which was acquired by Conveyance Deed dated 10.08.1967. Smt. Bharati Bhagwant

Tembwalkar died on 23/08/2009 leaving behind Bharat Bhagwant Tembwalka, Sharad Bhagwant Tembwalkar (assessee), Smt. Sulabha Ramesh Ambre (daughter) and Mr. Kunal janardan Chavan son of pre-deceased daughter namely Mrs. Meenal Janardan Chavan (died) on 12.09.1993. Smt. Sulabha Ramesh Ambre released their share in favour of assessee, vide Release Deed dated 23.11.2010. The assessee due to love and affection paid a sum of Rs. 55,00,000/- to Smt. Sulabha Ramesh Ambre. The said amount was paid due to love and affection and in respect to the sister by assessee. As we have already held that the assessing officer has made sufficient enquiry. So far as the observation of Ld. PCIT was related to the treatment given on the receipt of Rs. 55,00,000/- as gift are concern that the transaction cannot be treated different view in the hand of assessee. We have noted that in the release deed the payment of Rs. 55,00,000/- paid to Smt. Sulabha Ramesh Ambre is clearly mentioned. In our view, the relinquishment of share is a part of exercise to make a marketable title of capital asset. There is no dispute about payment of Rs. 55,00,000/- paid to Smt. Sulabha Ramesh Ambre. Thus, the payment of Rs. 55,00,000/- is made wholly and exclusively with the connection of transfer of capital asset. The release deed was executed on 23.11.2010 and the property was sold on 29.11.2010. In our considered view the assessing officer has taken a reasonable and possible view after examining the facts of the case. The order passed by assessing officer is not erroneous, though, it may be prejudicial to the interest of revenue. The Hon'ble Supreme Court in CIT Vs Max India (295 ITR 282 SC)

held that if after examining the details the assessing officer has taken a view which is possible view then it cannot be treated that the order passed by assessing officer is erroneous and prejudicial to the interest of justice. Consequently, the revision order passed by ld. PCIT is set-aside. In the result the grounds of appeal raised by the assessee are allowed.

10. In the result, appeal filed by assessee is allowed.

Order pronounced in the open court on 20th day of April 2018.

Sd/-	Sd/-
(B.R. BASKARAN)	**(PAWAN SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated 20/04/2018

S.K.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER

Asstt.Registrar)
ITAT, Mumbai