आयकर अपीलीय अधीकरण, न्यायपीठ –"B" कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH: KOLKATA

[Before Shri P. M. Jagtap, Vice-President and Shri A. T. Varkey, JM]

I.T.A. No. 332/Kol/2020
Assessment Year: 2015-16

Krishna MurariPoddar (PAN:AGBPP 6107 C)	Vs.	Pr. CIT, Kolkata-2, Kolkata
Appellant		Respondent

Date of Hearing (Virtual)	13.10.2020
Date of Pronouncement	28.10.2020
For the Appellant	Shri S. K. Tulsiyan, Advocate
For the Respondent	Shri Imokaba Jamir, CIT

ORDER

Per Shri A.T. Varkey, JM:

This is an appeal preferred by the assessee against the order of Ld. Pr. CIT-Kolkata dated 11.03.2020 for A.Y. 2015-16 passed u/s 263 of the Income Tax Act, 1961 (in short the 'Act'). The assessee has challenged the jurisdiction of the ld. PCIT to invoke jurisdiction u/s 263 of the Act.

2. Brief facts of the case is that the ld. PCIT took note of the original scrutiny assessment order passed u/s 143(3) of the Act against the assessee for AY 2015-16 on 23.08.2017 and was of the opinion that the assessment framed by the Assessing Officer was erroneous, prejudicial in the interest of the revenue. According to him, the case of the assessee was selected for scrutiny due to 'increasein capital' of the assessee in this assessment year. According to ld. PCIT from the explanation given by the assessee to Assessing Officer, he could discern that was on account of receipt of gift of residential flat at Apartment no. A0703, 7th Floor, Project RMZ Latitude, Bangalore. In this respect, further details was that assessee's daughter Ms. Ankita

Kejriwal by gift dated 29.08.2014 [which has been notarized as gift declaration on 20.01.2015] had gifted the residential flat to assessee; which action was followed subsequently on 16.03.2015 by a supplementary agreement wherein the assessee was nominated as purchaser in her place (donor Ms. AnkitaKejriwal) wherein she was the confirming party. According to ld. PCIT, gift deed which has not been registered with the respective Sub-Registrar office is void, since registration is mandatory as per section 17 of Registration Act, 1908 and Section 123 of the Transfer of Property Act. Therefore, according to ld. PCIT the assessment framed by the Assessing Officer was carried out without proper verification / examination of the issues stated above and since no addition was made in this regard, he issued show cause notice conveying his intention to exercise his revisional jurisdiction u/s 263 of the Act. Pursuant to show cause notice, the assessee objected to the revisional proceedings and made it submission which have been incorporated from page nos. 3 to 4 of the impugned order. Not being satisfied with the explanation given by the assessee, the Ld. PCIT was of the opinion that the assessee has increased his capital during the year on account of receipt of gift of residential flat as stated above at Bangalore. According to ld. PCIT as per Section 17 of the Registration Act, 1908 and Section 123 of the Transfer of Property Act, it was mandatory to register a gift deed at the respective Sub-Registrar office. According to ld. PCIT, since the gift deed is not registered, transfer of immovable property cannot take place thereby renders the transfer void. The Ld. PCIT noted that the ld. AR for the assessee submitted before him that the donor being the assessee's daughter, the gift by relative/daughter is not covered u/s 56(2)(vii) of the Act and any technical requirement of relevant Registration Act or Transfer of Property Act is tax neutral from the income tax point of view, however he did not agree. Even though it was brought to the notice of the ld. PCIT that the flat has been registered in assessee's name on 14.09.2018 after completion of all formalities by the developer of the property, the Ld PCIT after considering all the aforesaid facts was of the opinion that the Assessing Officer has accepted increase in capital without proper application of his mind, and since it is not mentioned in the assessment order that he had verified the source of increase in capital, according to ld.

PCIT, the Assessing Officer has not ascertained whether the daughter who has gifted the flat to the assessee has the capacity to purchase the flat or not. Therefore, he was of the opinion that the assessment order passed by the Assessing Officer was erroneous and prejudicial to the interest of the revenue and thereafter he took the aid of the explanation inserted in section 263 of the Act w.e.f 01.06.2015 and held that the assessment order dated 23.08.2017 passed by the Assessing Officer was erroneous insofar as prejudicial to the interest of the revenue and thereafter he restored the assessment back to the file of Assessing Officer and directed him to make fresh assessment and to verify the issues discussed in his order afresh after giving proper opportunity of being heard to the assessee.

3. Aggrieved by the aforesaid action of the ld. PCIT, the assessee is before us.

4. Assailing the action of the Ld. PCIT to invoke the revisional jurisdiction by finding fault with the scrutiny assessment order passed by AO on account of non-application of mind was according to him patently wrong. According to him, the assesse had filed his ROI declaring total income of Rs.17,42,030/-. According to him, in the assessee's Balance Sheet as on 31.03.2015, opening balance under Capital Account was Rs.97,94,441/- and closing balance was to the tune of Rs.3,42,31,441/-. Thereafter, the case was selected for limited scrutiny on the issue of 'increase in capital during the year'. According to Ld. AR, the AO had issued notices u/. 143(2) of the Act dated 29.07.2016 requiring the assessee to produce evidence in support of the said increase in capital account. Further notice u/s. 142(1) of the Act dated 21.02.2017 with questionnaire was also issued to provide further relevant documents. Pursuant to the statutory notice of AO, the assessee filed his replies vide letter dated 19.08.2016 and 15.03.2017 wherein the assessee had explained the reason for increase in capital was mainly on account of receiving gift of a residential flat from his daughter, Ms. Ankita Kejriwal, which was an act shown out of natural love and affection. Explaining the details of the gift the Ld. AR submitted that his daughter Ms. Ankita Kejriwasl had entered into an Agreement on 08.08.2014 to purchase a flat with

the developers/vendors, by virtue of which a flat measuring about 3895 sq. ft. at Apartment No. A-703, Project RMZ Latitude, Bangalore, valued at Rs.2,29,82,161/- was booked and thereafter, she out of her natural love & affection gifted the residential flat booked in her name to her father (appellant) vide the Declaration of Gift dated 29.08.2014 which was notarized on 20.01.2015. It was pointed out by Ld. AR that the assessee's daughter is assessed to tax at Ward-29(4), Kolkata and presently she is residing at USA. According to ld. AR, thereafter a supplementary deed with the builder was executed on 16.03.2015 wherein the appellant's name (father) has been nominated/substituted as 'Purchaser' in place of the original purchaser (daughter) with the daughter as the Confirming Party upon furnishing of the said notarized gift deed and a letter from the daughter (Ms. Ankita Kejariwal) requesting the vendors/developers to delete her name as the purchaser in the original agreement and to nominate her father as the sole purchaser. According to the Ld. AR, by virtue of the said Gift Declaration, the donor (daughter) has relinquished all her rights in the said flat. And in support of the increase in capital, facts of the case as stated above and requirements as per notices issued by the A.O, the assessee had furnished the following documents/evidences during the scrutiny assessment proceeding before the AO.

1. Copy of Declaration of Gift duly notarized on 20.01.2015.

2. Copy of Income-tax Return for A.Y. 2015-16 along with computation of income, Balance Sheet and P/L Account as on 31.03.2015 of the appellant.

3. Details of source of fund for acquisition of the said flat by Ms. Ankita Kejriwal (daughter) along with bank statement.

4. Copy of Supplementary Agreement executed on 16.03.2015 between the vendors and the appellant as purchaser of the said flat and the daughter as a Confirming Party.

5. According to the Ld. AR, it was thus explained to the AO that since the donor was the daughter, the gift in question which was given to her father was not covered u/s.56(2)(vii) of the Act and therefore, technical requirement of relevant Registration Act or Transfer of Property Act for the said gift was neutral from the income-tax point of view. Upon consideration of the above, the AO after making enquiries/verification

which he deemed fit for the purpose of scrutiny of the assessment passed the assessment order u/s.l43(3) dated 23.08.2017 assessing the income as per ROI filed by the appellant. Therefore, according to Ld. AR since the assessment order having been passed with proper enquiry and verification cannot be interfered with and the jurisdictional requirement for invoking revisional jurisdiction u/s. 263 of the Act was totally absent on the facts of this case. Thus, according to the Ld. AR, in view of the aforesaid facts and after taking into consideration of all facts the AO being satisfied with the explanation and supporting evidences, the AO took a plausible view and found nothing irregular in the gift having been made by a daughter to her father out of natural love and affection, which was the only reason for increase in capital of the appellant during the assessment year under appeal. Therefore, according to Ld. AR, the requirement of clause (b) of Explanation 2 to sec. 263 of the Act for invoking jurisdiction u/s.263 of the Act was totally absent and found wanting. Further, according to Ld. AR there is no dispute that the sole purpose of selection of limited scrutiny of the ITR filed by the appellant was to scrutiny on the issue of 'increase in capital during the year". The AO was satisfied about the gift of residential flat by the donor-daughter to the father-donee and the source of fund invested by the daughter was brought to his notice pursuant to AO's 142(1) notice dated 21.02.2017 and drew our attention to pages 7-9 of paper book from where the Balance Sheet of assessee as on 31.03.2015 and P&L Account (7&8pages PB) as well as the source of fund of his daughter Ms. Ankita Kejriwal (donor) to purchase of flat is found placed at page 9 (which we will re-produce infra). And thus according to ld. AR, the source of fund of Ms. Ankita Kejriwal who was assessed by ITO Ward-29(4), Kolkata at that point of time was brought to the notice of AO pursuant to his notice u/s. 142(1) of the Act (supra) and after being satisfied with the aforesaid enquiries and verification he accepted the increase in capital of assessee and did not find anything amiss in the gift of flat by daughter to father (assessee).

6. According to Ld. AR, the AO being satisfied about the genuineness of gift of the residential flat by a daughter to her father and the AO after going through the

source of funding by the donor which was duly documented, and taking into consideration other formalities like substitution of name of the appellant/assessee in the supplementary deed executed between the vendor ; and the appellant assessee being substituted as purchase and the daughter standing as confirming party and since the gift by daughter to her father was not covered u/s. 56(2)(vii) of the Act, there is hardly any scope of any revenue loss, so according to Ld AR, there was no question of any prejudice to the revenue. Therefore, according to ld. AR, the order passed by the AO is neither erroneous nor prejudicial to the interest of the revenue, thereby leaving any scope to invoke jurisdiction u/s. 263 of the Act. Therefore, according to Ld. AR, in the facts and circumstances of the assessee's case do not fall within the ambit/scope of Explanation 2 to section 263 of the Act as explained above. And that being so, the action of the Ld. Pr. CIT in issuing Show Cause Notice u/s. 263 of the Act and passing order on the alleged ground of assessment order being erroneous and prejudicial to the interest of the revenue is beyond the sanction of law and needs to be quashed.

7. Per contra, the Ld. CIT DR vehemently opposing the plea of the Ld. AR contended that the Ld. Pr. CIT has rightly exercised his revisional jurisdiction since the assessment order does not mention as to whether the AO has enquired about the source of fund of Ms. Ankita Kejriwal (daughter/donor) to purchase the flat and so the Ld. Pr. CIT wants the AO to verify this fact, so there is nothing wrong in such an action. According to Ld.CIT DR, as per Section 17 of the Registration Act, 1908 and Section 123 of the Transfer of Property Act, it was mandatory to register a gift deed at the respective Sub-Registrar office and since the gift deed in this case was not registered, transfer of immovable property/flat cannot take place since it renders the transfer void, which fact has not been appreciated by AO, goes on to show non-application of mind on the part of AO, which renders the assessment order erroneous as well as prejudicial to revenue. Relying on the other reasons cited by ld. Pr. CIT in the impugned order the Ld. CIT, DR does not want us to interfere with the order of ld. Pr. CIT.

8. We have heard both the parties and perused the material available on record. Since the legal issue of jurisdiction has been raised, first of all, we have to examine whether the requisite jurisdiction necessary to assume revisional jurisdiction is existing there before the Pr. CIT to exercise his power u/s 263 of the Act. For that, we have to examine as to whether in the first place the order of the Assessing Officer found fault by the Principal CIT is *erroneous as well as prejudicial to the interest of the Revenue*. For that, let us take the guidance of judicial precedence laid down by the Hon'ble Apex Court in Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83(SC) wherein their Lordship have held that *twin* conditions needs to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer must be erroneous and so far as prejudicial to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed on incorrect assumption of fact; or (ii) incorrect application of law; or (iii)Assessing Officer's order is in violation of the principle of natural justice; or (iv) if the order is passed by the Assessing Officer without application of mind; (v) if the AO has not investigated the issue before him; then the order passed by the Assessing Officer can be termed as erroneous order. Coming next to the second limb, which is required to be examined as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue. When this aspect is examined, one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industries (supra) held that this phrase i.e. "*prejudicial to theinterest of the revenue*'' has to be read in conjunction with an *erroneous order* passed by the Assessing Officer. Their Lordship held that it has to be remembered that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of

the revenue **"unless the view taken by the Assessing Officer is unsustainable in law".**

9. With the aforesaid ratio in mind when we examine whether the Ld PCIT had jurisdiction to invoke revisional jurisdiction u/s 263 of the Act, we note that in the show cause notice issued by the ld. PCIT, he was of the opinion that the Assessing Officer has passed the assessment order without proper verification / examination of the increase in capital and without making any addition in this regard. Thereafter, in the impugned order, he was of the opinion that Assessing Officer has accepted the increase in capital without proper application of mind and he has not verified the source of increase in capital i.e, the Assessing Officer has not ascertained the capacity of the daughter (donor) to purchase the flat and gift it to assessee. We note from the perusal of the page no. 1 to 3 of paper book that the assessee's case for AY 2015-16 was selected for limited scrutiny i.e. only for the issue in respect of increase in capital of assessee. We note from perusal of page 3 of paper book that the Assessing Officer has asked the assessee to provide the relevant documents in respect of substantial increase in capital for the year. We note from a perusal of page 4 to 9 of PB wherein the assessee has replied to the notices issued by the Assessing Officer by letter dated 19.08.2016 (Page-4 of PB) and by letter dated 15.03.2017 (Page-5 of PB) and had filed the declaration of gift which has been notarized on 20.01.2013 (Page-6 of PB) and had filed detailed written submission along with documents in respect of increase in capital which is found placed in page 7 to 15 of paper book wherein we note that the assessee has also placed the supplementary agreement executed at Bangalore on 16.03.2015 as well as the balance sheet and profit and loss account of the assessee and most importantly the assessee has given the source of the funds of Ms. Ankita Kejriwal (donor/daughter of assessee) for purchase of the flat at Bangalore, which is reproduced as under:

The source of fund for acquisition of said flat by Ms. Ankita Kejariwal is as below:

Date	Party Name	Amount	Source of Fund
25-04-2012	Millennia Realtors Pvt. Ltd.	1,50,00,000.00	Redemption of Mutual Fund of Rs.23,69,781.63 on 17-04-12
			Redemption of Mutual Fund of Rs.1,25,64,943.20 on 17-04-12
25-03-2013	Millennia Realtors Pvt. Ltd.	25,13,209.00	Out of current year income of Rs.13,29,205.00 on 24-06-13
			Gift received from relatives of Rs.12,00,000/-on 21-03-13
04-07-2013	Millennia Realtors Pvt. Ltd.	25,13,209.00	Out of current year income of Rs.10,01,293.73 on 24-06-13
			Gift received from relatives of Rs.5,00,000/-on 24-06-13
			Gift received from Relatives of Rs.10,00,000/-on 25-06-13
18-09-2013	Paid for Gas pipelines	77900.00	out of bank balance
13-12-2013	Millennia Realtors Pvt. Ltd.	25,13,209.00	Part maturity of Public Provident Fund of Rs.7,40,000/- on 07-12-13
			Gift received from relatives of Rs.16,00,000/- on 11-12-13
30-12-2013	Millennia Realtors Pvt. Ltd.	3,44,584.00	out of bank balance
18-04-2014	Paid for Stamp and Franking	20050.00	out of bank balance
	TOTAL	2,29,82,161.00	

We note from page 9 of paper book that along with the source of fund (supra) the assessee had stated to have filed the copy of bank statement of Ms. Ankita Kejriwal for substantiating/corroborating above transactions. We also note that the donor who is the daughter of assessee was an income tax assessee, who was assessed under ITO Ward 29(4), Kolkata. We note that the AO had issued the statutory notice calling for the relevant documents to substantiate the increase of capital as shown in the balance sheet as on 31.03.2015 and after going through the documents discussed supra, we note that the Assessing Officer has discharged his duties as an investigator by asking for the details in respect of increase in capital and pursuant to the same the assessee has given the explanation stating the increase in capital was mainly due to the addition of a flat in Bangalore which was gifted to him by his daughter Ms. Ankita Kejriwal. In order to support his contention, the assessee has kept the copy of gift deed dated 29.08.2014 as well as declaration which was notarized on 20.01.2015 along with supplementary agreement executed on 16.03.2015 to substitute the name of the assessee in place of the daughter as a purchaser. After being satisfied with the aforesaid exercise the AO accepted the increase in capital.

10. For interfering with the aforesaid action of AO, the main fault which the ld. PCIT notes is in respect of deficiency of the gift instrument dated 29.08.2014,which according to him, since has not been registered as per Section 17 of the Registration Act, 1908, therefore, transfer is void and therefore, no transfer of the flat could have taken place by virtue of non-registered gift instrument. Since this legal defect has not been taken into consideration by the AO, according to Ld. Pr. CIT the order of AO is bad for non-application of mind. It is true that non-registration of gift deed of immovable property falls foul of section 17 of the Registration Act 1908 and consequently affect the transfer of the immovable property (flat in this case) by virtue of section 49 of Registration Act, 1908 so no transfer of flat takes place in the eyes of law. When we agree with the contention of ld. Pr. CIT on this score, the legal effect of such a contention is that in the balance sheet the capital account of the assessee, the gifted item of flat given by his daughter Ms. Ankita Kejriwal to the tune of Rs. 2,29,82,161/- will disappear and consequently there will be no increase in capital of Rs 2.29 crores, thus causing no prejudice to the revenue.

11. Be that as it may be, during assessment proceedings when the Assessing Officer finds that there is credit entry in the books of an assessee, then he may ask for the nature and source of the credit and in such an event, the assessee is supposed to explain to the satisfaction of the Assessing Officer the identity, creditworthiness and genuinety of the credit i.e, the nature and source of the credit. In this case, since there was increase in capital account of the assessee because of the gift of a flat at Bangalore from his daughter Ms. Ankita Kejriwal to the tune of Rs. 2.29 crores being reflected in the capital account was duly enquired by AO and the assessee has submitted all documents to support his claim of gift including the source of the donor/Ms.Ankita Kejriwal along with the bank statement. From a perusal of the source of fund of Ms. Ankita Kejriwal (donor/daughter of assessee) which was furnished by the assessee during assessment proceedings, we note that Rs.1,50,00,000/- and Rs.25,13,209/- are from redemption of mutual fund in AY 2013-

14 and Rs.25,13,209, Rs.77,900/-, Rs.25,13,209/-, Rs.3,44,584/- were from AY 2014-15. Only Rs. 20,050/- is from this relevant AY 2015-16. Thus when the assessee placed before the AO the source of the total purchase consideration amount of Rs.2,29,82,161/- and has filed the bank statement of donor the assessee has explained the transaction and the donor's source of income for purchasing the flat and that donor at that time was assessed under ITO ward-29(4) Kolkata, the assessee in this process has discharged the onus casted upon him. It should be appreciated that due to the non-registration of the gift instrument, transfer of the flat from the donor to the donee will not be recognized in the eyes of law, and that would arise only if there is a dispute between the donor and the donee regarding the validity of this gift of immovable property in question. Therefore, as discussed (supra) by virtue of non-registration of the gift instrument, in the eyes of law, no transfer of flat takes place, then the assessee's capital account will get reduced by the cost of the flat which has been gifted and then will get reflected in the capital account of the donor Ms. Ankita Kejriwal, thereby increasing her capital account and not that of assessee/appellent. In such an event, there will be no prejudice caused to the Revenue, on account of AO not appreciating the legal effect of non-registration of gift instrument. However as discussed, we note from the enquiry conducted by the AO, assessee had furnished the source of the donor for purchasing the property which is evident from page 9 of the paper book which has been reproduced (supra) and we note that other than Rs.20,050/- the source of fund for purchasing the flat flows from the earlier assessment years. Thus, we note that even if the AO finds that the non-registration of the gift deed would result in non-transfer of the flat would not in any case prejudice the revenue. Therefore, the second limb of the jurisdictional requirement i.e. 'prejudicial to the revenue' does not exist and, therefore, the Ld. Pr. CIT lacks jurisdiction to interfere in the order of the assessment passed by the AO. In view of the aforesaid discussion and since the AO has enquired and elicited the relevant information/documents including the source of Ms. Ankita Kejriwal to buy the flat at Bangalore, the AO's action cannot be faulted as an outcome of lack of enquiry. And since there would be no prejudice caused to the revenue, as discussed, we are of the

view that in this case, the twin condition is not satisfied as held by the Hon'ble Apex Court in Malabar Industries Ltd (supra) therefore, the revisionary jurisdiction exercised by the Ld. PCIT u/s. 263 of the Ac was without jurisdiction and is liable to be quashed and accordingly quash the impugned order of Ld. PCIT u/s 263 of the Act.

12. In the result, appeal of the assessee is allowed.

Order is pronounced in the open court on 28.10.2020.

Sd/- Sd/-

(P. M. Jagtap) (A. T. Varkey)
Vice President Judicial Member

Dated: 28.10.2020

SB, Sr. PS
Copy of the order forwarded to:

1. Appellant- Krishna MurariPoddar, 10D, Alipore Park Place, Alipore, Kolkata-700027.
2. Respondent- Pr. CIT-2, Kolkata
3. The CIT(A)-, Kolkata (sent through e-mail)
4. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

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