

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES "B", JAIPUR  
श्री संदीप गोसाईं, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष  
BEFORE SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 255/JP/2020  
Assessment Year: 2015-16

Virendra Singh Bhadauriya, 71, Mansa Nagar, Shirsi Road, Jaipur-302012.	बनाम Vs.	Pr.CIT-3, Jaipur.
PAN No.: AAEPB 0767 F		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Ms. Datyani Pandey (Adv) &  
Shri Rajiv Pandey (CA)  
राजस्व की ओर से / Revenue by : Shri B.K. Gupta (CIT-DR)

सुनवाई की तारीख / Date of Hearing : 10/02/2021  
उदघोषणा की तारीख / Date of Pronouncement : 25/03/2021

आदेश / ORDER

**PER: SANDEEP GOSAIN, J.M.**

The present appeal has been filed by the assessee against the order of the Id. Pr.CIT-3, Jaipur dated 16/03/2020 passed U/s 263 of the Income Tax Act, 1961 (in short, the Act) for the A.Y. 2015-16. The assessee has raised following grounds of appeal:

"1. On the facts and circumstances of the case Ld. Pr. Commissioner of Income Tax-3, Jaipur erred in:-

**Ground No.1:-** In holding that the assessment order dt.26.12.2017 passed u/s 143(3) by Assessing Officer to be erroneous in so far as is prejudicial to interest of revenue on issues of

- a)** *In rejecting assessee's claim that once IT appeal has been filed against assessment order passed u/s 143(3) of IT Act, 1961 then revisionary power u/s 263 cannot be exercised as the platform of CIT(Appeal) and Pr.CIT(Adm.) are at same level and powers to be exercised on issues relating to assessment order are same. Ld. Pr.CIT failed to appreciate that the issue of objection of allowance u/s 54/54F is subject matter of appeal and that is the very issue under appeal and review Ld. Pr.CIT erred in not following provisions of law.*
- b)** *In not treating the investment in house property to be relating to " A House" and instead applying the provision of purchase of two flats and disregarding assessee's plea and in not following provisions of law. In alternate in not accepting that LTCG on sale of plot and house has been invested in "A House" and assessee is eligible for deduction u/s 54 of Income Tax Act, 1961.*
- c)** *There is no "Lack of enquiry" or " No enquiry" situation as assessee was thoroughly examined and questions raised by Ld. AO were replied informing that it is case of investment in "A House" where the house were not contiguous but in the same compound in separate towers, but the house amenity of joint living of a family of self, spouse, two sons with their families was present with living quarters, kitchen, bedrooms, guest room and such other amenity of bathrooms as the family lives and enjoys together. Ld.AO as well as Ld. Pr.CIT-3, Jaipur failed to appreciate that "A House" situation was present as assessee was unable to purchase contiguous property and had to be satisfied with such arrangement of "A House". In such case having invested in "A House" and declaring the same there was no case of prejudicial to interest of revenue and assessee made his intention full and clear at the outset.*

**Ground No. 2:-** *Ld. Pr. CIT — 3, Jaipur erred in not accepting assessee's submission that he was eligible for exemption both u/s 54F and Section 54 of Income Tax Act, 1961 and the proceeds*

*invested in "a house" was to be made exempt and without prejudice u/s 54 "one residential house" was to be made exempt fully (i.e. even with investment in name of self and spouse - Ref: Laxmi Narayan vs. CIT 402 ITR 117 (Raj.)) and therefore failed to follow the provisions of law.*

**Ground No. 3:-** *Ld. Pr. Commissioner of Income Tax, Jaipur — 3 erred in not accepting the investment made by assessee in "A House" amounting to Rs.97,82,780/- (K-702 Rs.62,82,780/- and A-605 Rs.35,00,000/-) and further erred in reviewing and setting aside assessment order dt. 26.12.2017 in which Id. AO has erred in not allowing exemption u/s 54F and without prejudice u/s 54 for aforesaid amount of Rs.97,82,780/- and in alternate of sum of Rs.62,82,780/- as claimed by assessee in computation of income and therefore erred in not following provisions of law.*

**Ground No. 4:-** *Assessee humbly prays that the order dt. 16.3.2020 passed by Id. Pr. CIT-3, Jaipur u/s 263 of Income Tax Act, 1961 and its operation may be stayed as assessee has already preferred IT appeal against order dt. 26.12.2017 passed by Id. AO u/s 143(3) and such appeal (IT No. 568/17-18) is being listed and pending hearing before Id. CIT(A)-3, Jaipur. It is further prayed that necessary order may be issued to Id. Pr. CIT-3, Jaipur and Dy. CIT, Circle 7, Jaipur.*

*Appellant reserves the right to add, alter, amend or withdraw of any of the grounds of appeal."*

2. The hearing of the appeal was concluded through video conference in view of the prevailing situation of Covid-19 Pandemic.
3. The brief facts of the case are that the assessee had filed his return of income for the year under consideration on 31/08/2015 declaring total income of Rs. 18,00,600/-. The case was selected for scrutiny for the reasons 'Large deduction claimed U/s 54B, 54C, 54D, 54G and 54GA of

the Act. Assessment U/s 143(3) of the Act was completed on 26/12/2017 at a total income of Rs. 80,40,080/- for the year under consideration. In consequence thereof, addition of Rs. 62,39,484/- was made U/s 54F of the Act. The Id Pr.CIT after scrutinizing the records of the assessment reached to the conclusion that the A.O. while finalizing the assessment order, has not given any thought to the fact that the assessee purchased two flats situated at K-702, Princess park, Sector-86, Faridabad on 10/05/2014 and A-605, Princess Park, Sector-86, Faridabad on 25/04/2014 in co-ownership of his wife Smt. Sarla Devi Bhadauriya and claimed deduction U/s 54F of the Act on both the properties. According to the Id. Pr.CIT, as per the proviso (ii) of Section 54F(1) of the Act, no deduction is allowable to the assessee if he purchases any residential house, other than the new asset, within a period of one year after the date of transfer of the original asset. Consequently, after issuing show cause notice and seeking reply of the assessee, the Id. Pr.CIT concluded that the A.O. had allowed deduction U/s 54F of the Act without understanding the entire gamut of proviso (ii) of section 54F, the examination of which was the only mandate given to the AO in which he utterly failed and allowed assessee an incorrect deduction leading to an erroneous order which is also prejudicial to the interest of revenue.

4. Aggrieved by the order of the Id. Pr.CIT, the assessee has preferred the present appeal before us on the grounds mentioned hereinabove. Ground No. 1 of the appeal relates to challenging the order of the Id. Pr.CIT in holding that the assessment order dated 26/12/2017 passed U/s 143(3) of the Act by the A.O. to be erroneous in so far as prejudicial to the interest of the revenue. The Id AR appearing on behalf of the assessee has reiterated the same arguments as were raised before the Id. Pr.CIT and has also relied upon the written submissions filed by the assessee before us and the same are reproduced below:

"Assessee objects to proceedings initiated u/s 263 of Income Tax Act, 1961 and submits that assessee after passing of assessment order dt. 26.12.2017 has preferred Income tax appeal before Ld. CIT (A) on 13.1.2018. Assessee vehemently submits that once income tax appeal has been filed no proceedings can be initiated u/s 263 of Income tax Act, 1961.

*Case citation*

*Oil India Vs. CIT 138 ITR 836 (Cal)*

*Held*

*It is well settled that, in an appeal preferred before the AAC, the whole assessment is open for review. It is also well settled that where an appeal is preferred and the matter raised in the appeal is the subject-matter before the AAC, then the AAC's order cannot be the subject-matter of revision by the Commissioner.*

*In the instant case, as the quantum of depreciation was the subject-matter of appeal, the Commissioner had no jurisdiction to issue the notice under section 263 and to pass any order on this aspect of the matter.*

*412 ITR 515 (Guj) Haryana Paper Distributors Pvt. Ltd. V. Pr. CIT Held*

*Two things immediately become clear. First that the Assessing Officer did not hold that assessee purchases from 'T' were bogus. In fact, he held to the contrary accepting the evidence produced by the assessee mainly in the form of the statement of the Director of 'T' Ltd. that the purchases were made. It was only after Assessing Officer had believed that the purchases were made that the question of transportation of the goods by the assessee of someone else would arise. Secondly, he made limited addition on the ground that when the assessee was not required to bear the transportation cost, his profit from such dealings would be higher than normal. [Para 10]*

*The Commissioner in the impugned show-cause notice thus committed an error in recording that the Assessing Officer had held that the purchases were bogus. This very foundation for issuance of the notice was incorrect. His further observations were merely consequential in nature. In his opinion, when the Assessing Officer had found the purchases to be bogus, there was no question of limiting the addition on the basis of GP ratio. When the Commissioner was wrong in its very foundational fact, the consequential observations, which are more in the nature of corollary, cannot survive. [Para 11]*

*Equally importantly, the issue itself had travelled before the Appellate Commissioner at the hands of the assessee. To the extent, the Assessing Officer rejected the assessee's request for making no additions, the assessee carried the matter in appeal. Appellate Commissioner deleted even the limited additions made by the Assessing Officer. The limited additions made by the Assessing Officer and the larger additions proposed by the Commissioner in the impugned notice are inextricably interlinked. The Commissioner argues that the entire purchases were bogus. The Assessing Officer accepted the purchases as genuine but added certain amount on the premise that the assessee's profit from such dealings would have been higher than disclosed.*

*The entire issue was at large before the Appellate Commissioner. It is well known that the Commissioner (Appeals) while hearing the*

*assessee's appeal has powers to even enhance the assessment. If he was of the opinion that not only limited additions made by the Assessing Officer but much larger additions were justified, he could have certainly exercised such powers, of course after putting the assessee to notice. In this context, one may refer to clause (c) of Explanation 1 to sub-section (1) of section 263 of the Act. As is well known sub-section (1) of section 263 of the Act empowers the Principal Commissioner or the Commissioner to call for and examine the record of any proceeding and revise the same if he considers that the order passed therein by the Assessing Officer was erroneous insofar as it is prejudicial to the interest of the revenue. [Para 12]*

*Clause (c) of Explanation 1 may be worded in a manner as suggesting the extent of the powers of the Commissioner for taking an order in revision, its effect is of circumscribing such powers in cases where the order passed by the Assessing Officer has been subject matter of any appeal and such subject matter has been considered and decided in such appeal. This provisions thus statutorily recognizes the principle of merger and avoids any conflict of opinion between two quasi-judicial authorities of the same rank. [Para 13]*

*When the Commissioner had no jurisdiction to exercise revisional powers, asking the assessee to submit to said impugned notice does not arise.*

*Impugned notice is therefore set aside. [Para 14]*

*The petition is disposed of accordingly. [Para 15]*

*172 ITR 733 (Kerala) CIT v. Travancore Tea Estates Co. Ltd.*

*[2014] 50 taxmann.com 100 (Delhi)/[2014] 227 Taxman 48 (Delhi)(Mag.)/[2014]*

*369 ITR 14 (Delhi)Globus Infocom Ltd. v. Commissioner of Income-tax, Delhi- IV*

It is clear from the order passed by the Ld. AO that the issue relating to disallowance of the claim of assessee u/s 54F was specifically gone

into and examined by the Assessing Officer. Thus, it was not a case of 'no inquiry' but specific and pointed enquiries by the Assessing Officer. The said finding could have been set aside and negated only with a finding by the Commissioner, that the Assessing Officer was erroneous and wrong. The Commissioner should have examined and gone into the question of claim u/s 54/54F on merits. Mere statement that there was a possibility that the Assessing Officer was erroneous, is not sufficient and does not meet the requirement stipulated by law.(369 ITR 14 (Delhi) Globus Infocom Ltd. v. Commissioner of Income-tax, Delhi- IV)

Ld. Pr. CIT- 3 has not pointed out anywhere in his order dated 16/03/2020, about any issue where the AO did not make any enquiry or there was lack of enquiry. Para 7, Page 15 of the Ld. Pr. CIT-3 order is reproduced hereunder for your ready reference :-

*"This omission as made by the assessing officer resulting in an order which is erroneous as well as prejudicial to the interest of revenue. It has necessitated the initiation of proceedings under section 263 of the Income Tax Act. This order has been done in a very mechanical way. This action of AO has resulted in an erroneous passing of assessment order u/s 143(3) of Income Tax Act, 1961 which required high level of care while finalizing an assessment order. The order dated 26.12.2017 u/s 143(3) passed by the AO is clearly prejudicial to the interest of revenue and clearly calls for invocation of Section 263 of the Income Tax Act 1961."*

From facts of the case it is borne out that Ld. PR. CIT has been misdirected on the proposition that Ld. AO while framing assessment order has not perused provisions of law. It is most respectfully submitted that Ld. AO has made full enquiry and issued questionnaire examining the case and it will not be a case of "no enquiry" or lack of enquiry and the assessment order lacks the characteristic of being prejudicial to the interest of revenue from side of revenue rather assessee is aggrieved with the assessment order and has preferred Income Tax appeal. Assessee submits that the proposition of claim of deduction u/s 54F was based on sale of a Long Term asset (which was house property at Lucknow – Plot

No. B-2/4, Rajiv Gandhi Ward, Vinay Khand, Gomti Nagar Scheme, Lucknow – sold on 6.4.2014 for Rs.1,69,50,000/- on which stamp value evaluation is for Rs.1,70,20,600/-) and assessee invested the sale proceeds in purchase of house property in the same compound at Faridabad and details of which appear at page 6 of the assessment order and for ready reference the same is reproduced hereunder:-

S.No.	Flat No. & address	Date Purchase deed	Consideration Reported in sale deed	Stamp duty & other expenses.
1	K-702, Princess Park, Sector-86, Faridabad	01.08.2015	3706551	488000+15200
2.	A-605. Princess Park, Sector-86, Faridabad	12.09.2015	2418002	146000+13100

The proposition of assessee is that he wanted to purchase "A House" for his residential purposes but since he was unable to get a property which could house himself and his family he opted for "A House" in the same compound of Princess Park, Sector 86 and purchased flat No. K-702 and A-605 which were available for housing self and family. The proposition is that the property in which investment have been made may not be contiguous but for the family it is in the same compound and in adjacent tower and the assessee and his family are satisfied with the arrangement that it is "A House" for them and both the flats are used for assessee's family residence.

Assessee's family comprises of –

- i) Sh. Virendra Singh Bhadauria (self)
- ii) Smt. Sarla Bhadauria (wife)
- iii) Sh. Avadhesh Kumar Singh Bhadauria (Son)
- iv) Sh. Brajesh Kumar Singh (Son)

And their respective families

The family is a content family and the proposition of "a house" has been fulfilled with investment made by assessee out of sale proceeds of the property situated at Lucknow. Assessee submits that the conditions prescribed as per law were fulfilled. It is submitted that Id. AO has discussed the above proposition in his assessment order and has rejected the same. So, it cannot be said that there is "no enquiry" or "lack of enquiry" or provisions of law being not followed. Ld AO is fully aware that it is proposition of "A House" and not two flats and hence the question of two property investment is out of question.

Assessee's averment reproduced from assessment order

Assessee submits and invites attention to the following part of the assessment order which is reproduced for your ready reference in which the above proposition is discussed recorded and rejected-

Para 3 page 2 and 3 of assessment order

*"3 Restriction & disallowance of claim u/s 54F of the IT Act, 1961:- During the year under consideration, assessee has sold an immovable property situated at B-2/4, Rajeev Gandhi Ward, Vinay Khand, Gomti Nagar, Lucknow on 06.04.2014 for sale consideration of Rs. 1,69,50,000/- whereas the stamp valuation authority has adopted the value of the property for the purposes of payment of stamp duty at Rs. 1,70,20,669/-. The assessee has shown full value of consideration of the property at Rs. 1,70,00,206/- and new Long Terms capital gain of Rs. 1,38,15,295/- has been worked out after deducting indexed cost of acquisition and cost of construction at Rs. 31,84,911/-. Assessee has claimed deduction u/s 54F & 54EC of the IT Act, 1961 respectively at Rs. 79,50,021/- and Rs,50,00,000/- by making investment of Rs. 97,82,780/- in house property and Rs. 50,00,000/- in specified bonds i.e. REC & NHAI bonds and taxable long term capital gain has been shown at Rs, 8,65,274/-"*

Para 3.5 page 4 and 5 of assessment order

*"3.5. In compliance of above query, Ld. AR of the assessee has submitted vide his written submission dated 22.12.2017 that:*

*"1. The assessee has invested in residential house property within the stipulated time to claim deduction u/s 54F of the IT Act, 1961. Copy of conveyance deed is enclosed along with Bank Statements where the invested amounts are clearly shown.*

*2. The assessee has got a joint family consisting of his wife and two major sons and their family. Therefore he purchased two flats according to his need in the same locality in Princess Park, Sector-86, Faridabad. The assessee purchased the two flats for the convenience of his family members. After his passing away, his two sons will take care of the flats and his wife-Sarla Devi. The Intention of the assessee is very clear to have a residential property where all his family members could settle their life happily and there would not be any dispute in between two sons for the residential units. The need of the assessee and his family members was fulfilled after the purchase of the two flats in the same locality. The assessee made purchase agreement of the two flats available at that time and made investment at the same day. Therefore the assessee deserves the entitlement of deduction u/s 54F."*

Para 3.6 page 7 and 8 of assessment order

*"8. The two flats purchased by the assessee with co-ownership with his wife are not adjacent to each other. Even both the flats are in different towers. Therefore, these cannot be treated as one residential house. On this count also assessee's contention is rejected.*

*9. Further, the assessee in his letter has mentioned the social obligation of his family members which have no relevance with provisions of Income tax Act, 1961."*

Para 3.8 and 3.9 and 3.10 page 8 to 9 of assessment order-

*"3.8. Further, the assessee has claimed deduction u/s 54F of the IT Act, 1961 on purchase of two flats in the same locality which is also not allowable as per provisions of section 54F of the IT Act, 1961. As per provisions of section 54F, assessee can purchase or construct a new house property within the specified time period for claiming*

*deduction u/s 54F of the IT Act, 1961. In the instant case under reference assessee is claiming deduction u/s 54F on purchase of two residential house property which is not allowable and as per provisions of section 54F of the IT Act, 1961, assessee is eligible for claiming deduction u/s 54F of the IT Act, 1961 on purchase/construction of one residential house property. Based on these facts, deduction u/s 54F of the IT Act, 1961 is being given on one residential house property subject to fulfillment of other conditions as discussed in below mentioned paras.*

*3.9. Both the flats have been purchased by the assessee in co-ownership with his wife and sale consideration was also paid through this bank account, therefore, assessee is being allowed to claim deduction under section 54F of the IT Act, 1961 to half value of investment made in one residential house property. As sale consideration reported in the registered sale deeds executed for purchase of immovable properties situated at flat No. 702, Princess Park, Sector-86, Faridabad is more than the same consideration reported in sale deed executed for purchase of flat No. A-605, Princess Park, Sector-86, Faridabad, therefore by following the principle of natural justice, assessee is allowed deduction u/s 54F of the Income Tax Act, 1961 on this house property subject to 50% of investment as assessee's share in the house property is 1/2nd .*

*3.10. Based on the above discussed facts, working of Long term capital gain & deduction claimed u/s 54F is being recomputed as under:-*

Full value of consideration as shown by assessee in his ITR	17000206
Less: Indexed cost of acquisition & construction	3184911
Net long term capital gain	13815295
Deduction u/s 54F of the IT Act, 1961 (LTCG X investment made in new residential house/full value of consideration) $13815295 \times 2104875/17000206$	17,10,536/-
Deduction u/s 54EC of the IT Act 1961	5000000
Net long term capital gain	7104758
Capital gain already shown in ITR	865274

Net long Term Capital gain chargeable to Tax	6239484
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Assessee submits with reference to the proposition and show cause notice is the only limitation on his powers is that he must have some material(s) which would enable him to form a prima facie opinion that the order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the Revenue. Once he comes to the above conclusion on the basis of the 'material' that the order of the AO is erroneous and also prejudicial to the interest of the Revenue, the CIT is empowered to pass an order as the circumstances of the case may warrant. He may pass an order enhancing the assessment or he may modify the assessment. He is also empowered to cancel the assessment and direct to frame a fresh assessment. He is empowered to take recourse to any of the three courses indicated in section 263. So, it is clear that the CIT does not have unfettered and unchecked discretion to revise an order. The CIT is required to exercise revisional power within the bounds of the law and has to satisfy the need of fairness in administrative action and fair play with due respect to the principle of audi alteram partem as envisaged in the Constitution of India as well as in section 263. An order can be treated as 'erroneous' if it was passed in utter ignorance or in violation of any law; or passed without taking into consideration all the relevant facts or by taking into consideration irrelevant facts. The 'prejudice' that is contemplated under section 263 is the prejudice to the Income Tax administration as a whole. The revision has to be done for the purpose of setting right distortions and prejudices caused to the Revenue in the above context. The fundamental principles which emerge from the several cases regarding the powers of the CIT u/s 263 may be summarized below: -

- i) The CIT must record satisfaction that the order of the AO is erroneous and prejudicial to the interest of the revenue. Both the conditions must be fulfilled.

- ii) Section 263 cannot be invoked to correct each and every type of mistake or error committed by the AO and it is only when an order is erroneous, that the section will be attracted.
- iii) An incorrect assumption of facts or an incorrect application of law will suffice for the requirement of order being erroneous.
- iv) If the order is passed without application of mind, such order will fall under the category of erroneous order.
- v) Every loss of revenue cannot be treated as prejudicial to the interest of the revenue and if the AO has adopted one of the courses permissible under law or where two views are possible and the AO has taken one view under which the CIT does not agree, it cannot be treated as an erroneous order unless the view taken by the AO is unsustainable under the law.
- vi) If while making the assessment, the AO examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income, the CIT, while exercising his power u/s 263, is not permitted to substitute his estimate of income in place of the income estimated by the AO.
- vii) The AO exercises quasi-judicial power vested in him and if he exercise such power in accordance with law and arrives as a conclusion, such conclusion cannot be termed to be erroneous simply because the CIT does not feel satisfied with the conclusion.
- viii) The CIT, before exercising his jurisdiction u/s 263, must have material on record to arrive at a satisfaction.
- ix) If the AO has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation by a letter in writing and the AO allowed the claim on being satisfied with the explanation of the assessee, the decision of the AO cannot be held to be erroneous simply because in his order he does not make an elaborate discussion in that regard.

Assessee submits and relies on following citations on the issue that –

- a) That the order of the AO sought to be revised is not erroneous

- b) That it is not prejudicial to the interests of Revenue. He relied on the following judicial pronouncements:

Malabar Industrial Co. Ltd. Vs. CIT 243 ITR 83 (SC)

411 ITR 437 (Raj) CIT Vs. Sunil Sankhla SLP of the Department dismissed 407 ITR (St) 25 (SC)

402 ITR 117 (Raj) Laxmi Narain Vs. CIT

414 ITR 485 (Mad) Pr. CIT V. Abhijit Bhandari

CIT Vs. Escorts Ltd. 338 ITR 0435 (Del)

CIT Vs. Deepak Mittal 324 ITR 411 (P & H)

CIT Vs. Nirmal Chemical Works Pvt. Ltd. 309 ITR 0067(Guj)

Gupta International Vs. ITO 002 ITR (Trib) 0428 (Del)

Green World Co. 314 ITR 81 (SC)

CIT Vs. Paul Bros. 216 ITR 548

CIT Vs. Gokul Das Exports 333 ITR 214

Smt. Anita Malpotra V/s. ITO (2007) 109 TTJ (ASR) 76

India Heritage Foundation's Vs. Dy. Director of Income Tax 149 TTJ 908 (Bangalore) relevant para 11 page 915 of the order.

EON Technologies Pvt. Ltd. 343 ITR 366 (Del)

5. On the other hand, the Id CIT-DR has relied on the order passed by the Id. Pr.CIT.

6. We have heard the Id. Counsels of both the parties and have perused the material placed on record. We have also deliberated upon the decisions cited in the orders passed by the authorities below as well

as cited before us and we have also gone through the orders passed by the revenue authorities. From the records, we noticed that the assessment in the present case was completed U/s 143(3) of the Act on 26/12/2017 at a total income of Rs. 80,40,080/-. The addition of Rs. 62,39,484/- was made U/s 54F of the Act by the A.O. However, the Id. Pr.CIT while considering the order of the A.O. had concluded that the A.O. had allowed the assessee the remaining deduction U/s 54F of the Act of Rs 17,10,536/- without understanding the entire gamut of provisions of Section 54F of the Act the examination of which was the only mandate given to the AO in which he utterly failed and allowed assessee an incorrect deduction leading to an erroneous order which is also prejudicial to the interest of revenue. It was also held by the Id. Pr.CIT that the A.O. had not applied the correct provisions of law while finalizing the assessment order indicating lack of enquiry or verification which should have been made. In this context, the Id AR has categorically submitted that the proceedings U/s 263 of the Act initiated by the Id. Pr.CIT were barred by law as the assessee after passing the assessment order U/s 143(3) dated 26/12/2017 had preferred Income Tax appeal before the Id. CIT(A) on 13/01/2018. It was also submitted by the Id AR that once an Income Tax appeal has been filed, then no proceeding can be initiated U/s 263 of the Act and in this respect, the Id AR has relied

upon the decision of the Hon'ble Kolkata High Court in the case of Oil India Vs CIT 138 ITR 836 (Cal) wherein it was held as under:

*"It is well settled that, in an appeal preferred before the AAC. the whole assessment is open for review. It is also well settled that where an appeal is preferred and the matter raised in the appeal is the subject-matter before the AAC, then the AAC's order cannot be the subject-matter of revision by the Commissioner.*

*In the instant case, as the quantum of depreciation was the subject-matter of appeal, the Commissioner had no jurisdiction to issue the notice under section 263 and to pass any order on this aspect of the matter."*

The Id AR has also relied upon the decision of the Hon'ble Gujarat High Court in the case of Haryana Paper Distributors Pvt. Ltd. Vs Pr.CIT 412 ITR 515 (Guj) wherein it was held as under:

*"Two things immediately become clear. First that the Assessing Officer did not hold that assessee purchases from T were bogus. In fact, he held to the contrary- accepting the evidence produced by the assessee mainly in the form of the statement of the Director of T Ltd. that the purchases were made. It was only after Assessing Officer had believed that the purchases were made that the question of transportation of the goods by the assessee of someone else would arise. Secondly, he made limited addition on the ground that when the assessee was not required to bear the transportation cost, his profit from such dealings would be higher than normal. [Para 10]*

*The Commissioner in the impugned show-cause notice thus committed an error in recording that the Assessing Officer had held that the purchases were bogus. This very foundation for issuance of the notice was incorrect. His further observations were merely consequential in nature. In his opinion, when the Assessing Officer had found the purchases to be bogus, there was no question of limiting the addition on the basis of GP ratio. When the Commissioner was wrong in its very foundational fact, the consequential observations, which are more in the nature of corollary, cannot survive, [Para 11]*

*Equally importantly, the issue itself had travelled before the Appellate Commissioner at the hands of the assessee. To the extent, the Assessing Officer rejected the assessee's request for making no additions, the assessee carried the matter in appeal. Appellate Commissioner deleted even the limited additions made by the Assessing Officer. The limited additions made by the Assessing Officer and the larger additions proposed by the Commissioner in the impugned notice are inextricably interlinked. The Commissioner argues that the entire purchases were bogus. The Assessing Officer accepted the purchases as genuine but added certain amount on the premise that the assessee's profit from such dealings would have been higher than disclosed.*

*The entire issue was at large before the Appellate Commissioner. It is well known that the Commissioner (Appeals) while hearing the assessee's appeal has powers to even enhance the assessment. If he was of the opinion that not only limited additions made by the Assessing Officer but much larger additions were justified, he could have certainly exercised such powers, of course after putting the assessee to notice. In this context, one may refer to clause (c) of Explanation 1 to sub-section (1) of section 263 of the Act. As is well*

*known sub-section (1) of section 263 of the Act empowers the Principal Commissioner or the Commissioner to call for and examine the record of any proceeding and revise the same if he considers that the order passed therein by the Assessing Officer was erroneous insofar as it is prejudicial to the interest of the revenue. (Para 12]*

*Clause (c) of Explanation 1 may be worded in a manner as suggesting the extent of the powers of the Commissioner for taking an order in revision, its effect is of circumscribing such powers in cases where the order passed by the Assessing Officer has been subject matter of any appeal and such subject matter has been considered and decided in such appeal. This provisions thus statutorily recognizes the principle of merger and avoids any conflict of opinion between two quasi-judicial authorities of the same rank. (Para 13]*

*When the Commissioner had no jurisdiction to exercise revisional powers, asking the assessee to submit to said impugned notice does not arise. Impugned notice is therefore set aside. (Para 14]*

*The petition is disposed of accordingly. (Para 15]”*

We had considered the said objection raised by the assessee before us. We are conscious of the fact that in respect of arguments of the assessee to the effect that he has already filed income tax appeal before the Id. CIT(A) against the order of the assessment dated 26/12/2017 and the entire issue was at large now before the Appellate Commissioner and that the Id. CIT(A) while hearing the assessee's appeal has power to enhance the assessment. If he was of the opinion that not only limited additions made by the A.O. but much larger additions were justified, then in that

eventuality, he could have certainly exercised such powers by putting the assessee to notice. For ready reference, we reproduce clause (c) of Explanation 1 of section 263 of the Act as under:

“263(1) where any order referred to in this sub-section and passed by the Assessing Officer  
(c) had been the subject matter of any appeal [filed on or before or after the 1st day of June, 1988], the powers of the [Principal Commissioner or] Commissioner under this sub-section shall extend [and shall be deemed always to have extended] to such matters as had not been considered and decided in such appeal.]”

From the above proposition of law, we noticed that the power of Id. Pr.CIT or the Id. CIT under the provisions of Section 263 shall extend to such matters as had not been considered and decided in such appeal. Admittedly, the appeal filed by the assessee against the order of the assessment passed U/s 143(3) dated 26/12/2017 has so far not been considered or decided by the Id. CIT(A), therefore, the objection of the assessee that no proceeding U/s 263 of the Act can be initiated or taken when the appeal is pending before the Id. CIT(A), is not sustainable and is thus, rejected. However, the other arguments raised by the Id. CIT-DR in support of the order passed by the Id. Pr.CIT is that the AO had not applied correct provisions of law while finalizing the assessment order indicating lack of enquiry or verification is concerned, in this respect, the Id AR has drawn our attention to the fact that the A.O. had made full enquiries and had issued questionnaire examining the case and thus, the present case cannot be said to be a case of “no inquiry” or “lack of

inquiry” and therefore, the assessment order lacks the characteristic of being prejudicial to the interest of revenue from side of revenue rather as per the Id AR, the assessee is aggrieved with the assessment order and has preferred an appeal before the Id CIT(A). The Id AR of the assessee has submitted that the proposition of claim of deduction u/s 54F was based on sale of a Long Term asset, which was house property at Lucknow - Plot No. B-2/4, Rajiv Gandhi Ward, Vinay Khand, Gomti Nagar Scheme, Lucknow was sold on 6.4.2014 for Rs. 1,69,50,000/- on which stamp value evaluation is for Rs. 1,70,20,600/-) and assessee invested the sale proceeds in purchase of house property in the same compound at Faridabad and details of which appear at page 6 of the assessment order and has been duly acknowledged and taken into consideration by the AO while allowing the deduction u/s 54F and the details thereof are as under:

S.No.	Flat No. & address	Date Purchase deed	Consideration Reported in sale deed	Stamp duty & other expenses.
1	K-702, Princess Park, Sector-86, Faridabad	01.08.2015	3706551	488000+15200
2.	A-605. Princess Park, Sector-86, Faridabad	12.09.2015	2418002	146000+13100

We found that the proposition with respect of claim of deduction raised by the assessee U/s 54F of the Act is concerned, in this

respect, the A.O. in the order of assessment had made detailed and extensive discussions which are at para 3 page No. 2 and 3, which reads as under:

Para 3 page 2 and 3 of assessment order

**"3 Restriction & disallowance of claim u/s 54F of the IT Act, 1961:-**During the year under consideration, assessee has sold an immovable property situated at B-2/4, Rajeev Gandhi Ward, Vinay Khand, Gomti Nagar, Lucknow on 06.04.2014 for sale consideration of Rs. 1,69,50,000/- whereas the stamp valuation authority has adopted the value of the property for the purposes of payment of stamp duty at Rs. 1,70,20,669/-. The assessee has shown full value of consideration of the property at Rs. 1,70,00,206/- and new Long Terms capital gain of Rs. 1,38,15,295/- has been worked out after deducting indexed cost of acquisition and cost of construction at Rs. 31,84,911/-. Assessee has claimed deduction u/s 54F & 54EC of the IT Act, 1961 respectively at Rs. 79,50,021/- and Rs,50,00,000/- by making investment of Rs. 97,82,780/- in house property and Rs. 50,00,000/- in specified bonds i.e. REC & NHAI bonds and taxable long term capital gain has been shown at Rs, 8,65,274/-"

Para 3.5 page 4 and 5 of assessment order

**"3.5. In compliance of above query, Ld. AR of the assessee has submitted vide his written submission dated 22.12.2017 that:**

**"1. The assessee has invested in residential house property within the stipulated time to claim deduction u/s 54F of the IT Act, 1961. Copy of conveyance deed is enclosed along with Bank Statements where the invested amounts are clearly shown.**

**2. The assessee has got a joint family consisting of his wife and two major sons and their family. Therefore, he purchased two flats according to his need in the same locality in Princess Park, Sector-86, Faridabad. The assessee purchased the two flats for the convenience of his family members. After his passing away, his two sons will take care of the flats and his wife-Sarla Devi. The Intention of the assessee is very clear to have a residential property where all his family**

*members could settle their life happily and there would not be any dispute in between two sons for the residential units. The need of the assessee and his family members was fulfilled after the purchase of the two flats in the same locality. The assessee made purchase agreement of the two flats available at that time and made investment at the same day. Therefore the assessee deserves the entitlement of deduction u/s 54F."*

Para 3.6 page 7 and 8 of assessment order

*"4. On perusal of both the sale deed executed by M/s BPTP Limited with the assessee and his wife Smt. Sarla Devi Bhadauriya for sale of aforementioned two flats, it is observed that sale consideration reported in these sale deeds is as under:*

S.No.	Flat No. & address	Date Purchase deed	Consideration Reported in sale deed	Stamp duty & other expenses.
1	K-702, Princess Park, Sector-86, Faridabad	01.08.2015	3706551	488000+15200
2.	A-605. Princess Park, Sector-86, Faridabad	12.09.2015	2418002	146000+13100

*8. The two flats purchased by the assessee with co-ownership with his wife are not adjacent to each other. Even both the flats are in different towers. Therefore, these cannot be treated as one residential house. On this count also assessee's contention is rejected.*

*9. Further, the assessee in his letter has mentioned the social obligation of his family members which have no relevance with provisions of Income tax Act, 1961."*

Para 3.8 and 3.9 and 3.10 page 8 to 9 of assessment order-

*"3.8. Further, the assessee has claimed deduction u/s 54F of the IT Act, 1961 on purchase of two flats in the same locality which is also not allowable as per provisions of section 54F of the IT Act, 1961. As per provisions of section 54F, assessee can purchase or construct a*

*new house property within the specified time period for claiming deduction u/s 54F of the IT Act, 1961. In the instant case under reference assessee is claiming deduction u/s 54F on purchase of two residential house property which is not allowable and as per provisions of section 54F of the IT Act, 1961, assessee is eligible for claiming deduction u/s 54F of the IT Act, 1961 on purchase/construction of one residential house property. Based on these facts, deduction u/s 54F of the IT Act, 1961 is being given on one residential house property subject to fulfillment of other conditions as discussed in below mentioned paras.*

*3.9. Both the flats have been purchased by the assessee in co-ownership with his wife and sale consideration was also paid through this bank account, therefore, assessee is being allowed to claim deduction under section 54F of the IT Act, 1961 to half value of investment made in one residential house property. As sale consideration reported in the registered sale deeds executed for purchase of immovable properties situated at flat No. 702, Princess Park, Sector-86, Faridabad is more than the same consideration reported in sale deed executed for purchase of flat No. A-605, Princess Park, Sector-86, Faridabad, therefore by following the principle of natural justice, assessee is allowed deduction u/s 54F of the Income Tax Act, 1961 on this house property subject to 50% of investment as assessee's share in the house property is 1/2nd .*

*3.10. Based on the above discussed facts, working of Long term capital gain & deduction claimed u/s 54F is being recomputed as under:-*

Full value of consideration as shown by assessee in his ITR	17000206
Less: Indexed cost of acquisition & construction	3184911
Net long term capital gain	13815295
Deduction u/s 54F of the IT Act, 1961 (LTCG X investment made in new residential house/full value of consideration) 13815295 X 2104875/17000206	17,10,536/-
Deduction u/s 54EC of the IT Act 1961	5000000
Net long term capital gain	7104758

Capital gain already shown in ITR	865274
Net long Term Capital gain chargeable to Tax	6239484

After analyzing the above discussion made by the A.O. in the order of assessment passed U/s 143(3) of the Act with regard to dealing with the claim of deduction raised by the assessee U/s 54F of the Act is concerned, we found that the A.O. had made full enquiries and had issued questionnaire examining the entire facts of case and basis such enquiry and detailed examination, has held that the assessee has claimed deduction u/s 54F on purchase of two flats in the same locality which is not allowable as per provisions of section 54F and deduction was given on one residential house property subject to fulfillment of other conditions. The AO has thus restricted the claim of deduction in respect of only one residential house property situated at K-702, Princess park to the extent of 50% of investment being the share of the assessee which has been jointly purchased in his and wife's name and thus it cannot be held that the present case is based on "no enquiry" or "lack of enquiry". Even otherwise there are limitations on the powers of the Pr.CIT to the effect that he must have some material which would enable him to form a prima facie opinion that the order passed by the A.O. is erroneous in so far as it is prejudicial to the interest of the Revenue and when once he comes to the above conclusion on the

basis of the 'material' that the order of the AO is erroneous and also prejudicial to the interest of the Revenue, the Pr.CIT or the CIT is empowered to pass an order as the circumstances of the case may warrant. He may pass an order enhancing the assessment or he may modify the assessment. He is also empowered to cancel the assessment and direct to frame a fresh assessment. He is empowered to take recourse to any of the three courses indicated in section 263. Therefore, it is clear that the Pr.CIT does not have unfettered and unchequered discretion to revise an order. The CIT is required to exercise revisional power within the bounds of the law and has to satisfy the need of fairness in administrative action and fair play with due respect to the principle of audi alteram partem as envisaged in the Constitution of India as well as in section 263. An order can be treated as 'erroneous' if it was passed in utter ignorance or in violation of any law; or passed without taking into consideration all the relevant facts or by taking into consideration irrelevant facts. In the instant case, the Pr CIT has alleged that as per proviso (ii) of section 54F(1), no deduction is allowable to the assessee if he purchases any residential house, other than the new asset, within a period of one year after the date of transfer of the original asset. In this regard, we find that the assessee has purchased the second residential house situated at A-

605, Princess Park vide registered sale deed dated 12.09.2015 which is well beyond the period of one year from date of transfer of the original asset on 6.4.2014 and thus, the said act cannot be held in violation of any of the terms of proviso to section 54F of the Act. What is relevant to determine is the date of purchase and such date of purchase is evidenced by the registered conveyance/sale deed reflecting the final payment and taking over the possession of the residential house. Merely because the assessee has entered into a sale/purchase agreement on 25.04.2014 and has made payments in instalments and some of the instalments were paid within one year window after the date of sale of the original asset would not debar the assessee from claim of deduction under section 54F of the Act. Our decision is fortified by the decision of the **Hon'ble Bombay High Court** in case of **CIT vs Beena K Jain** reported in 217 ITR 363 wherein the Hon'ble High Court has held as under:

*"2. Under section 54F in the case of an assessee if any capital gain arises from the transfer of any long-term capital asset, not being a residential house and the assessee has, within a period of one year before or two year after the date of which the transfer took place purchased a residential house, the capital gain shall be dealt with as provided in that section. As per the section certain exemption has to be allowed in respect of the capital gains to be calculated as set out therein. The department contends that the assessee did not purchase the*

*residential house either one year prior to or two years after the sale of the capital asset which resulted in long-term gains. According to the department, the agreement for purchase of the new flat was entered into more than one year prior to the sale. Hence, the petitioner is not entitled to the benefit under section 54F. In our view the Tribunal has rightly negated this contention and has held that the new residential house had been purchased by the assessee within two years after the sale of the capital asset which resulted in long-term capital gains. The Tribunal has held that the relevant date in this connection is 29-7-1988 when the petitioner paid the full consideration amount on the flat becoming ready for occupation and obtained possession of the flat. This has been taken by the Tribunal as the date of purchase. The Tribunal has looked at the substance of the transaction and came to the conclusion that purchase was substantially effected when the agreement of purchase was carried out or completed by payment of full consideration on 29.07.1988 and handing over of possession of the flat on the next day.”*

Therefore, we don't find that the AO has either ignored the said proviso or the deduction so allowed is in violation of the said provision to section 54F of the Act and therefore, the order so passed by the AO cannot be held as erroneous due to ignorance or incorrect application of law. All the relevant facts in respect of both the residential houses have been considered and provisions of law have been rightly applied by the AO and deduction u/s 54F has been allowed to the extent of assessee's share in respect of one residential house. The 'prejudice' that is contemplated under section 263 is the prejudice to the Income

Tax administration as a whole. The revision has to be done for the purpose of setting right distortions and prejudices caused to the Revenue in the above context. The fundamental principles which emerge from the several cases regarding the powers of the CIT u/s 263 may be summarized below:-

- i) The CIT must record satisfaction that the order of the AO is erroneous and prejudicial to the interest of the revenue. Both the conditions must be fulfilled.
- ii) Section 263 cannot be invoked to correct each and every type of mistake or error committed by the AO and it is only when an order is erroneous, that the section will be attracted.
- iii) An incorrect assumption of facts or an incorrect application of law will suffice for the requirement of order being erroneous.
- iv) If the order is passed without application of mind, such order will fall under the category of erroneous order.
- v) Every loss of revenue cannot be treated as prejudicial to the interest of the revenue and if the AO has adopted one of the courses permissible under law or where two views are possible and the AO has taken one view under which the CIT does not agree, it cannot be treated as an erroneous order unless the view taken by the AO is unsustainable under the law.
- vi) If while making the assessment, the AO examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income, the CIT, while exercising his power u/s 263, is not permitted to substitute his estimate of income in place of the income estimated by the AO.
- vii) The AO exercises quasi-judicial power vested in him and if he exercise such power in accordance with law and arrives as a conclusion, such conclusion cannot be termed to be erroneous simply because the CIT does not feel satisfied with the conclusion.

- viii) The CIT, before exercising his jurisdiction u/s 263, must have material on record to arrive at a satisfaction.
- ix) If the AO has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation by a letter in writing and the AO allowed the claim on being satisfied with the explanation of the assessee, the decision of the AO cannot be held to be erroneous simply because in his order he does not make an elaborate discussion in that regard.

In this respect, we rely upon the following decision:

- (i) Malabar Industrial Co. Ltd. Vs. CIT 243 ITR 83 (SC)
- (ii) 411 ITR 437 (Raj) CIT Vs. Sunil Sankhla SLP of the Department dismissed 407 ITR (St) 25 (SC)
- (iii) 402 ITR 117 (Raj) Laxmi Narain Vs. CIT
- (iv) 414 ITR 485 (Mad) Pr. CIT V. Abhijit Bhandari
- (v) CIT Vs. Escorts Ltd. 338 ITR 0435 (Del)
- (vi) CIT Vs. Deepak Mittal 324 ITR 411 (P & H)
- (vii) CIT Vs. Nirmal Chemical Works Pvt. Ltd. 309 ITR 0067(Guj)
- (viii) Gupta International Vs. ITO 002 ITR (Trib) 0428 (Del)
- (ix) Green World Co. 314 ITR 81 (SC)
- (x) CIT Vs. Paul Bros. 216 ITR 548
- (xi) CIT Vs. Gokul Das Exports 333 ITR 214
- (xii) Smt. Anita Malpotra V/s. ITO (2007) 109 TTJ (ASR) 76
- (xiii) India Heritage Foundation's Vs. Dy. Director of Income Tax 149 TTJ 908 (Bangalore) relevant para 11 page 915 of the order.

(xiv) 343 ITR 366 (Del) EON Technologies Pvt. Ltd.

Considering the above facts of the present case, we found that the A.O. had made full and complete enquiries with regard to claim of deduction raised by the assessee U/s 54F of the Act as we have discussed in detail mentioning the specific paras in the order of the assessment, we are of the view that the order passed by the Id. Pr.CIT U/s 263 of the Act by holding that the AO had not applied correct provisions of law while finalizing the assessment indicating lack of enquiries or verification is thus not sustainable in law and therefore, we quash the order of the Id. CIT(A) passed U/s 263 of the Act.

7. Since we have quashed the order passed U/s 263 of the Act by the Id. Pr.CIT by giving finding with regard to ground No. 1 of the appeal, therefore, the other grounds raised by the assessee are academic in nature and need no adjudication.

8. In the result, this appeal of the assessee is allowed.

Order pronounced in the open court on 25<sup>th</sup> March, 2021.

Sd/-  
(विक्रम सिंह यादव)  
(VIKRAM SINGH YADAV)  
लेखा सदस्य / Accountant Member

Sd/-  
(संदीप गोसाईं)  
(SANDEEP GOSAIN)  
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur  
दिनांक / Dated:- 25/03/2021

**\*Ranjan**

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Shri Virendra Singh Bhadauriya, Jaipur.
2. प्रत्यर्थी / The Respondent- The Pr.CIT-3, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 255/JP/2020)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar