IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A": HYDERABAD
(THROUGH VIRTUAL CONFERENCE)

BEFORE SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER
AND
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER

ITA No. 176/Hyd/2021 Assessment Years: 2012-13		
Sanjay Kumar Sanghi, Hyderabad. PAN – AFVPS 5491R	Vs.	Income-tax Officer, Ward – 12(4), Hyderabad.
(Appellant)		(Respondent)
Assessee by:		Shri P. Murali Mohan Rao
Revenue by:		Shri T. Sunil Goutam
Date of hearing:		16/03/2022
Date of pronouncement:		23/03/2022

<u>O R D E R</u>

<u>PER L.P. SAHU, A.M.:</u>

This appeal filed by the assessee is directed against Pr. CIT - 1 Hyderabad's order dated 29/03/2021 for AY 2012-13 involving proceedings u/s 263 of the Income Tax Act, 1961 ; in short "the Act", on the following grounds of appeal:

> *"1. Your appellant submits that issue of notice u/s 263 of the Income tax Act, 1961 is bad n law.*

2. Your appellant submits that Pro CIT ought to have appreciated the fact that the assessing officer has made the correct assessment of income and consequent revision of assessment order by Pr. CIT u/s 263 is unwarranted, as such assessment order cannot be said to be erroneous or prejudicial to the interests of revenue.

3. The Pro CIT ought to have appreciated the NA fact that the property was given on development, either cost to builder or value as per SOC have to be considered as sale consideration as well as for Section 54F in which case there is no prejudice to the interest of revenue, the assessment order is not erroneous or prejudicial to the interests of revenue.

4. Your appellant submits that the assessing officer has considered all the information made enquires considered the cost of construction on development to the builder as sale consideration and allowed the deduction under section S4F after taking a view of the evidence on record, facts and made the correct assessment of income, which is not erroneous and is not prejudicial to the interests of revenue. Hence, revision of order by Pr. CIT is bad in law.

5. Your Appellant submits that the Assessing Officer has considered all the facts while completing the assessment under section 143(3) r.w.s 147 including the issue raised under 263, therefore the order is not erroneous or prejudicial to the interests of revenue.

6. I Your appellant submits that the assessing I NA officer after application of mind has assessed the correct income, which is one of the plausible ways of the assessment. Therefore, the Pr. CIT ought not to have exercised revisionary powers u/s 263 of the Income tax Act, 1961.

7. I The Pr. CIT erred in computing the long I NA term capital gains based on SOC plus nonrefundable deposit as consideration and allowing exemption under section 54F on the cost of construction to the builder is wrong. In fact the value of the building received in exchange of land on development either cost of construction or 5OC value have to be considered and same should be value of the building considered for 54F and not different values, the Assessing Officer considered the cost to builder plus non-refundable deposit as sale consideration and cost to builder for 54F, which is a plausible method. Therefore the assessment order under section 143(3) r.w.s 147 is not erroneous or prejudicial to the interest of the revenue, order under section 263 is bad in law.

8. For these and such other grounds that may I General be urged at the time of hearing your appellant prays that the order under section 263 may be quashed."

2. The assessee has raised 8 grounds of appeal, in which, the assessee challenged the order passed by the Pr. CIT – 1, Hyderabad u/s 263 of the Act.

3. Briefly the facts of the case are that the assessee filed his return of income on 26/07/2012 for AY 2012-13 declaring total income of Rs.18,60,520/-. Gross total income of the assessee comprises of Rs 4,68,0001- under the head income from salary, Rs.12,26,226/- under the head long term capital gains, Rs.2,84,294/- under the head income from other sources. The case was selected for scrutiny under CASS to verify Large deduction claimed u/s.54B, 54C, 540, 54G, 54GA and assessment was

completed u/s.143(3) on 30.03.2015 by accepting the income returned.

3.1. Later, it was noticed that there was escapement of income of Rs.90,37,500/- in computation of capital gain. Hence, the case was reopened u/s.147 and the reassessment was completed u/s.143(3) rws 147 of the I.T. Act vide order dated 2812-2018 by accepting the same returned income once again. In doing so, Long Term Capital Gain had been assessed at Rs.12,26,226/- .

4. The powers vested u/s 263 of the Act, the Pr. CIT-1, Hyd., observed that on perusal of the assessment record, the said order is erroneous in so far as it is prejudicial to the interests of revenue for the following reasons:

4.1 The assessee had entered into development agreement with M/s. Jhaveri Properties for development of property of 864.52 sq. yds. Situated at Banjara Hills Hyderabad and agreed to share in the proportion of 50:50. Accordingly, assessee had admitted LTCG for AY 2012-13 amounting to Rs.12,26,226/- by adopting Rs.1,94,50,000/- as consideration. This includes 50% of Rs.3,15,00,000/- (being cost to the builder) and Rs.37,00,000/- (being non-refundable deposit received by the assessee). Here the sub-Registrar value of the property is Rs 4,96,15,000/-.

4.2 However, it was noticed from the registered sale deed that official market value of the property developed was Rs. 4,96,15,000/-. Hence, the assessment ought to have been made at Rs. 4,96,15,0001- as the Full Value of consideration instead of Rs.3,15,00,000/- (taken by Assessing Officer) as per the provisions u/s.50C of the IT Act.

4.3 The Assessing Officer completed the assessment u/s 143(3) rws 147 of the IT Act dated 28/12/2018 by accepting the income returned, thus, accepting the sale consideration as cost to the builder instead of SRO's value. This is not in accordance with the provisions of the act.

4.4 As seen from the reassessment order, the AO has wrongly adopted Rs. 1,94,50,000/- as sale consideration instead of Rs. 2,85,07,500/- (SRO value of Rs. 2,48,07,500/- + non-refundable deposit of Rs. 37,00,000/-)

4.5 The Pr. CIT observed that as seen from the order of the Assessing officer, the AO has wrongly adopted value of cost of construction instead of value u/s.50C as shown above and has allowed the total value of capital gains as deduction u/s 54F. Also, the computation is not correct as only proportionate value u/s. 54F is to be allowed. The Assessing Officer ought to have worked out the proportionate deduction allowable.

4.6. Further, the Prf. CIT observed that it is the duty of the assessing officer to collect relevant facts and apply the law correctly while making the assessment. The Assessing Officer should have caused necessary inquiries on issues as discussed above.

4.7. He, therefore, held that the order passed u/s.143(3) rws 147 of the IT Act on 28-12-2018 is erroneous in so far as it is prejudicial to the interests of revenue. Therefore, assessment needs to be revised u/s.263 of the I.T. Act. Hence, a notice u/s.263 was issued vide notice dt. 04.03.2020.

5. In response, the assessee filed written submissions on 20-3-2020 and 03-02-2021 stating that the assessment order is not erroneous as the Assessing Officer has examined all facts and determined the income correctly.

6. The Pr. CIT observed that the submissions of the assessee have been taken into account. As brought out above, the Assessing Officer has allowed deduction over and above the allowable deduction. The correct computation of taxable capital gains would be as follows:

	Amount in Rs.
Sale consideration as adopted by the Stamp Duty Authority(50% being the share of assessee)	2,48,07,500
Add: Non refundable deposit received	37,00,000
	2,85,07,500
Less: Indexed cost of acquisition	20,87,708
Capital Gains	**2,64,19,792**
Less: Exemption allowable (Rs.1,57,50,000 / 2,85,07,500) x 2,64,19,792	1,45,96,570
Taxable Capital Gains	**1,18,23,222**

As seen above, as against the taxable capital gain of Rs.1,18,23,222/- the Assessing Officer has computed the taxable capital gain at Rs.12,26,226/-.

7. In view of the above observations, the Pr. CIT held that the assessment made uls.143(3) rws 147 of the I.T Act dated 28-12-2018 for A.Y.2012-13 is erroneous and prejudicial to the interests of revenue, since there is loss of revenue within the meaning of section 263 of the IT Act. Accordingly, he set aside the assessment order and directed the AO tor re-do the assessment as per law after examining the issued as discussed above.

8. Aggrieved by the order of Pr. CIT, the assessee is in appeal before the ITAT.

9. Before us, the ld. AR of the assessee submitted that the original assessment was selected under CASS to verify large deduction claimed u/s 54B,54C, 54D, 54G, 54GA, the assessment was completed under section 143(3) on 30-3-2015 after verification of capital gains and deduction under section 54F by accepting the returned income. Further, he submitted that even during the reassessment proceeding a question was raised as to why 50C should not be applied for sale consideration and after verification of submission made during the reassessment proceedings the Assessing Officer after verification and application of mind completed the assessment by accepting the returned income and the same issue which was a subject matter of reopening cannot be again a basis for revisionary proceedings under section 263 of the Income Tax Act, 1961. He, therefore, contended that the notice under section 263 consequently the order under section 263 may be quashed. He relied on the following cases in support of assessee's case:

1. Amit Vishnu Pashankar Vs. DCIT, [2021] 131 Taxmann.com 118 (Pune – Trib.)

2. 165 ITD 574 (Visakhapatnam)

10. The ld. DR, on other hand, besides relying on the order of the Pr. CIT submitted that the AO has wrongly adopted Rs. 1,94,50,000/- as sale consideration instead of Rs. 2,85,07,500/-, which resulted into a wrong calculation of

capital tax gain of Rs. 12,26,226/- instead of correct calculation of capital gain tax of Rs. 1,18,23,222/-. He, therefore, submitted that the Pr. CIT has rightly set aside the order assessment and directed the AO to redo the assessment. Accordingly, he submitted that the order of the Pr. CIT ,may be upheld. The ld. DR relied on the judgment of the Hon'ble AP High Court in the case of Potla NageswaraRao *v.* Deputy Commissioner of Income-tax, [2014] 50 taxmann.com 137 (Andhra Pradesh).

11. We have considered the rival submissions and perused the material on record as well as gone through the orders of revenue authorities. There is no dispute that in regard to the transfer of capital asset as per section 2(47) of the IT Act. The development agreement was got registered as sale deed and the market value was determined at Rs. 4,96,15,000/- for the purpose of stamp duty. However, the assessee has shown the sale consideration received for computation of capital gain at Rs. 1,94,50,000/- which includes 50% of cost to the builder and Rs 37,00,000/- non-refundable security deposit. In the reassessment proceedings, the Assessing Officer (AO) did not consider the fair market value of the capital asset as determined by the stamp valuation authority at Rs. 4,96,15,000/, whereas, the registered document was available at the time of reassessment proceedings, in which the market value for the stamp duty purpose of the

transferred asset was more than the sale consideration shown by the assessee in his computation of income. Therefore, the section 50C is clearly applicable to which the AO ignored for making reassessment. Therefore, the order passed by the AO is erroneous and prejudicial to the interests of revenue. The arguments of the assessee are not acceptable that the issue was examined by the AO while reassessment proceedings. The Pr. CIT has rightly brought out the error committed by the AO in the reassessment proceedings. Therefore, in our considered view, the power exercised by the Pr. CIT u/s 263 in setting aside the assessment order is correct. In support of our decision, we rely on the decision of the Co-ordinate bench in the case of Babulal S. Solanki Vs. Income Tax Officer, Ward 7(1)(1), Ahd., [2019] 104 taxmann.com 155 (Ahmedabad - Trib.) wherein the coordinate bench has held as under:

> *“**5.** We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of applicable legal position.*
>
> ***6.** We find that the Assessing Officer, vide letter dated 9th December 2013, did state, in rather general terms, that where the stamp duty valuation (i.e. jantri value) is different from sale consideration, the assessee has to state whether the stamp duty valuation was adopted as sale consideration. There was neither a specific reference to the facts of this case or the application of Section 50. In reply to this letter, the assessee stated that "the land sold is agricultural land as clearly mentioned in the sale deed", that "index copy dated 3rd June 2011 (i.e. after the date of sale deed) clearly shows the said land as an agricultural land" and that "jantri*

value of said agricultural land is Rs 4,900 per sq mtr which was clearly mentioned as per letter of Superintendent of Stamps, Gandhinagar, Gujarat". It was further clarified that "the value of Rs 11,750 per square meter on which stamp duty is paid by the purchaser is for non agricultural land". The assessee thus explained that the sale consideration is less than the stamp duty valuation for the land sold, and then he pointed out the computation of conversion premium paid by the assessee was on the basis of valuation of agricultural land. This plea, however, proceeds on the assumption that the provisions of Section 50C come into play on a fair stamp duty valuation of the land or building or both, rather than the actual valuation adopted by the stamp valuation authority. Section 50 C comes into play, for substitution of actual sale consideration by the value adopted for stamp duty valuation purposes, "where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed...by any authority". What is thus clear is that, on the face of it, the actual stamp duty valuation adopted by the assessing authority rather than what would be the right, even if that be different from actual, stamp duty valuation which ought to have been adopted by the stamp duty valuation authority. If the registration does not take place in the year of transfer and no stamp duty is actually assessed as such, then, of course, value assessable could come into play but that's not the case here. The reply of the assessee was thus less than acceptable in law and on the basis of this explanation. The correctness of claim, on this basis of this claim by the assessee, cannot be established. Of course, there can be other aspects on which the jantri value may, or may not, be applicable but that is a different issue. The claim made by the assessee was thus clearly something which should have provoked further examination or at least being dealt by way of a speaking order, but the Assessing Officer chose to remain silent on the same. As

*observed by Hon'ble Delhi High Court, in the case of **Gee Vee Enterprises v. Addl. CIT [1975] 99 ITR 375 (Delhi)**, "**The position and function of the Income-tax Officer is very different from that of a civil court. The statements made in a pleading proved by the minimum amount of evidence may be accepted by a civil court in the absence of any rebuttal. The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which comes before it. The Income-tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. The meaning to be given to the word "erroneous" in section 263 emerges out of this context. It is because it is incumbent on the Income-tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word "erroneous" in section 263 includes the failure to make such an inquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct**." Of course, if the explanation given by the assessee was of the nature as could possibly satisfy any reasonable person, even if other view was possible, the situation would have been different. The explanation given by the assessee in this case, however, was simply not a legally possible view of the matter. Even in the oft quoted case of **Malabar Industrial Co. Ltd v. CIT [2000] 109 Taxman 66/243 ITR 83 (SC)**, Hon'ble Supreme Court has observed that "**when an ITO adopted one of the courses 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 Commissioner does not agree, it cannot be treated***

> ***as an erroneous order prejudicial to the interests of the revenue unless the view taken by the ITO is unsustainable in law****" (Emphasis supplied by us now). The view canvassed by the assessee, in our considered view, was unsustainable in law. Therefore, even if the matter was examined by the Assessing Officer and it was a conscious call of the Assessing Officer to accept the plea of the assessee, such a situation would not take the matter outside the ambit of Section 263 as the view adopted by the Assessing Officer was clearly unsustainable in law. Having said that, we must add that there can be other legal reasons for grant of relief on merits, and that area is not yet explored by, or before, us. In any case, all that the learned Commissioner has directed is examination of the claim on merits and, for the above reason, we see no infirmity in that direction. In view of these discussions, as also bearing in mind entirety of the case, we uphold the impugned revision order and decline to interfere in the matter. As we do so, we make it clear that our expression of view on merits of the case is only a prima facie impression, and it must not, therefore, influence the decision of the Assessing Officer on merits. Uninfluenced with these observations, the Assessing Officer will take a call on merits of the matter."*

11.1 In view of our observations and respectfully following the said decision of the coordinate bench of ITAT, Ahmedabad, we are of the considered view that the revisionary powers exercised by the Pr. CIT u/s 263 of the Act is correct. The case laws relied on by the ld. AR of the assessee are distinguishable on fact to the case of the assessee, therefore, they are not of any help to the case of the assessee.

11.2 We further observe from the order the Pr.CIT that there is a relief granted by the Pr.CIT u/s 54F of the Income Tax Act. 1961 to the tune of Rs. 1,45,96,570/- on proportionate basis in which the value for sale consideration has been taken at Rs. 2,85,07,600/-, which is a value adopted for the purpose of registration of the documents i.e., it was a notional value adopted by the SRO. As per section 54F(1)(b), *"if the cost of the new asset is less than the net consideration in respect of the original asset, so much of the cpaitgal gain as bears to the whole of the capital gain is same proportion as the cost of the new asset bears to the net consideration, shall not be charged under section 45".* In the impugned case, the cost of the new asset is Rs. 1,57,50,000/- and net sale consideration received by the assessee is Rs. 1,94,50,000/-. The entire sale consideration has not been invested for acquiring/purchasing of a new capital asset. However, the Pr. CIT has considered the sale consideration for the notional value at Rs. 2,85,07,500/-, which includes Rs. 37,00,000/- being non refundable security deposit. Therefore, the relief u/s 54F will be as under:

Rs. 1,57,50,000 x 2,64,19,792/1,94,50,000
= Rs. 2,13,93,919/-.

11.3 Therefore, the correct relief will be Rs. 2,13,93,919/- as against Rs. 1,45,96,570/- computed by the Pr. CIT.

Therefore, the taxable capital gains will be Rs. 50,25,873/- (Rs. 2,64,19,792 – Rs. 2,13,93,919/-)

12. In the result, appeal of the assessee is partly allowed in above terms.

Pronounced in the open court on 23rd March, 2022.

Sd/- **(K. NARASIMHA CHARY)** **JUDICIAL MEMBER**	**Sd/-** **(L. P. SAHU)** **ACCOUNTANT MEMBER**

Hyderabad, Dated: 23rd March, 2022.

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1	Draft dictated on	
2	Draft placed before author	
3	Draft proposed & placed before the Second Member	
4	Draft discussed/approved by Second Member	
5	Approved Draft comes to the Sr. PS/PS	
6	Kept for pronouncement	
7	File sent to Bench Clerk	
8	Date on which the file goes to Head Clerk	
9	Date on which file goes to A.R.	
10	Date of Dispatch of order	