

। आयकर अपीलीय अधिकरण न्यायपीठ, कोलकाता ।

IN THE INCOME TAX APPELLATE TRIBUNAL

"C" BENCH, KOLKATA

BEFORE SHRI RAJPAL YADAV, HON'BLE VICE PRESIDENT

&

SHRI RAJESH KUMAR, HON'BLE ACCOUNTANT MEMBER

I.T.A. No. 522/Kol/2015

Assessment Year: 2007-08

<b>Sri Sumitro Das</b> {legal heir of late Sukumar Das} 65B, Linton Street Kolkata - 700014 PAN : AGGPD1946A	Vs	<b>Commissioner of Income Tax</b> <b>Kol-V, Kolkata</b>
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<b>अपीलार्थी/ (Appellant)</b>		<b>प्रत्यर्थी/ (Respondent)</b>
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Assessee by :	Shri A.K. Ghosh, Advocate
Revenue by :	Shir Amal Shudir Kamar, CIT

सुनवाई की तारीख/Date of Hearing : 06/09/2022

घोषणा की तारीख/Date of Pronouncement : 31/10/2022

**आदेश/ORDER**

**PER SHRI RAJPAL YADAV, VICE PRESIDENT:**

The present appeal is directed at the instance of the assessee against the order of the learned Commissioner of Income Tax, Kolkata-V Kolkata (hereinafter the "ld. CIT") dt. 26/03/2014, passed u/s 263 of the Income Tax Act, 1961 ("the Act"), for Assessment Year 2007-08.

2. This appeal has a very checkered history, namely, it is time barred by 14 days. It was dismissed *ex-parte* on merits vide order dt. 22/11/019. It emerges out that Shri Sukumar Das, i.e., the assessee has expired during the pendency of the appeal, and this appeal was disposed off on merits *ex-parte*. The legal heir of the assessee filed a miscellaneous application bearing M.A. No. 72/Kol/2020, pleading therein that no valid notice was served upon them. The Tribunal allowed this application and recalled its order dt. 22/11/2019, vide order dt. 10/02/2021. The Tribunal has restored the appeal to its original number.

3. As far as the condonation of delay part is concerned, it is pertinent to note that the impugned order of the ld. CIT dt. 26/03/0214 was not communicated to the assessee for almost 11 months. It was served upon the assessee on 20/02/2015.

Thereafter, the assessee was not keeping good health. Medical record has been placed on record along with his affidavit for explaining the delay of 14 days in filing of the appeal.

4. With the assistance of the Id. Representatives, we have gone through all the details and are satisfied that the assessee was prohibited by plausible reason for not filing the appeal before the Tribunal within the period of limitation and, therefore, we condone the delay of 14 days and proceed to decide this appeal on merits.

5. The brief facts of the case are that the assessee has filed his return of income on 11/03/2008 declaring total income of Rs.4,50,760/-. This return was processed u/s 143(1) of the Act on 23/02/2009. The Assessing Officer thereafter issued a notice u/s 154 of the Act on 17/11/2009 intimating that certain rectification is required to be undertaken. However, this proceeding was dropped vide order dt. 28/04/2010.

6. The assessment was reopened by issuance of notice u/s 148 of the Act on 28/04/2010. The reasons for reopening are placed on page no. 19 of the paper book and they read as under:-

“OFFICE OF THE INCOME TAX OFFICER: WARD-14(1)  
169,AJ.C. BOSE ROAD, 2 FLOOR,BAMBOO VILLA,KOLKTA-700014.

NO. I.TO.,Wd-14(1)/Scrut./11-12/Kol/ 393

Dated: 15.12.2011

To  
Shri Sukumar Das,  
65B, Linton Street,  
Kolkata-700014.

Sir,

Sub: Supply of reasons for reopening of assessment  
u/s.147 of the I.T.Act, 1961 in the case of Shri Sukumar  
Das, PAN:AGGPD1946A for the A.Y. 2007-08.  
Ref: Your letter dt.15.12.2011.

Please refer to the above.

You are requiring the reasons for reopening the assessment ws.147 of the I.T.Act.1961 for the A.Y. 2007-08 vide letter dt. 15.12.2011, though the same has already been discussed with you/your representative several times as because without knowing reasons it is not possible to continue the above assessment proceedings. It is noted that you have not applied before the said reasons recorded for reopening ws.147 of the I.T. Act, 1961 for the A.Y. 2007-08 officially.

However, as required by you the reasons recorded for reopening u/s.147 of the I. T. Act, 1961 for the A.Y. 2007-08 are given as below:-

Reasons for reopening the assessment.

It appears that assessee has sold two flats during the A.Y. 2007-08 to 1. Smt. Kusum Devi Baid and Sri Ravi Baid and 2. Sri Ram Narayan Verma of Rs.24,50,000/- ( Rs.12,00,000/- + Rs. 12,50,000/-) whereas the market value is determined of two flats as per Registrar of Assurance of Rs.48,02,500/- ( Rs.22,76,250/- + Rs.25,26,250/- ). Therefore, income under the head Capital Gain has attracted under Sec.50C of the Income Tax Act, 1961 in the instant case.

Under the fact and above circumstances I have reason to believe that income chargeable to tax has escaped assessment for A.Y, 2007-08.

Issue notice ws.1 48 of the I.T.Act,1961."

Yours faithfully,

Sd/-

[Ganesh Chandra Debnath]

I.T.O., Ward-14(1), Kolkata

7. The Id. Assessing Officer, thereafter passed the reassessment order u/s 147/143(3) of the Act on 22/12/2011. At this stage, we deem it proper to take note of the brief finding on the issue which will be relevant for the present appeal. Therefore, we reproduce the finding of the Assessing Officer on that issue which reads as follows:-

"Land at 30E, Hara Mohan Ghosh Lane, P.S. Beliaghata, Kolkata-700085 purchased on 22.11.2004 in the name of the assessee and his wife Smt, Sandhya Das at a consideration of Rs.15,00,000/- plus expenditure in the nature of stamp duty, registration fees of Rs.1,69,018/-. The said land was given in the possession of M/s.Vidya Promoters (P) Ltd. for development and construction of flat for sale to the interested parties. In this respect an agreement was made on 05.08.2005 in which it was agreed upon as follows: -

"The profit and losses shall be shared by the parties according to their/its respective shares in, the property i.e. 2/3<sup>rd</sup> by M/s. Vidya Promoters (P) Ltd. And 1/3<sup>rd</sup> by Smt. Sandhya Das and Shri Sukumar Das or 2500 sq. ft. flat area more or less to each".

On completion of construction M/s. Vidya Promoters (P) Ltd. had given two flats of 1250 sq. ft. each to the assessee of which value was determined by an approved valuer to the tune of Rs.10,93,750/- & Rs.11,40,625/- respectively i.e. totaling Rs.22,34,375/- as per valuation report dt.03.05.2010 filed by the assessee on 15.12.2011. The flats as such owned by the assessee were sold out one to Shri Ram

*Narayan Verma and Smt. Sandhya Verma for a consideration of Rs.12,50,000/- & another to Shri Ravi Baid and Smt. Kusum Devi Baid for a consideration of Rs.12,00,000/- i.e., for total consideration of Rs.24,50,000/-. The assessee was required to file the details of such sale of flats received from M/s.Vidya Promoters (P) Ltd. The assessee could not file any such transactions made during the F.Y. 2006-07, stated that the said flats were sold out to parties mentioned above for a consideration of Rs.24,50,000/-. Later on, the assessee also filed conveyance deed dt.31.07.2009 and 30.09.2009 evidencing sale of the said property. The assessee was asked how the flats are treated as sold out when there was neither any agreement nor any deed of conveyance in support of such sale. The assessee stated that possession of the said flats had already been given during F.Y. 2006-07 against which the said sum of Rs.24,50,000/- was received treating the same as sale consideration. The flats were registered later on as per request of the parties of which value were determined by the Registering Authority at Rs.25,26,250/- & Rs.22,76,250/- totaling Rs.48,02,500/-. From the details and documents filed by the assessee it appears that the assessee has actually sold out the flats during the F.Y. 2006-07 because of the facts that possession of the said flats were handed over during that period.*

*Considering the above I am of the opinion that the provision of Sec. 50C of the I.T. Act, 1961 is squarely applicable here in the instant case. The capital arises in the nature of short term capital gains:-*

*The value determined by the Registering Authority Rs.48,02,500/-*

*Less: The value determined by the approved valuer  
as per valuation report dt. 03.05.2010 filed by the  
assessee on 15.12.2011 Rs.22,34,375/-*

*STCG: Rs.25,68,125/-"*

8. The Id. Commissioner thereafter took cognizance u/s 263 of the Act and issued a showcause notice. Copy of such notice is available at page 27 of the paper book which read as under:-

**P.T.O.**

OFFICE OF THE COMMISSIONER OF INCOME TAX, KOL-V, KOLKATA  
BAMBOO VILLA, 169, A.J.C. BOSE ROAD, KOLKATA - 700 014

No. CIT-V/KOL/U/s.263/2013-14/ 2305

Date :- 11/11/2013

To :  
Sri Sukumar Das,  
65B, Linton Street,  
Kolkata-700014.

Sub : Revision u/s.263 of the order U/s.143(3)/147 dt.22.12.2011-  
for the A.Y. 2007-2008 - PAN ACGPD1946A - reg.-

Please refer to the above.

On perusal of the assessment record it is seen that the return of income in your case for the A.Y. 2007-2008 was filed on 11-03-2008 declaring total income of Rs.4,50,760/-. The assessment order u/s.143(3)/147 was passed by ITO, Wd-1(1) on 22.12.2011 determining total income of Rs.30,24,020/-. It is further seen from the assessment order and the relevant assessment record that the assessment order u/s.143(3)/147 dt.22.12.2011 passed by the I.T.O., Wd-1(1), Kolkata is erroneous in so far as prejudicial to the interest of revenue for the following reasons:

1. From the records it is seen that the assessee along with his wife purchased a land at 30F, Haramohan Ghosh Lane, Kolkata-700085 on 22.11.2004 for a consideration of Rs.16,69,018/- (Rupees Rs.15,00,000/- + Registration Fee Rs.1,69,018/-). Hence the cost of acquisition of the assessee was Rs.8,34,509/- (50% of total cost). It is also seen from records that Smt.Sandhya Das, wife of the assessee had earnings of her own being the proprietress of M/s.Surya Tapa Associates which has been the developer of assessee property at Taj Pur. The land acquired on 22.11.2004 was given to M/s.Vidya Promoters Pvt. Ltd. for development and construction. One of the director's of the said company, Sri Sudipto Das is the assessee's son. By an agreement made on 5.08.2005 the assessee was to get 2500 sq.ft. flat area in exchange. This was sold out to (1) Sri Ram Narayan Verma & Smt.Sandhya Verma for Rs.12,50,000/- and (2) Sri Rabi Baid and Smt.Kusum Devi Baid for Rs.12,00,000/-, totaling Rs.24,50,000/-. The payments were realized within F.Y. 2006-07 vide assessee's letter dt.15.12.2011. The valuation of these flats was Rs.10,93,750/- & Rs.11,40,625/-, totaling Rs.22,34,375/-. As per valuation reports submitted by the assessee's approved valuer.

So there is element of capital gain from the date of purchase of land (cost of acquisition of Rs.8,34,509/- on 22.11.2004 to the date of completed flats receipt and value at Rs.22,34,375/- amounting to Rs.13,99,866/- which has escaped assessment.

2. Therefore, I propose to pass a suitable order u/s.263 of the I.T.Act,1961 and accordingly, you are hereby provided with an opportunity to represent your case either personally or through Authorized Representative before the undersigned at my Chamber at 1st Floor, Room No.13 on 27/11/2013 at 2-30.

(L.C.JOSHI RANEE )  
COMMISSIONER OF INCOME-TAX  
KOL-V: KOLKATA



(एल. सी. जोशी रानी)  
L. C. JOSHI RANEE  
आयकर आयुक्त, कोल-V  
Commissioner of Income Tax-V  
कोलकाता/Kolkata

9. The Id. Commissioner has set aside the assessment order for a limited purpose that the issue regarding escapement of short term capital gain of Rs.13,99,866/- was not considered by the Assessing Officer. It deserves to be considered. We take note the brief finding recorded by the Id. CIT on this aspect in the impugned order:-

*"I have carefully considered the submissions made for the assessee and also the records available. Considering the facts and circumstances of the case, it would be appropriate if the issue of short term capital gain of Rs. 13,99,866/- is restored back to the file of the A.O. for fresh and proper adjudication and accordingly taking action as per law. As such, the assessment order dated 22. 12.201 1 for Assessment Year 2007-2008 is set aside u/s.26 as being erroneous in so far as it is prejudicial to the interest of the revenue as because the short term capital gain of Rs. 13,99,866/- was not considered in the assessment order. The assessing officer is directed to adjudicate the matter afresh after giving due opportunity of being heard to the assessee. The adjudication should be limited only on the issue of Short Term Capital Gain after giving the assessee the opportunity of being heard."*

10. In response to the notice of hearing, the Id. Counsel for the assessee appeared before us and submitted written submissions also. In the written submissions, it has been pleaded that notice issued u/s 148 of the Act vide which the assessment was reopened has been challenged before the Hon'ble Calcutta High Court vide writ petition no. 22496 (W) of 2011. According to the submissions of the assessee, this writ petition is still pending but Hon'ble Court has granted an interim order restraining the Assessing Officer from realizing the disputed taxes from the assessee.

11. With the assistance of the Id. Representatives, we have gone through the record carefully.

12. Before we embark upon an enquiry on the facts and issues agitated before us to find out whether the action u/s 263 of the Act, deserves to be taken against the assessee or not, it is pertinent to take note of this section. It reads as under:-

*"263(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment."*

*[Explanation.- For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,-*

*an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include-*

*(i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Incometax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;*

*(ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorized by the Board in this behalf under section 120;*

*(b) "record shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Commissioner;*

*(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the 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.*

*(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.*

*(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.*

*Explanation.- In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the*

*proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded.”*

13. A bare perusal of the sub section-1 would reveal that powers of revision granted by section 263 to the learned Commissioner have four compartments. In the first place, the learned Commissioner may call for and examine the records of any proceedings under this Act. For calling of the record and examination, the learned Commissioner was not required to show any reason. It is a part of his administrative control to call for the records and examine them. The second feature would come when he will judge an order passed by an Assessing Officer on culmination of any proceedings or during the pendency of those proceedings. On an analysis of the record and of the order passed by the Assessing Officer, he formed an opinion that such an order is erroneous in so far as it is prejudicial to the interests of the Revenue. By this stage the learned Commissioner was not required the assistance of the assessee. Thereafter the third stage would come. The learned Commissioner would issue a show cause notice pointing out the reasons for the formation of his belief that action u/s 263 is required on a particular order of the Assessing Officer. At this stage the opportunity to the assessee would be given. The learned Commissioner has to conduct an inquiry as he may deem fit. After hearing the assessee, he will pass the order. This is the 4th compartment of this section. The learned Commissioner may annul the order of the Assessing Officer. He may enhance the assessed income by modifying the order. He may set aside the order and direct the Assessing Officer to pass a fresh order. At this stage, before considering the multi-fold contentions of the ld. Representatives, we deem it pertinent to take note of the fundamental tests propounded in various judgments relevant for judging the action of the CIT taken u/s 263. The ITAT in the case of *Mrs. Khatiza S. Oomerbhoy Vs. ITO, Mumbai, 101 TTJ 1095*, analyzed in detail various authoritative pronouncements including the decision of Hon'ble

Supreme Court in the case of *Malabar Industries* 243 ITR 83 and has propounded the following broader principle to judge the action of CIT taken under section 263.

(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) *Sec. 263 cannot be invoked to correct each and every type of mistake or error committed by the AO and it was 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 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 interests 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 with which the CIT does not agree. It cannot be treated as an erroneous order, unless the view taken by the AO is unsustainable under 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 determine the income, the CIT, while exercising his power under 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 exercises such power in accordance with law and arrive at a conclusion, such conclusion cannot be termed to be erroneous simply because the CIT does not see stratified with the conclusion.*

(viii) *The CIT, before exercising his jurisdiction under 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 allows 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.*

14. Apart from the above principles, we deem it appropriate to make reference to the decision of the Hon'ble Delhi High Court in the case of *CIT vs. Sun Beam Auto* reported in 227 CTR 113 and *Gee Vee Enterprises Ltd vs. Addl. Commissioner of*

*Income Tax (99 ITR 375)*. In the case of Sun Beam Auto, the Hon'ble High Court has pointed out a distinction between lack of inquiry and inadequate inquiry. If there is a lack of enquiry, then the assessment order can be branded as erroneous. The following observations of the Hon'ble Delhi High Court are worth to note:

*"12. We have considered the rival submissions of the counsel on the other side and have gone through the records. The first issue that arises for our consideration is about the exercise of power by the Commissioner of Income-tax under section 263 of the Income-tax Act. As noted above, the submission of learned counsel for the revenue was that while passing the assessment order, the Assessing Officer did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This argument predicates on the assessment order which apparently does not give any reasons while allowing the entire expenditure as revenue expenditure. However, that by itself would not be indicative of the fact that the Assessing Officer had not applied his mind on the issue. There are judgments galore laying down the principle that the Assessing Officer in the assessment order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate, that would not by itself, give occasion to the Commissioner to pass orders under section 263 of the Act, merely because he has different opinion in the matter. It is only in cases of "lack of inquiry", that such a course of action would be open".*

15. In the case of *Gee Vee Enterprise vs. Commissioner of Income Tax* reported in 99 ITR page 375, the Hon'ble court has expounded the approach of ld. Assessing Officer while passing assessment order. The observation of the Hon'ble court on pages 386 of journal read as under:-

*"... it is not necessary for the Commissioner to make further inquiries before cancelling the assessment order of the Income-tax Officer. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Income-tax Officer should have made further inquiries before accepting the statements made by the assessee in his return.*

*The reason is obvious. The position and function of the Income-tax Officer is very diffident from that of a civil court. The statement made in a pleading proved by the minimum amount of evidence may be adopted 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 on*

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*adjudicator but also an investigator. He cannot remain passive in the face of the return which is apparently in order but called 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... 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 enquiry. 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."*

16. In the light of the above, let us examine the facts and circumstances of the case. A perusal of the record would indicate that the controversy can be demarcated in three compartments, which are as follows:-

A - Whether a valid notice u/s 148 of the Act was issued upon the assessee which has resulted into a valid re-assessment order u/s 147 r.w.s. 143(3) of the Act dt. 22/12/2011 which can be made a foundation for initiating the revisionary proceedings u/s 263 of the Act.

B - The Assessing Officer has made addition on the same item of transaction which has been raked by the Id. CIT u/s 263. It is not discernible whether the assessee has challenged the assessment order in appeal before the Id. CIT u/s 246A of the Act because if that was filed then, under sub-clause (c) to Section 263(1), no action u/s 263 of the Act can be taken against the assessee.

C - Whether the Id. Commissioner has exercised powers u/s 263 of the Act for revising assessment order passed u/s 147(143(3) of the Act, in accordance with law or not.

17. When we examine the record carefully, then neither the submissions of the assessee are specific nor complete details are available demonstrating the fact as to how the notice issued u/s 148 of the Act, upon the assessee was not valid.

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Probably, this is a subject matter of writ petition also before the Hon'ble Calcutta High Court and in a proceeding u/s 263 of the Act, this issue might have not been raised by the assessee but before us, though the assessee has raised it as an additional Ground, in Ground Nos. 1, 2 & 3 but did not place the material on record to demonstrate as to how the notice u/s 148 of the Act and the person who has recorded the reasons are different. We have taken cognizance of the reasons which are available on page no. 19 of the paper book extracted (supra). The reasons are recorded by ITO, Ward-14(1), Kolkata whereas, the assessment order is also passed by ITO, Ward-14(1), Kolkata. Such details are available on the last page of the assessment order passed u/s 147/143(3) of the Act. It appears that the assessee is pointing out the copy of the notice issued u/s 148 of the Act. It is under the seal of Shri M.P. Kharwar, Income Tax Officer, Ward-14(1), Kolkata. To our mind, the assessee has failed to appreciate that there may be concurrent jurisdiction of a ward with more than two Income Tax Officers. In all these notices, seal of ITO, Ward-14(1), Kolkata has been used. The assessee has not placed on record copy of any notification issued by the Income Tax Department accepting the fact that jurisdiction in an Income Tax Officer was infused particularly to one person. Therefore, we are of the view that there is no merit in this ground of appeal.

18. As far as the second fold of submission is concerned, neither complete details were being placed by the ld. Counsel for the assessee before us nor by the revenue. It is not ascertainable whether the assessee has challenged the assessment order in appeal before the ld. CIT or not. Probably the assessee might be expecting acceptance of his writ petition by the Hon'ble High Court vide which the reopening proceedings stated to have been challenged. Therefore, we are at a loss to appreciate this controversy and to record any categorical finding.

19. As far as the third limb of dispute is concerned, we are of the view that the impugned order of the Id. CIT is not sustainable. There is no dispute with regard to the fact that capital gain arose to the assessee. The capital gain has to be computed as provided u/s 48 of the Act which contemplates:-

*"48. The income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely :-*

- (i) expenditure incurred wholly and exclusively in connection with such transfer;*
- (ii) the cost of acquisition of the asset and the cost of any improvement thereto;*
- [(iii) in case of value of any money or capital asset received by a specified person from a specified entity referred to in subsection (4) of [section 45](#), the amount chargeable to income-tax as income of such specified entity under that sub-section which is attributable to the capital asset being transferred by the specified entity, calculated in the prescribed manner:]"*

20. Referring back to the finding of the Assessing Officer in the impugned assessment order, we find that the assessee has purchased land at 30E, Haramohan Ghosh Lane, Kolkata - 700085, on 22/11/2004 for a consideration of Rs.15,00,000/- (+) stamp duty charges of Rs.1,69,018/-. This land was purchased by him and his wife in equal shares. The assessee entered into a joint venture agreement for development and construction of flats for sale to the interested party on this land. This agreement was entered into with M/s. Vidya Promoters Pvt. Ltd. Out of the developed property, 2/3<sup>rd</sup> share will be of M/s. Vidya Promoters and 1/3<sup>rd</sup> share would be of assessee and his wife. In other words, the assessee and his wife were entitled for 2500 sq.ft. of area. The assessee was entitled for 1225 sq.ft. According to the Assessing Officer, the flats were sold @ Rs.12,50,000/- & Rs. 12,00,000/-. In other words, this 2500 sq.ft. area was sold at Rs.24,50,000/-. The Assessing Officer replaced this full sale consideration with deemed sale consideration contemplated u/s 50C of the Act i.e., the amount equivalent to the sum for which stamp duty was paid and this sum was taken at Rs.48,02,500/-. The Id. Assessing Officer thereafter took the cost of acquisition at Rs.22,34,375/-. This cost of acquisition was taken on the basis of valuation report dt. 03/05/2010, filed by the assessee.

21. The dispute at the end of the Id. CIT in the 263 proceeding relates to computation of cost of acquisition. The Id. CIT was of the view that cost of acquisition should be Rs.16,69,018/-. The assessee has 50% shares i.e., Rs.8,84,509/-. According to him this should have been reduced from the deemed sale consideration falling in the hands of the assessee as per Section 50C of the Act. This exercise has not been carried out by the Assessing Officer and, therefore, he termed the assessment order as erroneous. It is pertinent to observe that the deemed sale consideration u/s 50C of the Act is not an absolute figure. It has to be further verified u/s 50C sub-Clause (2) for determining the market rate all these aspects are to be examined. It is also pertinent to observe that the cost of acquisition was on 22/11/2004. The indexation with appreciation of cost of acquisition is calculated for taking a final figure for the purpose of reducing it from full sale consideration assumed u/s 50C of the Act. From the finding of the Assessing Officer, it is to be seen that all these consideration must have gone by. It is not a mathematical formula. He has taken a particular cost of acquisition on the basis of valuer's report and thereafter calculated the capital gain. This calculation may have been not matched with the understanding of the Id. Commissioner but this cannot be a reason to set aside the assessment for framing the same *de-novo*. Therefore, on this point, we are of the view that the impugned order passed by the Id. Commissioner is not sustainable. It is to be further notice that the Id. CIT himself failed to conduct any enquiry in the finding extracted *supra* pointing out as to why the valuer's report considered by the Assessing Officer for taking cost of acquisition is erroneous.

22. On due consideration of the above facts and circumstances, we are of the view that, for taking action u/s 263 of the Act, twin conditions should be fulfilled i.e., the order should be erroneous inasmuch as it causes prejudice to the revenue. From the finding of the Id. CIT, it appears that the Id. CIT has erred in construing the position of law. The Hon'ble Delhi High Court in the case of *DG Housing*

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*Projects Ltd. [2012] 343 ITR 329 (Delhi)* has held that the Id. Commissioner should not simply relegate the point that the assessment order is erroneous to the AO. The Id. Commissioner, after analyzing the record, ought to have recorded a categorical finding and provided valid reasons as to how the assessment order is erroneous. In other words, the Id. Commissioner should have recorded a finding about the error that had crept in which required action u/s 263 of the Act. Therefore, in the absence of this finding, we are of the view that the impugned order is not sustainable and hence the same is quashed.

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

**Order pronounced in the Court on 31<sup>st</sup> October, 2022 at Kolkata.**

*Sd/-*

**(RAJESH KUMAR)  
ACCOUNTANT MEMBER**

*Sd/-*

**(RAJPALYADAV)  
VICE PRESIDENT**

Kolkata, Dated 31/10/2022

*\*SC Sd/-*

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील) / The CIT-
5. विभागीय प्रतिनिधि, अधिकरण अपीलीय आयकर , कोलकाता/DR,ITAT, Kolkata,
6. गार्ड फाईल /Guard file.

आदेशानुसार/ BY ORDER,  
TRUE COPY

**Assistant Registrar**  
आयकर अपीलीय अधिकरण  
ITAT, Kolkata