

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM

आयकर अपील सं./ITA No.57/SRT/2021

Assessment Year: (2015-16)

(Physical Court Hearing)

Navinchandra K. Patel, 5, Kaaliytawadi Faliya, At Post Saniya Hemad, Surat-395006.	Vs.	The PCIT-1, Surat.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: BIRPP6292D		
(Appellant)		(Respondent)

Assessee by	Shri Sapnesh Sheth, CA
Respondent by	Shri Ritesh Mishra, CIT(DR)
Date of Hearing	02/02/2023
Date of Pronouncement	10/02/2023

आदेश / ORDER

PER DR. A. L. SAINI, AM:

Captioned appeal filed by assessee, pertaining to Assessment Year (AY) 2015-16, is directed against the order passed by the Learned Principal Commissioner of Income Tax, Surat (in short “ld. PCIT”)], under section 263 of the Income Tax Act, 1961 (hereinafter referred to as “the Act”), dated 31.03.2021.

2. The grounds of appeal raised by the assessee are as follows:

“1. On the facts and circumstances of the case as well as law on the subject, the learned Pr. Commissioner of Income-Tax has erred in passing revisionary order u/s 263 of the I.T. Act setting aside the order of ld. assessing officer passed u/s 143(3) of the Act dated 24.11.2017 for the year under consideration although said order is neither erroneous nor prejudicial to the interest of revenue.

2. On the facts and circumstances of the case as well as law on the subject, the learned Pr. Commissioner of Income-tax has erred in observing that order passed by assessing officer u/s 143(3) of the Act is erroneous on the ground that indexed cost of acquisition of property is under assessed by Rs.2,12,58,035/-.

3. On the facts and circumstances of the case as well as law on the subject, the learned Pr. Commissioner of Income-tax has erred in observing that order

passed by assessing officer u/s 143(3) of the Act is erroneous as deductions claimed by assessee u/s 54B & 54F of the Act is not allowable.

4. It is therefore prayed that order passed by Pr. Commissioner of Income-tax u/s 263 of the I.T. Act setting aside the order of assessing officer and directing assessing officer to make fresh investigations on issue of capital gain & deductions claimed by assessee may please be quashed.

5. Appellant craves leave to add, alter or delete any ground(s) either before or in the course of hearing of the appeal.”

3. Succinctly, the factual panorama of the case is that assessee before us is an Individual and had filed his return of income for A.Y. 2015-16 on 21.03.2017 declaring total income at Rs.7,71,620/-. Thereafter, the assessee's case was selected for scrutiny through CASS; and scrutiny assessment under section 143(3) of the Act was finalized on 24.11.2017 accepting return of income.

4. Later on, Learned Principal Commissioner of Income Tax, Surat (in short “ld. PCIT”), exercised his jurisdiction under section 263 of the Income Tax Act, 1961. On verification of details, it was noticed by ld PCIT that assessee had sold an immovable property (a land situated at Vill. Saniya Remand, Khata No. 169, R.S. No. 130/1, Block No. 145 having area hectare 273.16 sq. meter lying in T.P. Scheme No. 52) for a sale consideration of Rs.7,78,52,500/- on 28.08.2014. The assessee calculated indexed cost of acquisition of Rs.2,23,77,267/-. The assessee had claimed deduction of Rs.3,11,41,000/- as expenses on premium for conversion of agriculture land to non-agriculture land. He had also claimed deduction of Rs.5,46,02,050/- u/s 54B of the I.T. Act for purchase of agriculture land and deduction u/s 54F of Rs.44,48,230/- for purchase of new residential house. On verification of case records, it was noted by ld PCIT that while computing indexed cost of acquisition, the assessee had taken the cost of land at Rs. 80/- per sq. meter as per registered valuer's report. The AO has opined that the value adopted by the assessee as per registered valuer is higher than the prevailing market value as on 01.04.1981. Therefore, AO referred the issue to the Departmental Valuation officer for estimation of fair market value of the said property as on 01.04.1981.

The Valuation report from the DVO (Departmental Valuation Officer) was received on 11.12.2017 after completing of assessment. The DVO has estimated the fair market value of the said land is Rs.1,09,300/- (27316.00 sq. mtr. @ Rs. 4.00) by estimating the cost of land at Rs. 4/-per square meter as on 01.04.1981. While finalizing assessment proceedings, the AO could not consider the FMV market value of the land determined by the DVO and taken fair market value at Rs.80 per square meter as valued by the Registered Valuer which is higher than the value determined by the DVO. As per the registered valuer Indexed value of the land calculated at Rs.2,23,77,267/- whereas as per the value determined by the DVO, Indexed cost of the land is calculated at Rs.11,19,232/-. Thus, there is under assessment of Rs.2,12,58,035/-.

5. The Id PCIT further noted that before execution of sale deed of the land at VIill. Saniya Remand, Khata No. 169, R.S. No. 130/1, Block No. 145, the assessee had taken the permission from the competent Authority on 10.06.2014 for selling the agricultural land as non-agricultural commercial purpose and paid premium of Rs.3,11,41,000/-. Thus the nature of land sold was not agricultural land but it was non-agricultural for commercial purpose. During the course of assessment proceeding, no details in respect of the agricultural land carried out on said land in previous two years have been submitted by the assessee. While finalizing the assessment proceedings, the AO has erred allowing deduction claimed under section 54B of the Act.

6. The Id PCIT also noted that assessee has purchased a new house property at Palsana district at “Avadh Shangrila” for a consideration of Rs.44,48,230/- or 16.10.2015 and claimed deduction under section 54F of the I.T. Act. Payment was made as under –

Date	Cheque	Bank	Amount
18.09.2014	003132	Dena Bank	Rs.10,00,000
28.09.2015	605279		Rs.16,00,000
30.09.2015	619241		Rs.16,00,000
Total Payment			Rs.42,00,000

The Id PCIT noted that assessee had paid Rs.10,00,000/- on 18.09.2014 and the balance amount of Rs.32,00,000/- was paid (Rs.16,00,000/- on 28.09.2014 and Rs.16,00,000/- on 30.09.2015) i.e. after the due date (i.e. 07.09.2015 for A.Y. 2015-16) of furnishing of return of income as per sub section (1) of section 139 of the I.T. Act. The Id PCIT observed that as per the section 54F(4) of the Act, the amount of capital gain which is not utilized for the purchase of new asset, before the due date of furnishing the return of income under section 139 of the Act should be deposited in Capital gain account before the furnishing the return of income under sub section (1) of section 139 of the Act. However, in the instant case, amount of capital gain, neither used to purchase a new assets nor deposited in the Capital Gain account on or before the due date (i.e. 07.09.2015 for A.Y. 2015-16) for furnishing return of income under section 139 of the Act, the claim of deduction u/s 54F should be restricted to Rs.10,00,000/-instead of Rs.44,48,230/- allowed in assessment. On consideration of above irregularities, the assessment order is found to be erroneous and prejudicial to the interest of Revenue. Therefore, Id PCIT issued a show cause notice bearing No. ITBA/REV/REV1 /2020- 21/1031740313(1) dated 25.03.2021 to the assessee to explain the transaction.

7. In response to the show-cause notice dated 25.03.2021, the assessee submitted his reply through ITBA system. The assessee replied that during the course of assessment proceeding, all the required details have been submitted to the Assessing Officer; the AO has duly examined these details and found them satisfactory. The assessee also stated that agricultural activities were being done during the last 2 previous years on the land sold. In his reply, the assessee has also relied upon the various case laws and judicial pronouncement. The assessee also replied that the land sold was being cultivating till date of sale, however, Id PCIT noted that assessee has not submitted any documentary evidences i.e. method of irrigation, copy of invoices for sale of agriculture products, copy of the purchase of bills for purchasing of fertilizers, seed etc. The assessee submitted copy of 7/12 for F.Y. 2011-12 to 2013-14 which shows the land was

growing 'sugar cane' during the F.Y. 2011-12 to 2013-14. The assessee has sold the land on 28.08.2014, however, copy of the 7/12 has not submitted F.Y. 2014-15, the year in which the land was sold. In absence of 7/12 documents, it is not established that the land was being used for agriculture purpose before date of the sale.

8. The Id PCIT noted that assessee had claimed deduction u/s 54B of Rs.5,46,02,050/- in respect to land purchased and transfer expenses of Rs.3,11,41,000/-, so even if FMV adopted by the DVO, as Zero, even then it will not affect income offered under the head of Long Term Capital Gain. The contention of the assessee was not accepted by Id PCIT as it is not established that any agricultural activities were being done on the land sold, therefore, the assessee is not eligible for deduction u/s 54B of the Act. During the assessment proceeding, fair market value of the land sold was determined by the Registered Valuer at Rs.80 per square meter and value of the same land was determined by the DVO at Rs.4 per square meter. As per the registered valuer indexed value of the land calculated at Rs.2,33,77,267/- whereas as per the value determined by the DVO, indexed cost of the land is calculated at Rs.11,19,232/-, and the assessee is not eligible to getting deduction u/s 54B of the Act, therefore, there is under assessment to the tune of Rs.2,12,58,035/- in respect of Long Term Capital Gain.

9. The Id PCIT observed that in respect of claim of the 54F of the Act, no reply has been submitted by the assessee; therefore the matter has been decided on merit and the material available on record. The assessee has purchased a new house property at Palsana district at "Avadh Shangrila" for a consideration of Rs.44,48,230/- on 16.10.2015 and paid Rs.10,00,000/- on 18.09.2014 and the balance amount of Rs.32,00,000/- was paid (Rs.16,00,000/- on 28.09.2014 and Rs.16,00,000/- on 30.09.2015) i.e. after the due date (i.e. 07.09.2015 for AY.2015-16) of furnishing of return of income as per sub section (1) of section 139 of the I.T. Act. Thus, Id PCIT observed that in view of the provisions of

section 54F(4), the assessee is not entitled for getting deduction u/s 54F of the Act.

10. In view of the above facts, Id PCIT held that this is not a case of lack of inquiry, but no inquiry in respect of valuation of the impugned land was made. It is also a case where the AO got carried away with submission of the assessee without application of mind. Therefore, Id PCIT held that assessment order in this case passed under section 143(3) of the Act on 24.11.2017 is found to be erroneous and prejudicial to the interest of revenue. Therefore, the assessment order under section 143(3) of the Act dated 24.11.2017 was set-aside by Id PCIT to the AO to be decided de novo with a direction to examine the issue of Capital Gain and deduction under section 54B and 54F of the Act.

11. Aggrieved by the order of Ld. PCIT, the assessee is in appeal before us.

12. Shri Sapnesh Sheth, Ld. Counsel for the assessee, submitted that assessee under consideration, has sold his agricultural land after converting the land into non-agriculture land. Prior to sale of such land, the assessee was doing agricultural activities, therefore, assessee is eligible to claim deduction under section 54B of the Act. Therefore, Ld. Counsel also contended that if the indexed cost of acquisition is treated as if it is Nil, then also assessee is eligible to claim the deduction u/s 54B of the Act and after claiming deduction u/s 54B of the Act, the tax payable by the assessee comes to nil. Therefore assessee's case under consideration is revenue neutral. The computation submitted before the Bench, by Id Counsel, is reproduced below:

Reg: Shri Navinchandra K Patel
A.Y :- 2015-16

Computation of Capital Gain	
Sale Value	77852500
Less: Indexed COA	<u>7459082</u>
	70393418
Less: Transfer expenses	<u>31141000</u>
	39252418
Less: Deduction u/s 54B (max. available amt)	<u>54602050</u> ✓

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Therefore, Ld. Counsel contended that order passed by the Assessing Officer is neither erroneous nor prejudicial to the interest of Revenue. Further, Ld Counsel submitted that during the assessment stage, the assessing officer, by issuing notice under section 142(1) of the Act, has asked relevant questions and assessee has replied them. After verification of relevant documents and evidences, the assessing officer has taken the plausible view which is sustainable in law, therefore order passed by the assessing officer is neither erroneous nor prejudicial to the interest of revenue.

13. On the other hand, Learned Departmental Representative (Ld. DR) for the Revenue relied on the order of the Ld. PCIT and submitted that Ld. PCIT has passed an elaborate order therefore it should be upheld.

14. We have given our thoughtful consideration to rival contention. We have perused case file as well as paper books furnished by assessee We find that one key issue arises for our apt adjudication in the instant lis, which is, whether the assessee is eligible to claim deduction under section 54B of the Act or not? Before us, the assessee submitted the submission made before the Ld. PCIT during the revision proceedings under section 263 of the Act, which is placed at paper book page nos. 15 to 17. The assessee also submitted the notice issued under section 142(1) by Assessing Officer dated 20.11.2017 which is placed at paper book page no.20 wherein the Assessing Officer asked the question about the confirmation of weight of sugar cane, dated 01.10.2013 which was cultivated on land. The proof of doing agricultural activities were submitted. In response to the notice under section 142(1), the assessee has also submitted its reply, which is placed at paper book page no.18. The assessee submitted the details of sugar cane sold to the Co-operative Khand Udyag Mandli Limited. The assessee also submitted the evidence that prior to sale of the land, the assessee was the owner of the land and for that he submitted, the Form 7/12 and 8A of land holding before the Bench. The assessee also submitted the reply furnished to the Assessing Officer dated 17.10.2017, which is placed at paper book page nos.27. The Assessing Officer issued further show cause notice,

during the assessment proceedings, under section 142(1), dated 12.08.2017 which is placed at paper book page no.53 wherein the Assessing Officer asked the nature of the land sold and an another land purchased. In response to that the assessee has submitted its reply dated 12.10.2017 which is placed at paper book page nos.54. Therefore, we note that the issue of deduction under section 54B has been scrutinized by Assessing Officer during the assessment proceedings. It is also a undisputed fact that before the sale of the land, the assessee is doing agricultural activities and in order to sale the land, the assessee has converted the land into non-agricultural status, therefore it is evidently clear that the assessee is entitled to claim deduction under section 54B of the Act. All these aspects and evidences were examined by the assessing officer.

15. Based on these facts, narrated above, we note that Assessing Officer during the assessment proceedings made adequate inquiries and applied his mind, and examined the entitlement of the assessee to claim deduction under section 54B of the Act. Moreover, the Id Counsel also submitted before the Bench that if the Revenue takes the cost of acquisition at Rs. Nil, the position remains the same. Therefore assessee's case under consideration is revenue neutral. The computation submitted before the Bench, by Id Counsel, is reproduced by us in above para. The deduction under section 54F may be allowed in accordance with law. Therefore, based on the above facts, we are of the view that assessee is entitled to claim deduction under section 54B of the Act and the assessing officer has correctly allowed the claim of the assessee, hence order passed by the assessing officer is neither erroneous nor prejudicial to the interest of Revenue.

16. We note that when there is an application of mind and a decision has been taken by the A.O., the assessment order cannot be said to be erroneous unless the same is potentially wrong or unlawful. For that we rely on the judgment of the Hon'ble Supreme Court in the case of M/s. Malabar Industrial Co. Ltd. Vs CIT (2000) 243 ITR 83 (SC).

17. Further, we note that the Hon'ble Delhi High Court in the case of CIT Vs. Sunbeam Auto Ltd. (227 CTR 133) drew the thin line of difference between "lack of inquiry" and "inadequate inquiry" and held that in the case of inadequate inquiry there cannot be 263 order. Therefore, without prejudice, even it is held that the AO had made inadequate inquiry then also powers under section 263 of the Act cannot be invoked under the facts and circumstances of the case. This position is further supported by the following judicial pronouncements;

- ❖ *CIT Vs. Anil Kumar Sharma, 335 ITR 83 (Del HC);*
- ❖ *Ramakant Singh Vs. CIT 140 TTJ 41 (Patna ITAT);*
- ❖ *Vodafone Essar South Ltd. vs CIT 141 TTJ 84 (Del ITAT);*
- ❖ *CIT Vs. Developement Credit Bank Ltd. 323 ITR 206 (2010);*
- ❖ *CIT vs Gabrial India Ltd. 203 ITR 108 (1993);*
- ❖ *Russel Properties Pvt Ltd Vs. CIT 109 ITR 229 (Cal);*
- ❖ *CIT Vs. Vikash Polymers 341 ITR 537 (Del);*

18. In this regard, we also place reliance on the judgment of Delhi High Court in the case of Fab India Overseas (P) Ltd. Vs. CIT, 201 Taxman 173 wherein under the similar facts and circumstances of the case the Hon'ble court observed as under:

"In view of aforesaid, it is reiterated that the Assessing Officer called for certain clarifications through the questionnaire of the assessee and that the same were furnished with the required details. This fact is even taken note of by the Commissioner himself in his order. The only grievance of the Commissioner was that the Assessing Officer should have made further enquiries rather than accepting the explanation given by the assessee. It cannot be said to be a case of lack of enquiry. We accordingly, answer Question No. 2 in favour of the assessee and against the Revenue. "(Emphasis supplied)."

In view of the facts of the case and judicial pronouncements relied upon, it is well established that the impugned order passed u/s. 143(3) dated 24.11.2017 was passed after calling for relevant information and after detailed examination of the same. The AO has passed the assessment order after calling for details on the issue and after considering the reply and documents after verification of the same and after due application of mind passed the assessment order, so it

cannot be termed as erroneous and prejudicial to the interest of the revenue. So, the Ld. CIT's finding fault with the order of the AO is erroneous as well as prejudicial to the interest of revenue on account of lack of inquiry has to fail.

19. In any event, we note that the Assessing Officer has adopted one of the courses permissible in law and even if it has resulted in loss to the revenue, the said decision of the Assessing Officer cannot be treated as erroneous and prejudicial to the interest of the revenue as held by Hon'ble Supreme Court in Malabar Industries Ltd. vs. CIT (supra). Since the order of the Assessing Officer cannot be held to be erroneous as well as prejudicial to the interest of the revenue, in the facts and circumstances narrated above, the usurpation of jurisdiction exercising revisional jurisdiction by the Principal CIT is "null" in the eyes of law and, therefore, we are inclined to quash the very assumption of jurisdiction to invoke revisional jurisdiction u/s 263 by the Principal CIT. Therefore, we quash the order of the Principal CIT dated 31.03.2021, being *ab initio void*.

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

Order is pronounced on 10/02/2023 by placing result on notice board.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(Dr. A.L. SAINI)
ACCOUNTANT MEMBER

सूरत /Surat

दिनांक/ Date: 10/02/2023

SAMANTA

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

// TRUE COPY//

By Order

Assistant Registrar/Sr. PS/PS
ITAT, Surat