आयकर अपीलीय अधिकरण, राजकोट न्यायपीठ

IN THE INCOME TAX APPELLATE TRIBUNAL,
RAJKOT BENCH, RAJKOT

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
MS. MADHUMITA ROY, JUDICIAL MEMBER

आयकरअपीलसं./**ITA No. 93/Rjt/2021**
निर्धारणवर्ष/Asstt. Year:2015-16

Shri Tulsibhai Polabhai Sakariya 2-Bombay Housing Society, Meghdhara, University Road, Opp. G. K. Dholakiya, Rajkot **PAN: EEDPS9685N**	Vs.	The Pr. C.I.T, Rajkot-1, Rajkot.
(Applicant)		**(Respondent)**

आयकरअपीलसं./**ITA No. 94/Rjt/2021**
निर्धारणवर्ष/Asstt. Year:2015-16

Shri Khodabhai Polabhai Sakariya Meghdhara, Vejagam Road, Raiya Village, Rajkot **PAN: EEDPS9686R**	Vs.	The Pr. C.I.T, Rajkot 1, Rajkot.
(Applicant)		**(Respondent)**

आयकरअपीलसं./**ITA No. 95/Rjt/2021**
निर्धारणवर्ष/Asstt. Year:2015-16

Shri Khodidas Ganeshbhai Sakariya Street No.2, "Bhumikrupa", University Road, Bombay Housing Society, Rajkot-360005 **PAN: AIAPP6533D**	Vs.	The Pr. C.I.T, Rajkot-1, Rajkot.
(Applicant)		**(Respondent)**

Assessee by :	Shri Mehul Ranpura, A.R.
Revenue by :	Shri Shramdeep Sinha, CIT DR

सुनवाईकीतारीख/**Date of Hearing : 02/01/2023**
घोषणाकीतारीख/**Date of Pronouncement: 15/02/2023**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeals have been filed at the instance of the different assessee against the order of the Ld. Pr. Commissioner of Income Tax, Rajkot -1 (in short the Ld. Pr. CIT), Rajkot on various dates arising in the matter of assessment order passed under Section 143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2015-16.

2. The Ld. AR at the outset brought to our notice that there is a delay in filing the appeal of the captioned three different assessee for 94 days which is falling during the covid-19 period, therefore, the same should be condoned. On the other hand, the Ld. DR did not raise any objection on the condonation of delay in filing the appeal by the assessee. Accordingly, we condone the delay in filing the appeal by the assessee in pursuance to the judgment of Hon'ble SC in the case of **Cognizance for Extension of Limitation, In** reported in 125 taxmann.com 151 and proceed to adjudicate the issue on merit.

First, we take up ITA No. 93/AHD/2021 in case of Shri Tulsibhai Polabhai Sakariya

2.1 The assessee has raised following grounds of appeal:

"1. The grounds of appeal mentioned hereunder are without prejudice to one another.

2. The order passed by Pr. Commissioner of Income-tax, Rajkot-1[hereinafter referred as to the "PCIT"] is bad in law, invalid and requires to be quashed, the same may kindly be quashed.

3. Ld. PCIT erred in law and on facts in arriving at a conclusion to the effect that the assessment order passed by the AO was erroneous as well as prejudicial to the interest of the revenue on the ground that such order was passed without making proper enquiries. Therefore, the order passed Pr.CIT is requires to be quashed and may kindly be quashed.

4. The learned Pr.CIT erred on facts as also in law in setting aside the assessment order dated 18.09.2017 passed u/s. 143(3) of the I. T. Act, directing the AO to pass a fresh assessment order. The order passed u/s 263 of the Act by the learned Pr. CIT is totally unjustified on facts as also in law therefore the same may kindly be quashed.

5. Your Honour's appellant craves leave to add, to amend, alter, or withdraw any or more grounds of appeal on or before the hearing of appeal."

3. The only effective issue raised by the assessee is that the learned Pr. CIT erred in holding the assessment order framed under section 143(3) of the Act as erroneous insofar prejudicial to the interest of Revenue.

4. The brief facts are that the assessee is an individual and during the year under consideration has transferred certain inherited agricultural lands for Rs. 3,82,50,000/- only. The assessee on the basis of valuation report by the Government approved valuer adopted the cost of acquisition as on 1st April 1981 at Rs. 740 per Sq. Mts. Accordingly, the assessee claimed indexed cost of acquisition at Rs. 3,22,04,800/- only. The assessee against the capital gain also claimed deduction under section 54F of the Act. The claim of the assessee was allowed by the AO in the assessment order framed under section 143(3) of the Act dated 13th December 2017.

5. Subsequently, the learned Pr. CIT found that the valuer without adopting realistic approach or scientific method valued the property at unrealistic value at Rs. 740 per Sq. Mts. The learned Pr. CIT also found that the Jantri Value of the impugned property as on 1st November 1999 (the date on which Jantri value made effective) was at Rs. 120 per Sq. Mts. Hence the learned Pr. CIT was of the view that assessee claimed excess of cost indexation by Rs. 2,69,82,400/- which needs to be disallowed. Thus, the ld. Pr. CIT issued notice under section 263 of the Act dated 27th October 2020 purposing to revise the assessment order being erroneous insofar prejudicial to interest of the Revenue.

6. The assessee vide letter dated 1st December 2020 submitted that he claimed the cost of acquisition at Rs. 740 per Sq. Mts. based on valuation report of a registered valuer who holds the expertise in the field of valuation of the properties. Such valuation report was available before the AO at the time of assessment and AO after considering the same accepted the claim of the assessee

towards the cost of acquisition. In such a scenario, the provision of section 263 of the Act cannot be invoked merely for the reason that the learned CIT/PCIT has a different view than the view adopted by the AO.

7. The assessee further submitted that as per the provisions of section 55A of the Act the valuation of a registered valuer can be disregarded by the AO and referred to the DVO if the AO is of the opinion that the value adopted is less than the FMV whereas the value adopted in his case exceeds the FMV. In view of the above, the assessee contended that there is no error in the assessment order as the same was passed by the AO after due verification and inquiry.

8. However, the learned Pr. CIT was not convinced with the submission of the assessee. The learned Pr. CIT held that the registered value adopted by the assessee of the impugned property at Rs. 740 per Sq. Mts. as on 1st April 1981 is abnormally high as compared to the Jantari value as on 1st November 1999. The Jantri value of a property is fixed by the district administration including revenue authority. The fact that the Jantri value of the impugned land stand at Rs. 120 per Sq. Mtr. was in the knowledge of the AO. However, the AO ignored the same and without conducting further inquiry with regard to the value of impugned property merely accepted the submission made by the assessee. Therefore, the order passed by the AO is erroneous and prejudicial to the interest of the Revenue. The learned Pr.CIT with regard to judicial pronouncement relied by the assessee held that those cases were pronounced before the insertion of explanation- 2 to section 263 of the Act w.e.f. 1st June 2015. The provision of explanation-2 provided that an order of the AO shall be deemed to be erroneous insofar prejudicial to the interest of the Revenue if same is passed without making inquiry which should have been made. Hence, the learned Pr. CIT by exercising the power conferred under section 263 of the AO set aside the order of the AO being erroneous and prejudicial to the interest of revenue with the direction to make fresh assessment to the extent of above discussion.

9. Being aggrieved by the order of the learned PCIT, the assessee is in appeal before us.

10. The learned AR before us filed a paper book running from pages 1 to 134 and contended that the appellant during the assessment proceeding furnished all the necessary details about the computation of capital gain on sale of agricultural property. The learned AR in support of his contention drew our attention on pages 8 to 16 and pages 17 to 68 of the paper book where the notice under section 142(1) of the Act and reply of assessee along with documentary evidences were placed. Thus, the learned AR contended that the AO after considering the reply of the assessee along with evidences has taken a view, therefore, it cannot be said that the assessment order is erroneous and causing prejudice to the interest of Revenue on account of non-verification in the given facts and circumstances.

11. On the contrary, the learned DR submitted that the AO has accepted the valuation report without verifying the authenticity of the value declared therein as on 1 April 1981. It was very much in the knowledge of the AO that Jantri Value as on 1st November 1999 was Rs. 120 per square yard. As such the assessee based on the valuation report has increased the value of the property as on 1 April 1981 manifold so as to avoid the capital gain. Even the valuation report does not contain the comparable instances suggesting the value of the property as on 1 April 1981 and furthermore no enquiry from the local parties has been done. It was also pointed out that the AO is not a competent person to verify the value declared by the assessee as on 1 April 1981 based on the valuation report. As such the AO should have referred the matter to the DVO to find out the value of the property in dispute. The learned DR vehemently supported the order of the ld. PCIT.

12. We have heard the rival contentions of both the parties and perused the materials available on record. The issue in the present case relates whether the assessment order has been passed by Ld. AO without making inquiries or verification with respect to the value of cost of acquisition adopted by the

assessee while computing capital gain on sale of agricultural land as discussed above and hence the assessment is erroneous insofar prejudicial to the interest of the Revenue and thus requiring revision by Pr. CIT u/s 263 of the Act.

13. An inquiry made by the Assessing Officer, considered inadequate by the Commissioner of Income Tax, cannot make the order of the Assessing Officer erroneous on account of non-verification. In our view, the order can be erroneous if the Assessing Officer fails to apply the law rightly on the facts of the case or he has misunderstood the facts of the case. As far as adequacy of inquiry is considered, there is no law which provides the extent of inquiries to be made by the Assessing Officer. It is Assessing Officer's prerogative to make inquiry to the extent he feels proper. The Commissioner of Income Tax by invoking revisionary powers under section 263 of the Act cannot impose his own understanding to the extent of inquiry. There are a number of judgments by various Hon'ble High Courts in this regard.

14. Delhi High Court in the case of CIT Vs. Sunbeam Auto 332 ITR 167 (Del.), made a distinction between lack of inquiry and inadequate inquiry. The Hon'ble court held that where the AO has made inquiry prior to the completion of assessment, the same cannot be set aside u/s 263 of the Act on the ground of inadequate inquiry. The relevant observation of Hon'ble Delhi High Court reads as under:

> "*15. Thus, even the Commissioner conceded the position that the Assessing Officer made the inquiries, elicited replies and thereafter passed the assessment order. The grievance of the Commissioner was that the Assessing Officer should have made further inquires rather than accepting the explanation. Therefore, it cannot be said that it is a case of 'lack of inquiry'.*"

15. The Hon'ble Bombay High Court in case of Gabriel India Ltd. [1993] 203 ITR 108 (Bom), discussed the law on this aspect in length in the following manner:

> "*The consideration of the Commissioner as to whether an order is erroneous in so far as it is prejudicial to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be*

> *illegal and without jurisdiction. The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity.*

16. The Mumbai ITAT in the case of Sh. Narayan TatuRane Vs. ITO, I.T.A. No. 2690/2691/Mum/2016, dt. 06.05.2016 examined the scope of enquiry under Explanation 2(a) to section 263 in the following words:-

> *"20. Further clause (a) of Explanation states that an order shall be deemed to be erroneous, if it has been passed without making enquiries or verification, which should have been made. In our considered view, this provison shall apply, if the order has been passed without making enquiries or verification which a reasonable and prudent officer shall have carried out in such cases, which means that the opinion formed by Ld Pr. CIT cannot be taken as final one, without scrutinising the nature of enquiry or verification carried out by the AO vis-à-vis its reasonableness in the facts and circumstances of the case. Hence, in our considered view, what is relevant for clause (a) of Explanation 2 to sec. 263 is whether the AO has passed the order after carrying our enquiries or verification, which a reasonable and prudent officer would have carried out or not. It does not authorise or give unfettered powers to the Ld Pr. CIT to revise each and every order, if in his opinion, the same has been passed without making enquiries or verification which should have been made. In our view, it is the responsibility of the Ld Pr. CIT to show that the enquiries or verification conducted by the AO was not in accordance with the enquries or verification that would have been carried out by a prudent officer. Hence, in our view, the question as to whether the amendment brought in by way of Explanation 2(a) shall have retrospective or prospective application shall not be relevant."*

17. The Hon'ble Supreme Court in recent case of Principal Commissioner of Income-tax 2 v. Shree Gayatri Associates [2019] 106 taxmann.com 31 (SC), held that where Pr. CIT passed a revised order after making addition to assessee's income under section 69A in respect of on-money receipts, however, said order was set aside by Tribunal holding that AO had made detailed enquiries in respect of such on-money receipts and said view was also confirmed by High Court, SLP filed against decision of High Court was liable to be dismissed. The facts of this case were that pursuant to search proceedings, assessee filed its return declaring certain unaccounted income. The Assessing Officer completed assessment by making addition of said amount to assessee's income. The Principal Commissioner passed a revised order under section 263 on ground that Assessing Officer had failed to carry out proper inquiries with respect to assessee's on money receipt. In appeal, the Tribunal took a view that Assessing Officer had carried out detailed

inquiries which included assessee's on-money transactions and Tribunal, thus, set aside the revised order passed by Commissioner. The Hon'ble High Court upheld Tribunal's order. The Hon'ble Supreme Court while dismissing the SLP filed by the Department held as under:-

> *"We have heard learned counsel for the Revenue and perused the documents on record. In particular, the Tribunal has in the impugned judgment referred to the detailed correspondence between Assessing Officer and the assessee during the course of assessment proceedings to come to a conclusion that the Assessing Officer had carried out detailed inquiries which includes assessee's on-money transactions. It was on account of these findings that the Tribunal was prompted to reverse the order of revision. No question of law arises. Tax Appeal is dismissed"*

18. The Supreme Court in the another recent case of Principal Commissioner of Income-tax-2, Meerut v. Canara Bank Securities Ltd [2020] 114 taxmann.com 545 (SC), dismissed the Revenue's SLP holding that 263 proceedings are invalid when AO had made enquiries and taken a plausible view in law, with the following observations:

> *"Having heard learned counsel for the parties and having perused the documents on record, we see no reason to interfere with the view of the Tribunal. The question whether the income should be taxed as business income or as arising from the other source was a debatable issue. The Assessing Officer has taken a plausible view. More importantly, if the Commissioner was of the opinion that on the available facts from record it could be conclusively held that income arose from other sources, he could and ought to have so held in the order of revision. There was simply no necessity to remand the proceedings to the Assessing Officer when no further inquiries were called for or directed"*

19. From an analysis of the above judicial precedents, the principle which emerges is that the phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an Assessing Officer adopts one of the course permissible in law and it has resulted in loss of revenue; or where two views are possible and the Assessing Officer has taken one view with which the Commissioner of Income-tax does not agree, it cannot be treated as an erroneous order causing prejudice to the interests of the Revenue unless the view taken by the Assessing Officer is unsustainable in law, or the AO has completely omitted to make any enquiry altogether or the order demonstrates non-application of mind.

20. Now in the facts before us, we note that the AO during the course of assessment proceedings, raises specific query on the issue of computation of capital gain and required the assessee to furnish supporting evidences which can be verified from the notice issued under section 142(1) of the Act dated 14-06 2017. The relevant question reads as under:

> *"2. On verification of information available with this office, it is seen that during the financial year relevant to assessment year under consideration you have sold the following immovable properties:*

Sr. No.	***Description of property sold***	***Amount***	***Date***	***Remarks***
1.	*Agricultural land*	*38250000*	*17/4/2014*	

> *Please explain how the said transitions and the profit earned there on are reflected in your Books of Account for the year under consideration.*
>
> *3. Particulars of transactions in immovable properties in the form of Agricultural land in respect of which you have shown Long Term Capital Gain of Rs.56,32,566/- during the year under consideration. Please also furnish the copy of Purchase Deed/ Sale Deed of all such properties."*

20.1 The assessee in response to such notice vide letter dated NIL made following reply:

> *"2. During the financial year 2014-15 we have sold our inherited agriculture land for a value of Rs. 38250000/- this property is our inherited property and we have held this property before 01/04/1981 so we have receive a valuation report from approved valuer for value as on 01/04/1981 for claiming a cost of acquisition,*
>
> *3. In our IT Return for AY 2015-16 we have disclosed Long Term Capital Gain of Rs. 56,32,566/-, we herewith attached Calculation of this capital gain in Computation of Income for A Y 2015-16, Sale Deed of Agriculture land and Valuation Report of valuer for values as on 01/04.1981.*
>
> *4. We herewith attached copy of Copy of Bank statement for the period 01/04/2014 to 31/03.2015 of all banks.*
>
> *5. We have purchase a one old residential house and this house is demolished and made a new residential house and claimed these amount as deduction U/s 54F so we herewith attached copy of Residential House A/c., Purchase deed of old residential house and copy of bill of construction cost for your reference."*

20.2 From the above, it is revealed it is not the case that the AO has not made any enquiry. Indeed, the Pr. CIT initiated proceedings under section 263 of the Act on the ground that the AO has not made enquiries or verification which should have been made in respect value of land adopted by the registered valuer. It is

not the case of the Pr. CIT that the Ld. AO did not apply his mind to the issue on hand or he had omitted to make enquiries altogether. In the instant set of facts, the AO had made enquiries and after consideration of materials placed on record accepted the genuineness of the claim of the assessee.

21. At this juncture, it is also important to note that the learned PCIT in his order passed under section 263 of the Act has made reference to the explanation 2 of section 263 of the Act. It was attempted by the learned PCIT to hold that there were certain necessary enquiries which should have been made by the AO during the assessment proceedings but not conducted by him. In this regard, we make our observation that the learned PCIT has not invoked the explanation 2 of section 263 of the Act in the show cause notice about the same. Therefore, the opportunity with respect to the explanation 2 of section 263 of the Act was not afforded to the assessee. Thus, on this count the learned PCIT erred in taking the recourse of such provisions while deciding the issue against the assessee. In holding so, we find support and guidance from the judgment of Hon'ble Gujarat High Court in the case of PCIT Vs. Shreeji Prints Pvt. Ltd. reported in 130 taxmann.com 293 wherein it was held as under:

> *5 The Tribunal has found that in the order passed by the PCIT, Explanation 2 of section 263 of the Act, 1961 is made applicable. The Tribunal observed that the PCIT has not mentioned in the show cause notice to invoke the Explanation 2 of section 263 of the Act 1961. Therefore, by invocation of Explanation in the order without confronting the assessee and giving an opportunity of being heard to the assessee is not appropriate and sustainable in law.*

21.1 In view of the above and after considering the facts in totality, we hold that there is no error in the assessment framed by the AO under section 143(3) causing prejudice to the interest of revenue. Thus, the revisional order passed by the learned PCIT is not sustainable and therefore we quash the same. Hence, the ground of appeal of the assessee is allowed.

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

Coming to ITA No. 94 and 95 /RJT/2021 in the case of Shri Khodabhai Polabhai Sakariya and in case of Shri Khodidas Ganeshbhai Sakariya

23. At the outset, we note that the issues raised by the assessee namely Shri Khodabhai Polabhai Sakariya and Shri Khodidas Ganeshbhai Sakariya in their respective appeals bearing ITA Nos. 94 and 95/RJT/2021 are identical to the issues raised by the assessee namely Shri Tulshi Polabhai Sakariyain ITA No. 93/RJT/2021. Therefore, the findings given in ITA No. 93/RJT/2021 shall also be applicable to the ITA Nos. 94 and 95/RJT/2021. The appeal of the assessee in ITA No. 93/RJT/2021 has been decided by us vide paragraph No. 12 to 22 of this order in favour of the assessee. The learned AR and the DR also agreed that whatever will be the findings for the ITA No. 93/RJT/2021 shall also be applied for the ITA Nos. 94 and 95/RJT/2021. Hence, the grounds of appeal filed by both the assessee are hereby allowed.

24. In the result, both the appeals filed by assessee are allowed.

25. In the result, all the appeals filed by different assessee are allowed.

Order pronounced in the Court on 15/02/2023 at Ahmedabad.

Sd/-	**Sd/-**
(MADHUMITA ROY)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 15/02/2023

Tanmay/Manish, Sr. PS