IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G" MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI PAVAN KUMAR GADALE (JUDICIAL MEMBER)

ITA No. 1611/MUM/2020
Assessment Year: 2015-16

SH Kelkar and Company Limited, Devkaran Mansion, 36, Mangaldas Road, Mumbai-400 002. **PAN No. AAACS 9778 G** **Appellant**	***Vs.***	Principal Commissioner of Income-tax-4, Room No. 629, 6th floor, Aayakar Bhavan, Mumbai-400020. **Respondent**

Assessee by	:	Shri J.D. Mistry, Sr. Advocate & Shri Harsh Kothari
Revenue by	:	Dr. Kishor Dhule, CIT-DR
Date of Hearing	:	13/02/2023
Date of pronouncement	:	20/02/2023

ORDER

PER OM PRAKASH KANT, AM

This appeal by the assessee is directed against revision order dated 24.02.2020 passed by the Ld. Principal Commissioner of Income-tax-4, Mumbai (in short 'the Ld. PCIT') for assessment year 2015-16, raising grounds as under:

1. *The learned Pr. Commissioner of Income-tax CITY - 4, Mumbai erred on facts and circumstances of the case*

and in law, in revising the assessment order passed us. 143(3) of the Income-tax Act, 1961 by exercising jurisdiction under section 263;

2. *The Id. PCIT - 4 failed to appreciate that proper enquiry and investigation was conducted into the claims made while computing income chargeable to tax under the head "Capital Gains" and that the said query was raised during the assessment through questionnaire under section 142(1);*
3. *The learned PCIT - 4, Mumbai erred in setting aside the assessment order passed under section 143(3) and directing a fresh assessment in the matter;*
4. *The appellant prays to your Honours to hold that the exercise of jurisdiction under section 263 of the Act was bad in law and therefore, declare the said order as null and void;*

2. Briefly stated, facts of the case are that the assessee filed return of income for the year under consideration on 28.12.2015 declaring total income of Rs.43,18,43,795/-. In the return of income, the assessee declared long-term capital gain on sale of a land, which was under unauthorized encroachments by hutment dwellers. The return of income filed was selected forscrutiny for various reasons including the reason of low amount of long-term capital gain declared as compared to sale consideration of land. The assessment u/s 143(3) of the Income-tax Act, 1961 (in short'the Act') was completed by the Ld. Dy. Commissioner of Income-tax-4, Mumbai (in short 'the Ld. Assessing Officer') on 07.06.2017, wherein he accepted the long term capital gain but made disallowance of expenses u/s 14A r.w.r. 8D of Income-tax Rules 1962 and disallowance of professional fees for merger and demerger.

2.1 Subsequently, the Assessing Officer (i.e. might be successor) observed that against thelong-term capital gain of Rs.5,83,10,312/- on sale of land to M/s Reva Properties P Ltd (i.e. sister concern) , the assessee claimed deduction for cost of improvement amounting to Rs.43,31,00,000, but claim of deduction of improvement was not examined during assessmentproceedings ignoring the facts that said payment was made to M/s Sandhu Homes LLP, later on which was joined by the Directors of the Company as partners. The relevant observations of the Assessing Officer in proposal sent to the Ld. PCIT for revising the assessment order are reproduced as under:

> *"2. The Assessing Officer observed that during the year under consideration the assessee sold an immovable property being urban land at City Survey No.626, admeasuring 6596 sq. mtrs at Mulund (West), Mumbai for a total consideration of Rs.53,49,00,000/-, This property was sold to the sister concern namely M/s. Keva Properties P. Ltd vide conveyance deed dated 29.09.2014. Perusal of the record further reveals that the assessee had declared a Long Term Capital Gain (LTG) of Rs.5,83,10,312/- on this transaction. Scrutiny of Long Term Capital Gain computation further reveals that the assessee had claimed J a deduction towards Cost of Improvement of Rs.43,31,00,000/-, TheCost of Improvement was paid to Ms.Sandu Homes LLP and the same was formalised vide agreement dated 17.09.2014. During the assessment proceedings the assessee submitted that the land in question was encroached by more than 350 persons and to rehabilitate them the cost has been worked out as under in the agreement dated 17.09.2014.*
>
> | | | |
> |---|---|---|
> | Land Area 6596 sq.mt | = | 70999 sq. ft. |
> | Land cost of Rs.4600/- per sq. ft. | = | 32,66,00,000/- |
> | Const. Material Cost Rs.900/- per sq. ft. | = | 6,39,00,000/- |
> | Const. Labour Cost Rs.600/- per sq. ft. | = | 4,26,00,000/- |

Total Rehabilitation Cost = 43,31,00,000/-

The Assessing Officer further submitted that the above land was declared as slum by the Government of Maharashtra. However, Maharashtra Slum Tribunal set aside the decision of the Government of Maharashtra and the same was confirmed by Hon"ble Bombay High Court. In view of the above facts, the Assessing Officer submitted that the encroachments made were declared illegal and there is no question of incurring any expenses on vacating and rehabilitating the encroachers. It is also'a matter of record that with within 10 days of executing the agreement with Mis.Sandu Homes LLP, the land in question was transferred to M/s.Keva Properties P.Ltd. Perusal of the sale deed dated 29.09.2014 also reveals that in the preamble of the deed of Conveyance dated 29.09.2014, the fact of contract agreement dated 17.09.2014 is mentioned however, Mis.Sandu Homes LLP neither acknowledged nor confirmed the Deed of Conveyance dated29.09.2014. It is also submitted by the Assessing Officer that it is impossible for any entity to get more than 350 illegal encroachers evicted and rehabilitate within 10 days i.e. between 17.09.2014 to 29.09.2014. It is also interesting to note that neither in the agreement deed with MIs. Sandu Homes LLP nor Conveyance Deed dated 29.09.2014, the details of encroachers are mentioned nor details of service rendered byM/s.Sandu Homes LLP is elaborated. It is also submitted by the Assessing Officer that the Directors of the Assessee company namely Mr. Kedar Ramesh Vaze and Mr. Ramesh VinayakVaze became partners of M/s. Sandu Homes LLP on 04.10.2016 i.e. almost 2 years after the agreement towards eviction& rehabilitation of encroachers with M/s. Sandu Homes LLP dated 17.09.2014. The Assessing Officer further submitted that there is no evidence in record to establish the fact that MIs. Sandu Homes LLP had actually got the land in question vacated and encroachers were rehabilitated in lieu of payments-made by the assessee company.In view of the above facts, the Assessing Officer is of the opinion that payments made to M/s.Sandu Homes LLP does not qualify for cost of improvement while computing Long

Term Capital Gain (LTCG) and income to this extent had escaped assessment,Accordingly, the Assessing Officer vide his letter dated 06.01.2020 moved a proposal to revise the assessment order completed us. 143(3) of the I.T.Act, 1961 dated 07.06.2017 u/s.263 of the I.T.Act, 1961."

3. Thereafter, the Ld. PCIT called for the records and after examining the same, he was of the view that the Assessing Officer had not carried out inquiries on the issue of cost of improvement and therefore issued notice to the assessee u/s 263 of the Act proposing to revise the assessment order passed by the Assessing Officer, being erroneous in so far as prejudicial to the Revenue. The assessee objected for such a revision on the ground that issue was thoroughly examined during the assessment proceedings by the Assessing Officer. However, the Ld. PCIT was of the view that the Assessing Officer had not examined detailed description of the duties of the contractor LLP to whom payment was made of Rs.43.31 crores. The PCIT also noted that no detail of the encroachers which were proposed to be evicted was kept on record. He further noted that issue was to be examined particularly in view of fact that directors of the assessee company were introduced as partners of the said contractors namely 'M/s Sandhu Homes LLP' after the transaction was completed. In other word, according to him the genuineness of the transaction was doubtful which was not enquired by the Assessing Officer. Accordingly, he invoked Explanation-2 to section 263 of the Act and held the assessment

order as erroneous in so far as prejudicial to the interest of the Revenue observing as under:

> *"4. I have carefully considered the facts placed on record. I have also gone through the assessment records. I have also perused submissions made by the assessee. The facts placed on record clearly indicate that in the assessee engaged contractor namely M/s.Sandu Homes LLP on 17.09.2014 to get the land in question evicted from encroachers. It is also a matter of record that the land in question was sold to the sister concern M/s.Keva properties P.Ltd on 29.09.2014 for a sale consideration of Rs.53.49 Crores. It is also a matter of record that consideration paid to contractor namely M/s.Sandu Homes LLP of Rs.43.31 Crores were not made against any specific service. The payment made to contractor were broadly worked out under the headsLand Cost, Construction Material cost, and construction Labour cost on per Sq.ft basis. There is nothing on record to substantiate this working, Perusal of record further reveals that detailed description of duties of contractor is neither detailed in the agreement dated 17.09.2014 nor in the conveyance deed dated 29.09.2014. It is also interesting to note that payment of Rs.43.31 Crores were made to the contractor on 29.09.2014 i.e. date of conveyance deed. This is in fact the entire payment of contract agreement, which had been made in one go without ensuring completion of intended eviction and rehabilitation.Perusal of record further reveals that there is no evidence on record to substantiate the services rendered by the contractor. The Assessing Officer had also not taken on record the details of encroachers, eviction of which had statedlycosted Rs.43.31 Crores to the assessee. It is also an established fact that the Directors of the assessee company were introduced as partners of the Contractor namely M/s.Sandu Homes.LIP after the transaction was completed. In view of the above facts, I am convinced that the Assessing Officer had not made enquiries or verification which should have been made. This way this case is wholly and squarely covered with provisions of Sub Clause(a) to Explanation 2 of the Section 263 of the I.T.Act, 1961.The assessee had*

placed reliance on various case laws. I have gone through these case laws and noticed that these case laws pertains to the years 1991, 2002 and 1996. It is a matter of fact that Explanation 2 to Section 263 of the I.T.Act, 1961 was inserted with effect from 01.06.2015.By insertion of this explanation, provision of Section 263 were substantially amended and the ratio of case laws pertaining to the provisions prior to this amendment will not hold good. Since the case laws relied upon by the assessee pertains to the provisions of Section 263 as it was prior to 01.06.2015 accordingly, the ratio of case laws will not help the assessee.

5. In view of the above facts, I am of the firm view that the assessment order completed us.143(3) of the I.T.Act, 1961 dated 07.06.2017 is erroneous in so far as it is prejudicial to the interest of revenue and accordingly, the same is hereby revised as per the provisions of Section 263 of the I.T.Act, 1961. The assessment order dated 07.06.2017is set aside to the file of the Assessing officer and the Assessing Officer is directed to complete the assessment and frame the assessment afresh after getting the cogent evidences on record and decide the issue as per provisions of law."

4. Before us, the Ld. Senior Counsel of the assessee filed a Paper book containing pages 1 to 388 on behalf of the assessee.

4.1 Before us, the Ld. Sr. Counsel of the assessee has challenged validity of the revision order on two counts. ***Firstly***, according to him, the Ld. PCIT has invoked Explanation-2 to section 263 of the Act without referring the same in the show cause notice issued u/s 263 of the Act, which is in violation of principle of natural justice. The Ld. Counsel relied on the decision of the **Hon'ble Gujarat High Court in the case of Shreeji Paints Pvt. Ltd.in Appeal No. 828 of 2019**. He also informed that SLP filed by the Revenue against the same has been dismissed by the **Hon'ble Supreme Court as**

reported in (2021) 130 taxmann.com 294 (SC).*Secondly*, according to the Ld. Counsel, the Assessing Officer has carried out inquiries in the matter and after examination and considering the submission of the assessee, he accepted the cost of improvement and no addition was made in the assessment order u/s 143(3) of the Act. According to him, the Ld. PCIT is not justified in holding the order erroneous in so far as prejudicial to the interest of the Revenue just because he was having different view based on the same material. In support of contention, the Ld. Counsel relied on the decision of the Hon'ble Bombay High Court in the case of **CIT v. Gabrial India Ltd. 203 ITR 108 Bombay**. He further relied on the decision of the Hon'ble Bombay High Court in the case of **CIT Central (III) v. Nirav Modi 390 ITR 292 Bombay** and submitted that the Ld. PCIT is not justified in setting aside the assessment order where the Assessing Officer had taken a view after making proper inquiry. He also relied on the other decisions of the Tribunal to support that the Assessing Officer has made inquiry in the matter. As far as the instant case is concerned, the Ld. Sr. Counsel referred to Paper Book page No. 22 to 23, which is a copy of notice u/s 142(1) of the Act dated 17.04.2017 issued by the Assessing Officer. He further referred to the reply dated 03.05.2017 filed by the assessee justifying the low capital gain with respect to the sale consideration, available on page 24 to 29 of the Paper Book. Further, he referred to reply of the assessee dated 31.05.2017 which is available on page 30 to 32 of the Paper book, justifying the

expenditure in connection with sale of the land.During the course of hearing order sheet of the assessment folder was filed by the Ld. DR.Referring to the said order sheet, the Ld. Sr.Counsel of the assessee submitted that there is a reference of letter dated 31.05.2017 filed by the assessee in the said order sheet also, therefore according to him, sufficient inquiry has been carried out by the Assessing Officer and the Ld. PCIT cannot substitute his view by replacing view of the Assessing Officer on the issue of cost of improvement allowed by him.

5. On the contrary, the Ld. Departmental Representative (DR) submitted that the Ld. Assessing Officer has particularly not examined the issue, ***firstly***, cost of improvement paid to concern in which directors of the assessee-company became partner subsequently and sale/transfer of the land made to sisters concern i.e. M/s Keva Properties Pvt. Ltd. and therefore, entire arrangement was involving related party transaction. ***Secondly***, the entire arrangement had been put in place for removal of encroachment of 356 developers within a period of 10 days and which itself ought to have put Assessing Officer on alert. According to him related party nature of transaction made to have rung a bell to the Assessing Officer for making inquiry or verification. ***Thirdly***, no inquiry or verification has been carried out by the Assessing Officer in respect of ledger account of the parties, ***fourthly***, the Assessing Officer has merely put the papers on record and not bothered to carry any inquiry into the nature of the payments or the services rendered by

the contractor. The Ld. DR further opposed the argument of the Ld. Counsel of doctrine of alternate views available to the Assessing Officer and one view adopted by the AO and submitted that same is not applicable as it is a case of no/improper/inadequate inquiry or verification. The Ld. DR in support of his contention relied on the decision of the ITAT Pune Bench in the case of **Jalgaon Peoples's Co-op Bank Ltd. v. PCIT-2, Nashik** reported in (2021) 127 taxmann.com 243 (Pune-Trib.) wherein *it is held that if the Assessing Officer has not conducted necessary verification and has passed assessment order accepting documents furnished by the assessee without analyzing or examining them, the assessment order is bound to be erroneous and prejudicial to the interest of the Revenue.* The Ld. DR also relied on the decision of Hon'ble Supreme Court in the cases **Rampyari Devi Saraogi v. Commissioner of Income-tax [1968] 67 ITR 84 (SC)** and **Tara Devi Aggarwal v. Commissioner of Income-tax [1973] 88 ITR 323 (SC)**.

5.1 Regarding the issue of no mention of Explanation-2 in the show cause notice, the Ld. DR submitted that Explanation-2 to 263 is part of the section 263 and therefore, there was no requirement of separately specifying or invoking of Explanation-2 in the show cause notice proposing for revision of the assessment order. He submitted that once the main section is quoted and such section is invoked to initiate any proceedings, the sub-section or clauses or explanation might not be required to mention as there is irrefutable presumption that main section includes the sub-section or clauses

or explanation or proviso to the main section. According to him, it is not the case that particular issue of revision has not been confronted to the assessee but added in the final revision without raising in show cause notice, for which the assessee could claim violation of the principle of natural justice.

6. We have heard rival submission of the parties on the issue-in-dispute and perused the relevant material on record. In the case, the assessee has shown long term capital gain on sale of land which was under illegal encroachment. The computation of the said capital gain is available on page 2 of the paper book, which was submitted by the assessee along with acknowledgement of the return of income. For ready reference, said computation is reproduced as under:

INCOME FROM CAPITAL GAINS	
Long term capital gains on sale of land situated at Mulund West full value of consideration	53,49,00,000
Less: Indexed Cost of Acquisition 3358368 X 1024/100	3,43,89,688
Sub-total	50,05,10,312
Less: Cost of Improvement (undertaken during the year)	43,31,00,000

6.1 The Assessing Officer issued notice u/s 142(1) of the Act on 17.04.2017 wherein he asked the assessee for explanation with respect to the reasons for which the case of the assessee was selected for scrutiny. The relevant query raised by the Assessing Officer which is available on paper book page 23, is as under:

> "*6. Furnish justification with evidence in connection with grounds for selection of your case in scrutiny which are as under:*

a. ***Low capital gain with respect to sale consideration (higher of AR and IT)***
b. *Large deduction claimed u/s 35, 35(2AA), 35[2AB).*
c. *High ratio of refund to TDS.*
d. *Large other expenses claimed in the Profit & Loss a/c.*
e. *Large any other deduction claimed in sch. BP creating a loss without any income in Profit & Loss a/c.*
f. *Large out ward remittances to a non-resident not being a company, or to a foreign company (Form 15CA)*
g. *Depreciation claimed at higher rates/higher additional depreciation claimed.*
h. *Large loans/advances to sister concern(s) (Form 3CD).*
i. *Loan/Advance to a substantial share holder u/s 2(22)(e) (Deemed dividend (Form 3C0).*
j. *Mismatch in amount paid to related persons u/s 40A(2)(b) reported in Audit Report and ITR*
k. *Sale of property reported in Form 26QB.*

6.2 With reference to the notice u/s 142(1) of the Act dated 17.04.2017, the assessee filed reply on 03.05.2017. The reply relevant to the reason for selection of the case on the ground of low capital gain with respect to the sale consideration, filed by the assessee is reproduced as under:

> ***"6. Furnish justification with evidence in connection with grounds for selection of your case in scrutiny which are as under:***
>
> *Low capital gain with respect to sale consideration (higher of AR and ITR)*
>
> *During the year, the assessee company has transferred a capital asset, being a plot of land, for a consideration of Rs. 53,49,00,000/-, This land was encroached upon by slum dwellers by way of 350 hutments / slums for the last several years. Various cases were filed in*

courts in order to obtain the possession of the land but in vain. No buyer / developer was ready to purchase the land due to the encumbrances which were existing on the land. In order to remove the encumbrance, the assessee company entered into rehabilitation agreement with third party developer for rehabilitation of tenants (slum dwellers) so that a peaceful and vacant possession of land could be obtained.For the same, the assessee engaged a contractor in connection with which an amount of Rs. 43,31,00,000/- was incurred as expenditure. It was only due to removal of the encumbrances that the assessee company was able to sell the land for Rs. 53,49,00,000/-."

6.3 Thereafter, the assessment proceedings were adjourned to 23.05.2017, 26.05.2017 and then 31.05.2017. On 31.05.2017, the assessee filed a reply, which is available on paper book page 30 to 34.In the said reply the assessee gave a detailed submission as how the land was sold to M/s Keva Properties Private Limited and how the contract was given "Sandu Homes LLP" who was engaged for eviction of the encroachers on the land.

6.4 On analysis of the above facts, we find that the Assessing Officer has only issued a preliminary questionnaire for gathering the information from the assessee in support of reasons for which the case was selected under scrutiny. One of such reason for the selection of the scrutiny was,Capital gain of Rs.6,74,10,312/- (i.e. low) shown by the assessee against the sale consideration of Rs.53,49,00,000/-.

6.5 On perusal of the query letter issued by the Assessing Officer, we find that he has not issued even a single query letter justifying

or examining the genuineness of the cost of improvement of Rs.43,31,00,000/- claimed by the assessee while computing the long-term capital gain. The Assessing Officer did his formality of informing the reasons to the assessee , on which the case was selected for scrutiny and thereafter he simply placed the submissions filed by the assessee on record, whereas the circumstances of the related party transactions should have alerted him for examining or verifying the issue. The Tribunal in the case of **Jalgaon Peoples's Co-op Bank Ltd. v. PCIT-2, Nashik**(supra) held that *wherever it is found by the Commissioner of Income-tax that the Assessing Officer has not conducted necessary verification and has passed the assessment order accepting the documents furnished by the assessee without analyzing or examining them and when no verification has been conducted by the Assessing Officer in that area as highlighted in the order passed u/s 263 of the Act. In such scenario, the assessment order is bound to the erroneous and prejudicial to the interest of the Revenue.* In the case of **Rampyari Devi Saraogi (supra)**, *the Hon'ble Supreme Court has observed that the information filed by the assessee comprising of declaration giving effects regarding initial capital, the ornaments and presents received at the time of marriage, other gifts received from her father-in-law, etc. which should have put any Income-tax Officer on his guard,but the Income-tax Officer without making any inquiries to satisfy himself passed the assessment order which was held to be erroneous in so far as prejudicial to the interest of the Revenue.* Similarly, in the case

of Tara Devi Aggarwal (supra), the Hon'ble Supreme Court followed their finding in the case of Rampyari Devi Saraogi (supra) and upheld that the Assessing Officer was not justified in accepting the initial capital sale of the ornaments, the income from business, the investment without any inquiry or evidence whatsoever and therefore, the order of the assessment was erroneous and prejudicial to the interest of the Revenue.

6.6 Before us, the Ld. Counsel of the assessee submitted that M/s Keva Properties P Ltd was a common director and it was not a sister's concern. In our opinion, the issue was regarding the payment made to Sandhu LLP in which clearly the directors of the assessee-company had become partner. The issue of genuineness or justification of payment ought to have been examined by the Assessing Officer as he is not only an adjudicator but he is also having duty of investigator. In the case of assessee, he only placed agreement with the Sandhu LLP, who has been made payment of Rs.43,31,00,000/- without either raising any bill or invoice by the said LLP and without evidence of even a small fraction of service rendered by said LLP. The Assessing Officer has blindly accepted the said claim of deduction of cost of improvement ignoring the fact that encroachment was held illegal by the Competent Authority, which was further upheld by the Hon'ble High Court. In such facts and circumstances, prima-facie, there was no necessity of hiring agency for eviction of encroachers and assessee was required to approach low enforcement agencies for eviction of such encroacher.

In such circumstances, the Assessing Officer was duty bound to examine the claim of expenditure of Rs.43,31,00,000/- as cost of improvement to the land. Therefore, in our opinion it is evident that no inquiry has been made by the Assessing Officer on the issue of cost of improvement. In the case of Gabrial India Ltd. (supra), the CIT on perusal of the records was of the opinion that estimate made by the Assessing Officer concern was on lower side and according to the Commissioner should have been on a higher figure. The Hon'ble High Court held that order cannot be hold erroneously only because of the reason that assessment order should have been more elaborate in view of Ld. CIT and the Commissioner could not have power to re-examining himself at a higher figure. Thus, the fact of the said case, are entirely different. Similarly, in the case of CIT v. Nirav Modi (supra) also the claim of no inquiry was rejected by the Hon'ble High Court that for examining application of section 68 of the Act inquiry of source of the source was not required under the law and therefore it could not be said the case was of no inquiry. The facts of instant case are clearly different , therefore, ratio of said decision cannot be applied in the instant case.

6.7 However, as far as the decision of the Hon'ble Gujarat High Court in the case of **Shreeji Prints Pvt. Ltd.** (supra) is concerned the Hon'ble High Court after analyzing the decision of the Tribunal held that in the show cause notice, the PCIT has not mentioned for invokingExplanation -2 of section 263 of the Act and therefore without invoking the said explanation in the show cause notice, the

revision order of the Ld. CIT(A) was held invalid. The relevant finding of the Hon'ble Gujarat High Court is reproduced 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.*
>
> *6 Thus, the Tribunal has considered in detail the aspect of revisional power to be exercised by the PCIT in the facts of the case and has given a finding of facts that the Assessing Officer has made inquiries in detail and after applying mind, accepted the genuineness of loans received by the respondent assessee from the aforesaid two companies and such view of the Assessing Officer is a plausible view, and therefore, the same cannot be said to be erroneous or prejudicial to the interest of the Revenue.*
>
> *7 In view of such finding of facts arrived by the Tribunal, no questions of law much less of any substantial questions of law arise out of the impugned order passed by the Tribunal."*

6.8 In the case before us the show cause notice issued by the Ld. PCIT is reproduced as under:

> *"Subject: Show cause notice us 263 of the IT.Act in the case of MIs. Mis. S H Kelkar And Company Ltd.*
>
> *(PAN: AAACS9778G) for A.Y 2015-16 - Reg.*
>
> *Please refer to the above.*
>
> *2. In this case, the Return of Income for A.Y. 2015-16 was e-filed on 28.11.2015, declaring total income at Rs.43, 18,43,790/-. Subsequently, the case was*

selected for scrutiny under CASS and the assessment was completed us 143(3) of the IT. Act on 07.06.2017 determining assessed income at R$.43,74,75,450/- after making disallowance of Rs.49,31,256/- us 14A of the Act and Rs.7,00,400/- under the head professional fees for merger and demerger.

3.Perusal of case record revealed that there is an under assessment of income of Rs.45,22,30,325/- on account of sale of immovable property to M/s. Keva Properties Pvt. Ltd.

4. In view of the above, the assessment order passed us. 143(3), of the IT. Act, 1961 dated 07.06.2017 for A.Y. 2015-16 is erroneous in so far as it is prejudicial to the interest of revenue. I, the Commissioner of Income-tax -4, Mumbai, in exercise of the powers conferred on me under the provisions of Section 263 of the I.T.Act, 1961, propose to consider this matter and pass such order thereon as the facts and circumstances of the case may justify.

5. Before doing so, I hereby give you an opportunity of being heard to explain your stand. If you desire to be heard in person or through an authorized representative, you may please attend before me at my office at the above mentioned address on 28.01.2020 at 3.30 p.m. It is also requested to furnish submissions, if any, in writing so as to reach this office on or before the date mentioned above.

6. Please note that in the event of failure to avail of the opportunity as aforesaid, the matter will be decided on merits on the basis of material available on record."

6.9 Evidently, there is no mention of invoking of Explanation -2 of section 263 of the Act in the show cause notice issued by the Ld. PCIT, whereas in the final conclusion, he has invoked said Explanation for holding the assessment order as erroneous in so far as prejudicial to the Revenue. Therefore, respectfully following the finding of the Hon'ble Gujarat High Court of Shreeji Prints Pvt. Ltd.

(supra) order of the Ld. PCIT cannot be sustained and accordingly same is set aside.

7. In the result, the appeal of the assessee stands allowed.

Order pronounced under Rule 34(4) of the ITAT Rules, 1963 on 20/02/2023.

Sd/-	**Sd/-**
(PAVAN KUMAR GADALE)	**(OM PRAKASH KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai;
Dated: 20/02/2023
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Asst. Registrar)
ITAT, Mumbai