

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

आयकर अपीलसं./ITA No.271/SRT/2019

(निर्धारण वर्ष / Assessment Year: (2014-15)

(Virtual Court Hearing)

Shri Sunny Chandrakant Fudhnawala, 47, Matawadi, Nr. Bhavani Mata Mandir, Lambe Hanuman Road, Surat-395006	Vs.	Deputy Commissioner of Income Tax, Circle-3(3), Aaykar Bhavan, Majura Gate Nr. New Civil Hospital Road, Surat-395001
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AAHPF 6359 G		
(Appellant)		(Respondent)

निर्धारिती की ओर से /Assessee by : Shri Manish J Shah, Advocate

राजस्व की ओर से /Respondent by : Shri Ashok B. Koli, CIT-D.R

सुनवाई की तारीख/ Date of Hearing : 17/01/2023

घोषणा की तारीख/Date of Pronouncement: 22/02/2023

**आदेश / ORDER**

**PER DR. A. L. SAINI, AM:**

By way of this appeal, the assessee has challenged the correctness of the order passed by the Learned Principal Commissioner of Income Tax-3, Surat (in short "Id. PCIT"] dated 29.03.2019 u/s 263 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for assessment year 2014-15.

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

*"1. The Principal C.I.T. erred in passing an order u/s 263 revising the assessment order passed u/s 143(3) after detailed scrutiny.*

*2. The Principal C.I.T further erred in holding that the Sec. 143(3) order passed by the Assessing Officer was erroneous and prejudicial to the interest of the revenue and in the process, set aside the assessment order back to the Assessing Officer with a direction to pass an order de novo.*

*3. The appellant craves leave to add, amend or alter the aforesaid grounds of appeal at the time of hearing, if the need arise."*

3. The relevant material facts, as culled out from the material on record, are as follows. Learned Principal Commissioner of Income Tax, called the case records of the assessee and on examination of the same, it was noticed that the assessee has filed his return of income on 29.11.2014 declaring total income of Rs.77,19,390/-. During the year under consideration, assessee has sold a land at Khatodara (Block No. 187+188), Surat vide sale deed No. 5865 dated 23.05.2013 with one other co-owner at Rs.3,56,99,100/- in which assessee's share was Rs.1,78,49,550/-. Against this sale consideration, assessee has shown LTCG of Rs.1,69,49,579/- and after claiming exemption u/s 54F to the extent of Rs.1,20,08,843/- offered LTCG of Rs. 49,40,736/- in return of income (ROI) filed for AY 2014-15. Later on, case-of the assessee was manually selected for scrutiny and assessing officer has passed assessment order on 23.12.2016 and assessed income at Rs.78,44,860/- after treating agriculture income to the tune of Rs.1,25,470/- as income from other sources.

4. Therefore, Ld. PCIT has exercised his jurisdictional power u/s 263 of the Act. On examination of the assessment records, it was noticed by the Ld. PCIT that vide show cause notice dated 16.12.2016, the Assessing Officer had pointed out that assessee was having more than two residential properties during the year and hence exemption u/s 54 to the extent of Rs.1,20,08,843/- was required to be disallowed. In response to the above, vide point No. 2 of the submission dated 22.12.2016, the assessee has stated that he deals in real estate, construction and in course of business, he has purchased the land, open plot, dilapidated properties and after construction/development, sold the same. The residential properties mentioned in SCN dated 16.12.2016 were his stock in trade and accordingly shown as stock in trade in balance sheet. The Ld. PCIT thus noticed that the Assessing Officer was required to take cognizance to the fact that the assessee's business is to purchase and sale of the immovable properties which was admitted by the assessee in his reply to SCN dated 16.12.2016. Thus, the sale of the above land was the assessee's business activity and sale consideration receipt was the assessee's business receipt which-was required to be taxed as business receipt.

However, Assessing Officer has not verified the same. Therefore, assessment order passed by the Assessing Officer is erroneous and prejudicial to the interest of the revenue as per Explanation 2(a) of section 263 of the Act. Further, as the immovable property transferred was stock in trade rather than capital asset the assessee's claim of deduction u/s 54F was not allowable. However, the same was allowed by the Assessing Officer. Therefore, assessment order passed by the Assessing Officer is erroneous; and prejudicial to the interest of the revenue as per Explanation 2(b) of Section 263 of the I.T. Act.

5. Therefore, Ld. PCIT has issued a show cause notice dated 07.03.2018 and served upon the assessee. In response to the said show cause notice, assessee attended the office of Ld. PCIT on 14.03.2019 and filed a written submission. The gist of the said reply is as under:

- a. The property sold by the assessee was inherited by the assessee from his father who was died on 15.07.2012 and never treated as stock in trade by him. Thus, said land is a capital asset and eligible for exemption u/s 54F.
- b. All the properties mentioned in Show cause notice dated 16.12.2016 were open plots and assessee was not having any single residential property during the year under consideration. Therefore, he is eligible to claim exemption u/s 54F of the Act.

6. However, Ld. PCIT rejected the contention of the assessee and observed that the assessee has *suo moto* stated in his reply to show cause notice date 16.12.2016 that assessee's business is the purchase and sale of the immovable properties. When during the time of assessment proceedings, assessee has admitted that his business is to purchase and sell the immovable properties, it was imperative on the part of the Assessing Officer to carry out inquiry and verification regarding the fact that:

- i. Whether the property in question was assessee's capital asset or not?

- ii. Whether the said transaction is part of the assessee's business activity or not?
- iii. Whether the sale consideration receipt was assessee's business receipt or not?

As AO failed to verify these facts, therefore, Ld. PCIT noted that assessment order passed by the AO is erroneous and prejudicial to the interest of the revenue as per Explanation 2(a) of section 263 of the Act.

7. The Ld. PCIT further noted that allowance of exemption u/s 54F can only be claimed if there is transfer of any long term capital asset (*not being a residential house*). As the Assessing Officer has granted the deduction u/s 54F without verification whether the property in question is a capital asset or stock in trade while the assessee is entitled to deduction u/s 54F only in the case of transfer of the capital asset, the claim has been wrongly allowed by the Assessing Officer without proper and due verification which rendered the order erroneous and prejudicial to the interest of the revenue as per Explanation 2(b) of section 263 of the I.T Act.

The Id PCIT also noted that as the property in question was transferred on 23.05.2013, assessee has to construct the house within a period of three years after that date of transfer i.e. 23.05.2016. The assessee has purchased a land on 10.07.2014 and agreement for construction was done on 30.07.2014. As the order was passed on 23.12.2016, Assessing Officer was required to make verification and inquiries to check that whether the house was constructed within prescribed time limit before allowing deduction u/s 54F of the Act. However, Assessing Officer has passed the order without making any inquiry or verification in this regard and allowed the deduction u/s 54F to the assessee which rendered the order erroneous and prejudicial to the interest of the revenue as per Explanation 2(b) of section 263 of the Act. In view of above facts and observations, the Id PCIT held that assessment order passed by the Assessing Officer u/s 143(3) of the Act dated 23.12.2016 is erroneous and prejudicial to the interest of the revenue. Therefore, Ld. PCIT set aside the order of Assessing

Officer with a direction to frame afresh assessment order after verifying the issues raised by the Ld. PCIT.

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

9. Shri Manish J. Shah, Ld. Counsel for the assessee, at the outset submitted that solitary issue in this appeal is in respect of deduction u/s 54F of the Act. The Ld. Counsel took us through paper book page-32, wherein the show cause notice issued by Ld.PCIT is placed. The Ld. Counsel stated that Ld.PCIT has pointed out that assessee has sold land at Khatodara within Block No.187 +188 Surat vide sale deed No.5865 dated 23.05.2013 with one co-owner at Rs.3,56,99,100/- in which the assessee's share was at Rs.1,78,49,550/- and after claiming exemption u/s 54F to the extent of Rs.1,20,08,843/-, the assessee offered long term capital gains of Rs.49,40,736/- in his return of income filed for the year under consideration. The Ld. counsel stated that Ld.PCIT noted that assessee has more than two residential properties and during the year assessee has claimed exemption u/s 54F to the tune of Rs.1,20,08,843/-, which was required to be disallowed and assessee himself has stated that assessee is dealing in real estate, construction business and in the course of the real estate business, the assessee purchased land of open plot, dilapidated properties and other construction / development and sold the same. As per Ld. PCIT, since the residential properties mentioned in the show cause notice dated 16.12.2016 was assessee's stock-in-trade in the assessee's balance-sheet. The Assessing Officer was required to take cognizance to the fact that assessee's business to purchase and sale of immovable properties, which was admitted by assessee and this fact also established that assessee has shown immovable as stock-in-trade in assessee's balance-sheet. Therefore, sale of the above land was assessee's business activities and sale consideration received was required to be taxed as business receipt, rather than capital asset. Therefore Ld. PCIT pointed out that the asset sold by the assessee was not the capital asset within the meaning of section 2(14)(i) of the Act.

Therefore, the assessment order was considered by Id PCIT as erroneous and prejudicial to the interest of revenue.

10. In this connection, Ld. Counsel pleaded that the property sold by assessee was not part of stock-in-trade and assessee can maintain two portfolio viz: – one investment portfolio and second business portfolio. In investment portfolio, the assessee has shown such asset, therefore it is not a part of stock-in-trade. Hence assessee is entitled to take exemption u/s 54F of the Act. The Ld. Counsel took us through paper book pages-47, wherein the computation of long term capital gains has been shown by the assessee. The Ld. Counsel took us through paper book page-25, wherein assessee has submitted that during the assessment proceedings, the assessing officer has raised the relevant question and assessee has replied. The assessee has also replied during the assessment proceedings, vide letter dated 19.12.2016, which is placed at page-27 of the paper book, wherein the assessee submitted list of stock-in-trade for financial years 2012-13 and 2013-14 respectively. The show cause notice issued by the Assessing Officer during the assessment proceedings is placed at paper book pages-28 & 29, wherein the Assessing Officer has raised the query in respect of deduction u/s 54F of the Act and in response to said show cause notice dated 16.12.2016, the assessee submitted his reply in respect of exemption u/s 54F of the Act, which is placed in paper book page-30. The Ld. Counsel took us through the paper book page-43, wherein the assessee has shown that asset is part of investment activities. The Ld. Counsel submitted copy of ledger account, wherein assessee has shown the agricultural land at Rankuwa at Rs.1,74,99,550/- and stated that this property is not on account of stock-in-trade and therefore assessee is entitled to claim the deduction u/s 54F of the Act. The Ld. Counsel also took us through paper book page-15, wherein land has been shown in investment portfolio, which is placed at paper book page-12. The Ld. Counsel stated that the stock-in-trade shown in the Balance-Sheet are getting reflected on page 49 of the paper book on which assessee has not claimed deduction under section 54F of the Act. Therefore Ld. Counsel contended that during the assessment stage the Assessing Officer has raised the relevant question and the assessee has replied the question raised by the

Assessing Officer and having applied his mind, the Assessing Officer passed order u/s 143(3) of the Act and hence there is no lack of inquiry and rather it is kind of full inquiry in assessee's case under consideration. The Assessing Officer, having examined the relevant details and explanation of assessee's claim, the same was allowed, therefore, such assessment order is neither erroneous nor prejudicial to the interest of revenue.

11. The Ld. Counsel further stated that in case of co-owner of the land, that is, in case of Shashiben Chandrakant Fudhnawala, the co-owner has filed his return of income showing computation of total income and also shown capital gains in respect of her share, which was accepted by the Department without passing scrutiny assessment u/s 143(3) of the Act. That is, after filing the return of income, the Department did not raise the question about allowability of the capital gains. Therefore, the assessee's co-owner has also claimed deduction u/s 54F of the Act on the same property. Hence assessee should not be treated in different way by the Department. Since co-owner's case although, not selected for scrutiny assessment and there is no scrutiny assessment in case of co-owner, however yet the Department has accepted the return of income. In the assessee's case, the long term capital gain has been offered by the assessee therefore exemption u/s 54F of the Act, on the same property, should be allowed, as it has already been allowed in case of co-owner. The assessment has been made u/s 143(1) of the Act in case of co-owner of such land. Therefore, assessee should not be treated differently and for that Ld. Counsel has relied on the following judgments:

- Rajeshkumar Shantilal Patel vs. Income Tax Officer, Ward-2(1) Surat [2021] 127 taxmann.com 342 (Surat-Trib.)
- Asstt. Commissioner of Income Tax, Circle-5, Baroda vs. Shri Mahesh Chunilal Shah in ITA No.210/Ahd/2011 dated 27.08.2014
- Shri Chandulal Prabatbhai Patel vs. DCIT, C.C.5(3) Ahmedabad ITA No.2444/Ahd/2016 dated 23.10.2018

- Laxmanbhai Jivrajbhai Patel vs. DCIT,Cir-5(3), Ahmedabad ITA No.421/Ahd/2018 dated 17.06.2019

12. The Ld. Counsel also pointed out that explanation-2(b) to Section 263 does not apply in assessee's case. For that Ld. counsel relied on the recent judgment of Hon'ble jurisdictional High Court in the case of Principal Commissioner of Income-tax, Surat-2 vs. Shreeji Prints (P.) Ltd. [2021] 130 taxmann.com 294 (Guj)

13. On the other hand, Learned CIT-DR for the Revenue took us through the assessment order framed by the Assessing Officer u/s 143(3) dated 23.12.2016 and submitted that Assessing Officer has nowhere stated about exemption u/s 54F of the Act in the assessment order, that is, the Assessing Officer has not discussed anything regarding section 54F of the Act in his order. Therefore, it is a complete case of non-inquiry i.e. 'no inquiry' has been conducted by the Assessing Officer on his part as there is no discussion about exemption u/s 54F in the assessment order. The Ld. DR also took us through the paper book page-27 and stated that Assessing Officer has not asked the question about deduction u/s 54F by way of issue of notice u/s 142(1) of the Act. The Ld. DR pointed out that no doubt entire details were submitted during assessment stage before Assessing Officer, however, Assessing Officer has not applied his mind to the facts that whether asset is capital asset or stock-in-trade. Hence, this aspect has not been verified by the Assessing Officer. Therefore, Assessing Officer has failed to conduct the necessary inquiry in respect of deduction u/s 54F of the Act. Hence, order passed by Assessing Officer is erroneous and prejudicial to the interest of revenue. The Ld. DR also submitted that judgment of Hon'ble jurisdictional High Court in the case of Shreeji Prints (P). Ltd. (supra) is distinguishable on facts, as this case relates to issue of verification of unsecured loan and in this case the complete details were filed before the Assessing Officer in respect of loan / unsecured loan and Assessing Officer has examined such unsecured loan with the help of ledger account, copy of acknowledgement of income tax return and the bank statements were filed. Therefore, in this case, the entire details were submitted before the

Assessing Officer and the Hon'ble jurisdictional High Court took the view in favour of assessee. However, in the assessee's case under consideration, the assessee has not submitted the entire details and documents during the assessment proceedings before the Assessing Officer. Therefore, the order passed by the Assessing Officer is erroneous and prejudicial to the interest of revenue.

14. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position. In our considered view, it was wholly erroneous on the part of the Id PCIT to exercise the jurisdiction under section 263 of the Act despite of the fact that assessing officer has examined the issue raised by Id PCIT during the assessment stage. As pointed out by Id Counsel that assessing officer has raised the relevant question and assessee has replied during the assessment stage vide letter dated 19.12.2016. The show cause notice issued by the Assessing Officer during the assessment proceedings is placed at paper book pages-28 & 29, wherein the Assessing Officer has raised the query in respect of deduction u/s 54F of the Act and in response to said show cause notice dated 16.12.2016, the assessee submitted his reply in respect of exemption u/s 54F of the Act, which is placed in paper book page-30. The assessee has demonstrated that asset is part of investment activities. The stock-in-trade shown in the Balance-Sheet are getting reflected on page 49 of the paper book on which assessee has not claimed deduction under section 54F of the Act.

15. It is pertinent to mention here that there was as such no allegation of 'no enquiry' or 'lack of enquiry' or verification, because the Ld. Pr. C.I.T. himself found all the details/evidences in the assessment record, i.e. well within the A.O.'s possession and what he alleged was about the plausible view taken by the A.O. as against his perception and understanding on the same set of facts and documents. It is the domain of the assessing officer to decide, whether further inquiry is needed or not in a particular case. After getting the documents and information from the assessee, during the assessment proceedings, the assessing officer has examined the documents and evidences and applied his mind.

16. We note that the Ld. Pr. C.I.T. by invoking his jurisdiction u/s 263 of the Act is giving another opportunity to the Assessing Officer to re-examine and to verify again the same documents and evidences, which is not permissible. Hon'ble Bombay High Court in the case of **Ranka Jewellers vs. Addl. CIT (328 ITR 148)** relying on the decisions of Hon'ble Supreme Court in the cases of **Malabar Industrial Co. Ltd. vs. CIT (supra)** and **CIT vs. Max India Ltd. [(2007) 295 ITR 282 (SC)]**, has held that once the issue was considered by the A.O., the remedy of the revenue could not lie in invoking of the jurisdiction u/s. 263 of the Act. Therefore, the order of the Ld PCIT was definitely outside the purview of section 263 of the Act. As noted above, the exercise aimed at ascertaining the correct income of the assessee has been fulfilled by the Ld. A.O. by exercising his quasi-judicial functions, hence order passed by the assessing officer is neither erroneous nor prejudicial to the interest of revenue, therefore, we quash the order under section 263 passed by ld PCIT.

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

Order is pronounced on 22/02/2023 by placing record on notice board.

**Sd/-**  
**(PAWAN SINGH)**  
**JUDICIAL MEMBER**

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

सूरत /Surat

दिनांक/ Date: 22/02/2023

***Dkp Outsourcing Sr.P.S***

**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