

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

आयकर अपील सं./ITA No.120/SRT/2022

(निर्धारणवर्ष / Assessment Year: (2017-18)

(Physical Court Hearing)

Dineshchandra Narharishankar Upadhyay, 5/1203, Main Road, Haripura, Surat-395003	Vs.	Principal Commissioner of Income-tax-1, Room No. 123, Aaykar Bhavan, Majura Gate, Surat-395001
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AACPU 1094 J		
(Appellant)		(Respondent)

निर्धारिती की ओर से /Assessee by : Shri Hiren M. Diwan, C.A

राजस्व की ओर से /Respondent by: Shri Ravinder Sindhu, CIT-D.R

सुनवाई की तारीख/ Date of Hearing : 25/01/2023

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-1, Surat (in short "ld. PCIT"] dated 22.03.2022 under section 263 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for assessment year 2017-18.

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

*"1) The learned Principal Commissioner of Income Tax-1, Surat (hereinafter referred to as 'the ld. PCIT" has erred in and on facts in setting aside the original assessment order made by the ld. A.O and directing him to frame the fresh assessment order.*

*2) The ld. PCIT has erred in law and on facts in directing the ld. A.O to consider while framing the fresh assessment order the issue of exemption granted u/s 54F of the Act to the appellant.*

*3) The ld. PCIT has erred in law and on facts in directing the ld. A.O to consider the issues already considered by the ld. A.O while passing the original assessment order and then frame the fresh assessment order.*

*4) The learned PCIT has erred in law and on facts in assuming jurisdiction u/s 263 of the Act.*

5) *The appellant craves leave to add, amend, alter, modify, substitute, delete, change or vary all or any of the ground or grounds of appeal.*”

3. Succinctly, the factual panorama of the case is that assessee before us is an Individual and filed his return of income for the assessment year under, (A.Y.) 2017-18 on 23.10.2017, declaring total income of Rs.39,54,380/-. Thereafter the case was selected for limited scrutiny and the reasons for selection were (i) share capital/capital(ii) deduction/exemption from capital gains and (iii) other income reported in Schedule A-OL. The assessment proceedings were completed u/s143(3) of the Act, on 24.12.2019 by accepting the returned income.

4. Later, the Ld.PCIT has exercised his jurisdictional power u/s 263 of the Act. On going through the assessment records, it was noticed by the Ld. PCIT that the assessee had claimed Rs.1,32,24,658/- as exemption u/s 54F of the Act against long term capital gain earned on sale of property. In order to verify the genuineness of claim of deduction, the Assessing Officer during the assessment proceedings issued various notices to the assessee to submit details in support of his claim of deduction u/s 54F of the Act. In response, the assessee had made submission wherein it is contended that he had sold a property situated at Plot No.19, Sant Keval, Umra, Surat for total sale consideration of Rs.1,35,10,000/- which was acquired on 08.06.1990 and long term capital gains on sale of this asset of Rs.1,32,24,658/- was claimed as deduction u/s 54F of the Act by virtue of acquisition of new residential property situated at No.30 B/VTC Law College, Athwalines, Surat at total cost of Rs.1,46,34,000/- by registered sale deed executed on 11.04.2017. In this regard, it was noted by Ld. PCIT that as per the provision of Section 54F of the Act, the assessee is not eligible for deduction where the assessee owns more than one residential house, other than the new asset, on the date of transfer of the original asset. On perusal of balance sheet submitted by the assessee as on 31.03.2017, it was noted by ld PCIT that assessee already owned below mentioned residential properties:

- (i) 701-Pancham Heights
- (ii) Flat DVF-F-25

- (iii) Property at 5/1203
- (iv) Property at 5/1208
- (v) Property at 76-Sai Kutir

Further the assessee had purchased new property on 11.04.2017, therefore, provision of section 54F of the Act shall not apply in assessee's case. Therefore, total amount of Rs.1,32,24,658/- was required to be disallowed by Assessing Officer and to be added to the total income for the year under consideration. From the above facts, the Ld. PCIT observed that Assessing Officer has passed the assessment order without proper verification/inquiry on the issue as mentioned above which should have been made during the course of assessment proceedings and thereby rendering the assessment order u/s 143(3) of the Act passed by the Assessing Officer on 24.12.2019 as erroneous in so far as it is prejudicial to the interest of Revenue within meaning of section 263 of the Act.

5. Therefore, proceedings for revision order u/s 263 of the Act were initiated by Ld. PCIT by issuing show cause notice bearing DIN ITBA/REV/F/REV1/2021-22/1040733831(1) dated 15.03.2022 and duly served on assessee.

6. In response to the show cause notice issued, the assessee submitted his reply through e-proceedings and a copy has been submitted to Ld. PCIT with all the enclosures. The relevant para of the reply of assessee is reproduced as under:

1. *"The said return of income was selected for limited scrutiny u/s 143(3) of the Act to verify claim of exemption u/s 54F. During the course of hearing A.O had raised several questions and made inquiries specifically to verify my claim u/s 54F, which were replied satisfactorily in due course and after examining all the facts and evidences put on record, AO passed the order u/s 143(3) allowing exemption/s 54F.*
2. *AO had verified all the records after inquiries and with application of mind he found case fit for allowance of exemption u/s 54F and he passed an order, allowing exemption. The said allowance is as per law. Therefore, said order cannot be held erroneous which requires revision.*
3. *I did not hold more than one residential property (an affidavit to the same is attached herewith). Therefore, I am eligible to claim exemption u/s 54F. explanations with requisite evidences for the properties listed in your notice is attached herewith, kindly accept the same.*

4. I had acquired/purchased new residential property within time allowed u/s 54F. (property's registered conveyance deed of sale was executed on 16.09.2016 and new property's registered conveyance deed was executed on 11.04.2017) which is within time allowed u/s 54F. Ledger and bank statement of sale proceeds received and showing payment made to acquire new residential property is attached herewith. Entire sale proceeds received on 16.09.2016 of Rs.1,30,00,000 was paid to seller on 23.01.2017 (within the financial year). Subsequently registered deed was executed on 11.04.2017. So, entire transaction was done within time allowed on or before due dated u/s 139(1). Therefore, exemption is allowable u/s 54F.
5. As all requisite conditions laid down in Section 54F have been satisfied, there is no case for withdrawal of exemption of Section 54F. Therefore, I strongly urge to allow exemption u/s 54F.
6. During the course of hearing, I had submitted all documents asked by A.O for your ready reference I am attaching the relevant documents again. However, if your honour requires further documents/details. Kindly intimate me and give an opportunity, so that I can submit the same.
7. I am an advocate and senior citizen. I have been discharging my duty of a citizen by way of regular payment of income tax, for which I have been also honour by I.T. Department by issuing certificate of appreciation. If, proposed exemption is withdrawn then at this old age I will be put under severe mental stress and will cause mental and financial irreparable loss.

Property	Usage	Used by	Evidence	Book value
701, Pancham Heights flat	For own profession. Given to own office staff as rent free accommodation.	Office staff	Agreement	2,77,118
Flat DVFF25	Rented	Tenant (rent is not received since many years) monthly rent Rs.165	Rent agreement, Municipal Corporation Bill.	12,000
Property 5/1203	Residence	Self	Municipal Corporation Bill. Affidavit	2,07,875
Property 5/1208	Commercial Property is used as Shop by wife Smt. Yaminiben D. Upadhyay	Wife's shop	Registration certificate of Dist. Industries Centre as MSME, Municipal Corporation Professional Tax	11,15,600

			<i>Receipt, ITR of Yaminiben</i>	
<i>Property @ 76 Saikutir</i>	<i>Open plot</i>	<i>Open plot</i>	<i>Affidavit</i>	<i>1,50,000</i>

7. However, Ld. PCIT rejected the contention of the assessee and observed the following mistakes/error in the assessment order along with and vis-à-vis interpretation of explanation submitted by the assessee:

(i) The assessee argued that the AO had verified all the records and after inquired issue and with application of mind, he found case fit for allowing of deduction u/s 54F of the Act. However, during the course of the assessment proceedings, neither the AO raised any specific query, nor any information was submitted by the assessee in respect of number of residential properties owned by the assessee, during the year under consideration. Therefore, the issue of deduction claimed u/s 54F remained unverified with respect to the condition specified in proviso (a)(i) of section 54F of the Act, during course of the assessment proceedings.

(ii) The assessee stated as he did not hold more than residential properties during the subject year. However, on going through the balance-sheet submitted by the assessee during the assessment proceedings as well submission made by the assessee, it is noticed that the assessee owned more than one residential house other than the new asset purchased during the year. During the year under consideration the assessee was owning total six properties. As per balance-sheet as on 31.03.2017, submitted during the assessment proceedings, a property addressed at 5/1982 is mentioned as being used for office purpose. However, rest of five properties; nature of the properties is not mentioned in balance-sheet. As per details submitted by the assessee, it was found by the Ld. PCIT that all are the residential properties except one '76-Saikutir' claimed as open plot and property '5/1208' claimed as used for commercial purpose by wife of the assessee. Even if both the above properties are considered as non-

residential property of the assessee even the assessee was still owner of the three residential properties other than the new asset on the date of transfer of the original assets which has been sold. The assessee has therefore not fulfilled the condition mentioned in proviso of the Section 54F of the Act.

(iii) The assessee further claimed that out of the remaining three properties two were given for rent and one was being used for his own residence. However, it is nowhere mentioned in the Act that if the property given on rent, it is not included in the definitions of the residential property as mentioned in the section 54F of the Act. During year under consideration, the assessee owns more than one residential house other than the new assets purchased by the assessee, hence he is not eligible for deduction u/s 54F of the Act. The Ld. PCIT noted that in respect to one property '76-Sai Kutir' the assessee claimed that it is an open plot not a residential property. However, no documentary evidences have been furnished by the assessee to prove his claim except 'an affidavit' filed by the assessee. Correctness of the assessee's claim requires further verification.

8. In view of the facts discussed above, the Ld. PCIT noted that during the course of assessment proceedings, the Assessing Officer has not inquired the issue of the deduction claimed in the light of further proviso of the section 54F of the Act. This shows non application of mind by the Assessing Officer while completing the assessment proceedings. Therefore, Ld. PCIT held that the assessment order passed u/s 143(3) of the Act dated 24.12.2019 for the assessment year under consideration in the case of assessee was set aside with a direction to the Assessing Officer to pass fresh assessment order after taking into consideration the issues raised by Ld. PCIT.

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

10. 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. Shri Hiren M. Diwan, Learned Counsel for the assessee, begins by pointing out that during assessment proceedings, the Assessing Officer has issued notice u/s143(2) dated 06.05.2019, which is placed at paper book page-1, wherein it is specially mentioned that assessee's case was selected for limited scrutiny to examine the share capital and deduction exemption from capital gains and income return in Schedule A-OL. The Ld. Counsel stated that Assessing Officer has issued notice u/s 142(1) dated 6.5.2019, which is placed at paper book pages-2 & 3, wherein the Assessing Officer has asked the details and documents in respect of the issue raised by Id PCIT in his 263 order. During the assessment proceedings, assessee has replied to the show cause notice u/s 142(1) dated 17.05.2019, which is placed at paper book pages 4-5. After going through the reply of the assessee, the assessing officer has applied his mind and provided the relief to the assessee, therefore it can not be said that assessing officer has not applied his mind. The Ld. Counsel also submitted a statement showing computation of total income, which is placed at paper book pages 6 to 8 and stated that assessee does not any other income other than the business income and the capital gains. To substantiate, his arguments, the Id Counsel stated that assessee submitted the copy of ledger account of property sold, before AO, which is placed at paper book page-9 and the assessee submitted copy of ledger account of property purchased, which is placed at paper book pages 10-11 and the assessee submitted copy of sale deed dated 11.04.2017, for property sold, which is placed at paper book pages 104-138 and the assessee also furnished the Balance-Sheet as on 31.03.2017, and all these above documents and evidences were submitted before Assessing Officer by the assessee, during the assessment stage.

11. This way, Shri Diwan, with help of the above facts, explained the Bench that details of the properties held by the assessee, for residential purposes has been disclosed in the balance-sheet and it is mentioned in audit report also, which was filed by assessee before Assessing Officer. To prove these essential facts, the assessee submitted affidavit in local language and English version dated

19.03.2022 before Ld. PCIT, which is placed at paper book pages 155-160 and copy of agreement executed by assessee dated 10.03.2016 in favour of employee of assessee, which is placed in paper book pages 161 to 166. To prove this fact that some of the properties were let out by assessee for commercial use, and these properties have been using only for commercial purposes since a long, the assessee submitted copy of property tax receipts, photo copy of agreement showing the name of tenant, who are using the properties for commercial purposes, photo copy of corporation tax (Municipal tax) receipt, documents of property at 5/1208 in favour of his wife including professions tax, Shop Establishment Employee's group insurance scheme, MSME payment of registration of trade licence with SMC and copy of affidavit dated 19.03.2022, were submitted which is placed at paper book pages 171 to 179. Based on the above documents and statements submitted before the Assessing Officer, the Ld. Counsel contended that assessing officer applied his mind and took a plausible view, hence order passed by the Assessing Officer is neither erroneous nor prejudicial to the interest of Revenue.

12. Shri Diwan, also pleaded that just because the Assessing Officer has passed the order in brief and does not bring the issue in assessment order, which was raised by Ld. PCIT in his order passed u/s 263 of the Act, does not mean that order is erroneous and Assessing Officer has not applied his mind. The Assessing Officer needs to mention in his order only those issues which are against the assessee and not those issues which are not against the assessee. The Id Counsel, to bolster his stand relied on certain precedents, which we have gone through. The Id Counsel, finally prays the Bench to quash the order passed by Id PCIT.

13. On the other hand, Learned CIT-DR for the Revenue argued that Assessing Officer has never discussed and examined the issues raised by the Ld. PCIT. The assessee has submitted the list of properties only, however, the nature of properties were not explained before the Assessing Officer. The Assessing Officer even not conducted any inquiries about nature of properties and there is no discussion in the impugned assessment order. To purchase more than one

house, in the pretext of promotion of housing scheme and to cheat the revenue, is not the object of section 54F of the Act. The assessee has to prove with cogent evidence that the property held by him is a commercial property and is in the nature of commercial purpose and such nature has not been proved by the assessee during the assessment stage. The Ld. PCIT also pointed out that assessee is having three residential properties and out of which two properties are given on rent basis. Therefore, assessee has to establish that these properties are in a commercial nature and such nature was not discussed in the assessment order. Therefore, assessment order passed by the Assessing Officer is erroneous and prejudicial to the interest of revenue and hence the order passed by Id PCIT may be upheld.

14. In short rejoinder, Shri Diwan, submitted that during the assessment stage, the assessee has explained the commercial nature of the property and out of the two properties – one property is being used for residential purpose of assessee and second property is being used by staff of the assessee, as the assessee is an advocate and third property is let out on rental basis for commercial use since a long. Therefore, the Assessing Officer after applying his mind, did not disallow the claim of assessee. Hence, the order passed by the Assessing Officer is neither erroneous nor prejudicial to the interest of revenue.

15. We have considered the submissions of both the parties. We find merit in the submission of Id Counsel for the assessee, as he pointed out that Assessing Officer has issued notice u/s 142(1) dated 6.5.2019, wherein the Assessing Officer has asked the details and documents in respect of the issue raised by Id PCIT in his 263 order, the assessee explained the nature of each properties before the Assessing Officer. Those properties, which are using for commercial purposes, the assessee submitted rent agreement, Municipal tax receipt, electricity bill, and proper evidence to demonstrate that such properties have been using only for commercial purposes for a very long period. All these facts and evidences were before the Assessing Officer. The Assessing Officer, as an adjudicator and investigator, has applied his mind and framed the assessment

order, thus such order passed by the Assessing Officer is neither erroneous nor prejudicial to the interest of revenue.

16. We note that Revenue had no right to appeal to the Commissioner (Appeals) against any order passed by the Income-tax Officer. Therefore, this provision, corresponding to section 33B of the 1922 Act, was enacted to arm the Commissioner with powers of revision whenever there is any erroneous order prejudicial to the revenue. There must be an error in the order and it must be "prejudicial to the revenue". For example, an order of the Assessing Officer in which he merely follows the order of the Tribunal for an earlier year, which in turn had applied the decision of the Supreme Court cannot be said to be erroneous. If the error is advantageous to the revenue, then the Principal Commissioner of Income Tax cannot invoke section 263, if the order passed by the assessing officer is not erroneous and order was passed by him within the legal framework.

17. The law with regard to exercise of jurisdiction u/s.263 of the Act on the ground that the AO failed to make enquiries which he ought to have made in the given circumstances of a case is well settled. The Ld.PCIT can regard the order as erroneous on the ground that in the circumstances of the case the Income-tax Officer should have made further inquiries before accepting the statements made by the assessee in his return. The Income-tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. It is because it is incumbent on the Income-tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word "**erroneous**" in section 263 includes the failure to make such an enquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct. We derive support for the

proposition as stated above from the decision of the Hon'ble Delhi High Court in the case of Gee Vee Enterprises 99 ITR 375 (Del).

18. Since in the present case the PCIT has exercised jurisdiction u/s.263 of the Act on the ground that the Assessing Officer while completing the assessment proceeding did not make enquiries which he ought to have made. Therefore, it is necessary to look into what enquiries the Assessing Officer made on the issues raised in the order u/s.263 of the Act. It is clear from the submissions and material available on record with regard to claim of assessee u/s 54F of the Act, that Assessing Officer got the details of the properties and examined the nature of properties and then framed the assessment order. In appropriate cases he made further inquiry also. A mere observation that no proper details have been obtained, cannot be sufficient to come to a conclusion that the Assessing Officer did not make proper and adequate inquiries which he ought to have made in the given facts and circumstances of this case. In the conclusion we are of the view that none of the reasons set out by the Ld.PCIT for invoking the jurisdiction u/s 263 of the Act are sustainable. The impugned order of the Ld.PCIT has to be quashed for the reason that order of the Assessing Officer sought to be revised in the impugned order was neither erroneous nor prejudicial to the interest of the revenue for the reason of any lack of inquiry that the Assessing Officer ought to have made in the given facts and circumstances of the case. We accordingly quash the order passed by the Ld.PCIT u/s 263 of the Act and allow the appeal of the assessee.

19. 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**

Surat

दिनांक/ Date: 22/02/2023

*Dkp Outsourcing Sr.P.S*

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

**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

By Order

**// True Copy //**

Senior Private Secretary /Private  
Secretary/Assistant Registrar, ITAT, Surat