

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

आयकरअपीलसं./ITA No.228/SRT/2023

(निर्धारणवर्ष / Assessment Year: (2018-19)

(Virtual Court Hearing)

ChetanbhaiPrahadbhaiGami 39, China Gate-1, Near Spring Valley, Althan, Surat-395017	Vs.	PrincipalCommissioner of Income Tax-1,Surat, 1, 123, 1 <sup>st</sup> Floor, Aaykar Bhavan, Majura Gate, Surat-395002
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: ABEP6880C		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारितीकीओरसे /Assessee by	Shri Manish J Shah, Advocate
राजस्वकीओरसे/Respondent by	Shri Ashok B. Koli, CIT-DR
सुनवाईकीतारीख/Date of Hearing	18.07.2023
घोषणाकीतारीख/Date of Pronouncement	26.09.2023

**आदेश / ORDER**

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

By way of this appeal, the assessee has challenged the correctness of the order dated 13.03.2023 passed by the Learned Principal Commissioner of Income-Tax (in short "Ld PCIT") under section 263 of the Income-Tax Act, 1961 (hereinafter referred to as 'the Act'), for the assessment year 2018-19. Grievances raised by the assessee, are as follows:

*"1. The Learned P.C.I.T has erred in law and on facts of the case in passing order u/s 263 for revision of the assessment order dated 05.02.2021 for A.Y 2018-19.*

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

2. The relevant material facts, as culled out from the material on record, are as follows. The assessee before us is an individual and filed return of income for the assessment year (AY) 2018-19 on 27.03.2019, declaring

total income at Rs.3,23,75,540/-.Subsequently, the assessee`s case was selected for limited scrutiny, under e-assessment scheme 2019 to verify the issues of “Details of assets and liabilities/capital gains/income on sale of property”. Assessment proceedings were finalized on 05.02.2021 by passing assessment order u/s 143(3), by determining assessed income at Rs.3,23,75,540/-, that is, accepting the returned income filed by the assessee.

3. Later on, Learned Principal Commissioner of Income-Tax (in short “Ld PCIT”) exercised his jurisdiction under section 263 of the Income-Tax Act, 1961. On verification of the records, it was noticed by ld PCIT that the assessee and his brother, Mr. Prakashbhai Prahladbhai Gami had purchased an agricultural land for Rs.39,51,700/-, vide purchase deed on 31.07.2008 with 50% share and sold the same immovable property on 19.07.2017, for sale consideration at Rs.11,16,00,000/- out of which the assessee received Rs.4,58,00,000/- with 41.04% share as stated in the sale deed.

4. On further verification, it was noted by ld PCIT that the assessee had claimed to have incurred cost of improvement of Rs.57,42,000/- and indexed cost of property at Rs.84,11,040/-. On perusal of return of income (ROI), it was noticed by ld PCIT that the assessee has furnished calculation for LTCG as under:

Sr.No.	Particulars	Amount (Rs)
1	Full value of consideration	4,58,00,000/-
2	Indexed cost of acquisition	84,11,040/-
3	Indexed cost of improvement	57,42,000/-
4	Total cost of acquisition	1,41,53,040/-
5	Balance	3,16,46,960/-
6	Long term Capital Gain	3,16,46,960/-

5. In the calculation of LTCG, the assessee has claimed cost of acquisition at Rs.84,11,040/-. However, on verification of the records the cost of acquisition is recalculated at Rs.36,20,866/- as under:

Sr.No.	Particulars	Amount (Rs)
1	Cost of acquisition (F.Y 2007-08)	
2	Consideration	39,51,700/-
3	Stamp duty	1,94,000/-
4	Registration fee	39,650/-
5	Total cost	41,85,350/-
6	Indexed cost of acquisition (4185350*272/129)	88,24,924/-
7	Indexed cost of acquisition for the assessee (41.03% of total indexed cost of acquisition)	36,20,866/-

The share of the assessee in the property is 41.03%. Hence, cost of acquisition is also required to be claimed in the same proportion. Accordingly, indexed cost of acquisition in the case of the assessee comes to **Rs.36,20,866/-**. Out of total cost of improvement of Rs.1,14,84,000/-, the assessee has claimed cost of improvement at Rs.57,42,000/-.

When the assessee's share in the sale consideration received is of 41.03% share in cost of improvement should also be restricted to the same ratio and he cannot claim beyond this share as ownership ratio of each co-owner determines their tax liability. Moreover, bills furnished in support of cost of improvement shows that payments have been made by Prakashbhai and others and no specific bifurcation/percentage or specific amount incurred by each of them has been mentioned therein. Therefore, cost of improvement is to be divided in the ownership ratio. Secondly, the assessee has not furnished any receipt/bill in respect of improvement of cost being the payment of Rs.4,23,708/- made to SMC. Also, no receipt/bill for payment of Rs.1,67,493/- made to Surat Mahanagr Seva Sadan has been furnished. Instead of it, receipt is furnished in support of this payment has been paid by Shri Chetankumar Balubhai Patal and same is of Rs.24,395/- only. Cost

of improvement should be supported by documentary evidences, supporting bills, vouchers, documents etc. to establish the genuineness of the transaction. It is the foremost duty of the assessee to produce the documentary evidences, supporting bills, vouchers, documents etc., to substantiate his claim. As evident from the above, the assessee had not discharged his onus and filed partial supporting documents. Therefore, the claim of Rs.5,91,201/- (4,23,708 + 1,67,493) as improvement cost is required to be rejected.

6. Thus, based on the above facts, Id PCIT noted that total cost of improvement stands at Rs.1,08,92,800/- (1,14,84,000 – 5,91,200) as against the assessee's claim of Rs.1,14,84,000/- and as discussed in the preceding paragraph, the assessee's share for cost of improvement comes to Rs.44,69,315/- (41.03% of 1,08,92,800/-).

In view of the above, computation of LTCG is worked out as under:

Sr.No.	Particulars	Amount (Rs)
	Full value of consideration	4,58,00,000/-
	Indexed cost of acquisition	36,20,866/-
	Indexed cost of improvement	44,69,315/-
	Expenses	0
	Total indexed cost of the property	80,90,181/-
	Balance	3,77,09,819/-
	Exemption claimed u/s 54 of the Act	0
	LTCG	3,77,09,819/-

**In view of the above, it was noted by Id PCIT that the assessee has earned LTCG of Rs.3,77,09,819/- but the assessee has offered LTCG of Rs.3,16,46,960/- for the year under consideration. Hence the difference of LTCG of Rs.60,62,859/- (3,77,09,819/- minus 3,16,46,960/-) was required to be added to the total income of the assessee for the year under consideration, which the AO has failed to do so. From the above facts, the Id PCIT noted that Assessing Officer has passed the assessment order without proper verification/inquiry on the issue as mentioned above,**

therefore ld PCIT issued a notice under section 263 of the Act, which was duly served upon the assessee, through e-proceedings.

7. In compliance with the show cause notice, the assessee has furnished his reply on 01.03.2023, relevant portion of which is reproduced as under:

*“This is with reference to above captioned show cause issued u/s 263 of the Income Tax Act by your goodself on 27.09.2022, wherein your goodself has request me to furnish certain information/or clarification on the issues raised in assessment proceedings which was finalized on 05.02.2021 by National E-Assessment Centre passing assessment order u/s 143(3) r.w.s. 143(3A) & 143(3B) for which I am submitting my clarification/or explanations as under:*

*1.In the captioned show cause notice your goodself has recalculated calculated index cost of acquisition and index cost of improvement on the basis of % method of my relevant share. In this regard I would like to bring to your goodself that during the course of e-assessment proceeding, vide letter dated 03.11.2020 the Index Cost of Acquisition and Index Cost of Improvement was duly inquired by NEAC.*

*1.1 Para 1 that, On perusal of your reply dated 02.11.2020, it is seen that at the time of purchase of property, the amount paid was 39,51,700/- vide cheque no. 537091, 537092, 583942 and 583943 through ABN Amro Bank and share of individuals was not defined. As the half of payment mode by continuous cheque i.e. 19,75,850/- by cheque no 537091 and 537092, which belongs to some account and the other half payment was made by other continuous cheques i.e. 19,75,850/- by cheque no 583942 and 583943, these belongs to same account. Further, in sale deed dated 01.09.2017, the 41.04% of consideration was paid to you and 58.96% of consideration was paid to the other owner. Please justify your claim of share in the property at the time of purchase and sale with sufficient documentary evidence.*

*1.2 Para 3 that, On perusal of ITR, it is seen that you have claimed cost of improvement with indexation of Rs.57,42,000/-. Please furnish the documentary evidences in support of cost of improvement and necessary calculation for arrival of this amount. Copy of the said notice dated 03.11.2020 is enclosed and marked as Anneure-1 for your records.*

*2.1 However in respond to the aid notice, I vide my letter dated 30.11.2020, I have duly informed/explained in para 1.2 I hereby humbly submit that the share in the property was in the ratio of 50:50 with my brother Shri Prakashbhai Prahaladbhai Gami. Thereafter there was a dispute in the family and at the time of sale of the property, I was given only Rs.4,58,00,000/- being 41.04% of the sale consideration and the balance was taken by Shri Prakashbhai Prahaladbhai Gami as orally agreed between us to settle the dispute in relation to the said property. I have accordingly calculated the capital gains as per the actual consideration received by him and paid the required taxes accordingly. The balance sale consideration was received by my brother Shri Prakashbhai Prahaladbhai Gami and he has declared the same in his return of income as informed to me and has also paid the necessary taxes on the same.*

2.2 Further in the said letter dated 30.11.2020, I have duly informed in para 3.0 the details of the cost of improvements of Rs.57,42,000/- is as under:

Sr.No.	Particulars	Amount
1	Payment made to Surat Municipal Corporation Bill (SMC) dated 2/08/2016 (50% of Exp. Rs.1,07,79,600)	53,89,800
2	Payment made to Surat Municipal Corporation Bill (SMC) dated 04/02/2017 (50% of Exp. Rs.1,13,200)	56,600
3	Surat Mahanagar Seva Sadan (SOP of Exp. Rs.1,67,493)	83,746
4	Payment made to Surat Municipal Corporation Bill (SMC) (50% of Exp. Rs.423708)	2,11,854
	Total improvement cost incurred during the year under consideration by me	57,42,000

2.3 Thus from the above, submission along with documentary evidence submitted to NEAC, it was informed during enquiry and explained about the Index Cost of Acquisition and Index Cost of Improvement and further all cost of improvement expenses were incurred by cheque only during the year under consideration to Municipal Corporation and all the receipts of the said cost of improvement expenses were duly submitted before the NEAC during the course of e-assessment proceedings.

2.4 However in your show cause notice issued u/s 263 of the Act wherein your goodself have calculated index cost of acquisition and index cost of improvement on the basis of % method of my relevant share but your goodself hasn't considered the actual payment and receipt for the said immovable transaction done by me. However, for the said immovable property I have incurred following cost which is as under:

Sr.No.	Particulars	Amount (Rs)
1	Cost of acquisition consideration	19,75,850
2	Stmp paper	97,000
3	Registration fees	19,825
4	SMC (IC) incremental contribution fee	11,44,768
5	Leveling and other fees	9,99,000
	Total cost of acquisition consideration	42,36,443
	Total index cost of acquisition consideration	

2.5 Thus from the above it very clear that your gooself have calculated index cost of acquisition and index cost of improvement on the basis of % method of my relevant share but your goodself hasn't considered the actual payment and receipt for the said immovable transaction during the course of assessment proceedings. Thus from the above, it was very clear that all the information which was provided by me during the course of e-assessment was duly verified by the NEAC and all the details I would like to inform your goodself that I have duly offered the my share of capital gain and cost incurred by me for the relevant transaction and tax on sale of immovable in

*my return of income which is duly enclosed for your reference as Annexure-3 for your records.*

*3.0 In case your goodself required any further information &/or document please let me now. Further an opportunity may kindly be granted before drawing any adverse inference, if any. Hence, I humbly request your goodself to kindly drop the show cause notice issued u/s 263 and provide relief to us.”*

8. However, Id PCIT has rejected the contention of the assessee and observed that during the assessment proceedings, the assessee has submitted that his share in the property was in the ratio of 50:50 with his brother Shri Prakashbhai Prahaladbhai Gami and there was a dispute in the family at the time of sale of the property and the assessee was given only Rs.4,58,00,000/-being 41.04% of the sale consideration and the balance was taken by Shri Prakashbhai Prahaladbhai Gami as orally agreed between them to settle the dispute in relation to the said property. The AO was required to verify this issue and capital gain offered in light of the facts, which he has failed to do. Therefore, Id PCIT observed that the assessment order has been passed by the AO without making inquiry/verification which should have been made, therefore the assessment order passed u/s 143(3) dated 05.02.2021 is deemed to be erroneous in so far as it is prejudicial to the interest of Revenue within the meaning of Section 263 of the Act.

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

10. At the outset, Learned Counsel for the assessee, argued that while passing the original assessment order u/s 143(3), dated 05.02.2021, the assessing officer made adequate enquiry about the issue raised by Id PCIT in his revision order. The assessing officer issued notice u/s 142(1) dated 03.01.2020 (vide pages 16-18 of paper book) wherein the assessing officer has raised the relevant question. In response to the notice, the assessee submitted its reply dated 14.09.2020 (vide paper book pages 19-22). Thus, Id counsel submitted that after making adequate enquiry, the assessing

officer took possible view and has framed the assessment order. Therefore, the order passed by the assessing officer should not be erroneous.

11. On the other hand, Ld. CIT-DR for the Revenue relied on the findings of Ld. PCIT.

12. 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. We note that Id Counsel for the assessee submitted before the Bench the following documents and evidences, viz:(i) Income Tax Return acknowledgment, along with computation of total income for A.Y. 2018-19 (page nos. 12-15 of paper book) (ii) Notice u/s 142(1) dated 03.01.2020 (pages 16-18 of paper book) (iii) Reply submitted by the assessee, dated 14.09.2020, in response to above notice,( vide pages 19-22 of paper book) (iv) Sale dated 01.09.2017 ( vide pages 23-49 of paper book); (v) Purchase dated 31.03.2002 ( vide pages 50-62 paper book), (vi) Notice u/s 142(1) dated 16.10.2020 ( vide pages 63-64 of paper book) (vii) Reply dated 02.11.2020 in response to above notice ( vide pages 65 of paper book).(viii) English translation of sale deed dated 01.09.2017 (pages 66-97 of paper book) (ix) English translation of purchase deed dated 31.03.2008 (pages 98-112 of paper book) (x) Notice u/s 142(1) dated 03.11.2020 (page nos.113-114 of paper book) (xi) Reply filed by the assessee, dated 30.11.2020 in response to above notice ( vide pages 115-118 of paper book) (xii) Copy of receipts of cost of improvement ( vide pages 119-121 of paper book).

13. We note that assessee has calculated index cost of acquisition and index cost of improvement on the basis of % method of relevant share but hasnot considered the actual payment and receipt for the said immovable transaction during the course of assessment proceedings. We note that assessee has submitted before assessing officer that his share in the property

was in the ratio of 50:50 with his brother, Shri Prakashbhai Prahaladbhai Gami and there was a dispute in the family at the time of sale of the property and the assessee was given only Rs.4,58,00,000/-being 41.04% of the sale consideration and the balance was taken by Shri Prakashbhai Prahaladbhai Gami. All the information which was provided by the assessee during the course of assessment was duly verified by the assessing officer (NEAC) and all the same details were submitted before Id PCIT. That is, the assessee submitted before the assessing officer, the share of capital gain and share in the cost incurred by assessee for the relevant transaction and due taxes were paid by the assessee. Based on the facts order passed by the Assessing Officer is neither erroneous nor prejudicial to the interest of Revenue.

14. We are very much conscious of Hon'ble Apex Court's landmark decision in Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83(SC) wherein their Lordship have held that *twin* conditions needs to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the PCIT. The twin conditions are that the order of the Assessing Officer must be erroneous and so far as prejudicial to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed on incorrect assumption of fact; or (ii) incorrect application of law; or (iii) Assessing Officer's order is in violation of the principle of natural justice; or (iv) if the order is passed by the Assessing Officer without application of mind; (v) if the AO has not investigated the issue before him; then the order passed by the Assessing Officer can be termed as erroneous order. Coming next to the second limb, which is required to be examined as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue. When this aspect is examined one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industries

(supra) held that this phrase i.e. “*prejudicial to the interest of the revenue*” has to be read in conjunction with an *erroneous order* passed by the Assessing Officer. Their Lordship held that it has to be remembered that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue “**unless the view taken by the Assessing Officer is unsustainable in law**”. We are aware of the fact that the Assessing Officer’s role while framing an assessment is not only an adjudicator. The AO has a dual role to dispense with i.e. he is an *investigator* as well as an *adjudicator*; therefore, if he fails in any one of the role as afore-stated, his order will be termed as erroneous. We take note that it is not the case of Id. Principal CIT that AO failed to made any enquiry. The impugned order of the CIT has to be quashed for the reason that order of the AO 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 AO ought to have made in the given facts and circumstances of the case. We accordingly quash the order u/s 263 of the Act and allow the appeal of the assessee.

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

Order is pronounced on 26/09/2023 by placing record on notice board.

Sd/-  
(PAWAN SINGH)  
JUDICIAL MEMBER

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

सूरत/Surat

दिनांक/ Date: 26/09/2023

Dkp Out sourcing 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

By Order

**// True Copy //**

Assistant Registrar/Sr. PS/PS  
ITAT, Surat