

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

ITA No.2271/Del/2017
Asstt. Year: 2012-13

Neelam Malhotra 28/1A, Streret No. 6 Nnand Parbat, Indl. Area Delhi – 110 005 PAN AALPM8514C	Vs.	Pr. CIT-16 Room No. 101, Drum Shape Building New Delhi – 110 002
(Appellant)		(Respondent)

ITA No. 2270/Del/2017
Asstt. Year 2012-13

Praveen Kumar Malhotra 28/1A, Streret No. 6 Anand Parbat, Indl. Area Delhi – 110 005 PAN AALPM8085C	Vs.	Pr. CIT-16 Room No. 101, Drum Shape Building New Delhi – 110 002
(Appellant)		(Respondent)

Assessee by:	Shri Krishnan, Advocate
Department by :	Smt. Meeta Singh, CIT(DR)
Date of Hearing	01/10/2018
Date of pronouncement	30/11/2018

ORDER

PER AMIT SHUKLA, J.M.

The aforesaid appeals have been filed by the above named assessee against separate impugned order dated 15.2.2017 and

16.2.2017, passed u/s 263 by Ld. Pr. CIT Delhi 16 for the assessment year 2012-13. Since issues involved in both the appeals are identical arising out of similar set of facts, therefore, same were heard together and are being disposed off by way of this consolidated order.

2. We will take up the appeal of Smt. Neelam Malhotra and our finding given therein will apply *mutatis mutandis* in the appeal of Shri Praveen Kumar Malhotra also. Assessee has challenged the impugned order of Ld. PCIT u/s 263 cancelling the assessment order in respect of one issue, i.e., valuation of shares 'M/s. Sundial Infotech Pvt. Ltd.' and computation of long term capital gain and consequent claim of deduction u/s 54F.

3. The facts in brief are that, the assessee is in the computation of income for the assessment year 2012-13 has shown Long Term Capital Gain from sale consideration from transfer of shares at Rs.6,74,30,171/-. Such long term capital gain on sale of shares was invested in purchase of residential property on which exemption u/s 54F was claimed. The AO during the course of assessment proceedings had asked the details of long term capital gain on sale of shares and also examine the claim of exemption u/s 54F. In response, the assessee has given all the details and the documents on the basis of which assessee had claimed exemption u/s 54F. After examining the details the AO duly accepted the Long term capital gain and also allowed the claim of exemption u/s 54F vide order dated 12.1.2015.

4. Thereafter, the Ld. Pr. CIT in his revisionary jurisdiction u/s 263 had raised as many as 6 issues which have been highlighted in the impugned order. In response to the said show cause notice assessee filed detailed reply which has been incorporated and dealt by the Ld. PCIT in detail in the impugned order. After considering the entire submissions, the Ld. Pr. CIT has dropped 5 points out of 6 points

raised and since no action has been taken by him on those 5 points, therefore, we do not deem fit to discuss those issues which was raised by him in the show cause notice and later on he has dropped the pointes in favour of the assessee. However, with regard to one issue i.e., the valuation of shares and the sale consideration shown by the assessee from sale of shares of M/s. Sundial Infotech Pvt. Ltd., he held that the valuation of the shares and sale consideration receipt is much higher. After considering the facts relating to sale of shares he has noted the following facts:-

“1.1 The assessee had interest in the company M/s. Sundial Infotech Pvt. Ltd. and was having 3750 shares of that company since 31.08.2006-and 02.05.2006. These shares were sold by the assessee along with other share holders on 02.01.2012 to a company M/s. Veecon-IPA Gastechnik Ltd. with management and controlling interest of M/s. Sundial Infotech Pvt. Ltd. along with all assets held by the company Sundial Infotech Pvt. Ltd. The resulting long term capital gains on sale of shares was invested by the assessee in a residential property and claimed exemption u/s 54F of the IT Act 1961. In the written submissions, the counsel for the assessee stated that the assessee invested Rs. 6,84,80,000/- for purchase of residential house which consists of transaction value of Rs. 6,40,00,000/- and stamp duty of Rs. 44,80,000/-. Since the investment in purchase of house property is more than the net sale consideration of Rs. 6,74,30,171/- of the shares, therefore, whole of the capital gain was claimed exempt u/s 54F.”

5. Ld. PCIT observed that assessee has inflated the sale consideration of the shares of M/s. Sundial Infotech Pvt. Ltd. and in this garb has introduced her own unaccounted income in the shape of inflated sale consideration of the said shares and thereby declaring

higher long term capital gain for claiming deduction u/s 54F. The reason given by him to make such observation was that the company M/s. Sundial Infotech Pvt. Ltd. was holding a property admeasuring 3300 Sq. Mt. shown in the balance sheet of the company under the head tangible assets and work-in-progress. Assessee had contended that the price of the shares valued by the assessee was on the basis of net worth of the company which depends upon the fair market value of the assets including land measuring 3300 Sq. Mt. held by the company and not on the basis of cost of assets appearing in the books of accounts. The price of the immovable property increased over the passage of the time and resultantly the price of the shares also were increased. It was further pointed out by the assessee that the purchaser of the shares, M/s. Veecon-IPA Gastechnik Ltd. is a renowned company specializing in design, installation and commissioning of industrial gas generation plants and gas purification systems. This company has acquired all the shares of M/s. Sundial Infotech Pvt. Ltd. the sale of 3750 shares held by the assessee was a genuine sale, done at the fair market value, therefore, order of the AO is not prejudicial to the interest of the revenue. In support of valuation of the shares on net assets value method, it was pointed out that land was taken at RS. 38,61,00,000/-, whereas the value of the land as per balance sheet was only Rs. 1,61,22,124/- and capital-work-in-progress was Rs. 1,09,54,963/-.The total value of fixed assets was thus, Rs. 2,70,77,087/- in the books, whereas the fair market value of the land was Rs. 38,61,00,000/-. In support of such valuation, Valuation Report of Govt Approved Registered Valuer was also filed who has taken the value of land at Rs. 1,17,000/- per sq. Mt.

6. However, Ld. PCIT held that registered valuer has not given any basis for value of land at Rs. 1,17,000/- per sq. mt and value adopted is arbitrary. The proper method to arrive at the correct value of fair

market value of the land should have been stamp duty rate of the land at the time of sale of shares and on this basis he has rejected the registered valuation report. Accordingly, he held that sale consideration of the shares of M/s. Sundial Infotech Pvt. Ltd. has been inflated by introducing unaccounted money to show higher value of long term capital gain and thereby claiming deduction u/s 54F of the higher value and thus, he set aside the assessment order on this issue after observing and holding as under :-

“In the result, the assessment order dated 12.1.2015 passed by the Assessing Officer for A.Y. 2012-13 is set aside on the issue of valuation of shares of M/s. Sundial Infotech Pvt. Ltd. and computation of Long Term Capital Gain and deduction u/s 54F of I.T. Act, 1961. The Assessing Officer is directed to pass a fresh assessment order after giving due opportunity of being heard to the assessee and also after taking into account all the relevant facts and confronting the same to the assessee.”

7. We have heard both the parties at length and also perused the relevant finding given in the impugned order as well as material preferred to before us. The main allegation on which assessment order has been set aside is that assessee has inflated the fair market value of the land belonging to the company, M/s. Sundial Infotech Pvt. Ltd. and thereby has increased the value of the shares so as to earn higher long term capital gain and claiming higher deduction of section 54F. It is not in dispute that sale of shares of M/s. Sundial Infotech Pvt. Ltd. is subject to long term capital gain which is chargeable u/s 45. The assessee had sold shares of M/s. Sundial Infotech Pvt. Ltd. for a sum of Rs. 6,89,88,159/- and the net sale consideration shown was Rs. 6,74,30,171/-. The long term capital gain and exemption u/s 54F was claimed in the following manner:

Particulars	Amount
Full Value of Consideration (affidavit from Veecon and bank statement attached)	6,89,88,159/-
Less : Expenditure incurred in connection with transfer (i.e.) sales commission paid to Chopra Promoters & Developers) (invoice attached and tallies with bank statement)	15,57,988/-
Net Sales Consideration	6,74,30,171/-
Less : Indexed Cost of Acquisition (cost of acquisition x CII of FY 2011-12/CII of FY 2006-07) (12,500 x 785/519)	11,53,300/-
Long-term Capital Gains	
Less: Exempt u/s 54F (refer note below)	6,62,76,871/-
Taxable Long-term Capital Gains	6,62,76,871/-
	NIL

8. The main charge of the Ld. PCIT in the impugned order is that sale consideration of the shares has been inflated for the reason that the land owned by the said company has been valued at a very higher rate based on Valuation Report. Nowhere, Ld. PCIT has observed or held that under the sale agreement for transfer of shares, the consideration received was less than Rs. 6,89,88,159/-, because this fact is clearly evident from the bank statement filed before the AO as well as Ld. PCIT which is not in dispute. If long term capital gain has been shown on the basis of full value of consideration received as a result of transfer of the capital assets, then without any material on record to show that such a sale transaction or transfer is sham or

bogus, then the full value of the consideration received or accruing cannot be disturbed. This is clearly evident from the terms expressed in section 48 which reads as under:-

*“The income chargeable under the head “Capital gains” shall be computed by deducting from **the full value of the consideration received or accruing as a result of the transfer of the capital asset** the following amounts namely*”

The full value of consideration received or accruing cannot be substituted either by fair market value or otherwise at least in the assessment year 2012-13, because the provision of deeming fiction of substituting the FMV of shares has been brought by way of Section 50CA which has been introduced from w.e.f. 1.4.2018 i.e., from the A.Y. 2018-19, which provides that, where consideration received or accruing as a result of transfer of a capital assets being shares of a company is less than the fair market value determined in the manner as may be prescribed, then the value so determined shall be for the purpose of section 48 be deemed to be full value of consideration received or accrued as a result of such transfer. The prescribed method of valuation of shares has been given in Rule 11 UA. Thus, the full value of consideration received on transfer of shares cannot be substituted either by fair market value or by any other manner, at least in the concerned assessment year before us (i.e., Asstt. Year 2012-13). Even otherwise also Section 50CA postulates that from assessment year 2018-19 that the full value consideration if is less than the fair market value, then that would be a deemed consideration receipt in terms of section 48. Here in this case, assessee had shown the shares which have been determined by method which is one of the prescribed method under the rule 11UA. Ld. PCIT is trying to substitute the full value of consideration received on transfer of shares

by holding that the valuation of the shares should be much less as declared by the assessee, i.e., the full value of consideration which is subject to chargeability under the head long term capital gain should have been far less than what has been shown by the assessee. First of all, the full value of consideration on transfer of capital asset is subject to taxability u/s 45; and section 48 provide the mode of computation for deducting various amounts for the purpose of working of the capital gains which is to be deducted from the full value of the consideration relieved or accrued from sale of capital asset and that to flowing from the agreement between the parties. Once the long term capital gain has been arrived u/s 48, then only the issue of exemption u/s 54 or 54F or 54EC, etc. would apply. Thus, the full value of the consideration received from the transfer of shares by the assessee cannot be substituted either by holding that the fair market value is less or the fair market value is more. The phrase used is the *full value of consideration received or accrued as a result of transfer of capital assets* and nowhere the section or the Act provides that such full value of consideration receipt can be substituted except for deeming provision provided u/s 50C, 50CA and 50D. As held above, 50CA is not applicable the assessment year 2012-13 and therefore, we hold that Ld. PCIT could not under the law have tinkered with the amount of full value of consideration received by the assessee on sale of shares. Accordingly, we hold that assessment order passed by the AO is not erroneous in law. It is a trite and settled position of law that in order to acquire jurisdiction u/s 263 the Ld. CIT or PCIT has to satisfy himself that the assessment order passed is erroneous in so far as it is prejudicial to the interest of revenue and such twin conditions have to be fulfilled as simultaneously i.e. if order is not erroneous but prejudicial and vice versa, then Ld. CIT/PCIT cannot cancel the assessment order. Both the conditions are not mutually exclusive to

each other as both the conditions have to be fulfilled simultaneously. This proposition has been laid down by the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. vs. CIT (2000) 243 ITR 83 (SC).

9. Thus, the order of the AO in accepting the full value of the consideration received on transfer of shares cannot be held to be erroneous and therefore, such assessment order could not have been set aside or cancelled.

10. It appears that the only reason by the Ld. PCIT to hold that assessment order is erroneous in so far as prejudicial to the interest of revenue because the assessee has claimed higher exemption u/s 54F by inflating the sale value of the shares. The claim of exemption u/s 54F from of long term capital gain tax, i.e., first long term capital gain has to be assessed or worked out in the manner provided in section 48 and then the resultant long term capital gain would be subjected to tax u/s 45. The statute then provides exemption from long term capital gain tax can be availed by an assessee, if he invests the long term capital gain in the manner given in section 54 to 54EC. First step is determination of long term capital gain and then only exemption of benefit of section 54 to 54EC is available. Here in this case the Ld. CIT is trying to hold that the long term capital gain shown by the assessee is more and therefore, deduction or exemption claimed u/s 54F has been inflated. This perhaps is not the correct approach, because first of all he has to give a definite finding as to why long term capital gain u/s 40A is not correct and then he can tinker with the exemption provision. As we have already held above the Ld. PCIT could not have substituted the full value of consideration received which has been agreed by the parties in the agreement wherein one party is selling the capital asset and other party is purchasing such an asset. The full value of the consideration received has to be reckoned from the price

and the value of the consideration received or accrued which cannot be tinkered under the then existing provision of law. Accordingly, we set aside the impugned order passed u/s 263 and uphold the order of the assessment order and the computation of long term capital gain and consequently exemption/s 54F. In the result appeal of the assessee is allowed.

11. As stated above precisely the same issue is involved in the case of Shri Praveen Kumar Malhotra also wherein identical finding and observation has been given by the Ld. PCIT. Hence, our finding given above will apply *mutatis mutandis* for this appeal also and consequently, appeal of the assessee is allowed.

In the result both the appeals of the assessee are allowed.

Order pronounced in the Open Court on 30th November, 2018.

sd/-

**(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

Dated: 30/11 /2018

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Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

sd/-

**(AMIT SHUKLA)
JUDICIAL MEMBER**

ASSISTANT REGISTRAR
ITAT, New Delhi

