आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'C' अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, AHMEDABAD

BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
& SHRI MAHAVIR PRASAD, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No. 643/Ahd/2019

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

Smt. Minal Nayan Shah E 101, Altius-II, Iskon Amali Road, Near Ashok Vatika, Ahmedabad - 380058	**बनाम**/ Vs.	**Principal Commissioner of Income Tax -3** 411, C Wing, 4th Floor, Pratyakshkar Bhavan, Ambawadi, Ahmedabad - 380015
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ACIPS6341L		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से /**Appellant by :**	Shri S. N. Soparkar, Sr. Advocate with Shri Parin Shah, A.R.
प्रत्यर्थी की ओर से/**Respondent by :**	Shri Jitendra Kumar, CIT.D.R.

सुनवाई की तारीख / **Date of Hearing**	01/10/2019
घोषणा की तारीख /**Date of Pronouncement**	15/10/2019

आदेश/O R D E R

PER PRADIP KUMAR KEDIA - AM:

The captioned appeal has been filed at the instance of the Assessee against the order of the Principal Commissioner of Income Tax-3, Ahmedabad ('Pr.CIT' in short), dated 25.03.2019 arising in the assessment order dated 27.12.2016 passed by the Assessing Officer (AO) under s. 143(3) of the Income Tax Act, 1961 (the Act) concerning AY 2014-15.

2. The assessee in the present appeal has challenged revisional jurisdiction of the Pr.CIT invoked under s.263 of the Act whereby order of the AO under s. 143(3) of the Act dated 27.12.2016 is directed to be set aside by the Pr.CIT for fresh assessment on the grounds of lack of inquiry into certain vital aspects concerning eligibility of deduction under s.54F of the Act.

3. Briefly stated, the assessee, an individual, derives income from house property, capital gain and other sources. The return of income of the assessee for AY 2014-15 was subjected to scrutiny assessment and consequently, assessment order was framed under s.143(3) of the Act. The AO completed the assessment and accepted the income declared as per return of income amounting to Rs.1,26,94,100/- as assessed income without any adjustment. On verification of assessment records, the Pr.CIT found that the assessment order passed by the AO is erroneous and prejudicial to the interest of the Revenue. The Pr.CIT accordingly invoked revisional jurisdiction conferred under s.263 of the Act to show cause the assessee on the alleged infirmity in the assessment order which is narrated hereunder for ease of reference:

> *"Please refer to order passed under section 143(3) of the Income Tax Act, 1961 for A.Y. 2014-15 on 27.12.2016 by the DCIT,Cirete-3(3), Ahmedabad thereby, accepting your returned income i.e. Rs 1,26,94,100/- as per Return of income filed on 23.04.2015.*
>
> *On examination of records, it is noticed that your father, Late Pramodbhai Ratilal Shah, had entered into a development agreement with M/s Synthesis Engineers for the development and evolving of a project for construction of residential flats on the land situated at Bodakdev bearing Survey No. 123/2/3 and 123/4 against a consideration of Rs.8,10,00,001/- on 30/03/2010. Upon demise of your father, you have inherited the rights in the said property alongwith your brother-in-law Shri Sandeep J Shah and both of you have entered into a deed of confirmation with m/s.Synthesis Engineers on 26/07/2011 thereby enhancing yours consideration to Rs 13,47,83,000/- for the said land. As per computation of income as furnished by you during the assessment proceeding, you have shown Rs.4,79,68,453/- as your share of sale consideration received against the sale of aforementioned immovable asset during the year under consideration. You have claimed Rs.6,94,425/- as indexed cost of acquisition and as such Rs.4,72,74,028/- is calculated to be your gross Long Term Capital Gain so accrued against the sale of the immovable asset. Against the Gross Long Term Capital Gain, you have claimed*

Rs.1,00,00,000/- as deduction u/s 54EC of the Act and Rs.2,51,35,374/- as deduction u/s 54F of Act. Upon further verification, it has been noticed that this deduction u/s 54F of the Act has been claimed against the purchase of entire E Block [consisting of 03 residential units namely Unit 101, 201 & 301 each admeasuring 4910 Sq ft (super built up area) of the residential project Altius II which was being developed by M/s Synthesis Engineers upon your aforementioned land parcel. Further, out of the whole residential project, named as 'Altius-II' having Six blocks, each consisting 03 residential units, you had purchased the entire Block E alongwith Shri Sandeepbhai Jaswantlal Shah (the co-owner of the land) with equal share for a sum of Rs 4,71,23,702/-.

3. From the facts given above, it is evident that your said actions towards this land deal are adventure in nature of trade and should be brought under taxation under the head income from business. This fact is further strengthen by following facts:-

*(a) **Treatment given by the assesses to the land parcel :-** It can be noticed that you were treating the impugned land as "Stock in Trade". It is pertinent to mention here that, as per the will of your father, Late Pramodbhai Ratilal Shah, you have acquired undisputed right of 50% in the said land upon his death on 01/1 1/2010 and since, as per the Development Agreement entered by your late father on 30/03/2010, the impugned land had already been valued at Rs.8,10,00,001/- and your shares works out to Rs. 4,05,00,000/- which is above the wealth tax limit. Hence, the moment you had inherited the property, you became liable for payment of wealth tax. As you had claimed to have effected the sale transaction of the impugned land in the AY 2014-15, you should have filed wealth tax return for the intermediate period between the transaction i.e. AY 2011-12, AY 2012-13, AY 2013-14 duly including the said impugned investment in your statement of wealth. As per records available with the office and citing the fact that you have never claimed) to have filed any such return, it can be easily concluded that you were treating the impugned land as "Stock-in-Trade" and gain accrued from the impugned transaction can only be treated as Business Income and not Long Term Capital Gain.*

*(b) **Does the act of the assessee amount to adventure in nature of trade**:- You had inherited the property from your father upon his demise on 01/11/2010 and within 08 months, you had entered into another deed of confirmation with the developer i.e. M/s Synthesis Engineers thereby enhancing your consideration by 66% to the original consideration. This transaction cannot be said to be investment but is d Clear case of adventure, in nature of trade. **The motive to enter into development agreement by the father of the assessee and its subsequent confirmation by the assessee is a clear indicative that the land has been acquired solely to make profit at later stage by developing it into a commercially viable real estate project.** The motive of the land owners including the assessee was to earn profit through activity of development of land which is adventure in the nature of business. In this context, reliance is placed on the judgment of the Hon'ble Supreme Court in the case of C Venktaswami Naidu and Co Vs CIT [1959] 35 ITR 594 in which the Hon'ble Apex Court held that in a given case, even an isolated*

transaction can satisfy the description of an adventure in the nature of trade provided at least some of the essential features of trade are present in the isolated or single transaction.

(e) ***Act of the assessee in furtherance of the development agreement entered into by his late father*** *:- From the case records, it is clear that the assessee alongwith the other co- inheritor has entered into another supplementary deed of confirmation thereby enhancing the consideration receivable by 66% in comparison to the original development agreement. This act of the assessee is also an indicative of the fact that you have availed the opportunity to enhance your receipts which is clearly an act of adventure in nature of trade.*

3.1 From the above, it is crystal clear that your actions towards this land deal are in adventure in nature of trade and the assessing officer should have treated the income of ***Rs 4,77,77,003/-[Sale proceeds less cost of acquisition without indexation] arisen on sale of the land at Survey No 123/2/3 & 123/4 should have been taken as your business income with resultant disallowance of your claim of deductions u/s 54F and 54EC of the act of total amounts of Rs 3,51,35,374/-.*** *This fact has not been considered by the Assessing Officer in the assessment order passed on 27.12.2016 and hence the order is erroneous and prejudicial to the interest of revenue. You are therefore requested to show cause as to why the assessment made u/s. 143(3) on 27.12.2016 should not be modified u/s. 263 of the Act by directing a fresh assessment.*

4. ***Without prejudice to the above and as an alternative recourse,*** *it has further been noticed from the case records that the deduction u/s 54F has been claimed on account of purchased of the entire Block E of the scheme in the name and style 'Altius-II'. Vide Para 3 of your submission dated 14.12.2016 you have mentioned that you along with Shri Sandeep J Shah have purchased the entire super Structure of E Block which consists of 3 units for a consideration of Rs 4,71,23,702/- and had accordingly claimed deduction u/s 54F of the Act.*

4.1 In this connection, your attention is drawn towards the conditions laid down to claim deduction u/s 54F of the Act, extract of which is given as under:-

Where, in the case of an assesses being an individual, the capital gain arises from the transfer of any long-term capital asset, not being a residential house (hereafter in this section referred to as the original asset), and the assessee has/ within a period of one year before or after the date on which the transfer took place purchased, or has within a period of three years after that date constructed, ***a residential house (hereafter in this section referred to as the new asset)****, the capital gain shall be deal with in accordance with the following provisions of this section, that is to say, —*

(a) if the cost of the new asset is not less than the net consideration in respect of the original asset, the whole of such capital gain shall not be charged under section 45;

(b) if the cost of the new asset is less than the net consideration in respect of the original asset, so much of the capital gain as bears to the whole of the capital gain the same proportion as the cost of the new asset bears to the net consideration, shall not be charged under section 45:

Provided that nothing contained in this sub-section shall apply where the assessee ***owns on the date of the transfer of the original asset, or purchases, within the period of one year offer such date, or constructs, within the period of three years offer such date, any residential house, the income from which is chargeable under the head "Income from house property", otter than the new asset.***

4.2 If the above view is taken, it is evident that you have purchased the entire super structure of E Block consisting of 03 independent, units, and not a residential house and hence as per the applicability clause of section 54F of the Act, you are-not eligible for the claim of deduction u/s 54F of the Act and accordingly, ***your claim of such deduction u/s 54F of the Act amounting to Rs 2,51,35,374/- should have been disallowed****. However, you may kindly note that if this view is taken, it may result in drawing appropriate inference on you're the Wealth tax liability under wealth Tax Act for AY 2011-12, AY 2012-13 & AY 2013-14 and may lead to initiation suitable action as per law.*

4.3 These facts have not been considered by the Assessing Officer in the assessment order passed on 27.12.2016 and hence the order is erroneous and prejudicial to the interest of revenue. You are therefore requested to show cause as to why the assessment made u/s. 143(3) on 27.12.2016 should not be modified u/s.263 of the Act by directing a fresh assessment.

5. In case you have any objection to the action proposed, you are requested to furnish your reply on the proposed action by 29/01/2019 at my office at Room No. 411, C-Wing, Pratyakshkar Bhavan, Ambawadi, Ahmedabad 380 015.. You may also avail opportunity of hearing, either in person or through your Authorized Representative, on 29/01/2019 at 12.30 PM. However, it is clarified that personal appearance is not compulsory and furnishing of written submission completed in all respect shall be treated as sufficient compliance."

4. The Pr.CIT, in essence, raised two grounds for invoking jurisdiction under s.263 of the Act; (i) gain arising by virtue of development agreement in relation to land parcel is in the nature of 'business income' as against the capital gains claimed by the assessee and (ii) deduction claimed under s.54F of the Act on account of the entire block of the residential project so developed is not in accordance with law and wrongly allowed by the AO without requisite inquiry. However, as stated on behalf of assessee in the course of hearing before Tribunal, the assessee is no longer aggrieved by

the first ground concerning determination of nature of income arising from development agreement. The only controversy thus revolves around eligibility of deduction under s.54F of the Act only.

5. As regards the second issue towards eligibility of deduction under s.54F of the Act with which we are presently concerned with, the Pr.CIT observed that the entire super structure of the block in the project named Altius-II comprises of 3 independent units and thus cannot be regarded as 'a residential house' contemplated under s.54F of the Act and hence, the assessee is not eligible for claim of deduction under s.54F of the Act to the extent of Rs.25,35,374/-. It was also alleged that the AO committed error in admitting the claim of deduction of the assessee in contravention of Section 54F of the Act. It was also alleged that the AO has wrongly accepted the aforesaid claim under s.54F of the Act without making any requisite inquiry in this regard. The Pr.CIT accordingly passed order under s.263 of the Act and set aside the assessment passed under s.143(3) of the Act with a direction to the AO to pass a fresh assessment order after proper inquiry and after ascertaining the facts relevant to the eligibility of deduction in question.

6. Aggrieved by the action of the Pr.CIT cancelling the assessment earlier made, the assessee preferred appeal before the Tribunal and challenged the usurpation of revisional jurisdiction by the Pr.CIT.

7. In its defense, the learned Senior Counsel for the assessee submitted at the outset that the necessary background for exercise of revisional power of Pr.CIT does not exist. The learned Senior Counsel referred to a notice issued by the AO under s.142(1) of the Act dated 09.11.2016 to submit that the AO did initiate inquiry with respect to working of the long/short term capital gains which included claim of the exemption under s.54F of the Act. In fact, Question no. 8 of the questionnaire clearly reflects the consciousness of the AO towards existence of claim of exemption under s.54F of the Act. The learned Senior Counsel thereafter referred to the reply thereof by the assessee in response to the aforesaid notice and

submitted that all the questions raised in the notice issued under s.142(1) of the Act has been appropriately dealt with. The learned Senior Counsel thereafter adverted to the conveyance deed dated 04.02.2014 placed before AO whereby the developer agreed to transfer to the assessee the entire construction of super structure of block 'E' in the residential project for a total consideration of Rs.4.71 Crores. The cost of land belonging to the assessee was suitably reduced and exemption under s.54F of the Act to the extent of Rs.2.51 Crore was claimed which essentially has been controverted by the Pr.CIT. The learned Senior Counsel also referred to the development agreement for transfer of land belonging to the assessee alongwith attendant supplemental agreement and deed of confirmation to explain the whole gamut of transactions pertaining to transfer of land parcel and thereafter retrieving back a part of the land together with super structure constructed by the developer.

7.1 It was submitted that the controversy in the present case is limited to the eligibility of deduction under s.54F of the Act where the super structure comprises of 3 residential units. The learned Senior Counsel emphasized that notwithstanding the fact that the super structure of block 'E' purchased by the assessee comprises of 3 residential units, the entire structure has been purchased by the assessee by a common deed of conveyance. As referred to earlier, all the 3 residential units is required to be understood combinedly as 'a residential house' for the purposes of claim of deduction under s.54F of the Act. The learned Senior Counsel submitted that the Pr.CIT has wrongly construed 3 residential units as 3 residential houses instead of 1 conjoint residential house and consequently, disputed the eligibility of deduction under s.54F of the Act on the grounds of not meeting the criteria for eligibility of one residential house. In the context, the learned Senior Counsel for the assessee referred to the decision of Hon'ble Karnataka High Court in *CIT vs. Smt. K. G. Rukminiamma (2011) 331 ITR 211 (Karnataka); CIT vs. Gita Duggal (2013) 357 ITR 153 (Delhi); CIT vs. Gita Duggal (2014) 52 taxmann.com 246 (SC), CIT vs. Syed Ali Adil (2013) 352 ITR 418 (AP)* and *CIT vs. Smt. V. R. Karpagam (2015) 373 ITR 127 (Madras)* for construction of the expression 'a residential house'

in the context of Section 54 and Section 54F of the Act. It was pointed out that in the light of all the judicial precedents cited, the residential units forming part of the block acquired by the assessee could not be construed as 3 residential houses but is to be regarded as only 'a residential house'. In the light of the judicial precedents, it was submitted that the assessee was fully entitled to benefit under s.54F of the Act in respect of whole consideration paid for purchase of the block comprising of various residential unitsand therefore no error can be attributed to the action of the AO.

7.2 It was next submitted by the learned Senior Counsel that it is trite that twin conditions must co-exist for invoking jurisdiction under s.263 of the Act. It was submitted that in the absence of any error *per se* in the action of the AO, the alleged lack of required inquiry will have no consequence. It was further pointed out that without prejudice to the submissions made, the issue towards construction of the expression 'a residential house' is surely a highly debatable issue having regard to the series of decisions leaned in favour of the assessee at the time of the assessment. In such a scenario, when the issue is debatable, cannot be regarded as 'erroneous' as contemplated under s.263 of the Act. In such circumstances, the CIT(A) is not entitled to invoke jurisdiction under s.263 of the Act owing to non-satisfaction of one of the indispensible pre-condition of assessment order being 'erroneous'.

7.3 The learned Senior Counsel accordingly concluded that the exercise of supervisory jurisdiction of review by the Pr.CIT is not compatible with the scope and sweep of Section 263 of the Act. It was thus submitted that the Pr.CIT was not justified in invoking its power under s.263 of the Act to set aside the assessment framed in the absence of cause of action.

8. The learned CIT.DR, on the other hand, relied upon the order of the Pr.CIT. In furtherance, the learned DR submitted that the residential block purchased by the assessee comprises of three non-contiguous units with separate entrances etc. located on different floor *albeit* in the same block

and therefore each unit is independent of another. Consequently, all the three units cannot be regarded as 'a residential house'. The learned DR accordingly submitted that the AO has wrongly entertained the claim of the assessee for deduction under s.54F of the Act resulting in error which has caused prejudice to the interest of the Revenue.

9. We have carefully considered the rival submissions. Section 263 of the Act confers power upon the Pr.CIT/CIT to call for and examine the records of a proceeding under the Act and revise any order if he considers the same to be erroneous and prejudicial to the interests of the Revenue. The Pr.CIT can take recourse to revision under Section 263 of the Act where the assessment order is erroneous as well as prejudicial to the interest of Revenue. The twin conditions are required to be satisfied simultaneously. The Pr.CIT in the present case has purported to act in exercise of power under s.263 of the Act and thereby has sought to cancel the assessment order of the AO passed under s.143(3) of the Act. The Pr.CIT essentially observed that the AO has wrongly allowed deduction under s.54F of the Act in contravention of the provision of the Act. The ground for impugned action under s.263 of the Act is that the AO has failed to make requisite inquiry into the claim of deduction of the assessee under s.54F of the Act and in the absence of proper inquiry on the eligibility of deduction involved, the order of the AO is erroneous in so far as prejudicial to the interest of the Revenue.

9.1 As pointed out on behalf of the assessee, two pre-requisites must coexist before the designated authority could exercise the revisional jurisdiction conferred on him namely; the order should be (i) erroneous & (ii) the error must be such that it is prejudicial to the interests of the Revenue. However, an erroneous order does not necessarily mean an order with which the Pr.CIT is unable to agree. The AO while passing an order of assessment, performs judicial functions. An order of assessment passed by the AO cannot be interfered only because an another view is also possible on the issue as held in *CIT vs. Greenworld Corporation (2009) 181 Taxman 111 (SC)*. If in given facts and circumstances of the case, two

views are possible and one view as legally plausible has been adopted by the AO then existence of other possible view alone would not be sufficient to exercise powers under s.263 of the Act by the Pr.CIT / CIT concerned. Hence, there can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the AO. It is only when an order is erroneous and causing prejudice, that the Section will be attracted. An incorrect assumption of facts or incorrect application of law will satisfy the requirements of the order being erroneous.

9.2 In the instant case, it is demonstrated on behalf of the assessee that necessary inquiries were made towards computation of long term capital gain and claim of deduction under s.54F of the Act. The issue of eligibility of claim of deduction was thus present to the mind of the AO. Relevant documents were also shown to have been filed in the assessment proceedings. We also simultaneously notice that the assessee has placed reliance upon several judicial precedents namely; *CIT vs. Smt. K. G. Rukminiamma (2011) 331 ITR 211 (Karnataka); CIT vs. Gita Duggal (2013) 357 ITR 153 (Delhi); CIT vs. Gita Duggal (2014) 52 taxmann.com 246 (SC), CIT vs. Syed Ali Adil (2013) 352 ITR 418 (AP)* and *CIT vs. Smt. V. R. Karpagam (2015) 373 ITR 127 (Madras)* for the construction of expression 'a residential house' in the context of Section 54 & 54F of the Act. Different Courts noted above have echoed that expression 'a residential house' would encompass different residential units located on the different floors of the same building. On facts, we note that all the three units are located on the different floors of the same structure and purchased by the assessee by a common deed of conveyance. In the facts and circumstances, plurality of opinion about the allowability of deduction surely exists even if it is presumed for a moment that view adopted by the AO in favour of the assessee is not singular or absolute. In the circumstances, where the language couched in Section 54F of the Act has been interpreted in a manner favourable to assessee and multiple residential units were included within the sphere of Section 54F of the Act, we see no wrong in the action of the AO in seeing the issue in a wider spectrum. Thus, when the issue of eligibility of deduction under s.54F of the Act is

tested on the touchstone of prevailing judicial dicta, the action of the AO cannot be discredited as incorrect application of law or wrong assumption of facts. As noted earlier, the relevant facts concerning the purchase of super structure comprising of three different units were duly placed and available on record. The AO was not found to be totally oblivious of the relevant facts. Thus, there is an apparent plausibility about the assent of mind of AO on admissibility of claim having regard to the law existing at the relevant time. In these circumstances, the AO can be safely presumed to have adopted a view which was plausible though not necessarily agreeable to the Revisional Commissioner.

9.3 An inquiry on the issue contemplated under s.263 r.w. Explanation 2 of the Act has its limits implicit in it. It is only a very gross case of inadequacy in inquiry or where inquiry is per se mandated on the basis of record available before AO and such inquiry was not conducted which resulted an error fatal to the interest of the Revenue, the revisional power so conferred can be exercised to invalidate the action of the AO. The AO is not expected to chase *will o' the wisp* to find out something adverse to the assessee on each and every transaction. What is significant is the lack/inadequacy of inquiry should result in a substantive error or a visible abnormality resulting in loss of Revenue. The claim of the assessee towards deductibility under s.54F of the Act cannot be regarded to be erroneous in the light of judicial precedents and therefore lesser degree of inquiry made on the issue per se would not cover the situation in the sweep of expression 'erroneous'. A plausible view admitted in assessment stage in exercise of *quasi-judicial* function cannot be dislodged in a light hearted manner in the name of inadequacy in inquiries or verification as perceived in the opinion of the revisional authority.

9.4 On a broader reckoning of facts and law enunciated in this regard, we find merit in both the pleas raised on behalf of the assessee i.e. the alleged inadequacy in inquiry has not resulted in perceptible error when tested in the light of judicial precedents, secondly and without prejudice, the claim of the assessee under s.54F of the Act is certainly plausible in law and thus

the action of the AO is not open to attack on the grounds of being arbitrary and capricious. Section 263 of the Act does not visualize a case of substitution of the judgment of the Revisional Commissioner for that of AO unless the decision of the AO is found to be erroneous. The claim under s.54F of the Act being plausible, the foundation for exercise of revisional jurisdiction in our view does not exist. We thus find merit in the plea of the assessee towards lack of authority of Pr.CIT to exercise jurisdiction conferred under se.263 of the Act in the instant case. The revisional order is accordingly set aside and quashed.

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

This Order pronounced in Open Court on 15/10/2019

Sd/-	Sd/-
(MAHAVIR PRASAD)	(PRADIP KUMAR KEDIA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Ahmedabad: Dated 15/10/2019

True Copy

S. K. SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।