

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'C' BENCH  
MUMBAI**

**BEFORE: SHRI B.R.BASKARAN, ACCOUNTANT MEMBER  
&  
SHRI ABY T VARKEY, JUDICIAL MEMBER**

**ITA No.787/Mum/2022  
(Assessment Year :2016-17)**

Shri Prerak Goel 101, HDIL Tower Anant Kanekar Marg, Bandra East Mumbai – 400 051	Vs.	Pr. CIT-19, Mumbai Room No.228, 2 <sup>nd</sup> Floor Matru Mandir Tardeo Road, Mumbai – 400 007
<b>PAN/GIR No.AAKPG8954B</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Assessee by	Shri Gaurav Bansal
Revenue by	Shri Purushottam Tripuri
<b>Date of Hearing</b>	<b>04/10/2022</b>
<b>Date of Pronouncement</b>	<b>27/12/2022</b>

**आदेश / ORDER**

**PER B.R. BASKARAN (A.M):**

The assessee has filed the appeal challenging the revision order dated 30/03/2022 passed by Id. PCIT-19, Mumbai and it relates to A.Y.2016-17. The assessee is challenging the validity of revision order passed by Id. PCIT.

2. The facts relating to the case are stated in brief. The assessment in the hands of the assessee for the year under consideration was completed by the Assessing Officer u/s.143(3) of the Act on 22/06/2018

accepting income declared by the assessee. The Id. PCIT examined the assessment record and noticed that the assessee had claimed exemption u/s.54F of the Act against the long term capital gain arising on sale of shares and the said claim had been accepted by the Assessing Officer.

3. The facts relating to the claim made by the assessee u/s.54F of the Act are discussed in brief. During the year under consideration, the assessee has sold 350 shares of M/s. Concord Enviro Systems Pvt. Ltd. and earned long term capital gain of Rs.3.01 Crores. The assessee held a flat along with his mother as co-owner, viz., Flat No.1101, Eber-Ezer, Tagore Road, Santacruz, Mumbai. The assessee purchased the share of his mother by paying Rs.3.00 Crores and he claimed the above said purchase as deduction u/s.54F of the Act. The Id. PCIT noticed that the agreement for purchase has been entered on a notorized stamp paper only and conveyance deed has not been registered till date. The Id. PCIT took the view that the registration of deed is compulsory for availing deduction u/s 54F of the Act. The Id. PCIT of the Act also took the view that Section 53A of the Transfer of Property would not apply in the absence registration of Conveyance Deed for the purpose of Section 2(47)(v) of the Act. Accordingly, he took a view that the assessee would not be entitled for deduction u/s.54F of the Act. Accordingly, Id. PCIT took a view that the Assessing Officer has completed the assessment without enquiring or verifying the claim made by the assessee for deduction u/s. 54F of the Act. Accordingly, Id. PCIT held that the assessment order passed by the AO is erroneous and prejudicial to the interest of the Revenue and accordingly, initiated revision proceedings u/s.263 of the Act.

4. Before the Id. PCIT, the assessee submitted that the Assessing Officer has made proper enquiries by raising various queries. It was

contended that the AO has taken a plausible view in this matter. Accordingly, the assessee objected to the revision proceedings initiated by Id. PCIT. However, Id. PCIT was not convinced with the contentions of the assessee. Therefore, he set aside the assessment order and directed the AO to pass a fresh order after giving opportunity of hearing to the assessee. For the sake of convenience, the operative portion of the order passed by the Id. PCIT is extracted below:-

*“6.2 The assessee has also relied upon certain case laws in support of his claim of deduction u/s. 54F of the Act which are not applicable here, as it is not a case of builders flat. In view of the above, if the documents are unregistered it cannot be taken as evidence of any transaction affection such property and thus for the transfer of his mother's share of property as per Section 2(47)(v) of the Income Tax Act it would not be apply unless the property is registered as per Section 53A of the Transfer of Property Act On perusal of the assessment records it is noticed that the assessee has submitted computation of income of his mother, ITR acknowledgment of his mother, however, in the computation of income she has declared income from salary, income from property house property received on rent and income from other sources (bank interest) and she has not declared any income from Capital gain nor she declared any transaction/income related to transfer of property to her son, Prerak Goel. The AO has not verified this assessment proceeding. Accordingly. The Assessing Officer is directed to examine the legal provisions whether unregistered Sale deed can be used as evidence of transfer of property for the purpose of claiming benefit u/s. 54F of the Act, the AO is also directed to verify the payment made by the assessee for the purpose of transfer of his mother's share of the immovable property. The AO should also examine the veracity of the transaction whether it is a colourable devise to avoid taxation within meaning of the decision of the Hon. Supreme Court in McDowell and Co reported in (1985) 3 SCC 230.”*

The assessee is aggrieved by the revision order so passed by Ld PCIT and hence he has filed this appeal before the Tribunal.

5. The Ld A.R submitted that the assessing officer has made due enquiries with regard to the claim made u/s 54F of the Act. He submitted that the assessee has also furnished all the relevant details and the AO

was very much aware of the fact that the conveyance deed has not been registered. The Ld A.R took us to various queries raised by the AO and the replies furnished by the assessee. He submitted that, after due application of mind, the AO has accepted the claim of the assessee for deduction u/s 54F of the Act. He submitted that the scope of the amendment made to the provisions of sec.53A of the Transfer of Property Act was examined by the co-ordinate bench in the case of Sureshchandra Agarwal (2011)(15 taxmann.com 115)(Mum) and it was held by the Tribunal that the amended provisions do not provide that the instrument of transfer is necessarily to be registered. Accordingly, the Ld A.R submitted that the Ld PCIT has entertained a different view of the above said matter. Accordingly, the Ld A.R contended that the view taken by the AO is one of the possible views and merely because the Ld PCIT holds a different view of the matter, the impugned assessment order cannot be held to be erroneous and prejudicial to the interests of revenue.

6. The Ld A.R further submitted that the co-ordinate bench of Tribunal, in the above said case, has held that there is no requirement of registration of conveyance deed for the purpose of availing deduction u/s 54F of the Act. So long as the assessee has used the sale proceeds received on sale of old asset in purchasing a new residential house property, the deduction u/s 54F of the Act should be allowed. In support of this proposition, the Ld A.R placed his reliance on the decision rendered by Pune bench of Tribunal in the case of Shetty G D vs. ITO (2018)(112 ITD 103)(Pune), wherein, following the Circular No.471 dated 15-10-1986 issued by CBDT, the Tribunal held that the registration of flat is not compulsory for availing deduction u/s 54 of the Act. He further submitted that the seller of property Smt Pushpa Goel has declared long term capital gain in AY 2017-18 on sale of the above said property and

also furnished copy of computation of income of Smt Pushpa Goel relating to AY 2017-18.

7. The Ld D.R submitted that the AO has not made proper enquiries with regard to the claim for deduction made u/s 54F of the Act. Accordingly, he submitted that the Ld PCIT was justified in initiating the revision proceedings. He further submitted that the assessee has claimed to have purchased share of his mother in the flat, but he has not got the conveyance deed registered till date. Hence it was a colourable device adopted by the assessee in order to avail deduction u/s 54F of the Act. He submitted that the Ld PCIT has only directed the AO to examine the claim in accordance with law. With regard to the contention that the registration of conveyance deed is not compulsory for the purpose of availing deduction u/s 54F of the Act, the Ld D.R submitted that the circular issued by CBDT was in the context of DDA flats and hence the said circular cannot be applied to the facts of the present case. Accordingly, the Ld D.R contended that the impugned revision order does not require interference.

8. The scope of revision proceedings initiated under section 263 of the Act was considered by Hon'ble Bombay High Court, in the case of Grasim Industries Ltd. V CIT (321 ITR 92) by taking into account the law laid down by the Hon'ble Supreme Court. The relevant observations are extracted below:

Section 263 of the Income-tax Act, 1961 empowers the Commissioner to call for and examine the record of any proceedings under the Act and, if he considers that any order passed therein, by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, to pass an order upon hearing the assessee and after an enquiry as is necessary, enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment. The key words that are used by section 263 are that the order must be considered by the Commissioner to

be "erroneous in so far as it is prejudicial to the interests of the Revenue". This provision has been interpreted by the Supreme Court in several judgments to which it is now necessary to turn. In *Malabar Industrial Co. Ltd. v. CIT* [2000] 243 ITR 83, the Supreme Court held that the provision "cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer" and "it is only when an order is erroneous that the section will be attracted". The Supreme Court held that an incorrect assumption of fact or an incorrect application of law, will satisfy the requirement of the order being erroneous. An order passed in violation of the principles of natural justice or without application of mind, would be an order falling in that category. The expression "prejudicial to the interests of the Revenue", the Supreme Court held, it is of wide import and is not confined to a loss of tax. What is prejudicial to the interest of the Revenue is explained in the judgment of the Supreme Court (headnote) :

"The phrase 'prejudicial to the interests of the Revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer, cannot be treated as prejudicial to the interests of the Revenue, for example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the Income-tax Officer is unsustainable in law."

The principle which has been laid down in *Malabar Industrial Co. Ltd.* [2000] 243 ITR 83 (SC) has been followed and explained in a subsequent judgment of the Supreme Court in *CIT v. Max India Ltd.* [2007] 295 ITR 282."

The principles laid down by the courts are that the **Learned CIT cannot invoke his powers of revision under section 263 if the Assessing Officer has conducted enquiries and applied his mind and has taken a possible view of the matter.** If there was any enquiry and a possible view is taken, it would not give occasion to the Commissioner to pass orders under section 263 of the Act, merely because he has a different opinion in the matter. The consideration of the Commissioner as to whether an order is erroneous in so far it is prejudicial to the interests of Revenue must be based on materials on record of the proceedings

called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. The Commissioner cannot initiate proceedings with a view to start fishing and roving enquiries in matters or orders which are already concluded.

9. We shall now examine the facts prevailing in the instant case. The Ld A.R brought to our notice following documents to support his contention that various queries have been raised by the AO with regard to the claim for deduction u/s 54F of the Act and replies filed by the assessee:-

(a) Notice u/s 142(1) dated 03-08-2018 issued by the AO, wherein, vide query no.3, the AO has asked to furnish documentary evidence to show that the deduction from Capital gain has been claimed correctly.

(b) The assessee, vide his letter dated 07-08-2018, has furnished the reply

(c) Notice u/s 142(1) dated 28-08-2018 issued by the AO, wherein the AO has extracted "computation of capital gains" itself. Further, vide query no.(f), the AO has specifically mentioned that the purchase of new property was through unregistered document and he has also asked as to whether the registration of deed was done subsequently.

(d) Reply dated 11.09.2018, wherein it has been specifically stated that the sale deed is yet to be registered.

We notice that the assessee has specifically state that the sale deed is not registered and the AO was very much aware of it. From the queries and replies mentioned above, we are of the view that the AO has conducted proper enquiries and taken a decision.

10. The next question that arises is whether the decision taken by the AO can be considered as a plausible view. In this regard, we may refer to the decision rendered by the co-ordinate bench in the case of Sureshchandra Agarwal (supra), wherein the co-ordinate bench has expressed the following view:-

“7. We have considered the submissions carefully as well as the relevant material on record. The dispute is regarding denial of deduction u/s.54 which reads as under:

"54. (1) Subject to the provisions of sub-section (2), where, in the case of an assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of a long-term capital asset, being buildings or lands appurtenant thereto, and being a residential house, the income of which is chargeable under the head "Income from house property" (hereafter in this section referred to as the original assessment), and the assessee has within a period of one year before or two years 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, then, instead of the capital gain being charged to income-tax as income of the previous year in which the transfer took place, it shall be dealt with in accordance with the following provisions of this section, that is to say, "

From the above, it is clear that where a new property has been purchased within one year from the date of transfer, then exemption is allowed. The dispute is only in respect of transfer of the old property and there is no dispute in respect of other conditions. According to the assessee, the old property was transferred on 30-04-2004 and the new property was purchased on 25-06-2003, whereas, according to the AO, the new property was purchased on 25-06-2003 but the old property stood transferred only on 27-08-2004 when the transfer deed got registered. Section 2(47), which defines the term "transfer", reads as under:

" (47) "transfer", in relation to a capital asset, includes,

- (i) the sale, exchange or relinquishment of the asset ; or
- (ii) the extinguishment of any rights therein; or
- (iii) the compulsory acquisition thereof under any law; or
- (iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment ; or
- (iva) the maturity or redemption of a zero coupon bond; or
- (v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882) ; or
- (vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of

any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

A plain reading of the above show that this is an inclusive definition. First, we shall deal with clause (v), which has been considered by the AO as well as CIT(A). The AO has refused to reckon the transfer on 30-04-2004 because, according to him, that instrument was not registered and after the amendment to sec. 53A w.e.f. 24-09-2001, it is mandatory for application of sec. 53A of the Transfer of Property Act, 1882, that such instrument of transfer should be registered. Sec. 53A of Transfer of Property Act, 1882, before amendment and after amendment reads as under :

**Before amendment :**

"53A. Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertain with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract :

**Provided** that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contact or of the part performance thereof."

**After amendment :**

**53-A. Part performance.**—Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertain with reasonable certainty,

And the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract :

**Provided** that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

The above clearly shows that paras 1, 2 and 3 remain the same and there is change only in the 4th para by way of omission of the words "the contract, though required to be registered, has not been registered, or, "which, according to the AO, means after 24-09-2001 the provisions of section 53A would not be applied if the document was registered but a reading of the whole provision clearly shows that this provision is basically for the benefit of a buyer and it has been provided that where an instrument of transfer has been executed in writing and in part performance such transferee has taken possession and paid consideration and transferee has performed or willing to perform his part of the contract, then this would constitute part performance. Even after amendment, it has not been specifically provided that such instrument of transfer is necessarily to be registered. Without going further on this aspect, we have to ascertain the true meaning in the context of clause (v) of sec. 2(47). Clause (v) has been inserted by the Finance Act, 1987, w.e.f. 01-04-1988 and explanatory notes explaining the provisions of the Act, which has been circulated by circular No.495 dated 22-09-1987. Para 11.1 reads as under:

"11.1 The existing definition of the word "transfer" in section 2(47) does not include transfer of certain rights accruing to a purchaser, by way of becoming a member of or acquiring shares in a co-operative society, company, or association of persons or by way of any agreement or any arrangement whereby such person acquires any rights in any building which is either being constructed or which is to be constructed. Transactions of the nature referred to above are not required to be registered under the Registration Act, 1908. Such arrangements confer the privileges of ownership without transfer of title in the building and there are a common mode of acquiring flats particularly in multi-storeyed constructions in big cities. The definition also does not cover cases where possession is allowed to be taken or retained in part performance of a contract, of the nature referred to in section 53A of the Transfer of Property Act, 1882. New sub-clauses (v) & (vi) have been inserted in section 2(47) to prevent avoidance of capital gains liability by recourse to transfer of rights in the manner referred to above."

The above clearly shows that there was certain situation where properties were being transferred without registration of transfer instruments and people were escaping tax liabilities on transfer of such properties because the same could not be brought in the definition of "transfer" particularly in many States of the country properties were being held by various people as leased properties which

were allotted by the various Govt. Departments and transfers of such lease were not permissible. People were transferring such properties by executing agreement to sell and general power of attorney as well as Will and receiving full consideration, but since the agreement to sell was not registered and though full consideration was received and even possession was given, still the same transactions could not be subjected to tax because the same could not be covered by the definition of "transfer". To bring such transactions within the tax net, this amendment was made. It has to be appreciated that clause (v) in section 2(47) does not lift the definition of part performance from section 53A of the Transfer of Property Act, 1882. Rather, it defines any transaction involving allowing of possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act. This means such transfer is not required to be exactly similar to the one defined u/s.53A of the Transfer of Property Act, otherwise legislature would have simply stated that transfer would include transactions defined in sec. 53A of the Transfer of Property Act. But the legislature in its wisdom has used the words "of a contract, of the nature referred in section 53A". Therefore, it is only the nature which has to be seen. As discussed above, the purpose of insertion of clause (v) was to tax those transactions where properties were being transferred by way of giving possession and receiving full consideration. Therefore, in our humble opinion, in the case of a transfer where possession has been given and full consideration has been received, then such transaction needs to be construed as "transfer". Therefore, the amendment made in section 53A by which the requirement of registration has been indirectly brought on the statute need not be applied while construing the meaning of "transfer" with reference to the Income-tax Act."

In the above said case, the Tribunal has expressed the view that the requirement of registration is not there for construing the meaning of "transfer" u/s 2(47)(v) of the Act. Thus the above said decision is contrary to the view expressed by Ld PCIT in the impugned revision order, meaning thereby, the view taken by the AO should be considered as one of the possible views. In the case of Malabar Industrial Company (supra), the Hon'ble Supreme Court has held that, if the AO has taken one of the possible views, then the assessment order cannot be considered to be prejudicial to the interests of revenue merely for the reason that the Ld PCIT has got different view on the very same matter. Hence the impugned revision order is liable to be quashed on this ground alone.

11. In view of the foregoing discussions, we are unable to sustain the impugned revision order passed by Ld PCIT. Accordingly, we quash the same.

12. In the result, the appeal filed by the assessee is allowed.

Order pronounced on 27/12/2022 by way of proper mentioning in the notice board.

**Sd/-**  
**(ABY T VARKEY)**  
JUDICIAL MEMBER

**Sd/-**  
**(B.R. BASKARAN)**  
ACCOUNTANT MEMBER

Mumbai; Dated 27/12/2022  
KARUNA, *sr.ps*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)  
ITAT, Mumbai