आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर

IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER

ITA No.426/Ind/2018
Assessment Year:2013-14

Satyanarayan Sharma, 11/2, South Tukoganj, Swapnalok Colony, Indore	**बनाम**/ Vs.	Pr.CIT-I, Indore
(Appellant)		(Revenue)
P.A. No.AEAPS5126D		
Appellant by	Shri Girish Agrawal & Miss Nisha Lahoti, ARs	
Revenue by	Smt. Ashima Gupta, CIT-DR	
Date of Hearing:	**11.11.2020**	
Date of Pronouncement:	**28.12.2020**	

आदेश / O R D E R

PER KUL BHARAT, J.M:

This appeal by the assessee is directed against the order of ld. Pr. Commissioner of Income Tax (in short 'Ld. Pr. CIT)-I, Indore dated 26.03.2018 pertaining to assessment year 2013-14.

The assessee has raised following grounds of appeal:

"1. In the facts and in the circumstances of the case, Ld. Pr. CIT-I, Indore erred in invoking the provision of section 263 of the Act and passing the order therein by holding that order passed by Ld. Assessing Officer under section 143(3) of the Act is erroneous and prejudicial to the interest of the revenue, which is illegal, bad in law and devoid of any merit.

2. In the facts and in the circumstances of the case, Ld. Pr. CIT-I, Indore erred in observing for the purpose of passing order under section 263 of the Act that the value adopted by the ld. Assessing Officer for determination of cost of construction for the purpose of calculating of eligible deduction under section 54F of the Act is incorrect.

3. In the facts and in the circumstances of the case, Ld. Pr. CIT-I, Indore erred in directing Ld. Assessing Officer to allow deduction under section 54F of the act proportionately when such an action is covered by the provisions of section 154of the Act at the end of Ld. Assessing officer.

4. In the facts and in the circumstances of the case, Ld. Pr. CIT-I, Indore erred in setting aside the order to the file of Ld. Assessing officer with a direction to pass a fresh order by invoking the provisions of section 263 of the Act.

5. The appellant craves leave to add, amend, alter or otherwise raise any other ground of appeal."

2. Briefly stated facts are that in this case the assessment was completed u/s 143(3) of the Income Tax Act 1961(hereinafter referred as the Act) vide order dated 23.03.2016. The assessing Officer computed total income at Rs.16,50,920/-. Subsequently, the Ld. Pr. CIT after examining the report found that the assessment order passed by the Assessing Officer was erroneous and prejudicial to the interest of the revenue. Hence, he initiated proceedings u/s

263 of the Act by issuing a show cause notice dated 12.03.2018. In response to the notice issued by the Ld. Pr. CIT assessee filed written reply, the reply by the assessee was not found acceptable. Ld. Pr. CIT, therefore, set aside the assessment to the file of assessing officer with direction assessing officer would examine the issue in the light of the observation made in the order passed u/s 263 of the Act.

3. Aggrieved against this the assessee is in present appeal

4. Grounds No. 1 to 4 are against initiating proceedings u/s 263 of the Act and passing the impugned order, thereby directing the assessing officer to make assessment afresh.

5. Ground No.5 is general in nature which needs no separate adjudication.

6. Apropos to grounds No.1 to 4 Ld. counsel for the assessee reiterated the submissions as made in the written submissions. The submissions of the assessee are reproduced as under:

> ***A.*** *Enquiry conducted by Ld. AO – no lack of enquiry*
>
> 1. *Order sheet noting evidently demonstrates the detailed and extensive enquiry conducted by the Ld. AO on the issue raised by Ld. Pr. CIT in the instant revisionary proceedings u/s 263. Certified true copy of the same are placed on record. [PB 10-12]*

2. *Ld. AO has conducted proper enquiry to verify the entire transaction of sale of agricultural land and investment made towards construction of residential house. Ld. Pr. CIT has not pointed out any shortcoming in the verification conducted by Ld. AO so that the assessment order be treated as erroneous and prejudicial to the interest of the Revenue.*

3. *Ld. AO has applied his mind while conducting the assessment proceedings which is evident [AO Page 2 Para (ii) & (iii)] from the reference made by him to the Ld. DVO for valuation and adopting the value so arrived*

a. from the verification of copies of B-1 and P-II for carrying of agriculture activity and land used for agriculture purposes

b. from verification of copy of ledger and bill produced as evidence of cost of investment

c. from the verification of valuation report obtained from an Authorized Valuer

d. from verification of copies of bills of interior work, electrical equipments and household installations like AC, Sofa sets, etc

e. from the amount of addition re-worked towards taxable LTCG of Rs. 10,30,044 out of which Rs. 3,75,152 was already reported in the return and balance Rs. 6,54,892 was added while making the assessment

4. *Ld. AO allowed the claim on being satisfied with the explanation of assessee, on an enquiry made during the course of assessment proceedings. Thus, the decision of Ld. AO cannot be held to be erroneous.*

5. *Distinction is to be appreciated between <u>lack of enquiry</u> and <u>inadequate enquiry</u>. If there was any enquiry, even inadequate that would not by itself give occasion to Ld. Pr. CIT to pass orders u/s 263, merely because he has different opinion in the matter. It is only in cases of "<u>lack of enquiry</u>" that such a course of action would be open for the Ld. Pr. CIT.*

6. *Reliance is placed on the following decisions –*

a. *Hon'ble jurisdictional ITAT Indore Bench in the case of Vinod Bhandari in ITA 350/Ind/2017 & others, order dtd 20.03.2020:*

"43. Hon'ble Gujarat High Court in the case of Arvind Jewellers (259 ITR 502) held that:

"Held, that the finding of fact by the Tribunal was that the assessee had produced relevant material and offered explanations in pursuance of the notices issued under section 142(1) as well as section 143(2) of the act and after considering the material and explanations, the Income-tax Officer had come to a definite conclusion. Since the material was there on record and the said material was considered by the Income-tax Officer and a particular view was taken, the mere fact that different view can be taken should not be the basis for an action under section 263. The order of revision was not justified."

44. Hence, the preposition and ratio laid down by Hon'ble Gujarat High Court is that, when the assessee had produced relevant material and offered explanation in pursuance of notices u/s 143(2) and 142(1) of the Act and after considering the material and explanations, the AO had come to a definite conclusion. Their Lordship further held that in this situation, since the material was there on record and the said material was considered by the AO and a particular view was taken, the mere fact that a different view can be taken should not be the basis for a valid action u/s 263 of the Act and therefore, dismissing the appeal of the revenue the Hon'ble High Court held that the order u/s 263 of the Act was not justified and valid.

45. In the light of above judgments and applying the facts of the instant case and perusal of the assessment order, paper book and the note-sheet of the assessment proceedings show that the AO has raised several queries by way of note sheet entries and notices. The assessee submitted various relevant documents. It is also pertinent to note that the AO adjudicated the issue of queries and replies in regard to said claim by passing a detailed order. Further the note sheet entries clearly shows the deliberations between the AO and the assessee company on all the issues and adjudication by the AO which was further guided by order u/s 144A. Therefore in view of the above facts and circumstances, details submitted before Ld. A.O, enquiries conducted by the Ld. A.O, issuing various notices, conducting enquiry about the linkage of the surrendered income of Rs.7 crores, considering all the details of hundis found during the course of survey, alleged additions made by linking the cash deposited with the unexplained income from Vyapam scam even though the assessee is having sufficient cash in hand in the books of accounts, we in view of judgment in the case of Malabar Industrial

Co. (supra) as per which before invoking the provisions of Section 263 of the Act Ld. PCIT should have satisfied the twin conditions, namely order of the Ld. A.O stated to be erroneous and secondly it is prejudicial to the interest of revenue. But in the instant case wherein we have examined each and every issue raised by Ld. PCIT in the light of the reply filed by the assessee, information called by the Ld. A.O and the finding in the assessment order, we are of the considered view that under the given facts and in law the view taken by the AO in the order passed u.s143(3) of the Act dated 24.3.2015 seems to be reasonable and plausible which cannot be held as legally unsustainable and not in accordance with law. In our view it is passed with complete application of mind and thus it can neither be held as erroneous nor prejudicial to the interest of revenue. Therefore Ld. PCIT under the given facts and circumstances of the case erred in assuming jurisdiction u/s.263 of the Act since the Ld. A.O has made sufficient enquiry by way of questionnaire to which detailed reply have been filed from time to time and the Ld. A.O in the interest of revenue have also made addition of Rs.7,74,12,941/- to the income disclosed by the assessee. It clearly appears that the Ld. A.O has applied his mind and therefore the assessment order is not vitiated on the ground that the order is erroneous and prejudicial to the interest of revenue because no enquiry were undertaken. Accordingly we find merit in the contention of the learned senior counsel for the assessee and are of the considered view that Ld. PCIT grossly erred in invoking the provisions of Section 263 of the Act on the basis of issues raised in the show cause notice. Thus the order of Ld. PCIT of setting aside the assessment order u/s 143(3) of the Act under consideration are beyond the scope of Section 263 of the Act and hence not valid and we accordingly quash the relevant order passed by Ld. PCIT u/s 263 of the Act dated 30.3.2017 and restore the assessment order u/s 143(3) dated 24.3.2015.

46. In the result all the grounds raised by the assessee in appeal No.350/Ind/2017 are allowed."

b. *Hon'ble Jurisdictional Bench of Indore ITAT in the case of Narottam Mishra – [2015] 25 ITJ 206 –*

"Even this is not the case of the Ld. CIT that certain evidences were overlooked which were very much on record or in the knowledge of the AO. Even this is not the case of Ld. CIT that certain new facts or evidences were brought to the notice of the Revenue Department which were having a direct impact on the income assessed by the AO. Neither there was an escapement of evidence nor there was any

evidence now brought to the notice of the revenue department, therefore if that was not the position, then we are not inclined to give our approval to such directions."

c. *Hon'ble Allahabad High Court in the case of Krishna Capbox (P) Ltd – [2015] 60 taxmann.com 243 – order pronounced on 23.02.2015 – HEAD NOTE – "Section 263 of the Income-tax Act, 1961 - Revision - Of orders prejudicial to interest of revenue (erroneous order) - Assessment year 2008-09 - Assessee filed its return - Case was selected for scrutiny and statutory notice was issued - Assessing Officer made certain queries, which were replied by assessee and after inquiry, being satisfied in respect to queries replied by assessee, Assessing Officer accepted declared income and passed assessment order - Commissioner, however, issued a notice under section 263 on ground that Assessing Officer had not made inquiry on certain aspects and accepted version of assessee without making any inquiry or verification, which was substantially prejudicial to revenue - Accordingly, he partly set aside assessment - Tribunal held that once inquiry was made, a mere non-discussion or non-mention thereof in assessment order could not lead to assumption that Assessing Officer did not apply his mind or that he had not made inquiry on subject and this would not justify interference by Commissioner by issuing notice under section 263 - Whether since department could not place anything to show that findings recorded by Tribunal were perverse or contrary to record, invoking of revision proceedings was unjustified - Held, yes [Para 13] [In favour of assessee]" [emphasis supplied]*

d. *Hon'ble Delhi High Court in the case of Vikas Polymers – [2010] 194 Taxman 57 – order pronounced on 16.08.2010 – HEAD NOTE – "Section 263 of the Income-tax Act, 1961 - Revision - Of orders prejudicial to interests of revenue - Assessment year 1982-83 - Whether for exercising power under section 263, it is a prerequisite that Commissioner must give reasons to justify exercise of suo motu revisional powers by him to reopen a concluded assessment and exercise of power being quasi-judicial in nature, reasons must be such as to show that enhancement or modification of assessment or cancellation of assessment or directions issued for a fresh assessment were called for, and must irresistibly lead to conclusion that order of Assessing Officer was not only erroneous but was also prejudicial to interest of revenue - Held, yes - Whether before exercising revisional powers, assessee must be called, his explanation sought for and examined by Commissioner, and thereafter, if Commissioner still feels that order is erroneous and prejudicial to interest of revenue, Commissioner may pass revisional*

orders - Held, yes - Whether if a query was raised during course of scrutiny by Assessing Officer, which was answered to satisfaction of Assessing Officer, but neither query nor answer was reflected in assessment order, that would not, by itself, lead to conclusion that order of Assessing Officer called for interference and revision - Held, yes" [emphasis supplied]

e. *Hon'ble Delhi High Court in the case of Ashish Rajpal – [2009] 320 ITR 674 – order pronounced on 14.05.2009 – HEAD NOTE – "Section 263 of the Income-tax Act, 1961 - Revision - Of orders prejudicial to interest of revenue - Assessment year 2002-03 - Whether merely because an assessment order does not refer to queries raised by Assessing Officer during course of scrutiny and response of assessee thereto, it can be said that there has been no enquiry and, hence, assessment is erroneous and prejudicial to interest of revenue - Held, no - Whether it is requirement of section 263 that assessee must have an opportunity of being heard in respect of those errors which Commissioner proposes to revise - Held, yes - Whether to accord such an opportunity after setting aside assessment order would meet mandate of section 263 - Held, no - Whether where notice issued by Commissioner before commencing proceedings under section 263 referred to four issues and final order passed referred to nine issues, revisional proceedings were vitiated as a result of breach of principles of natural justice - Held, yes" [emphasis supplied]*

f. *Hon'ble Mumbai Bench of ITAT in the case of Anil Shah – [2007] 162 Taxman 39 – order pronounced on 21.01.2006 – HEAD NOTE – "Section 263, read with section 80HHC, of the Income-tax Act, 1961 - Revision - Of orders prejudicial to interest of revenue - Assessment year 2000-01 - Whether if all relevant details have been filed by assessee and Assessing Officer allows assessee's claim, decision of Assessing Officer cannot be held to be erroneous simply because in his order he does not make any elaborate discussion in that regard - Held, yes" [emphasis supplied]*

B. *Application of mind by the Ld. AO*

1. In the instant case, Ld. AO during the assessment proceedings has made enquiries related to claim of deduction u/s 54B and 54F as is evident from the assessment order and the entries made in the order sheet. After due verification of the evidences and proofs placed on record and taking in to account the valuation reports by Ld. DVO and the Authorized Valuer, the Ld. AO made the addition and assessed the total income.

2. It is not a case of non-application of mind by the Ld. AO. It is also not a case where Ld. AO has allowed the relief without enquiring in the claim made by the assessee. Invoking provisions of section 263 is not in accordance with the law.
3. Reliance is placed on following judicial precedents –

a. *Hon'ble Jurisdictional High Court of Madhya Pradesh in the case of Ratlam Coal Ash Co. – [1987] 34 taxman 443 – order pronounced on 17.08.1987 – HELD – "It is well settled that where the ITO made the assessment in undue hurry, accepting what the assessee states in the return without making any enquiries in the circumstances of the case, the Commissioner would be justified in holding the order of the ITO to the erroneous. However, in the instant case, the Tribunal had found that the assessee had furnished all the requisite information and that the ITO considering all the facts had completed the assessment. It was further held that in the circumstances of the case it could not be held that the ITO had made assessment without making proper enquiries. Accordingly, the Tribunal was justified in reversing the order passed by the Commissioner." [emphasis supplied]*

b. *Hon'ble Delhi High Court in the case of Anil Kumar Sharma – [2010] 194 Taxman 504 – order pronounced on 24.04.2010 – Para 7 – "In view of the above discussion, it is apparent that the Tribunal arrived at a conclusive finding that, though the assessment order does not patently indicate that the issue in question had been considered by the Assessing Officer, the record showed that the Assessing Officer had applied his mind. Once such application of mind is discernible from the record, the proceedings under section 263 would fell into the area of the Commissioner having a different opinion. We are of the view that the findings of facts arrived at by the Tribunal do not warrant interference of this Court. That being the position, the present case would not be one of 'lack of inquiry' and, even if the inquiry was termed as inadequate, following the decision in Sunbeam Auto Ltd.'s case (supra), "that would not by itself give occasion to the Commissioner to pass orders under section 263 of the said Act, merely because he has a different opinion in the matter". No substantial question of law arises for our consideration. Consequently, the appeal is dismissed." [emphasis supplied]*

c. *Hon'ble Jurisdictional High Court of Madhya Pradesh in the case of Mehrotra Brothers – [2004] 270 ITR 157 – "Section 263 of the Income-tax Act, 1961 – Revision – Of orders prejudicial to interest of revenue - Commissioner invoked provision of section 263 against*

assessment order passed in case of assessee-firm on ground that Assessing Officer did not make proper enquiry regarding genuineness of certain cash credits found in books of firm – However, Tribunal held that since assessee had explained satisfactorily cash credit in books of account and discharged burden and Department had not brought out material or evidence to rebut same, cash credits were not income of assessee-firm and, accordingly, set aside order of Commissioner passed under section 263 – Whether in view of finding of fact recorded by Tribunal, no substantial question of law arose out of impugned order – Held, yes – Whether, therefore, instant appeal was to be dismissed – Held, yes" [emphasis supplied]

d. *Hon'ble Apex Court in the case of Malabar Industrial Co. Ltd. – [2000] 243 ITR 83 – order pronounced on 10.02.2000 – HEAD NOTE – "Section 263 of the Income-tax Act, 1961 - Revision - Of orders prejudicial to interests of revenue - Assessment year 1983-84 - Whether in order to invoke section 263 Assessing Officer's order must be erroneous and also prejudicial to revenue and if one of them is absent, i.e., if order of Income-tax Officer is erroneous but is not prejudicial to revenue or if it is not erroneous but is prejudicial to revenue, recourse cannot be had to section 263(1) - Held, yes - Whether if due to an erroneous order of ITO, revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to interests of revenue - Held, yes - Assessee-company entered into agreement for sale of estate of rubber plantation - As purchaser could not pay instalments as scheduled in agreement, extension of time for payment of instalments was given on condition of vendee paying damages for loss of agricultural income and assessee passed resolution to that effect - Assessee showed this receipt as agricultural income - Resolution passed by assessee was not placed before Assessing Officer - Assessing Officer accepted entry in statement of account filed by assessee and accepted same - Commissioner under section 263 held that said amount was not connected with agricultural activities and was liable to be taxed under head 'Income from other sources' - Whether, where Assessing Officer had accepted entry in statement of account filed by assessee, in absence of any supporting material without making any enquiry, exercise of jurisdiction by Commissioner under section 263(1) was justified - Held, yes" [emphasis supplied]*

e. *Hon'ble Delhi High Court in the case of Sunbeam Auto Limited – [2010] 189 Taxman 436 – order pronounced on 11.09.2009 – HEAD NOTE – "Section 263 of the Income-tax Act, 1961 - Revision - Of order prejudicial to interest of revenue - Assessment year 2001-*

02 - Whether if while making assessment, Assessing Officer has made an inadequate enquiry , that would not, by itself, give occasion to Commissioner to pass order under section 263, merely because he has different opinion in matter, it is only in cases of 'lack of inquiry' that such a course of action would be open - Held, yes - Assessee-company was engaged in business of manufacturing and supplying auto parts - In assessment for relevant assessment year, it had been allowed deduction of expenditure incurred on tools and dyes as revenue expenditure - Commissioner, however, set aside assessment order in exercise of his powers under section 263 on ground that Assessing Officer had allowed aforesaid expenditure without making proper enquiry - He, accordingly, remitted matter back to Assessing Officer to re-examine issue - Whether when facts clearly showed that Assessing Officer had undertaken exercise of examining as to whether expenditure incurred by assessee in replacement of dyes and tools was to be treated as revenue expenditure or not and on being satisfied with assessee's explanation, he accepted same, it could be said to be a case of lack of inquiry - Held, no - Whether further, on facts and law, view taken by Assessing Officer was one of possible views and, therefore, assessment order passed by Assessing Officer could not be held to be prejudicial to interest of revenue - Held, yes - Whether, therefore, Tribunal was justified in setting aside order of Commissioner - Held, yes" [emphasis supplied]

f. *Hon'ble Delhi High Court in the case of Hindustan Marketing & Advertising Co. Limited – [2011] 196 Taxman 368 – order pronounced on 21.09.2010 – HEAD NOTE – "Section 263 of the Income-tax Act, 1961 - Revision - Of orders prejudicial to interest of revenue - Assessment years 1983-84 and 1984-85 - Assessee-company was incorporated with an object of carrying on business of marketing agents and to render marketing services, etc. - For relevant assessment years, assessee filed its returns and assessments were framed - Commissioner set aside assessment orders holding that ITO had not made adequate and detailed investigations/enquiries in respect of a major area of assessee-company's operation and source of its income - Tribunal quashed revisional order passed by Commissioner - Whether in view of fact that ITO had made reasonably detailed enquiries, had collected relevant material and discussed various facets of case with assessee, order of Commissioner to direct fresh assessment by going deeper into matter would not form a valid or legal basis to exercise jurisdiction under section 263 - Held, yes - Whether, therefore, impugned order of Tribunal was to be upheld - Held, yes" [emphasis supplied]*

g. *Hon'ble Delhi High Court in the case of D.G. Housing Projects Ltd – [2012] 20 taxmann.com 587 – order pronounced on 01.03.2012 – HEAD NOTE – "Section 263 of the Income-tax Act, 1961 - Revision - Of orders prejudicial to interests of revenue - Assessment year 2004-05 - Assessee sold an immovable property and claimed capital loss after indexation - Commissioner had doubts about valuation and sale consideration received but he had not examined said aspect himself and had merely given a finding that order passed by Assessing Officer was erroneous as Assessing Officer had not properly examined consideration receivables - Whether Commissioner could not direct Assessing Officer to conduct further enquiry to verify and find out whether order passed was erroneous or not - Held, yes [In favour of assessee]*

h. *Hon'ble Jurisdictional Bench of Indore ITAT in the case of Flexituff International Limited – ITA No. 282/Ind/2017 – order pronounced on 14.05.2019 – Para 18 – ".....assessee made correct claim by firstly taking the benefit of Section 10A of the Act for the profits earned from SEZ units and remaining profits of other units including SEZ unit were utilised for setoff of current and brought forward losses. It remains an undisputed fact that the Assessing Officer had made adequate enquires as noted herein above adopting one of permissible view for allowing the assessee's claim for exemption u/s 10A of the Act before the claim of set off of brought forward and current year loss. The Ld. Pr. CIT took a different view of the matter. However that would not be sufficient to permit Ld. Pr. CIT to exercise the power u/s 263 of the Act because when two views are possible and Ld. Pr.CIT does not agree with the view taken by the Assessing Officer, assessment order cannot be treated as erroneous and prejudicial to the interest of the revenue unless the view taken by the Assessing Officer not unacceptable in law.....this action of the Ld. A.O cannot be held as erroneous and prejudicial to the interest of revenue. We therefore set aside the finding of Pr. Commissioner of Income Tax on this issue as it was a mere change of opinion which would not enable Ld. Pr. Commissioner of Income Tax to exercise jurisdiction u/s 263 of the Act as the Ld. A.O had considered the details and the explanation offered by the assessee before accepting the claim. We therefore reinstate the action of the Ld. A.O allowing the assessee's claim of exemption u/s 10A of the Act at Rs. 12,51,79,200/- against the profits earned from SEZ units." [emphasis supplied]*

i. *Hon'ble Bombay High Court in the case of Reliance Communication Limited – [2016] 69 taxmann.com 103 – order pronounced on*

28.03.2016 – HEAD NOTE – "Section 68, read with section 263, of the Income-tax Act, 1961 - Cash credits (FCCBs) - Assessee raised funds by way of FCCBs during year under consideration - Assessing Officer completed assessment accepting income declared by assessee - Commissioner noticed that no investigation was carried out by Assessing Officer to establish name and address, genuineness and creditworthiness of actual subscribers to FCCBs in terms of section 68 - He thus passed a revisional order setting aside assessment - Tribunal noted that Assessing Officer had made detailed enquiries about aforesaid aspect and mere fact that he did not make any reference to said issue in assessment order, could not make said order erroneous and prejudicial to interest of revenues - Accordingly, Tribunal set aside revisional order - Whether finding recorded by Tribunal being a finding of fact, no substantial question of law arose therefrom - Held, yes [Para 11] [In favour of assessee]" [emphasis supplied]

j. *Hon'ble Andhra Pradesh High Court in the case of Dr. Kodela Siva Prasada Rao – [2013] 29 taxmann.com 18 – order pronounced on 20.11.2012 – Para 12 – "From the above facts it is clear that the assessee had received a gift of Rs. 22,76,750/-in U.S. dollars from an NRI, N.Mohan and the assessee had filed two confirmation letters, one in December 2006 and another on 10-07-2007 given by the donor stating that he had gifted the above amount to the assessee, that the assessee is his close relative, that he is a man of means owning a software company of a net worth of US $ 25 million, that he had gifted during the year 2002-03 Rs. 2.00 crores to rebuild a government school, and got constructed a guest house for Sri Sitaramachandra Swami temple at Bhadrachalam. Copies of the income tax returns filed by the donor in USA were also filed by the assessee. Even though the assessee informed the department that the donor was available in India in December 2006 on account of the death of his mother-in-law and the contact details of the donor in India (address and mobile numbers), the department did not bother to contact him and verify the above facts. In this view of the matter, we are of the view that the assessee had discharged the burden cast on him to prove the identity of the creditor, the creditworthiness of the creditor and the genuineness of the transaction. Therefore, the contention of the Revenue that the said sum ought to be added to the income of the assessee cannot be accepted. The finding recorded by the Tribunal is based on appreciation of the material on record and cannot be said to be perverse. In our view, no question of law, much less a substantive question of law arises for consideration in this appeal.*

C. *Meaning of 'Cost of new asset' as per the provisions of section 54F*

1. *The term of 'cost of new asset' has not been defined under the Income Tax Act, 1961 (the Act). The Act defines the term 'cost of any improvement' u/s 55(1)(b) which means all expenditure of capital nature incurred in making any additions or alternations to the capital asset by the assessee after it became his property.*
For expenditure to be termed as 'cost of improvement' the most essential element is that there should a time gap between incurring the expense and the acquisition of capital asset. If there is a time gap between incurring of expenses and its acquisition only then will the expense be treated as 'cost of improvement'.
In the instant case, there is no such time gap between the acquisition of capital asset (i.e. construction of a new residential house) and incurring expense towards installation of electric equipment and other items which works out to a total investment of Rs. 11,79,768. There exists a proximate cause. Thus, this amount of Rs. 11,79,768 forms part of 'cost of new asset'.
2. *Provisions of section 54F read –*

"……or has within a period of three years after that date constructed, one residential house in India (hereinafter in this section referred to as the new asset), the capital gain shall be dealt with in accordance with……"

Provisions of section 54F require construction of one residential house in India. Construction of a residential house means all the investments/expenses incurred to make it a habitual place to live. All the investments made at the time of construction of new residential house to give it an adequate standard of living shall also form part of construction of residential house for the purpose of section 54F. A residential house ought to be a building in 'habitual state'.

Ld. Pr.CIT has not raised any doubt on the quantum of investment made/expense incurred and refers it only for the purpose of the computation of deduction u/s 54F.

3. *Reliance is placed on following judicial precedents –*

a. *Hon'ble Ahmedabad Bench of ITAT in the case of Rajat B Mehta – [2018] 90 taxmann.com 176 – order pronounced on 09.02.2018 –*

Para 7 – "It is in this backdrop that the question that we have to essentially take a judicial call on is as to what is the cost of the new residential house so purchased by the assessee at C 6 Anandvan Complex. As we do so, we must bear in mind the fact that the expression used in the statute is "cost of the residential house so purchased" and it does not necessarily mean that the cost of the residential house must remain confined to the cost of civil construction alone. A residential house may have many other things, other than civil construction and including things like furniture and fixtures, as its integral part and may also be on sale as an integral deal. There are, for example, situations in which the residential units for sale come, as a package deal, with things like air-conditioners, geysers, fans, electric fittings, furniture, modular kitchens and dishwashers. If these things are integral part of the house being purchased, the cost of house has to essentially include the cost of these things as well. In such circumstances, what is to be treated as cost of the residential house is the entire cost of house, and it cannot be open to the Assessing Officer to treat only the cost of only civil construction as cost of house and segregate the cost of other things as not eligible for deduction under section 54." [emphasis supplied]

b. *Hon'ble Ahmedabad Bench of ITAT in the case of Shriniwas R Desai – ITA No. 1245/Ahd/2010 – order pronounced on 07.09.2012 –*

Para 4 – "…….In our view although the cost of "improvement" of the asset is not allowable, but in a case where the assessee has purchased "new asset", which is not in a habitable condition, the expenses incurred by the assessee to make it habitable should be allowed under section 54(2) of the Act……" [emphasis supplied]

In the instant case, the investment made by assessee of Rs. 11,79,768 towards installation of household items like Air Conditioner, Sofa sets, etc forms an integral part of the new residential house so as to put it in a habitable condition. This cost incurred is an integral part of cost of construction of the new residential house.

D. *Non – application of mind by Ld. Pr.CIT*

1. *Order u/s 263 dated 26.03.2018 page 6, 2nd para –*

"It may be mentioned that collector, Indore 2015-16 guideline rate of Rs. 10,000/- per sq. mt. have been taken for determining the basic cost of construction of Rs.24,53,520/-. This has been mentioned in valuation report itself. This makes clear that this was valuation as

on 15.01.2016 while the assessment pertains to A.Y. 2013-14. Accordingly, the above value has been incorrectly adopted by the AO thereby making the assessment erroneous and prejudicial to interest of revenue. The AO should have determined the correct cost of construction for A.Y. 2013-14 for purpose of allowing the deduction u/s 54F of the IT Act."

a. Assessee submits that the valuation is done by taking the current guideline rate from the office of collector. Fair market value is arrived at after applying the rate of depreciation. [PB 18]

b. The Government Approved Valuer personally inspected the property on 15.01.2016 and made the valuation on 15.01.2016 as noted in his valuation report. [Clause 2 of Part I and clause (c) of Part III at PB 13 and 15]

c. Cost of construction – Clause 41 – Year of commencement and year of completion: 2012-14 [PB 15]

d. Valuation report also states that 'valuation done for cost of construction only'. [PB 15]

2. *Ld. Pr.CIT erred in not applying his mind on the documents available on record and stating that value adopted by AO on the basis of valuation report. Reliance is placed on the decision of Hon'ble Delhi High Court in the case of D G Housing Projects Limited [2012] 20 taxmann.com 587 order pronounced on 01.03.2012 followed by Hon'ble Co-ordinate Bench in the case of Vipin Chauhan ITA no. 52&53/Ind/2018 order pronounced on 21.08.2019.*

3. *Ld. Pr.CIT in order passed u/s 263 at page 7, 2nd para has stated –*

"What is to be examined is the whether the item is essential and integral part of new house or it is just the contents of new house. Any number of items may be added in as contents of house which may not be integral to cost of new assets. The claim regarding electronic items added and furniture & fixture which is not integral to new asset is not allowable." [emphasis supplied]

Ld. Pr. CIT has drawn conclusions merely on the basis of surmises and conjectures without giving basis of how this leads to order being erroneous.

E. *Applicability of provisions of section 154 for the computation mistake of deduction u/s 54F on proportionate basis*

1. It is a settled law that scope of section 263 to revise an assessment is different from scope of section 154 to rectify any mistake apparent from record.

Provisions of section 263 gives jurisdictional power whereas provisions of section 154 gives power of rectification. It is not correct to say that "rectification" is equal to "revision" under the Act.

Term "erroneous" used in the section 263 is to be read relating to jurisdictional error on the part of the Assessing Officer in exercise of his powers vested under the law. It cannot be read as to a "mistake" which is rectifiable under the provisions of section 154 either suo moto or on the application of the assessee.

Error committed by the Assessing Officer must be an error of jurisdiction, for if the order is not kept confined to jurisdictional error, no distinction would be left between the corrective powers conferred under section 154 and the revisionary powers exercisable under section 263.

If such a distinction between the corrective powers and revisionary powers is not recognized, every incorrect order would become amenable to revisionary jurisdiction and the fall out would be that revisionary jurisdiction would then become exercisable even in case where the provisions for rectification are attracted. Such an exercise of provisions of section 263 will lead to making the provisions of section 154 redundant. This surely was never the intent of the legislature.

2. *Rectification u/s 154 can be done suo motto either by Assessee himself or by Assessing Officer. In the instant case, during the impugned year assessee sold an agricultural land and subsequently made investment by purchasing another agricultural land and also constructed a new residential house. Details of manner of computation of LTCG are as under –*

Sr. No	Particulars	Amount (Rs.)	Remarks
1	Full value of sale consideration	1,26,54,892	Value as per DVO in accordance with provisions of section 50C. **This value has not been disputed either by Ld. AO or by Ld.**

			Pr.CIT.
2	Less: Indexed Cost of Acquisition (FY 1981-1982)	4,26,000	**Not disputed either by Ld. AO or by Ld. Pr.CIT.**
3	Long Term Capital Gain (LTCG) **[3 = 1 - 2]**	1,22,28,892	
4	Deduction claimed u/s 54B	36,40,080	
5	Deduction claimed u/s 54F **[Correct]** (1,22,28,892*75,58,768/1, 26,54,892)	73,04,318	Ld. AO in assessment order has considered the entire cost of new residential house i.e. Rs. 75,58,768 as deduction u/s 54F. **Computation of deduction u/s 54F is in dispute** *
6	Deduction claimed u/s 54F **[Actual]**	75,58,768	
7	Excess deduction allowed by Ld. AO u/s 54F (or short LTCG computed by Ld. AO) **[7 = 6 - 5]**	2,54,450	The excess deduction allowed u/s 54F is rectifiable under the provisions of section 154.

** While computing the deduction claimed u/s 54F Ld. Pr. CIT took the FMV of cost of construction of building (only) i.e. Rs. 63,79,000 for the purpose of calculation of proportionate deduction as per provisions of section 54F(1).*

*Ld. Pr. CIT computed the deduction u/s 54F at Rs. 61,64,265/- (1,22,28,892*63,79,000/1,26,54,892). Thus, excess deduction allowed u/s 54F as per Ld. Pr. CIT is Rs. 13,94,503.*

From the above table it is evident that what has been disputed by Ld. Pr. CIT is the cost of new residential house which has to be taken for the purpose of computation of deduction u/s 54F and that the deduction should be computed on proportionate basis as per provisions of section 54F(1).

No doubt has been raised on value of investment made by assessee on the new residential house i.e Rs. 75,58,768. What is under dispute is the amount that has to be taken as cost of new asset for the purpose of calculation of deduction u/s 54F. The matter was open before Ld. AO to take appropriate measures for rectification of mistake apparent from records, if he so believed to exist.

3. *In order passed u/s 263 by Ld. Pr. CIT no doubt has been raised on verification and enquiry conducted by Ld. AO during the assessment proceedings of various items namely –*

a. *manner of verification of the transaction of sale of agricultural land*
b. *investment made towards purchase of another agricultural land (for which deduction claimed u/s 54B is not under doubt by Ld. Pr. CIT)*
c. *investment made towards cost of new residential house (Ld. Pr. CIT has taken FMV of cost of construction of building only for the purpose of computation of deduction u/s 54F). All the bills and vouchers as evidence for the investment in construction of residential house were produced before Ld. AO and duly verified.*

4. *Ld. Pr. CIT in order passed u/s 263 has stated at para 4.4 –*

"In view of above discussion it is apparent that the order passed by AO is erroneous and prejudicial to interest of revenue in regard to determination of cost of new asset acquired as well as computation of eligible amount U/s 54F of I.T.Act."

Ld. Pr. CIT has failed to make out of there is any jurisdictional error. What has been pointed out by Ld. Pr.CIT is only computational error rectifiable u/s 154.

5. *Thus, twin conditions required to invoke the provisions of section 263 i.e. order should be erroneous and also prejudicial to the interest of revenue are not satisfied.*

Considering the above facts and circumstances of the case, submissions made, judicial precedents and documents on record, appeal of the assessee be allowed.

7. Per contra Ld. Departmental Representative (DR) vehemently opposed these submissions and supported the order of the ld. Pr. CIT. Ld. CIT-DR submitted that the assessment order is erroneous and prejudicial to the interest of Revenue which is evident from the fact that there was a computational error. Further, Ld. DR took us

through the impugned order and the observation made by the Ld. Pr. CIT.

8. In rejoinder Ld. counsel for the assessee Shri Girish Agrawal submitted that the computation error could be rectified by passing order u/s 154. The computation error could be rectified u/s 154 such error would not confer jurisdiction on the Ld. Pr. CIT to revise the well-considered assessment order.

9. We have heard rival submissions and perused the material available on record and gone through the orders of authorities below. We find that Ld. Pr. CIT issued show cause notice dated 12.03.2018. The relevant contents of the notice recorded in the impugned order are reproduced as under:

> *a) "On perusal and examination of records, it is found that aforesaid order is erroneous as well as prejudicial to the interest of revenue on account of failure of the Assessing Officer in allowing excess deduction u/s 54F by taking excess value of the eligible investment as well as making a calculation error by allowing entire investment value as deduction rather than allowing on proportionate basis as pre section 54F(l). Accordingly, 1 am satisfied that provisions of section 263 of the Income Tax Act, 1961 are required to be invoked in your case, hence this show cause notice is issued and opportunity of being heard is provided to you. The detailed reasons for the same are described as under:*
>
> *On perusal of record it is found that during the year the assessee has sold a property claimed to be agricultural land for a sale consideration of Rs. 1,20,00,000/-. The property was valued at Rs1,92,88,000/- for stamp duty purposes. During assessment proceedings the valuation was challenged and the matter was referred to the DVO for valuation of the property. The DVO determined the value of the property at Rs.1,26,54,892/-.*

The assessee has claimed deduction u/s 54B and 54F against the capital gains accruing on the sale of the property. For the claim of Section. 54F the assessee claimed to have constructed a new residential house. He has claimed to have invested total of Rs.75,58,768/- by the 31.07.2013 (i.e. before date of filing of return).

On perusal of the record it is seen that the assessee has submitted a valuation report by the Registered valuer who has valued the cost of construction in respect of the residential property at Rs.63,79,000/-. Apart from this the assessee has submitted a list of items like household installations, AC's, Sofa electrical equipment of value of Rs.12 lacs. It is observed that the valuation of the property has been done as per Collector guidelines for FINANCIAL YEAR 2015-15 expenses on account of purchase of air conditioners, fitting of AC, Wallpapers, curtains, so far and runners are not allowable expenditure under section 54F. The expenditure on these items was done before the date of valuation which is already included in the valuation report. Therefore, the extent of deduction allowed against these expanses in the new property acquired was not in order.

Further, the computation of income was done allowing deduction of entire amount invested i.e. Rs.75,58,768/- under section 54F, which was not correct. AO was only to allow proportionate amount of money actually invested Rs.63,79,000/-) to the long term capital gain i.e. Rs.1,22,28,892/-. The allowable deduction would be {1,22,28,892X6379,000/1,26,54,892} i.e. Rs.61,63,265/-. Therefore, there was excess deduction allowed of Rs.13,94,503/-

From the above, it can be seen that while taking value of investment for the purpose of deduction u/s 54F, the AO had adopted the value of Rs.75,58,768/- whereas as per the report of the registered valuer, the amount of investment stands at Rs.63,97,000/-. The amount stated to be sent on various furniture and electronic items claimed by the assessee would have been taken into account by the Registered valuer while making valuation. Hence, to that extent the AO's order is erroneous and prejudicial to the interest of revenue. Alternatively, the AO ought to have examined the genuineness of the investment claimed to have been made in furniture and electronic items and also whether such amount is allowable as deduction u/s 54F, however, the same has not been done."

The b) As per provisions of section 54F(1), the quantum of deduction has to be calculated based on the proportion of Capital gain to the investment in new asset with regard to net consideration received from sale of original asset. However, the AO has allowed the entire amount claimed to have been invested U/S 54F. In this way the AD allowed excess deduction amounting to Rs 13,94,5031- as per working given above.

2.2 Further, It is noted from the valuation report submitted by the assessee that

the value of the newly acquired house has been determined at Rs.63,79,000/-. It has been mentioned in the valuation report that the above value is fair market value (cost of construction only) as on 15.01.2016. The assessee was asked as to why the cost of construction as on 31.07.2013 which is due date of return should be adopted.

10. In response thereto the assessee filed the reply the contents of the same are recorded in the impugned order:

A.Regarding the calculation of allowable deduction on proportionate amount of money actually invested in the construction of house upto the due date of filing of IT return, it is accepted that the deduction claimed &amp,' allowed u/s 54F at Rs.75587681- was an inadvertant error which needs to be corrected. The correct calculation of allowable deduction u/s 54F, therefore is as under-

Total Sale consideration u/s 50C	*12654892/-*
Long Term Capital Gains	*12228892/-*
Amount invested in construction of house till 31.07.2013	*7558768/-*
Allowable deduction U/S 54F (12228892 x 7558768/ 12654892)	*7304318/-*

Accordingly the AD has allowed excess deduction of Rs.254450/-.

B.Regarding your observation that, the amount of investment in the residential house which is eligible for deduction u/s 54F is Rs. 63,97,000/-, it is respectfully submitted that this figure of Rs. 63, 97, 0001- is not the amount actually invested in construction of residential house but is the fair market value (Cost of Construction only) as on 15.01.16 of the residential house belonging to the assessee as per the valuation report dt.16.02.16.

It is very important to note here that the valuer has only made the valuation of cost of construction only. Therefore your observation that "AO was only to allowed proportionate amount of money actually invested (Rs. 63, 97, 000/-) is contrary to the facts of the case.

The entire details of date wise investment in construction of residential house property was duly submitted before the AO during the assessment proceedings and is available on the assessment records. All the bills 1 vouchers receipts regarding the proof of investment in construction of residential house property were duly produced before the AO and were examined by him.

As per the date wise details of investment in construction of residential house property submitted before the AO, the total amount incurred stands at Rs.75,58,768/- and not Rs. 63, 97,000/- as mentioned in

your show cause notice.

C . Your Honour's observation regarding non allowability of expenditure incurred on account of purchase of Air Conditioners, fitting of AC, wall papers, curtains, sofa and runners etc. is also contrary to the law.

The provisions of sec. 54F are reproduced for the sake of convenience as under.-

54F. Capital gain on transfer of certain capital assets not to be charged in case of investment in residential house.-(J) Where, in the case of an assessee 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 dealt 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 after such date, or constructs, within the period of three years after such date, any residential house, the income from which is chargeable under the head & not,-Income from house property & not; other than the new asset.

Explanation.-For the purposes of this section,-

(i) "long-term capital asset " means a capital asset which is not a short-term capital asset,·

(ii) "net consideration ", in relation to the transfer of a capital asset, means the full value of the consideration received or accruing as a result of the transfer of the capital asset as reduced by any expenditure incurred wholly and exclusively in connection with such transfer.

The amount elegible for deduction u/s 54F is "cost of new asset" i.e.residential house and not the cost of construction only. Sir, it is a very common knowledge that a residential house means a house which is habitable. For making a house habitable, all the necessities required for living are to be installed. Air Conditioners, fitting of AC, wall papers, curtains, sofa and runners etc. are all necessities required for making a

house inhabitable. Therefore all these things are part & parcel of a residential house
The cost of new asset i.e. the residential house ought to include all the cost incurred for making a house inhabitable. Therefore your observation that the expenses on account 0/ purchase of Air Conditioners. fitting of AC, wall papers. curtains. sofa and runners etc. art not allowable expenditure u/s 54F is erroneous.
Reliance is placed on the case of Shri Shriniwas R. Desai vs. A CIT - ITA No. 1245 & 2432/Ahd/20l0 (copy of judgment enclosed) wherein the Hon'ble Tribunal held that "the AO is directed to allow deduction of the cost of new asset purchased by him and the .....expenses. if any. incurred by him to make the same inhabitable .."
Reliance is also placed on a very recent judgment in the case of Rajat B. Mehta vs. ITO (2018) 90 Taxmann.com 176 (Ahd-Trib) (Copy enclosed) wherein the Hon'ble Tribunal held that the payment on account of furniture &;fixture was also allowable for deduction u/s 54F.
D. As explained herein above. as per the facts of the case and as per the above cited judgments, it is established that the cost of new asset (i. e. residential house) comprises of cost of construction of residential house & expenses incurred on furniture fixtures etc. for, making the residential house habitable. Accordingly expenses on account of purchase of Air Conditioners. fitting of AC, wall papers, curtains, sofa and runners etc. qualify for deduction u/s 54F.

11. We have given our thoughtful consideration to the rival contentions of the parties. So far exercising of powers u/s 263 of the Act is concerned, we find no infirmity in the order of Ld. PCIT as the Assessing Officer has wrongly allowed the claim without examining that how much deduction can be allowed. Ld. Counsel for the assessee argued that this order could be rectified by the Assessing Officer u/s 154 of the Act. However Ld. Counsel for the

assessee did not bring to our notice any such action being taken by the Assessing Officer. Hence on this ground revision of the order is justified. Another ground for exercising of power u/s 263 of the Act was regarding adoption of the cost of acquisition of new asset. Ld. Counsel for the assessee submitted that the cost of furniture, Air Conditioners is allowable and the same would form part of acquisition of new assets. To buttress this contention Ld. Counsel has placed reliance on the decision of the Co-ordinate Bench rendered in the case of *Shriniwas R Desai V/s ACIT, ITA No.1245 and 2432/Ahd/2010* wherein the Co-ordinate Bench has held that cost of the asset is not allowable but in a case where the assessee has purchased a new asset, which is not habitable condition the expenses incurred by the assessee to make it habitable should be allowed u/s 54(2) of the Act. Reliance has also placed on the decision of Co-ordinate Bench in the case of *Rajat B Mehta V/s ITO (2018) 90 taxmann.com 176* wherein it has been held that the expression used in statute is cost of the residential house so purchased and it does not necessarily mean that the cost of residential house must remain confined to the cost of civil construction alone. A residential house may have many other

things, other than civil construction and including things like furniture and fixtures, as its integral part and may also be on sale as an integral deal. Further the Tribunal held that if these things are integral part of house being purchased, the cost of house has to essentially include the cost of these things as well. In such circumstances, what is to be treated as cost of the residential house is the entire cost of house and it cannot be open to the Assessing Officer to treat only the cost of only civil construction as cost of house and segregate the cost of other things as not eligible for deduction u/s 54. In this case it was not a composite deal, we find that the Ld. PCIT has also considered these case laws. However it is not clear whether the assessee had entered into with a contract with the contractor that included the cost of furniture and other fixtures. Ld. PCIT has also not brought any such evidence on record. Under these facts we modify the direction of Ld. PCIT to the extent that the Ld. Assessing Officer would allow the expenses incurred for furniture and Air Conditioners if it is part and parcel of the contract for construction of new house. This ground of the assessee is partly allowed.

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

Order was pronounced in the open court on 28.12.2020.

Sd/-	Sd/-
(MANISH BORAD)	(KUL BHARAT)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Indore; दिनांक Dated : 28/12/2020

/Dev

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

Assistant Registrar, Indore