

**IN THE INCOME TAX APPELLATE TRIBUNAL
JODHPUR BENCH, JODHPUR**

**BEFORE SHRI HARI OM MARATHA, JUDICIAL MEMBER AND
SHRI N.K.SAINI, ACCOUNTANT MEMBER**

**ITA No. 122/JU/2011
[A.Y. 2006-07]**

Shri Sunil Bhandari
S/o Shri Dhanpat Raj Bhandari
E - 48, Jodhpur

Vs. The ACIT
Circle - 1
Jodhpur

PAN No: AANPB 5802 G

(Appellant)

(Respondent)

Assessee by : Shri Amit Kothari
Department by : Shri Subash Chandra

Date of Hearing : 23.11.2012
Date of Pronouncement : 30.11.2012

ORDER

PER HARI OM MARATHA, J.M.

This appeal of the assessee for the A.Y 2006-07 is directed against the order of the ld. CIT-I, Jodhpur dated 17.3.2011, passed u/s 263 of the Income-tax Act, 1961 [hereinafter referred to as 'the Act', for short].

2. The assessee has been deriving income from 'dealing in property transactions'. He filed Return of Income [ROI] for A.Y. 2006-07 on 31.07.2006 declaring total income of Rs. 11,75,085/-. The assessee also disclosed capital gain and interest income. The regular assessment was made u/s 143(3) on 19.12.2008.

3. Subsequently, the ld. CIT called for the records of this assessment order and after finding this order erroneous in so far as it is prejudicial to the interest of the Revenue, issued a show cause notice dated 22.3.2010 u/s 263 proposing to revise it. The show-cause notice issued is verbatim, as under:

"On perusal of your assessment records for the A.Y. 2006-07, it has been noticed that you have shown capital gain of Rs.22,67,451.50 on sale of 12 plots and after deducting the investment of Rs.14,57,522/- towards residential house at Shastri Nagar, Jodhpur the Long Term capital Gain has been declared at Rs.8,09,929/-. The AO worked out the LTCG at

Rs.25,73,706/- by applying DLC rates and after deducting the investment of Rs.14,57,522/- the taxable LTCG has been determined at Rs.11,16,184/- . The AO without making proper investigation/enquiry accepted your claim that the sale consideration received by you on 12 plots as Long Term Capital Gain despite the fact that you were carrying on the business of purchase & sale of plots and have declared net profit of Rs.,65,156/- from such business. There is nothing available either in the assessment order or in the records on the basis of which it could be said that the issue was analyzed as to whether the gains arising from sale of plot are to be treated as business income or as capital gains. Merely for the reason that sale of plot was shown as investment, it cannot be said that the gains arising from sale of plot is to be taxed as capital gains. A mere stroke of pen cannot alter the correct and true nature of income. The entire facts and circumstances surrounding the case are to be looked into before coming to a conclusion as to whether the gains arising from sale of plot is to be treated as business income or as capital gains. The AO failed to look into and make inquires in this regard as stated above. You have shown sale of some plot as business activity and others as capital gain.

1.1 In view of the above, the deduction for Rs.14,57,522/- on account of investment in residential house at Shastri Nagar as claimed/allowed is also not allowable under the provisions of Act.

ii In the balance sheet as on 31.03.2006 enclosed with the return of income you have shown following investments:-

i.	Investment in land	Rs.7,21,565/-
ii.	Land at Pal	Rs.12,07,970/-
iii.	Land at Bilara	Rs.3,04,500/-
iv.	Air Condiitioner	Rs.42,492/-
v.	Car	Rs.2,74,854/-
vi.	Residential House	Rs.79,95,000/-
vii.	Television	Rs.3,208/-
viii.	Furniture & Fixtures	Rs.9,287/-
ix.	Mobile instrument	Rs.13,834/-
x	FDR	Rs.19,366/-
Xi	NSC	Rs.35,364/-
xii	PPF	Rs.1,22,680/-

Perusal of the records as well as the assessment records reveals that you have neither furnished any details before the AO in respect of the above investments nor the AO has made any enquiry regarding these investments. The AO has simply accepted the investments without examining them.

In respect of the amount of Rs.98,000/-, Rs.1,55,758/-, Rs.17,50,000/- and Rs. 2,28,000/- shown in the assets side of balance sheet as on 31.03.2006 against Sahyog Estate Pvt. Ltd., HDFC Bank, Sunil Bhandari HUF and Smt. Anita Bhandari respectively, the assessment records as well as the assessment order do not show what the amount

represented. The AO has simply accepted the investments without examining them.

iv. In respect of the amount of Rs.1,24,43,310.57, Rs.3,50,000/-, Rs.60,000/-and Rs.96,000/-, Rs.7,000/- and Rs.45,000/- shown in the liabilities side of balance sheet as on 31.03.2006 against Capital, Advance for plot No.1 Jhalamand, Rakesh, Ravi Surana, Amit Kothari and Sahyog Estate Pvt. Ltd respectively, nothing is available on record nor the assessment order speak about it. The AO has simply accepted the liabilities without examining them.

v. In respect of withdrawals of Rs.60,000/- and LIC premium, there are neither any evidence/details available on record nor the AO has called for and examined the same.

vi. From the entire discussion as above, it becomes amply clear that the AO completed the assessment in undue haste without making required investigations, verifications and inquires. Therefore, I consider that the assessment order so passed by the AO is erroneous as also prejudicial to the interest of revenue and the same requires to be set aside or modified or enhanced, or cancelled accordingly.

I would like to invite your attention to the decision of Hon'ble Kamataka High Court in the case of Thalibai F. Jain Vs. ITO (101 ITR 1) wherein it was held that the assessment made in undue haste or without enquiry is prejudicial to the interest of the revenue, and what is prejudicial to the interest of the revenue must be held as erroneous. In the case of CIT Vs. Pushpa Devi (164 ITR 639), it has been held by the Hon'ble Patna High Court that if enquiry into the source of the initial capital is crucial for the ITO and if that is not done, the assessment is bound to be erroneous and hence prejudicial to the revenue. Similar views have been expressed by the Hon'ble Delhi High Court in the case of Gee Vee Enterprises Vs. Addl. CIT (99 ITR 375) holding that the Commissioner can regard the ITO's order as erroneous on the ground that in the circumstances of the case the ITO should have made further enquiries before accepting the statements made by the assesses in his return."

4. This notice was complied with through written submissions [w/s] filed on 14.3.2011. The gist of submissions, as incorporated by the ld. CIT read as under:

“A. The proceedings u/s 263 initiated^ in the case of the assessee for A.Y. 2006-07 are not justified in the facts and circumstances and are not in consonance with the provisions of law and well settled judicial decisions. It is submitted that the condition precedent for initiation of such proceedings are apparently not present and the assessment framed in the case of the assessee cannot be said to be erroneous or prejudicial to the interest of the Revenue.

B. The assessee had submitted return of income for A.Y. 2006-07 on 31st July 2006 declaring total income of Rs. 11,75,085/-. The main source of income had been the business income as well as long term capital gains. The assessee had duly submitted the computation of long term capital gains in the return of income, giving details of sale value and the indexed cost and the gain arisen. The return of income was selected for scrutiny by issue of notice u/s 143(2) and assessment in the case of assessee was completed u/s 143(3) after detailed scrutiny from time to time. The assessee attended the hearings before the Id. AO and submitted various details called for during the course of assessment proceedings. The assessment u/s 143(3) was completed vide order dated 19.12.2008 at total income of Rs.15,00,905/-. The main addition had been on account of long term capital gains in which the sale value was

substituted by the value as adopted for DLC purpose by Stamp Authorities and the long term capital gains was recomputed.

C. In the notice issued u/s 263 vide letter dated 22.03.2010 the various issues which have been raised are as under:

a. The assessee had shown long term capital gains on sale of twelve plots. The contention is that whether such income should be regarded as business income or capital gains has not been properly examined.

B The second issue relates to deduction on account of investment in new residential house which was allowed by accepting the contention of long term capital gains. If the gain is treated as business income such claim would not be eligible to the assessee. The copies of registered sale deed were also duly submitted.

c. There are certain investments shown in the balance sheet or which roper enquiry has not been made.

d. Similarly, there are certain liabilities which also had not properly examined.

e. In relation to payment of LIC premium of Rs.60,000/- paid during the year under consideration, the same was also not properly examined.

D. In view of above observations it was contended that the order is erroneous and prejudicial to the interest of Revenue and therefore, making fresh assessment in the case of the assessee.

E. In relation to the first issue relating to the sale of certain plots on which long term capital gains has been claimed, the assessee has duly submitted the details to the Id. AO. The investment in plots has been made long back and were held by the assessee as an investment. The copies of registered documents were also submitted which indicates that these investments were made in April and May 2001. These investment have been retained by the assessee for a period of more than about 5 years prior to the sale. These were long term investment made by the assessee. Further, since, the assessee had purchased new residential house and therefore, the plots which were held by the assessee as investment were sold and the proceeds were utilized in investment in residential house. The income so derived was rightly shown income from long term capital gains. These investments year after year had been regularly shown as investment in the Balance Sheets submitted by the

assessee and were never claimed to be stock in trade. The Id. AO appreciating the submission made by the assessee on this regard had considered the same as long term gains. It was only therefore, that provisions of section 50C were applied and the rates as per stamp duty purposes was taken for computation of long term capital gains. The Id. AO had therefore, applied his mind on the issue and after considering it appropriate it to be taken as long term capital ad asked the assessee to furnish the copies of registered sale deed examining the value adopted for stamp duty purposes. The perusal of assessment order would reveal the different plots sold by the assessee during the year under consideration, the date of purchase and the date of sale. In such facts if the Id. AO has taken a view that such sale of plots is to be considered as long term capital gain it cannot be said to be an erroneous order.

F. Once, the Id. AO has treated the gain as long term capital gains, he was justified in granting deduction u/s 54F in relation to investment in residential house. The investment in residential house at E-48, Shastri Nagar is not in dispute and the deduction u/s 54F is permissible against such long term capital gains. In fact, the assessee had sold these plots and had reinvested the amount in residential house and it was only for purpose that the investment in plots were liquidated. This claim being

consequential to the earlier issue I am therefore, in view of our submission made in relation to earlier grounds also supports the claim of deduction in relation to such investment.

G. As regards other investments shown in the balance sheet the Id. AO at the time of assessment had duly verified the same and there cannot be said to be any error or prejudice to the Revenue. In this regards your kind attention is also invited towards assessee's submissions made 011 19.05.2008 wherein in para 3 it was specifically stated that no addition in any of the fixed assets had been made during the year under consideration. However, in relation to the various investments as mentioned in para 2 of your shown cause notice dated 22.03.2010 we submit herewith details to indicate that all investments are old:

<i>S.N</i>	<i>Particulars</i>	<i>Balance as on 31.03.2006</i>	<i>Balance as on</i>
<i>1.</i>	<i>Investment in land</i>	<i>7,21,565</i>	<i>10,57,863</i>
<i>2.</i>	<i>Land at Pal</i>	<i>12,07,970</i>	<i>15,71,200</i>
<i>3.</i>	<i>Land at Bilara</i>	<i>3,04,500</i>	
<i>4.</i>	<i>Air conditioner</i>	<i>42,492</i>	<i>49,992</i>
<i>5.</i>	<i>Car</i>	<i>2,74,854</i>	<i>3,23,358</i>
<i>6.</i>	<i>Residential House</i>	<i>79,95,500</i>	<i>54,95,000</i>
<i>7</i>	<i>Television</i>	<i>3,208</i>	<i>3,773</i>
<i>8</i>	<i>Furniture and</i>	<i>9,287</i>	<i>10,381</i>

9.	Mobile	13,834	16,275
10	FDR	19,366	11,50,000
11	NSC	35,364	32,448
12	PPF	1,22,680	71,000

H. In PPF Rs.1680 was interest and Rs.50,000/- was investment made for which necessary evidence was duly submitted during assessment. The investment was made by cheque no.557290 on 24.03.2006. In depreciable assets there has been no investment during the year and only on account of depreciation the value has decreased. In NSC the increase is on account of interest accrued on NSC. The assessee has duly shown such interest in the computation. The old FDR had matured during the year therefore, the value has also decreased. The assessee had duly submitted depreciation charts and details of fixed assets before the Id. AO during the course of original assessment and has produced the book of accounts before the Id. AO which will be evident from para 3 page 2 of the assessment order

I. In relation to amount of Rs.98,000/- in the name of Sahyog Estate P. Ltd., Rs.17,75,000/- in the name of Shri Sunil Bhandari (HUF), Rs.2,28,000/- in the name of Smt Anita Bhandari. It is submitted that the same were also duly verified at the time of original assessment. Investment of Rs.98,000/- in Sahyog Estate is an

old balance representing investment in shares of such company these are old investment only. In relation to amount advanced to Shri Sunil Bhandari HUF the same was also through account payee cheques issued in the name of HUF and were verifiable from the bank account already submitted during the course of assessment proceedings. The assessee had issued cheques from Jodhpur Nagrik Sahakari Bank Ltd. and from Bank Ltd. A cheque of Rs.9,00,000/- was given on 15.05.2005 and a cheque of Rs.10,00,000/- on 01.06.2005 and Rs.1,50,000/- on 30.07.2005. A cheque of Rs.3,00,000/- was received back on 11.03.2006. In relation to advance to Smt. Anita Bhandari the same was also paid by account payee cheque issued on 09.07.2005 for Rs.3,00,000/- and after credit of salary of Rs.72,000/- the balance remained at Rs.2,28,000/- which was also fully verified. The copy of bank account and copies of all the expenses account were also duly submitted to the Id. AO at the time of original assessment.

J. In relation to certain liabilities it is respectfully submitted that the same is also duly verifiable and was duly verified at the time of assessment. The opening capital of the assessee was 1,01,69,992.19. The capital account was duly submitted and the credit in account were on account of long term capital gain on sale of plot

amounting to Rs. 23,28, 887/-and profit during the year was amounting to Rs. 4, 65, 156. 37. Rs.3,50,000/- was received towards Plot No.1 at Jhalamand which was duly registered in the subsequent period. The amount due in the account of Shri Rekesh, Shri Ravi Surana were on account of current liabilities in relation to amount outstanding to them towards salary. The amount due to Amit Kothari for Rs. 7,000/- was towards legal expenses for tax returns. In earlier year also provision of 7,000/- was made which was paid during the year under consideration on 14.09.2005 vide cheque no. 006797.

K. In relation to withdrawals of Rs.60,000/- in LIC premium of Rs.49,007/-the same was duly debited in the capital account and necessary evidence was duly submitted with the return of income. The withdrawals were verifiable also from the books of accounts provided before the Id. AO and details furnished alongwith letter dated 19.05.2008.

In view of above referred facts and circumstances in the case of the assessee. It is submitted that the original order passed by the Id. AO to be said to be erroneous or prejudicial to the interest of the revenue and therefore, the proceedings initiated in the case of the assessee may kindly be dropped. Even if it is

presumed that there is another view possible in the matter, the view which the A.O. had taken cannot be said to be erroneous. In the written submission they relied upon various decisions which support the contention of the assessee that under present facts and circumstances in the case of the assessee no such revision proceedings are warranted.

5. After considering the reply of the assessee and after perusing entire records, called for, the ld. CIT(A) found that the main source of income of the assessee is from the purchase and sale of plots/lands. In respect of some plots/land, the assessee has claimed LTCG and has also claimed benefit of section 54F of the Act. The inference of the ld. CIT is that when the purchase and sale of plots/land is the main business of the assessee, his claim qua sale of some plots/land cannot and should not have been treated by the A.O. as 'capital gain' so claimed by the assessee. The assessee ld. CIT has treated this action of the A.O. to be erroneous in so far as it is prejudicial to the interest of the Revenue. He has also found similar position regarding issues like acceptance of investments

made in various aspects, acceptance of liabilities shown in balance sheet, acceptance of petty withdrawals for household expenses and acceptance of expense under various heads, without proper inquiry and investigation. On these aspects also, the ld. CIT has set aside the assessment order with a direction to make fresh order after making due inquiries.

6. Against this order of the ld. CIT, the assessee has come in appeal by raising the following grounds:

- 1. The impugned order us 263 passed by the Ld. CIT is patently invalid, void. contrary to provisions of law and also contrary to facts, material evidence existing on records.*
- 2. The impugned order u/s 263 passed by the Ld. CIT is apparently invalid as the original assessment u/s 143(3) was passed by the AO after conducting adequate enquiries and investigation in relation to all the points referred to in the impugned assessment order u/s 143(3).*
- 3. That on the facts and circumstances of the appellant's case, it is crystal clear from the material existing on records that the original assessment order passed by the Ld. AO by no*

stretch of imagination can be regarded as erroneous and prejudicial to the interest of Revenue.

4. *The impugned order passed by the Ld. CIT is clearly beyond the ambit and scope of section 263.*
5. *The impugned order passed by the Ld. CIT is bad in law and bad on facts.*
6. *The appellant craves liberty to add, amend, alter, and modify any of the ground of appeal on or before its hearing before your honour.*

7. We have heard the rival submissions and have carefully perused the entire material on record. It would be worthwhile to narrate, in sum and substance, the law relating to revision as settled by the courts. It is trite that an order can be revised only and only if twin conditions of 'error in the order' and 'prejudice caused to the Revenue' co-exist. The subject of 'revision under section 263' has been vastly examined and analyzed by various Courts including that of Hon'ble Apex Court. The revisional power conferred on the CIT vide section 263 is of wide amplitude. It enables the CIT to call for and examine the records of any proceeding under the Act. It empowers the CIT to

make or cause to be made such an enquiry as he deems necessary in order to find out if any order passed by Assessing Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The only limitation on his powers is that he must have some material(s) which would enable him to form a prima-facie opinion that the order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the Revenue. Once he comes to the above conclusion on the basis of the 'material' that the order of the Assessing Officer is erroneous and also prejudicial to the interests of the Revenue, the CIT is empowered to pass an order as the circumstances of the case may warrant. He may pass an order enhancing the assessment or he may modify the assessment. He is also empowered to cancel the assessment and direct to frame a fresh assessment. He is empowered to take recourse to any of the three courses indicated in section 263. So, it is clear that the CIT does not have unfettered and unchequered discretion to revise an order. The CIT is required to exercise revisional power within the bounds of the law and has to satisfy the need of fairness in administrative action and fair play with due respect to the principle of audi alteram partem as envisaged in the

Constitution of India as well as in section 263. An order can be treated as 'erroneous' if it was passed in utter ignorance or in violation of any law; or passed without taking into consideration all the relevant facts or by taking into consideration irrelevant facts. The 'prejudice' that is contemplated under section 263 is the prejudice to the Income Tax administration as a whole. The revision has to be done for the purpose of setting right distortions and prejudices caused to the Revenue in the above context. The fundamental principles which emerge from the several cases regarding the powers of the CIT under section 263 may be summarized below:

- (i) The CIT must record satisfaction that the order of the Assessing Officer is erroneous and prejudicial to the interests of the revenue. Both the conditions must be fulfilled.
- (ii) Section 263 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.

- (iii) An incorrect assumption of facts or an incorrect application of law will suffice for the requirement or order being erroneous.
- (iv) If the order is passed without application of mind, such order will fall under the category of erroneous order.
- (v) Every loss of revenue cannot be treated as prejudicial to the interest of the revenue and if the Assessing Officer has adopted one of the courses permissible under law or where two views are possible and the Assessing Officer has taken one view under which the CIT does not agree, it cannot be treated as an erroneous order, unless the view taken by the Assessing Officer is unsustainable under the law.
- (vi) If while making the assessment, the Assessing Officer examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income, the CIT, while exercising his power under section 263, is not permitted to substitute his estimate of income in place of the income estimated by the Assessing Officer.

- (vii) The Assessing Officer exercise quasi-judicial power vested in him and if he exercise such power in accordance with law and arrives as a conclusion, such conclusion cannot be termed to be erroneous simply because the CIT does not feel satisfied with the conclusion.
- (viii) The CIT, before exercising his jurisdiction under section 263, must have material on record to arrive at a satisfaction.
- (ix) If the Assessing Officer has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation be a letter in writing and the Assessing Officer allowed the claim on being satisfied with the explanation of the assessee, the decision of the Assessing Officer cannot be held to be erroneous simply because in his order he does not make an elaborate discussion in that regard.

8. Reverting to the facts of this case, we have found that the A.O. himself has treated the main income of the assessee from purchase and sale of plots/land. The assessee himself has disclosed this fact over the years.

The A.O. has made proper inquiries in this regard. Before us, both parties have taken same stand, as was before ld. CIT. The ld. CIT, D.R has reiterated all the reasons given by the ld. CIT-I, in the appellate order to revise the assessment order. On the other hand, the ld. A.R. has relied on the w/s filed before the ld. CIT and also other documents which have been filed in his paper-book, inter alia. Both the parties have taken us through them and have also placed reliance on precedents favourable to them. After considering all the evidence on record, we have found that the ld. CIT(A) has proceeded on a notion that an assessee, whose main business is purchase and sale of plots/lands, cannot claim LTCG on the sale of some plot/land even if these were held for quite some time and the sale consideration even from those plots to be treated as assessee's business income. That is why he has found the claim of LTCG and benefit thereof u/s 54F of the Act made by the assessee and accepted by the A.O., has been held by the ld. CIT as an error which is prejudicial to the interest of the Revenue. While doing so, he has also

trampled on other aspects of the business of the assessee, like investments and liabilities shown, which have been doubted by him and by concluding that no proper enquiry was made in this regard also, he has set aside the order of de novo consideration.

9. The ld. CIT[DR] has vehemently argued that the A.O. has not made proper enquiries and hence the order becomes revisable on account of not making proper investigation. He has argued that the assessee sold 15 plots and out of which 8 plots situated in Pali were allotted to the assessee by Urban Authority which got converted into residential and the assessee has claimed u/s 54F has been allowed without making proper enquiry.

10. We have cogitated all the submissions made before us. We have found that there is no dispute regarding the source of income of the assessee which is mainly from the business of purchase and sale of plots/lands. But it does not mean that such an assessee is debarred from

purchasing and holding some plots/land as capital asset and claim benefit u/s 54F. The entire facts regarding this aspect go to prove that the assessee had kept the impugned asset and has earned LTCG, which has been invested in terms of provisions of section 54F. Accordingly, we are convinced that the action of the A.O. does not lack any enquiry in this regard and he has taken one of the possible views keeping in view the entire facts. The ld. CIT can have his own view and that may be another possible view. But as we have discussed above in such situations, the order cannot be treated as erroneous. Accordingly, in view of our foregoing discussion, we hold that the A.O. had made proper enquiries and has taken a correct decision. The ld. CIT cannot revise the order on this aspect.

11. The A.O. has also made requisite enquiries regarding other aspects of investments made and liabilities shown by the assessee and other expenses, which is clearly explained by the assessee as detailed above. Therefore,

on these accounts also, the order of the A.O. cannot be held erroneous.

12. Accordingly, we set aside the order of the ld. CIT and restore that of the A.O.

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

Order Pronounced in the Court on 30th November, 2012.

Sd/-

(N.K.SAINI)
ACCOUNTANT MEMBER

Dated : 30th November, 2012

VL/-

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT*
4. *The CIT(A)*
5. *The DR*

Sd/-

[HARI OM MARATHA]
JUDICIAL MEMBER

By Order

Assistant Registrar
ITAT, Jodhpur