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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA 568/2019**

PRINCIPAL COMMISSIONER OF INCOME TAX-16

..... Appellant
Through: Mr Shlok Chandra, Sr. SC with
Ms Priya Sarkar and Ms
Madhavi Shukla, Jr. SCs.

versus

SH. PRAVEEN KUMAR MALHOTRA Respondent

Through: Mr.S. Krishnan and Mr.Harshit
Chouhan, Advs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE PURUSHAINDR KUMAR

KAURAV

ORDER

11.03.2024

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1. The Commissioner questions the correctness of the decision rendered by the Income Tax Appellate Tribunal ["ITAT"] and which has in terms thereof set aside the order passed by the Principal Commissioner of Income Tax-16 ["PCIT"] in purported exercise of revisionary powers conferred by Section 263 of the Income Tax Act, 1961 ["Act"].

2. As is evident from a reading of the impugned judgment rendered by the ITAT, the solitary issue which appeared to survive was with respect to the exemptions claimed under Section 54F of the Act and the long term capital gains obtained from the sale of shares of M/s Sundial Infotech Pvt. Ltd.

3. Doubting the correctness of the disclosures which were made,



the PCIT appears to have undertaken an exercise to determine the fair market value. While doing so, it took note of the facts as emanating from the record and the contents whereof have been noticed in paragraph 5 of the judgment of the ITAT which reads as follows:-

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

4. It was this which ultimately led to the PCIT setting aside the Assessment Order dated 12 January 2015. However, and we find that the ITAT has found that the aforesaid exercise of ascertaining the fair and full value of consideration was undertaken at a time prior to the introduction of Section 50CA of the Act which came to be introduced



on the statute book with effect from 01 April 2018 and would thus apply from Assessment Year 2018-2019 and onwards.

5. While dealing with this aspect, the ITAT has observed as follows:-

"8. The main charge of the Ld. PCIT in the impugned order is that sale consideration of the shares has been inflated for the reason that the land owned by the said company has been valued at a very higher rate based on Valuation Report. Nowhere, Ld. PCIT has observed or held that under the sale agreement for transfer of shares, the consideration received was less than Rs. 6,89,88,159/-, because this fact is clearly evident from the bank statement filed before the AO as well as Ld. PCIT which is not in dispute. If long term capital gain has been shown on the basis of full value of consideration received as a result of transfer of the capital assets, then without any material on record to show that such a sale transaction is sham or bogus, then the full value of the consideration received or accruing cannot be disturbed. This is clearly evident from the terms expressed in section 48 which reads as under:-

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

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



Ld. PCIT is trying to substitute the full value of consideration received on transfer of shares by holding that the valuation of the shares should be much less as declared by the assessee, i.e., the full value of consideration which is subject to chargeability under the head long term capital gain should have been far less than what has been shown by the assessee. First of all, the full value of consideration on transfer of capital asset is subject to taxability u/s 45; and section 48 provide the mode of computation for deducting various amounts for the purpose of working of the capital gains which is to be deducted from the full value of the consideration relieved or accrued from sale of capital asset and that to flowing from the agreement between the parties. Once the long term capital gain has been arrived u/s 48, then only the issue of exemption u/s 54 or 54F or 54EC, etc. would apply. Thus, the full value of the consideration received from the transfer of shares by the assessee cannot be substituted either by holding that the fair market value is less or the fair market value is more. The phrase used is the full value of consideration received or accrued as a result of transfer of capital assets and nowhere the section or the Act provides that such full value of consideration receipt can be substituted except for deeming provision provided u/s 50C, 50CA and 50D. As held above, 50CA is not applicable the assessment year 2012-13 and therefore, we hold that Ld. PCIT could not under the law have tinkered with the amount of full value of consideration received by the assessee on sale of shares. Accordingly, we hold that assessment order passed by the AO is not erroneous in law. It is a trite and settled position of law that in order to acquire jurisdiction u/s 263 the Ld. CIT or PCIT has to satisfy himself that the assessment order passed is erroneous in so far as it is prejudicial to the interest of revenue and such twin conditions have to be fulfilled as simultaneously i.e. if order is not erroneous but prejudicial and vice versa, then Ld. CIT/PCIT cannot cancel the assessment order. Both the conditions are not mutually exclusive to each other as both the conditions have to be fulfilled simultaneously. This proposition has been laid down by the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. vs. CIT (2000) 243 ITR 83 {SC}.

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

10. It appears that the only reason by the Ld. PCIT to hold that assessment order is erroneous in so far as prejudicial to the interest of revenue because the assessee has claimed higher exemption u/s 54F by inflating the sale value of the shares. The claim of exemption u/s 54F from of long term capital gain tax, i.e., first long term capital gain has to be assessed or worked out in the manner provided in section 48 and then the resultant long term capital gain would be subjected to tax u/s 45. The statute then provides



exemption from long term capital gain tax can be availed by an assessee, if he invests the long term capital gain in the manner given in section 54 to 54EC. First step is determination of long term capital gain and then only exemption of benefit of section 54 to 54EC is available. Here in this case the Ld. CIT is trying to hold that the long term capital gain shown by the assessee is more and therefore, deduction or exemption claimed u/s 54F has been inflated. This perhaps is not the correct approach, because first of all he has to give a definite finding as to why long term capital gain u/ s 40A is not correct and then he can tinker with the exemption provision. As we have already held above the Ld. PCIT could not have substituted the full value of consideration received which has been agreed by the parties in the agreement wherein one party is selling the capital asset and other party is purchasing such an asset. The full value of the consideration received has to be reckoned from the price and the value of the consideration received or accrued which cannot be tinkered under the then existing provision of law. Accordingly, we set aside the impugned order passed u/ s 263 and uphold the order of the assessment order and the computation of long term capital gain and consequently exemption u/ s 54 F. In the result appeal of the assessee is allowed."

6. In view of the aforesaid, we find no infirmity in the view as expressed by the ITAT. No substantial question of law arises. The appeal shall consequently stand dismissed.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.
MARCH 11, 2024/MJ