आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'B' अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, AHMEDABAD
(Conducted through Virtual Court)

BEFORE SHRI RAJPAL YADAV, VICE-PRESIDENT
AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

ITA No.1685/Ahd/2018
Asstt.Year 2013-14

Smt.Anupama Bharat Gupta C/o. R.B. Gupta Financial Ltd. Satish Gupta Chambers Opp: Police Parade Ground Kharivav Road Raopura, Vadodara PAN : ACWPG 3840 L	Vs.	ITO, Ward-3(1)(2) Vadodara.

(Applicant)		(Responent)

Assessee by :	Shri U.S. Bhati, AR
Revenue by :	Shri Sanjeev Jain, CIT-DR

सुनवाई की तारीख/**Date of Hearing : 24/03/2021**
घोषणा की तारीख /**Date of Pronouncement: 12/04/2021**

आदेश/O R D E R

PER RAJPAL YADAV, VICE-PRESIDENT:

Present appeal is directed at the instance of the assessee against order of the ld.CIT(A)-3, Vadodara dated 8.3.2018 passed under section 263 of the Income Tax Act, 1961 for the Asstt.Year 2013-14

2. Though the assessee has taken two grounds of appeal, but her sole grievance is that the ld.CIT(A) has erred in taking cognizance under section 263 of the Income Tax Act, 1961 and thereby setting aside the assessment order for passing a fresh assessment order.

3. Brief facts of the case are that the assessee has filed her return of income on 25.6.2013 declaring total income at Rs.6,41,630/-. The case of the assessee was selected for scrutiny assessment, and assessment order was passed on 16.2.2016 under section 143(3) by accepting the returned income of the assessee. The ld.Commissioner took cognizance of assessment record and formed an opinion that the assessment order is erroneous and prejudicial to the interest of the Revenue. Therefore, a show cause notice under section 263 of the Act was issued and served upon the assessee. Though the show cause notice has been reproduced in the impugned order passed under section 263, its copy is also available at page no.76 to 78 of the paper book. We deem it appropriate to take note of this show cause notice, which reads as under:

> "On *verification from the computation of income & other details submitted by you during the course of assessment proceedings, it is noticed that you have shown working of capital gains as under:*
>
> | | | |
> |---|---|---|
> | *Sale consideration of 28Flats: -* | | *Rs.4,76,00,000/-* |
> | *Less:- Indexed cost* | *Rs.2,26,30,066/-* | |
> | *Improvement* | *Rs. 11,22,32s/-* | |
> | | | *Rs.2,37,52,391/-* |
> | | | *Rs.2,38,47,609/-* |
> | *Less:-Exempt U/s 54* | *Rs.2,61,00,000/-* | *Rs.2,38,47,609/-* |
> | *Long term capital gains .* | | *Rs. Nil/-* |
>
> *2. On perusal of the case records, it is noticed that the Collector, Baroda had given permission for conversion of agricultural land i.e. R.S. No. 95, 96 at Nagarwada, Baroda vide order dated No.NA/S.R.62/2005.06 dated 09.01.2007. No other material is on record. Thus, the claim of improvement is not supported by any evidence. The claim has been accepted without any verification which the case prima facie warrants. Hence the order is erroneous and prejudicial to the interest of revenue.*
>
> *3. Regarding exemption claim u/s.54 of the Act, on perusal of the indexed copy of the property purchased bearing R.S. 112/2, City Survey No. 1801, Baroda on 22.06.2015, it was noticed that a residential house admeasuring 550 sq. ft on land on 4702.20 sq. ft was bought. Thus, you*

have purchased readymade house which is beyond the specified time limit I.e. after more than two years from the date of transfer. Thus, the claim of exemption is not in accordance with law, Failure to disallow the same has resulted in the order being erroneous and prejudicial to the interest of revenue.

4. You have claimed indexed cost of Rs.2,26,30,066/- and a valuation salua&an report in this regard was submitted. It is is to mention here that in subsequent years, the claim of indexation Rs.196/- per sg. ft. was disallowed and the value of the land as on 01.04.1981 was arrived @Rs.8/- per sq. ft, after taking into consideration of instances of sales in and around the land situated at Nagarwada which were called for from the Sub-Registrar, Baroda. Thus, the indexation cost of Rs.2,26,30,066/- adopted by you is excessive having regard to the instances of the sales in the vicinity of the impugned land. Hence, it has made the order both erroneous and prejudicial to the interest of revenue/'

5. You have claimed indexed cost of Rs.2,26,30,066/- and a valuation report in this regard was submitted, It is to mention here that in subsequent years, the claim of indexation @Rs.l96/- per sq.ft was disallowed and the value of the land as on 1.4.1981 is was arrived at @Rs.8/- per sq.ft. after taking into consideration of instances of sales in and around the Land situated at Nagarwada which were called for from Sub-Registrar, Baroda. Thus, the indexation cost of Rs. 2,26,30,066/- adopted by you is excessive being regard to the instances of the sales in the vicinity of the impugned land. Hence, this has made the order erroneous and prejudicial to the interest of revenue.

6. From the above, it is clear that the Assessing Officer has failed to carry out enquiries as warranted by the facts and circumstances of the case and assessment has been completed without examining all aspects which were required to be looked into for determining the total income of the assessee, It has been held in number of cases by the Hon'ble courts that unlike the Civil Court which is neutral to give a decision on the basis of evidence produced before it, the Assessing Officer Is not only an adjudicator but also an investigator. He cannot remain passive on the face of a return, which is apparently in order but calls for further enquiry. It is his duty to establish the truth of the facts stated in the return of income when the circumstances of the case are such as to provoke enquiry. If there is failure to make such enquiry, the order is erroneous and prejudicial to the interest of revenue. In this regard references were made to the following cases:

Gee Vee Enterprises Vs.Addl.CIT, 99 ITR 375 (DEL) Rampyari Devi Saraogi Vs.Commissioner of Income-tax, 67 ITR 84(SC)
Malbar Industrial Co.Ltd, Vs.CIT, (2000)243 ITR 83(SC)
Rajalakshmi Mills Ltd,, Vs, ITO 313 ITR(AT)0182

7. It may further be stated that Explanation 2 has been inserted below sub-section (1) of Section 263 wherein it has been declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so

far as it is prejudicial to the interest of the revenue, if, in the opinion of the Principal Commissioner or Commissioner of Income-tax, the order is passed without making enquiries or verification which should have been made.
8. In view of the above facts, clear provisions of the Act and the authorities, you are hereby required to show cause as to why the assessment passed by the Assessing Officer on 21,01.2016 should not be set aside, for de novo consideration as per the provisions of the section 263 of the Act."

5. In response to the notice of hearing, the assessee appeared before the ld.Commissioner and filed her written reply. The relevant part of the reply submitted by her has been reproduced in the impugned order. We take note of the submissions filed by the assessee vide letter dated 9.2.2018 and 27.2.2018, whose relevant part has been reproduced by the ld.Commissioner in the impugned order, which reads as under:

"It *appears from above mentioned notice that the present proceedings have been initiated by considering the assessment order to be erroneous and prejudicial to the interest of revenue for the reasons mentioned in your show cause notice.*

We may permitted to submit that on the facts of the case *and in view of the settled law on the subject, the reasons mentioned .in notice dues not warrant any actions u/s 263 of the Act. It seems that the full facts have not been place before your good self. Kindly permit us to elaborate the same.*

Your assessee has filed return of income for AY 2013-14 declaring total income of Rs, 6,41,630. Your assessee has declares income of Rs.2,38,47,609 under long term capital gain and claimed exemption u/s 54. She has deposited amount of Rs.2/38,50,000 in capital gain scheme account. Further, we may mention that your assessee has constructed a residential house in April, 2015 within 3 years from amount deposited in scheme. Therefore, your assessee has eligible to claim exemption of Rs. 2,38,47,609 under capital gain.

In view of the above, the case of your assessee also selected for scrutiny assessment for the AY 2013-14. In response to the notice CA Chirag Shah and authorised representative attended and submitted requisite detail which is placed in the record. The Assessing officer consider the same and allowed the exemption claimed by assessee is valid. However, the proceedings u/s 263 has been Initiated by your good office claiming

that the order passed by the learned AOu/s 143(3) is erroneous and prejudicial to the interest of revenue and show cause notice ,s issued.

In view of above/ your assessee has provided the following clarifications to prove the Issues raised in your above notice Is not valid and the assessment completed is correct and not error-nous as the order is passed after making proper enquiries & verification.

1. Claim of Improvement

As per the notice issued to assessee In para 3 of notice for proceeding u/s 263 your good office stated that, "the collector, baroda had given permission for conversion ....the order is erroneous and prejudicial to the interest of revenue,"

In view of the same, we may mention that the cost of improvement / construction was Rs. 8,26,500. Out ^f constructed 72 flats,the cost of improvement for Property apportioned to 28 flats sold during the AY 2013-14 is Rs. 321417 (826500 x 28 / 72). Cost of improvement made in the year 1993-94. Therefore, indexed cost of improvement is calculated as below;

Indexed cost of improvement of AY 2013-14
*= Cost of improvement*CH of sale year/CII of cost of improvement year*
= Rs.3,21,417 852 / 244 = Rs.11,22,325*

Further, such cost was incurred in the year 1993-94 and copy of final bill dated 26.06.1993 of Rs. 8,26,500. Further, to substantiate our claim, your assessee would like to submit the copy of income tax return of AY 2006-07 along with the balance sheet and profit & loss account in which the cost of such improvement of Rs. 8,26,500 is also seen as a building account under fixed asset. The copy of final bill and ITR with balance sheet and Profit & Loss account is attached herewith for your ready reference as per ***Annexure 1.***

We may mention that your assessee has produced all such documents to learned A.O. along with the submission no.3 dated 28th December, 2015 and mentioned the same in the same submission.

The same was duly verified by him and found correct claim of cost of improvement and hence therefore the contention that the same was accepted without any verification is not correct and does not require any further verification etc.

2. Claim of Exemption

As per the para no 4 of notice your good office stated that "you have purchased readymade house which.................................claim of exemption is not in accordance with law."

In view of the above we may mention that your assesses has deposited money into capital gain deposit scheme u/s 54. Out of that deposited amount your assesses has completed construction of a residential house in April/ 2015. After construction of the said property your assessee *get done the dastavej of the said property in June, 2015. As per section 54 any person can claim exemption under that section if they can purchase ready nade residential house wit,') 2 years and constructed residential house within the limit of 3 years from earing of capital gain. Therefore, your assessee has claimed exemption u/s 54 is valid because your assessee has constructed residential house within the limit of 3 years from the earning of capital gain. It was explained to learned AO that the building in scrap mode and only plinth was use able. Your assessee has used the same plinth to construct a fresh / new house and submitted all related documents which proves that a house is constructed on the said piece of land. Your assessee already submitted the copy of list of cost incurred alongwith the map, dastavej and capital gain savings account for the whole period from date of deposit up to the date of expenditures / payment to your good office in submission no. 5 dated 15.02.2016 as per Annexure 4 , 5 & 6. Further, the copy of the same is also attached for your ready reference as per <u>Annexure 2.</u>*

The same was duly verified by him and found correct claim of cost of improvement and hence therefore the contention that the same was accepted without any verification is not correct and does not require any further verification etc.

3. <u>Indexed cost of acquisition</u>

The notice stated that in para 5 that "you have claimed indexed cost of Rs. 2,26,30,066 and a valuation report in this...adopted by you is excessive being regard to the instances of the sales in the vicinity of the impugned land.

In view of the same, we may mention that the valuation of the property was done by Mr.Dhrumesh shah, a government approved valuer with a registration no is F-21609. Further, we may mention that the Jantri rate which was introduced around 1999 *is a minimum base rate. However, in the normal course of practice, the person sell or purchase the property above the Jantri rate which is at prevailing market rate. In the instant case, there is no jantri value as on 01.04.1981 and hence the similar registry value quoted by learned AO is not allowed to adopt as per section* 55/4 *of the Income tax act when there is a higher market value as determined by registered valuer for the purpose of arriving* at *cost of acquisition of asset as on 01.04.1981. Further, the property is-sol-d at .much above its jantri value when the stamp duty rate for transfer of property was much higher in 1981, the agreement were made at much lower rate as compared to its real market value and hence the rate quoted by /earned AO is not correct and not justifiable. For the same your assessee has a/ready submitted the Valuation report in the submission no. 03 dated 28.12.2015.Further, the copy of the same is*

a/so attached for your ready reference as per ***Annexure*** *S. Therefore, the indexation cost of Rs. 2,26,30,066 adopted by your assessee based on government valuers valuation of Rs. 68,30,000 is correctly accepted and the order passed by learned AO is not erroneous and prejudicial to the interest of revenue as the same is based proper verification and procedure followed u/s 55A of the Act."*

2.1 Subsequently the Ld. AR filed further submission dated 27.02.2018 which reads as under:-

> In continuation of our earlier submission dated 9th February, 2018 submitted to your good office on 21st February, 2018, we further submits further clarification on few issues as below:

> In view of above, your assessee has provided the following clarifications to prove the issues raised in your above notice is not valid and the assessment completed is correct and not error-nous as the order is passed after making proper enquiries & verification. Your assessee has claimed exempt/or, u/s 54 is valid because your assessee has constructed residential house within the limit of 3 years from the earning of capital gain. It was explained to learned AO that the building in scrap mode and only plinth was use able. Your assessee has used the same plinth to construct a fresh / new house and submitted all related documents which proves that a house is constructed on the said piece of land. Your assessee a/ready submitted the copy of list of cost incurred along with the map, dastavej and capital gain savings account for the whole pen'od from date of deposit up to the date of expenditures / payment. In addition to the same, we herewith submit the payment proof in form of Receipt of Contractor and Ledger copy as per books of accounts for your ready reference as per ***Annexure 1.***

The same was duly verified by him and found correct claim of cost of improvement and hence therefore the content/on that the same was accepted without any verification is not correct and does not require any further verification etc.

We may further mention that the valuation of the property was done by Mr.Dhrumesh Shah, a government approved valuer with a registration no is F-21609. The same was submitted to your good office in our earlier above dated submission. Further, we may mention that we have already submitted copy of BanaKhat dated 7th February 1981 to learned AO in submission no.5 Dated ***18/11/2016 in scrutiny*** *assessment for AY 2014-15, where in the price* ***agreed is Rs. 180*** per *square feet which* /s[1] *nearly same as valued by the government approved in his valuation report. The same was presented to learned AO in scrutiny assessment of AY 2013-14 & AY 2014-15 and the learned AO has accepted the same by not commenting on the same either in his order or in office note. In view of the same, your assessee begs your honors to kindly accept the valuation done by government approved valuer. Copy of such Banakhat is attached as per* ***Annexure*** / ***2*** *for your ready reference."*

6. With the assistance of the ld.representatives, we have gone through the record carefully. We find that Section 263 has a direct bearing on the controversy, therefore it is pertinent to take note of this section. It reads as under:-

> "263(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.
>
> [Explanation.- For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,-
>
> (a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include-
>
> (i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;
>
> (ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorized by the Board in this behalf under section 120;
>
> (b) "record shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Commissioner;
>
> (c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Commissioner under this sub-section shall extend and shall be deemed always to have

extended to such matters as had not been considered and decided in such appeal.

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.

Explanation.- In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded."

10. On a bare perusal of the sub section-1 would reveal that powers of revision granted by section 263 to the learned Commissioner have four compartments. In the first place, the learned Commissioner may call for and examine the records of any proceedings under this Act. For calling of the record and examination, the learned Commissioner was not required to show any reason. It is a part of his administrative control to call for the records and examine them. The second feature would come when he will judge an order passed by an Assessing Officer on culmination of any proceedings or during the pendency of those proceedings. On an analysis of the record and of the order passed by the Assessing Officer, he formed an opinion that such an order is erroneous in so far as it is prejudicial to the interests of the Revenue. By this stage the learned Commissioner was not required the assistance of the assessee. Thereafter the third stage would come. The learned Commissioner would issue a show cause notice pointing

out the reasons for the formation of his belief that action u/s 263 is required on a particular order of the Assessing Officer. At this stage the opportunity to the assessee would be given. The learned Commissioner has to conduct an inquiry as he may deem fit. After hearing the assessee, he will pass the order. This is the 4th compartment of this section. The learned Commissioner may annul the order of the Assessing Officer. He may enhance the assessed income by modifying the order. At this stage, before considering the multi-fold contentions of the ld. Representatives, we deem it pertinent to take note of the fundamental tests propounded in various judgments relevant for judging the action of the CIT taken u/s 263. The ITAT in the case of Mrs. Khatiza S. Oomerbhoy Vs. ITO, Mumbai, 101 TTJ 1095, analyzed in detail various authoritative pronouncements including the decision of Hon'ble Supreme Court in the case of Malabar Industries 243 ITR 83 and has propounded the following broader principle to judge the action of CIT taken under section 263.

(i) The CIT must record satisfaction that the order of the AO is erroneous and prejudicial to the interest of the Revenue. Both the conditions must be fulfilled.

(ii) Sec. 263 cannot be invoked to correct each and every type of mistake or error committed by the AO and it was 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 the requirement of 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 interests of the Revenue and if the AO has adopted one of the courses permissible under law or where two views are possible and the AO has taken one view with which the CIT does not agree. If cannot be treated as an

erroneous order, unless the view taken by the AO is unsustainable under law

(vi) If while making the assessment, the AO examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determine the income, the CIT, while exercising his power under s 263 is not permitted to substitute his estimate of income in place of the income estimated by the AO.

(vii) The AO exercises quasi-judicial power vested in his and if he exercises such power in accordance with law and arrive at a conclusion, such conclusion cannot be termed to be erroneous simply because the CIT does not fee stratified with the conclusion.

(viii) The CIT, before exercising his jurisdiction under s. 263 must have material on record to arrive at a satisfaction.

(ix) If the AO has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation by a letter in writing and the AO allows the claim on being satisfied with the explanation of the assessee, the decision of the AO cannot be held to be erroneous simply because in his order he does not make an elaborate discussion in that regard.

7. In the light of the above, let us examine the facts of the present case. Before adverting to the reasoning given by the ld.Commissioner in the impugned order, we deem it appropriate to take note of the facts briefly which were pleaded before the AO. Copy of a letter written in the month of February, 2016 which has been received in the office of the ITO on 15.2.2016 has been placed in the paper book filed on 22.1.2021. This part of the paper book was filed before the ld.Commissioner. Page no.15 is the Annexure-2 which according to the assessee was annexed in her submission dated 27.2.2020 submitted before the ld.Commissioner. In this letter, the assessee has pointed out that on 7.2.1981 Shri Bharat Gupta and others have purchased

property admeasuring 9287 sq.meters vide *bhanakhat* dated 7.2.1981. Photo copy of this agreement along with its true translation has been placed on page nos.5 to 10 of the paper book. The assessee thereafter appraised the AO that there was a family arrangement vide which Shri Bharat Gupta got a share of 8457 sq.meters. A writing to this fact dated 23.6.2006 was filed before the AO along with this letter. She further alleged that on 17.2.2007 there is a family agreement i.e. MOU were executed between Shri Bharat Gupta and the assessee. In that arrangement she got 3266.72 sq.meters. The balance 5190.28 sq.meters was kept in family hotchpotch of Shri Bharat Gupta and others. In 1993 she constructed a residential house on this plot of 3266.72 sq.meters. Thereafter, she entered into an agreement with Aarbigi Nirmal Ltd. dated 19.7.2013. Copy of the agreement was also filed before the ld.CIT. In the letter, the assessee has explained how much share she got by virtue of this agreement and how she has applied for exemption under section 54. Relevant submissions made in this letter read as under:

In the Development agreement, on the page no.3 it is clearly mentioned that Rs.16,600 per sqr.mtr is given to land owner against the sale of flats. However, the calculation sheet is as under:

Particulars	*Area of sqr.mtr.*	*Remark*
Total land	*3266.72*	*As per development agreement on page no.3*
Less: Road cutting	*89.60*	
Less: Common plot	*317.70*	
Balance Area	*2859.42*	
FSI 2.5	*7148.55*	*(2859.42*2.5)*
Add; FSI-2.5 for Road area	*224*	
Total FSI	*7372.55*	*Total area for 72*

	flats
Amount to be given to land owner	*12,23,84,330 (i.e. Rs.16600 per sq.mtr x 7372.55 sq.mtr)*
Amount given per flat	*17,00,000 approx. (12,23,84,330/72 flats*

5. The ld.Commissioner has assigned three reasons for branding the assessment as erroneous and prejudicial to the interest of the Revenue. As far as first issue regarding cost of improvement is concerned, we will take this reasoning at the end. First we take the second reasoning given by the ld.Commissioner. It is pertinent to note here that while computing the capital gain on sale of house property for the purpose of capital gain, the assessee was required to be compute cost of acquisition. The assessee has adopted the cost of acquisition at Rs.68,30,000/- on the basis of registered valuer's report, who is a government approved valuer. After working out the indexation benefit as on 1.4.1981, the assessee has worked out indexed cost at Rs.2,26,30,066/-. Grievance of the ld.Commissioner was that the assessee has adopted the cost of acquisition at Rs.68,30,000/- on the basis of the report of registered valuer, and thereafter worked out indexed cost at Rs.2,26,30,066/-. This aspect was not examined by the AO and registered valuer has not made reference to any sale deed. Therefore, the ld.Commissioner has directed the AO to take value of the land at Rs.8/- per sq.ft as on 1.4.1981 in lieu of Rs.196/- adopted by the registered valuer.

5. We have considered this reasoning. However, it is not discernible from where the ld.Commissioner has brought report of Rs.8/- per sq.ft representing the value of the land as on 1.4.1981. He has not made reference to any documentary evidence or sale instance.

On the other hand, he has ignored the report of the registered valuer by observing that registered valuer has not assigned any sale instance for arriving at a value of rs.196/- per sq.ft. The report of registered valuer has been placed on record by the assessee and justification for value of 1981 worked out by the registered valuer at page no.72 reads as under:

"JUSTIFICATION FOR VALUE OF 1981

I got one sale instance of 1981 mentioning the same area. The sale deed no is 301 dated 27-11-1981. The particular sale deed is for R.S. No. 21-7-208, S. No. 185, B Tikka No.7/2 as per property card and its 86.08.0 sq.yards and 72.65 sq.mtr, land area.

This sale deed was made of Rs. 1,90,000/- including land and construction in 1981 and construction was carried out in 1947.

As per my opinion the construction cost assumed to be Rs. 40/- per sq.ft. in 1947.

So, the cost of construction = 72.65 x 10.764 x 40 = 31,280/-
Assume 75 % depreciation as on 1981 = 31,280 x 0.75 = 23,460/-
So, Construction cost in 1981 = 31,280 - 23,460/- = 7,820/-

Total sale deed for entire building including land and construction is Rs. 1,90,000/-. Hence the value of land comes to Rs. 1,82,180/-.

So the rate per sq.ft comes to 1,82,180 / 782 sq.ft = Rs. 232.96

The property is nucleolus zone, I consider the value 15 % less.

So, net value of land is derived at 232.96 -15 % (34.94) = Rs.198.01/ sq.ft

Hence I consider the fair value of Rs. 196/- per sq.ft in 1981 because this land is between two nucleous zone 1 & 2."

6. The registered valuer has made a reference to a sale instance, and thereafter worked out the value of the property as on 1.4.1981. Apart from this aspect, the copy of the agreement dated 7.2.1981 has been placed on record. By way of this agreement, the assessee and

others have purchased the suit property from the seller viz. Maganbhai Gordhabhai Patel. In the Schedule-A attached with this agreement, the rate prescribed was Rs.180/- per sq.feet. The assessee has placed on record true copy of translation of the alleged *banakhat*, and we take note of the relevant part from the schedule-A, which reads as under:

> ***"Schedule-A***
>
> *The land bearing survey no.95 and 96 paiki, admeasuring 9287 sq.mts. is situated in Mouje Nagarvada, Vadodara City, Tal. Vadodara, District Vadodara, Registration Sub District Vadodara. The same is decided to be sold by us to you for Rs.180/- (In words Rs.One Hundred Eighty only) per sq.ft.*
>
> *We have received today Rs.5,00,000/- (in words Rs.Five lacs only) from you in cash.*
>
> *The said property of Survey No.95 and 96 Paiki 9287 sq.mts. is situated in River Bas, the said land is shown as open space in VUDA."*

7. If we look into this agreement, which is very closure to 1.4.1981 along with working of the registered valuer, then it would reveal that in support of her working in indexation cost, the assessee has evidence. On the contrary, the ld.Commissioner did not refer to any sale instance for directing the AO to adopt Rs.8/- per sq.ft. as on 1.4.1981 for working the cost of acquisition.

8. Third reasoning assigned by the ld.Commissioner for branding the assessment as erroneous is that the exemption under section 54 was granted to the assessee without verifying the facts, and more so, that the assessee has purchased readymade house which was purchased beyond the specified time limit. The assessee has demonstrated that she has deposited the sale proceeds in a capital gain

account, and out of that account she has purchased the house well within the time limit. According to the assessee she has constructed residential house in April, 2015 and sale deed registered in June, 2015. It was also demonstrated that as per section 54 any person can claim exemption under that section if he has purchased a readymade residential house within two years and constructed residential house within the limit of three years from the earning of capital gain. According to the assessee, she has constructed the residential house within the limit of three years from the capital gain. This aspect has specifically been explained by the assessee to the AO in her letter dated 15.2.2016. The assessee has filed copy of the site plan and other details for demonstrating the fact that she has constructed the house.

9. As far as third reasoning is concerned, the ld.Commissioner has observed that the assessee failed to show any documentary evidence about the improvement cost claimed at Rs.11,22,325/-. The AO has not examined this aspect and allowed the claim. Though the assessee has demonstrated the facts as to how she has claimed the improvement cost, and it was a very old claim, the expenditure was incurred in the year 1993-94. It was duly recognized in the return of income for Asstt.Year 2006-07. Without going into that controversy, it is to be appreciated how the assessee has made working of the capital gain, which is reproduced by the ld.CIT page no.9, which reads as under:

Sale consideration of 28 flats		*Rs.4,76,00,000/-*
Less: Indexed cost	*Rs.2,26,30,066/-*	
Improvement	*<u>Rs. 11,22,325/-</u>*	*<u>Rs.2,37,52,391/-</u>*
		Rs.2,38,47,609/-

Less: Exempt u/s.54 Rs.2,61,00,000/- <u>*Rs.2,38,47,609/-*</u>
Long term capital gain *Rs. NIL*

If a sum of Rs.11,22,325/- is also added to the amount of Rs.2,38,47,609/-, then also it is lesser than the exemption worked out by the assessee at Rs.2.61 crores. In other words, even if this improvement cost disallowed to the assessee, then also she has more higher exempt amount under section 54 which can take care of this Rs.11,22,325/-. Net result in that is that no capital gain tax will be required to be paid by her. Thus by disallowing this amount to the assessee will not ultimately effect on computation of capital gain because she is having higher amount available for exemption. There will be no prejudice to the Revenue.

9. Apart from the above, we would like to make reference to the notice issued by the ld.AO whose copy is available at page no.98 of the paper book. It reads as under:

"You are requested to furnish the following details:-

1. *Please furnish the copy of capital a/c alongwith source of addition in the capital account-.*
2. *In respect of loans raised during the year, whether squared up or not, furnish confirmation of each party alongwith name, address, PAN and a copy of ledger account as appearing in your books of accounts. You are also requested please justify your claim as per requirement of section 68 of the Act.*
3. *Furnish the bank reconciliation statement of all the bank accounts alongwith bank statements.*
4. *Furnish details of the secured loans obtained during the year alongwith the details of the securities / assets rnortgaged furnished for obtaining such loans.*
5. *Please furnish details regarding house property receipt as shown in P & L Account.*
6. *Please furnish working of capital gain / loss and proof thereof.*
7. *As regards investment made during- the year, please provide date of purchase, purchase consideration, name of party from whom purchased copy of document as proof of purchases <u>and source of making payment alongwith copy of Bank statement with narrations.</u>*

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Name of party from whom purchased	*Date of purchase*	*Purchase Consideration*	*Documents furnished as proof*	*Source of payment*

In this regard you are hereby requested to appear before me alongwith all the details called for as above on *<u>12/08/2015</u>* ***<u>at 12.00</u>*** *<u>Noon.</u>* *This notice is treated as notice u/s 142(1).*

10. A perusal of this notice would indicate that the ld.AO has called for details regarding working of capital gain/loss. He has also called for investment made during the year. According to the assessee, she has submitted all the details and discussed it with the AO. Thereafter, he was satisfied and passed the assessment order under section 143(3) of the Act. It is a different matter that he has not elaborately discussed each and every aspect. But details are available in the record, therefore, it cannot be said that the AO had not applied his mind while allowing the claim of the assessee, and such order cannot be said to be erroneous and prejudicial to the interests of the Revenue. The ld.Commissioner ought to have looked into those details and ought to have arrived at a firm conclusion as to how the assessment order is erroneous. He cannot relegate this aspect to the AO to find as to how his order is erroneous. Hon'ble Delhi High Court in the case of DG Housing Projects Ltd. [2012] 343 ITR 329 (Delhi) has held that the ld.Commissioner should have not relegated the point that assessment order is erroneous to the AO himself. The ld.Commissioner, after analyzing the record, ought to have recorded a categorical finding and provided valid reasons as to how the assessment order is erroneous. In other words, the CIT has to examine the order of the Assessing Officer

on merits and then form an opinion on merits that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. In the absence of the same, original assessment order of the AO cannot be said to be erroneous and prejudicial to the interest of the Revenue. Accordingly, we do not find any reason for invoking provisions of section 263 by the ld.CIT, more so when relevant details and explanations were already available on the assessment record and based on which assessment order was passed by the AO. We quash the impugned order passed under section 263 restore that the original assessment order passed under section 143(3) of the Act.

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

Order pronounced in the Court on 12th April, 2021 at Ahmedabad.

Sd/-	Sd/-
(WASEEM AHMED)	**(RAJPAL YADAV)**
ACCOUNTANT MEMBER	**VICE-PRESIDENT**