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IN THE INCOME TAX APPELLATE TRIBUNAL,

ALLAHABAD BENCH, ALLAHABAD

(THROUGH VIRTUAL COURT)

BEFORE SHRI.VIJAY PAL RAO, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

ITA No. 68/ALLD/2018

Assessment Year: 2012-13

Mr. Sanjay Majumdar, Type II – 112, Devprayagam Sangam Vatika – Jhalwa, Allahabad 211012	v.	The Principal Commissioner of Income Tax, Aayakar Bhawan, 38, M.G. Marg, Civil Lines, Allahabad 211001
PAN: ADOPM 2688P		
(Appellant)		(Respondent)

Appellant by:	Shri Basudev Banerjee, CA
Respondent by:	Shri Debashish Chanda, CIT-DR
Date of hearing:	12. 01. 2021
Date of pronouncement:	28.01. 2021

O R D E R

PER SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER:

This appeal, filed by assessee, being ITA No. 68/Alld/2018, for assessment year(ay):2012-13 has arisen out of the revisionary order dated 21.12.2017 passed by ld. Principal Commissioner of Income Tax (hereinafter called "Pr. CIT")-Allahabad, U.P. u/s. 263 of the Income-tax Act, 1961 (hereinafter called "the Act"). We have heard both the parties through video conferencing mode through virtual court.

2. The grounds of appeal raised by assesse in memo of appeal filed with the Income Tax Appellate Tribunal, Allahabad(hereinafter called " the tribunal"), reads as under :

"1. Because the assumption of jurisdiction u.s. 263 of the Income Tax Act 1961, by the learned CIT - Allahabad in the present case is not warranted in view

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of the fact that at the Assessment stage the A.O. had made detailed scrutiny and made thorough enquiry after obtaining all the relevant documents from the Assessee and applied his mind before accepting the payment of free hold charges as cost of improvement of the lease hold land and hence cancellation of the Assessment order dated 24.06.2016 by CIT is not as per law.

2. Notwithstanding the above, Because the learned CIT has failed to appreciate the fact that conversion of lease hold property into Free hold by paying the conversion charges has immensely increased the value of the property sold and has fetched much higher price than it would have fetched as a lease hold property and therefore it was rightly considered as cost of improvement by the A.O.

3. Because the learned CIT failed to appreciate the fact that the payment of free hold conversion charges was done as per the Registered Agreement to sell dt. 15.7.2011 and not in terms of Agreement of sale dt. 15.7.2011 as quoted by CIT in his notice under section 263 and further that the source of fund which in this case was the advance received from the byer, did not change the fact that it increased the value of the lease hold land.

4. Because the conclusion drawn by the learned CIT that the A.O. failed to consider the fair market value of the property for calculating capital gains is not based on facts as the Assessment order of the A.O. clearly reflects that the full sale value of the property was taken as Rs. 602,01000/- which is the valuation considered by the registration authorities for stamp duty purposes.

5. Because the order of the CIT is bad both on facts and in law.

The Assessee reserves right to adduce additional grounds."

3. The brief facts of the case are that re-assessment in the case of the assessee namely Shri Sanjay Majumdar was made u/s. 147 r.w.s. 143(3) of the 1961 Act, vide reassessment order dated 24.06.2016 , as in the opinion of Revenue , income by way of long term capital gains earned by assessee had escaped assessment , which had led to reopening of the concluded assessment by Revenue within the provisions of Section 147/148 of the 1961 Act. The income of the assessee as re-assessed by ld. Assessing Officer(hereinafter called " the AO") , to the tune of Rs. 36,84,950/-, vide reassessment order dated 24.06.2016 , which reassessment order was later

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rectified under the provisions of Section 154 of the 1961 Act , dated 27.02.2017 as mistake apparent from records had crept in the aforesaid reassessment order, and income of the assessee was computed at Rs. 43,55,960/- by rectifying the mistake apparent from records.

4.1 On perusal of the record by ld. Pr. CIT, it was observed by ld. Pr. CIT that AO had allowed indexed cost of improvement charges to the tune of Rs.41,57,076/- for conversion of land from leasehold to freehold for improvement of title of property, which as per ld. Pr. CIT was not correct as the said charges were borne by the buyers and are merely reimbursement of expenses to the assessee by buyers of the property. The learned Pr. CIT was of the view that conversion of land from leasehold to freehold was done after sale agreement dated 15.07.2011 was entered into by assessee with buyers and further such charges were not incurred by assessee before sale of land. The ld. Pr. CIT observed that purchaser of the property has given advance from sale consideration and out of which conversion charges were paid by assessee, and further sale consideration is not on the basis of fair market value. Thus, learned Pr. CIT was prima-facie of the view that reassessment order dated 24.06.2016 passed by AO u/s 143(3) read with Section 147 of the 1961 Act was erroneous so far as is prejudicial to the interest of Revenue, which led to issuance of show cause notice u/s 263 of the 1961 Act by ld. Pr. CIT which was admittedly served on assessee , on 08.11.2017. The assessee objected to issuance of show cause notice u/s 263 of the 1961 Act by learned Pr. CIT during course of revisionary proceedings. It was argued by assessee during revisionary proceedings conducted u/s 263 of the 1961 Act before learned Pr. CIT that the assessee has duly complied with all the queries of AO during re-assessment proceedings and it is only after detailed enquiry/scrutiny and after due application of mind that AO allowed claim of the assessee towards cost of improvement of property by way of conversion charges from leasehold to freehold of the land . The assessee also contended before

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ld. Pr. CIT that AO also sought directions from Addl. CIT on certain issues u/s 144A of the 1961 Act while undertaking assessment proceedings for ay: 2013-14, and thereafter re-assessment proceedings were initiated by AO in compliance of directions of Addl. CIT u/s 144A of the 1961 Act , for impugned ay: 2012-13. It was also explained by assessee before learned Pr. CIT that it is not correct to say that payment of freehold charges of land to government is not cost of improvement of land . It was submitted by assessee that agreed sale price as per agreement of sale dated 15.07.2011 was inclusive of amount of freehold conversion charges . The assessee referred to page 8 and 9 of the agreement to sale. The assessee submitted that it was a condition in the agreement to sale that property should be converted into freehold within currency of the agreement. It was also claimed by assessee that conversion of land from leasehold to freehold , had fetched higher price for the property for assessee. The assessee referred to clause 3 at page 14 of agreement to sale to support its stand that the deduction towards cost of improvement was rightly claimed by assessee while computing long term capital gains chargeable to tax. Thus, the assessee submitted before ld. Pr. CIT during the course of revisionary proceedings that the reassessment order passed by AO was neither erroneous nor prejudicial to the interest of Revenue and hence revisionary proceedings initiated by ld. Pr. CIT within provisions of Section 263 of the 1961 Act, be dropped . The assessee also relied upon certain judicial precedents to support his contentions which are found mentioned at page 4-5 in revisionary order dated 21.12.2017 passed by ld. Pr. CIT u/s. 263 of the 1961 Act. The assessee made prayers before ld. Pr. CIT during revisionary proceedings not to exercise revisionary jurisdiction u/s 263 of the 1961 Act against reassessment order passed by AO u/s 147 read with Section 143(3) of the 1961 Act, dated 24.06.2016.

4.2 The ld. Pr. CIT after considering contentions of the assessee held that reassessment order dated 24.06.2016 passed by Assessing Officer u/s. 143(3)

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r.w.s. 147 of the 1961 Act is erroneous so far as is prejudicial to the interest of the Revenue within provisions of Section 263 of the 1961 Act, by holding as under:

> *"3. I have considered the assessment proceeding of the Assessing Officer, conduct of enquiry for making assessment and finding given in assessment order and counter representation of the assessee through Ld. AR, carefully. The issue under reference and in notice u/s 263 is as to whether expenditure of Rs.41,57,076/- claimed to be conversion charge of land from leasehold to freehold is the expenditure of the assessee comes within the concept of cost of improvement u/s 48 of the Income Tax Act or not. Apparently, the Assessing Officer has not considered this expenditure with reference to various facts available on record nor has properly applied provision of law u/s 48. The background fact of the issue under consideration is that there was a joint ownership property namely House No. 9 and 9/2 new no. 10 and 41 respectively at Minto Road, Allahabad including 3 out houses bearing Nos. 42/9/1, 39/9/3 & 38/9/4 which are situated at plot no. 6 Rajapur, Bandhwa, Allahabad. The total area of land was of 2593.58 Sq. Meter. Shri Narain Das Majumdar was the lessee of this property vide lease deed dated 18.10.1937 executed by the then Collector of Allahabad. Shri Narain Das Majumdar died on 31.10.1983 hence legal heirs became the owner/inherent lessee of the property. Subsequently these 4 joint owners/lessee have entered into agreement to sell with M/s Amity Infra Developers Pvt. Ltd. on 15.07.2011 for the sale consideration and Rs. 4,53,62,000/- of these properties which includes the freehold premium, freehold conversion stamp duty amounting to Rs. 1,43,62,000/-, thus according to the agreement the entire sale consideration of these properties was of Rs. 4,53,62,000/- inclusive of freehold charges. In this agreement of sale it was provided that transfer deed shall be registered after conversion of Nazul land/leased property into freehold land. The assessee alongwith other joint owners has, therefore, entered into this agreement for sale of the property accordingly. The purchaser company had paid an advance of Rs. 2,37,29,000/- to the joint owners in which assessee is one of the owners. As per this agreement joint owners had to file an application for conversion of aforesaid Nazul plot of land No. 6 to freehold land and was to incur the expenses like conversion charge from the money so advanced by the purchaser. Such expenditure under reference is included in the sale consideration, hence it becomes very obvious that assessee has not incurred any such expenditure of Rs. 41,57,076/- as cost of improvement of the property under reference. Though agreement, property has been sold out, but responsibility was taken by the joint owners including assessee for getting converted into freehold land and assessee including joint owners was not liable for incurring any such expenditure from its own pocket, rather such expenditure of Rs. 1,43,62,000/- is of purchaser of the property and not of the assessee because this expenditure is not over and above the total sale consideration of Rs. 4,53,62,000/-. Thus from the set of facts on record, it is very evident that assessee has wrongly claimed proportionate expenditure of Rs. 41,57,076/- as cost of improvement.*

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3.2 Under Section 48 mode of computation a capital gain has been provided that while calculating capital gains the cost of improvement and cost of acquisition of assets has to be reduced from the full value consideration. The word improvement has various shades of meaning as it includes everything by doing which there is enhancement of the value of the asset or there is rise in its price or the asset is made to grow better, vide CIT Vs Rama Swami Mudaliar (92) ITA No. 96 ITR 939 (MAD).

Onus to prove the cost of improvement is on the assessee that he has incurred the improvement charges before transferring the asset. Section 48 is enabling provision, which permits certain deductions from the sale consideration received by the assessee. In this case, facts are very peculiar which were not properly appreciated by the Assessing Officer.

3.3 The above finding and observation based on peculiar fact is unearthed while verifying the records show that while considering the issue, Assessing Officer has not considered as to how Rs. 4,53,62,000/- is full sale consideration of the property under reference whereas the sale deed executed subsequently on 25.04.2012, reveals the fact that fair market value of the property was of Rs. 6,02,01,000/- and stamp duty payable was of Rs. 42,14,100/-. Thus, it is very evident that fair market value of the property was not taken into consideration by the Assessing Officer. This fact noticed from the records fortify the above observation and finding. Thus it becomes very obvious that an amount of Rs. 41,57,076/- is not at all the expenditure of the assessee claimed to be cost of acquisition or improvement incurred out of advance of sale consideration for getting converted the leased land to freehold land. Thus it is not simple case that leasehold land has been converted into freehold land and improvement of cost of conversion charge has been borne by the assessee alongwith other co-owners. It is not an expenditure of the assessee, but as can be noticed, it has been incurred by reducing the sale consideration because the actual sale proceed should have been Rs. 6,02,01,000/- and not of Rs. 4,53,62,000/-. Thus from this angle also such proportionate amount of Rs. 41,57,076/- is not the actual expenditure of the assessee rather it has been incurred from the advance given by purchaser after sale agreement.

3.4 As regards various arguments of assessee or Ld. AR it is pertinent to mention that none of the arguments against notice u/s 263 is tenable. It is very open fact that the purchaser, namely Amity Infra Developer Pvt. Ltd. has incurred the expenditure as it has been included by it in its cost of acquisition of the same land. Therefore, Amity Infra Developer Pvt. Ltd. will definitely show an amount of Rs. 4,53,62,000/- as its cost of acquisition of property hence that expenditure is of the buyer and not of the assessee. If contrary arguments is advanced by the assessee that out of advance such expenditure has been incurred hence that expenditure is of the assessee, can be contradicted or refuted with the fact that the fair market value of the property was of Rs. 6,02,01,000/- and not of Rs. 4,53,62,000/-.

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3.5 The further argument that case of CIT Vs. Smt. Rama Rani Kalia ITA No. 56 of 2013 and Hon'ble ITAT decision in the case of Dhiraj Shyamji Chauhan Vs CIT ITA No. 132/Alld/2007 are applicable to this case is not convincing one. Both the cases are not applicable to the peculiar facts of the case under consideration. In the case of CIT Vs. Rama Rani Kalia the fact was that property was held by that assessee as lessee since 1984, and the same property was transferred on 31.03.2004, after the leasehold rights were converted into freehold rights and the same provided on 29.03.2004. The conversion was found to be by way of improvement of title which would not have any effect on taxability of profits as short term capital gain, hence it was held by the Hon'ble Allahabad High Court that there was no error of law in the order of Hon'ble Tribunal, hence questions no. 1 & 2 where answered in the favour of the assessee. Here in this case, agreement of sale was made on 15.07.2011 and all the rights were given and ultimately sale deed was registered on 25.04.2012. Thus it is very evident that when sale agreement was made on 15.07.2011 no improvement was made nor was any conversion from leasehold to freehold. Thus such expenditure under reference is not at all to be regarded as cost of improvement.

3.6 The Ld. AR has further placed reliance over various case laws, as mentioned in para 3 herein above. The facts of the case in hand are altogether different than the cases relied upon by the Ld. AR. The proposition given by Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. Vs CIT (Supra 2000) 243 ITR 83 (SC) goes against the assessee. If incorrect assumption of facts or incorrect application of law is there, it will satisfy the exercise of power u/s 263 as because such assessment order is erroneous and prejudicial order to the interest of Revenue. Here it is not the case where Assessing Officer had chosen one of the views over such issue, but is the case where Assessing Officer has not unearthed the fact that such conversion charge was not incurred before selling the property through agreement on 15.07.2011, and further such expenses were incurred from the advances/sale proceeds and, that sale proceed was not of fair market value. Similarly, the case of Teknika Components Vs. CIT (2012) 346 ITR 570 (SC) goes against the assessee as fact of this case is altogether different. In that case the assessee had claimed deduction u/s 80 IA which was allowed by the Assessing Officer. Subsequently, CIT u/s 263 had disallowed the deduction granted by the Assessing Officer. That assessee went to ITAT who has allowed the appeal. On further appeal by the Department, the Hon'ble Supreme High Court has set aside the order of the ITAT. On further appeal by the assessee, it was held that instead of answering certain issues by the High Court order was set aside where as Hon'ble Supreme Court has held that such issue ought to have been remitted to the Tribunal, hence matter was restored back for fresh adjudication by the CIT(A). Similarly, the set of facts of Atlantis Multiplex Pvt. Ltd. Vs. CIT ITA No. 45 and 65 Allahabad 2012 dated 30.09.2016 is altogether different. In that case issue was related to rental income which was income from house property or business income. The Assessing Officer after investigation found that the main business was running and leasing of a commercial mall which was a business income, hence in

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the light of articles of association of the company, it was held that view of the Assessing Officer was not prejudicial to the interest of revenue hence order u/s 263 was quashed. Here is not the case like that because of the fact that ASSESSING OFFICER has not appreciated the entire facts nor had unearthed the actual facts from the record, hence he has allowed the deduction without applying the correct law over the issue.

3.7 In the case of CIT Vs. Daga Entrade Pvt. Ltd & Others, (2010) 327 ITR 0467 the Hon'ble High Court has held that if there is a lack of proper enquiry by the Assessing Officer, such order is to be regarded erroneous and prejudicial order. Similarly, in the case of CIT Vs. Export House, (2002) 256 ITR 0603, it has been held that if wrong deduction is claimed, which was not allowable such assessment order is to be treated as erroneous and prejudicial to the interest of the revenue, hence, power u/s 263 can be exercised by CIT. Similarly, in the case of Arvee International Vs. Addl. CIT (2006) 8 SOT 0452 it has been held that if assessment is made without application of mind or on the basis of incorrect assumption of facts or assessment has been made on the basis of insufficient material or wrong application of law, CIT can exercise revisional jurisdiction u/s 263. Further, in the case of Gee Vee Enterprises Vs. Addl. CIT, (1975) 99 ITR 0375, it is held that the ITO being not only an ad judicature but also an investigator, if there is lack of a logical enquiry, the assessment order passed should be treated as erroneous order u/s 263.

3.8 In view of above discussion and on facts and circumstances, it is found that Assessing Officer has not made proper investigation from Amity Infra Developers Pvt. Ltd. as to what is the cost of acquisition shown by it in its books of accounts. Further, it is found that there is mis-application, rather improper application of law of section 48. Further, it is found that after agreement of sale dated 15.07.2011 leasehold property has been converted on behalf of the purchaser from the advance given by it, hence it cannot be presumed as cost of improvement incurred by the assessee selling property. Thus, obviously the assessment order passed by the Assessing Officer u/s 143 r.w.s. 147 dated 24.06.2016 is erroneous in so far as prejudicial to the interest of revenue, hence in the background of above finding/observation the assessment order so passed is set aside/cancelled and, Assessing Officer is directed to make full and proper enquiries and apply the provision of law properly while making the fresh assessment in the light of above observation/finding. Needless to say that while making the fresh assessment ASSESSING OFFICER should give full and proper opportunity to the assessee for his representation and submission of necessary evidences in support of his contention. Thus assessment order dated 24.06.2016 is set aside u/s 263 t for fresh assessment."

5. The assessee being aggrieved by revisionary order dated 21.12.2017 passed by learned Pr. CIT u/s 263 of the 1961 Act has filed this appeal before tribunal. The

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hearing in this appeal was held through video conferencing mode through virtual court. The learned counsel for the assessee submitted before the Bench that cost of conversion of property from leasehold to freehold was paid by assessee which was for better title of the property. It was submitted by ld. Counsel for the assessee that Ld. Assessing Officer while framing assessment has gone through agreement to sale dated 15.07.2011 and also sale deed dated 24.04.2012(correct date is 25.04.2012). It was submitted that after due application of mind, the AO framed re-assessment against the assessee , wherein AO rightly allowed deduction towards improvement of property for charges paid for conversion of property from leasehold to freehold , while computing long term capital gains chargeable to tax. It was submitted by ld. Counsel for the assessee that ld. AO while conducting assessment proceedings for ay: 2013-14 sought directions from ld. Addl. Commissioner of Income-tax u/s 144A of the 1961 Act for assessing the income of the assessee from long term capital gains in ay: 2013-14 with respect to sale of the aforesaid property , as the AO wanted to assessee income by way of long term capital gains arising from sale of the aforesaid property in ay: 2013-14, while ld. Addl. CIT directed AO to assess income earned by assessee by way of long term capital gains from the sale of aforesaid property in ay: 2012-13. The directions of ld. Addl. CIT , dated 28.01.2016 and 18.12.2015 u/s 144A of the 1961 Act during assessment proceedings for ay: 2013-14 , are placed in paper book. It was submitted by ld. Counsel for the assessee that said agreement to sale dated 15.07.2011 and sale deed dated 24.04.2012 are placed in paper book filed with tribunal , at page 48-88 and Annexure -1(of 148 pages). The learned counsel for assessee also submitted that copy of deed of free holding dated 13.03.2012 is also filed in paper book filed with tribunal at page 89-132.It was submitted by ld. Counsel for assessee that freehold conversion charges are improvement of property for better title of property and was rightly claimed as deductions towards cost of improvement of the property while computing long term capital gains chargeable to tax.

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5.2 The Ld. CIT-DR, on the other hand, submitted that ld. Pr. CIT has only set aside reassessment order u/s 147 read with Section 143(3), dated 24.06.2016 passed by AO as proper enquiries were not made by AO while passing reassessment order dated 24.06.2016 , u/s 143(3) read with Section 147 of the 1961 Act. It was submitted by ld. CIT-DR that assessee has claimed cost of conversion of land from leasehold to freehold and indexation by applying cost inflation index towards such freehold charges was also claimed which is not correct. Our attention was drawn to reassessment order passed by AO as well to revisionary order passed by ld. Pr. CIT. It was submitted by ld. CIT-DR that liability to pay for conversion charges from leasehold to freehold was of the buyer and not of the assessee. It was submitted by ld. CIT-DR that agreement to sale was entered into for consideration of Rs.4.53 crores, while market value of the property was Rs.6.02 crore , which included freehold charges and assessee is erroneously claiming that sale consideration of Rs.4.53 crores included freehold charges . The ld. CIT-DR submitted that the assessee has taken advance from buyers to pay for freehold charges and hence it was submitted by ld. CIT-DR that ld. Pr. CIT has correctly passed revisionary order dated 21.12.2017, u/s. 263 of the 1961 Act setting aside reassessment order dated 24.06.2012 passed by AO u/s 143(3) read with Sec. 147 of the 1961 Act.

6. We have considered rival contentions and perused the material on record including orders passed by authorities. The adjudication of this appeal depends upon careful reading , analysis and interpretation of clauses of agreement to sell dated 15.07.2011 , copy of deed of freehold dated 13.03.2012 and sale deed dated 25..04.2012 , which are placed in paper book filed by assessee. We have carefully gone through agreement to sell dated 15.07.2011, copy of deed of freehold dated 13.03.2012 and sale deed dated 25.04.2012 , which are all placed in paper book filed by assessee with tribunal.

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6.2 Briefly stated that the assessee has sold his share(25%) in property namely leasehold Nazul Plot No. 6, Rajapur Bhandawa, Allahabad,U.P. along with House No. 9 and 9/2 New No. 10 and 41 respectively at Minto Road, Allahabad including 3 out houses bearing Nos. 42/9/1, 39/9/3 & 38/9/4 which stood over Nazul Plot No. 6 Rajapur, Bandhwa, Allahabad. The total area of land was 2593.58 sq. meter. Shri Narain Das Majumdar was the lessee of the Nazul Plot No. 6, Rajapur Bandhawa, Allahabad by virtue of lease deed dated 18.10.1937 executed by the then Collector of Allahabad on behalf of Secretary of State in Council. The said lease deed was registered at Book No. 1 , Jild No. 706/708 at Page Nos. 178/111-114 , document number 1912 at Sub-Registrar Chayal, District Allahabad , on 01.12.1937. The aforesaid lease was valid with effect from 23.11.1935 for a term of thirty years and further period of 30 years and 30 years, so that total period of lease was 90 years. Shri Narain Das Majumdar was also the owner of the house which stood on that land. Shri Narain Das Majumdar died on 31.10.1983 , hence legal heirs became the owner/inherent lessee of the said property. The assessee is one of the four surviving legal heirs of said Shri Narain Das Majumdar, who has now sold his share in the aforesaid property viz. 25%. There is no dispute between rival parties as to share of the assessee being 25% in the aforesaid property.

6.3 The aforesaid surviving four aforesaid legal heirs (including assessee) of Shri Narain Das Majumdar have entered into an registered agreement to sell with M/s Amity Infra Developers Private Limited on 15.07.2011 , for a total consideration of Rs.4,53,62,000/- , which sale consideration amount includes freehold premium, freehold conversion stamp duty amounting to Rs. 1,43,62,000/- . Thus, as per agreement the consideration value included freehold charges. The relevant clauses as is recorded in agreement to sell dated 15.07.2011, are reproduced hereunder:

> *"AND WHEREAS the Second Party aforesaid wants to purchase the aforesaid leasehold property including House No. 9 and 9/2 (New Nos.40 and 41 respectively) Minto Road, Allahabad and also including three outhouses bearing nos. 42/9/1, 39/9/3, and 38/9/4 along with Nazul*

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> *Plot No. 6, Rajapur Bandhawa, Allahabad and the total Area of the aforesaid Nazul Land 3102 Sq. Yards = 2593.58 Sq. Metres,(together with all rights, title and interest) and has offered a sum of Rs,4,53,62,000/- (Rupees Four crores Fifty Three Lakhs and Sixty Two thousand only) (which amount includes freehold premium, freehold conversion stamp duty, etc. amounting to Rs.1,43,62,000/-) as its sale consideration which is the maximum and most adequate price which the aforesaid property could fetch at present. Accordingly, the First Party agrees to sell to the Second Party the aforesaid property with all their right, title and. interest in respect of the aforesaid property more fully described in the schedule annexed hereto for a sale consideration of Rs. 4,53,62,000/- (Rupees Four crores Fifty Three Lakhs and Sixty Two Thousand only) subject to the terms and condition mentioned herein.*
>
> *AND WHEREAS the execution of transfer deed and its registration in respect of the aforesaid property may be done after the aforesaid nazul land is converted into freehold land or as per lease deed mentioned aforesaid and as such the parties hereto have agreed to execute this deed of agreement and agree to abide by the terms and conditions enumerated hereunder:*

As could be seen above , the sale consideration of Rs. 4,53,62,000/- , which amount included freehold premium, freehold conversion stamp duty etc. The agreement also provided that execution of transfer deed and its registration shall be done after the aforesaid Nazul land is converted into freehold land.

6.4 The agreement to sell dated 15.07.2011 further provided that the buyer namely Amity Infra Developers Private Limited have advanced a sum of Rs. 2,37,29,000/- to the sellers , which amount of advance , inter-alia, also included cheque of Rs. 37,29,000/- in favour of one of the 'Shri Sudeb Majumdar' towards making of freehold application with State Government. The sellers were obligated under the agreement to sell dated 15.07.2011 to make application with State Government. The relevant clause as are recorded in agreement to sell dated 15.07.2011 , are reproduced hereunder:

> *"1. That the first party agrees to sell the aforesaid property comprising of House No.9 and 9/2 (New Nos.40 and 41 respectively) Minto Road, Allahabad, alongwith Nazul Plot No. 6, Rajapur Bandhawa, Allahabad and the Total Area of the aforesaid Nazul Land as stated above, is 3102 Sq. Yards = 2593.58 Sq. Metres, and buildings standing thereon alongwith all rights title and interest, to the Second Party for a sale consideration of Rs.4,53,62,000/- (Rupee's Four Crores Fifty Three Lakhs and Sixty Two thousand Only) and the Second Party has paid a sum of Rs.2,37,29,000/- (Rupees Two Crores Thirty Seven Lakhs and Twenty Nine Thousand only) as advance through the following cheques/banker' s cheque (1) Banker's Cheque No. 000928 dated 15 July 2011 Drawn on INS Vyaya Bank, Civil lines branch, Allahabad, for an amount of*

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> *Rs.50,00,000/- (Rupees Fifty lacs only), (2) Banker's Cheque No 000929 dated 15 July 2011 Drawn on ING Vysya Bank, Civil lines branch, Allahabad, for an amount of Rs.50,00,000/- (Rupees Fifty lacs only) , (3) Banker's Cheque No.000930 dated 15 July 2011 Drawn on ING Vysya Bank, Civil lines branch, Allahabad, for an amount of Rs.50,00,000 /- (Rupees Fifty lacs only) (4) Banker's Cheque No 000931 dated 15 July 2011 Drawn on ING Vysya Bank, Civil lines branch, Allahabad, for an amount of Rs.50,00,000/- (Rupees Fifty lacs only) , and (5) Cheque No 822977 dated 30 May 2011 drawn on ING Vysya Bank, Civil Lines branch, Allahabad in favour of Sudeb Majumdar for an amount of Rs.37,29,000/-**(for freehold application)** the receipt of which is hereby acknowledged by the First Party and the balance sale consideration of Rs.2,16,33,000/- (Rupees Two Crores Sixteen Lakhs Thirty Three Thousand only) shall be paid by the Second party to each of the First party as provided hereunder."*

Thus , it could be seen that Rs. 37,29,000/- out of total advance of Rs. 2,37,29,000/- was paid by buyers to sellers towards freehold application money to file application with State Government for conversion of leasehold Nazul land into freehold to perfect their ownership title of the property.

6.5 Before proceeding further, it is important to understand meaning and concept of Nazul land. We have observed that the Nazul land is a Land held by Government in public trust, in perpetuity , the possession of which can be transferred by way of lease or sale . It is the land which is confiscated from Zamindars, Rajas and Nawab etc. . There is a Uttar Pradesh Nazul Manual , 1949 which governed the Nazul lands in U.P.. Under the Nazul Manual, the Nazul land can be leased out. Under the provisions of Rule 22 of Nazul Manual , lease for Nazul land shall not ordinarily be for a period shorter than 30 years in the first instance and shall , in all cases , provide for renewal after expiry of first and subsequent terms upto a maximum period of 90 years. The granting of lease in perpetuity in respect of any Nazul land on any term is prohibited. Rule 67 of Nazul Manual read with Rule 22 , prohibits granting of lease in perpetuity of Nazul land. Under the provisions , the nazul land led out on lease for stipulated period is required to be evacuated as and when the concerned lease terminates. Under the new Nazul Policy 1998 , Nazul land can be disposed off by way of sale. If the sale deed is executed, then cost of land is to be recovered on the basis of market rate and stamp duty is to be paid on conveyance. If any Nazul land is transferred by way of sale or lease etc., execution of deed is

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required and stamp duty is chargeable as conveyance as laid down in Indian Stamp Act, 1899. There are mention of several of orders passed by U.P. Government in connection with Nazul land , in the freehold deed executed by His Excellency Governor of State of U.P. in favour of sellers which are applicable to the aforesaid Nazul land.

6.6 The agreement to sell further provided that execution and registration of the transfer/sale deed is possible in terms of the lease deed or could be transferred after getting it converted into freehold. The relevant clause in agreement to sell are reproduced hereunder:

> *"2. As mentioned above, the execution and registration of the transfer / sale deed is possible in terms of the lease deed or could be transferred after getting it converted into freehold land;*
>
> *3. That the First Party shall file an application for conversion of the aforesaid Nazul Plot No.6 Rajapur Bandhawa, Allahabad to freehold measuring 3102 Sq. yards = 2593.58 Sq. Meters along with the application money (part payment of frehold premium) out of the money advanced as provided herein.*
>
> *4. The liability for payment of the application money and further conversion charges / premium of conversion from nazul to freehold land of the aforesaid property, including all charges,expenses, stamp duty, registration charges, etc. present or future in respect of the aforesaid property for freehold conversion shall be of the First Party who will bear, the same out of the money advanced by the Second Party under this agreement.*
>
> *The Second Party shall not be entitled to claim any refund whatsoever from the first Party, in respect of the payments made by the First Party under this clause.*
>
> *5. Whenever any demand is raised / made by or on behalf of the State Government for payment of the balance of the freehold conversion charges /premium, etc. during the period of validity of this agreement to sell, the Second Party shall forthwith pay to the First Party the amount so demanded out of the balance of the total sale consideration mentioned here in above . On receiving the said amount from the Second Party, the first party shall, without undue delay, deposit the same with the State Government.*
>
> *6. As soon as the aforesaid nazul land is converted and declared freehold land within the period of validity of this agreement to sell, the First Party shall give an intimation in writing to the Second Party named above at his address mentioned first and the Second Party shall pay the entire of the total sale consideration due, to the Seller First Party forthwith. Thereafter, the First Party shall execute the transfer / sale deeds in favour of the second party or his nominee/s. The Second Party or his nominee/s shall be given peaceful possession of the aforesaid property on the date of such registration."*

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Thus, land in question was 'Nazul Land' which was leased to father of the assessee by then Collector of Allahabad in 1935 for a period of thirty years(with further extensions of thirty years and thirty years) and transfer of this leased 'Nazul Land' was possible only when it is converted into freehold. The buyer has agreed to provide advance to sellers , out of total agreed consideration for getting the aforesaid leased 'Nazul Land' converted into freehold land so that the same could be transferred to buyers , and agreed sale consideration of Rs. 4,53,62,000/- included amount of freehold charges, stamp duty for freehold etc. which was estimated in this agreement to sell to be Rs. 1,43,62,000/- . The sellers were the co-owners/ inheritor of aforesaid leasehold 'Nazul land' and they were required to file application with State Government for getting the leased 'Nazul land' converted into freehold in their names, for which the buyers have agreed to fund the same to sellers as and when demand is raised by State Government but it is clearly provided that it was the obligation of the sellers to get the said leased 'Nazul Land' converted into freehold within the currency of the agreement to sell dated 15.07.2011 , so that the land can be transferred to the buyers. Thus, there was clearly an impediment in the sale of the aforesaid leased 'Nazul land', which impediment to selling of the land can be removed by getting the said leased 'Nazul land' converted into freehold land, before being transferred to the buyers. Further, the conversion of leased Nazul land into freehold property shall certainly improve the title of the owners which shall become perfect on being converted into freehold property. The property consists of bundle of right and getting the said leased 'Nazul land' converted into freehold will certainly improve the title and marketability of the said land. Moreover, since it was a leased Nazul land , the ownership vested with Government till it is converted into freehold land and in that eventuality , the complete ownership of the property will get transferred to the assessee and his three brothers. Thus, presently title of the leased

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Nazul Land could have been transferred only after the land is converted into freehold land , deed is executed and conveyance charges/stamp duty paid for getting it converted into freehold in the name of sellers who are the registered lessee before ultimately transferring the land to the buyers, certainly the said freehold cost/charges were necessarily required to be incurred for removing the impediment to sale and getting the said land ultimately transferred to buyers. It will also improve the title and marketability of the property. The covenants between the two parties clearly provided that the total sale consideration was Rs. 4,53,62,000/- and the freehold charges to the tune of Rs. 1,43,62,000/- were included in the aforesaid sale consideration and was not to be paid by buyers over and above the said amount of sale consideration agreed between the buyers and sellers.

6.7 It is further provided in the agreement to sell , dated 15.07.2011 that in case the sellers fails to execute and get the transfer/sale deed registered , the buyers can after making full payment of sale consideration to the buyers shall have the right to get the transfer/sale deed executed and registered through the court of law. The relevant clause in agreement to sell , dated 15.07.2011 is reproduced hereunder:

> *"9. That if the First Party fails to execute and get the transfer/ sale deed registered as provided herein and after receipt of the full sale consideration, etc. from the Second Party, the Second Party shall have the right to get the transfer/sale deed executed and registered through court of law."*

6.8 It is further provided in the agreement to sell, dated 15.07.2011 that the buyers will be fully responsible for conversion of aforesaid Nazul land to freehold and shall get the necessary paper work completed and filed before the concerned authorities of the Government and persue the matter for expeditious conversion of the land to freehold so that the land becomes freehold within a period of thirty five months from the date of the agreement to sell and the sellers shall extend full co-operation and sign every lawful paper required for the same. The relevant clause in agreement to sell , dated 15.07.2011 is reproduced hereunder:

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> *"12. The Second Party shall be fully responsible for conversion of the aforesaid Nazul land to freehold and shall get the necessary paperwork in this regard completed and filed before the concerned authorities of the Government and pursue the matter for expeditious conversion of the land to freehold so that the land becomes freehold within a period of thirty five (35) calendar months from the date of this deed of agreement to sell. The First Party shall extend full cooperation and sign every lawful paper required for the said purpose."*

Thus, what transpires from this clause is that the buyers have taken the onus for getting the said leased 'Nazul land' converted into freehold including follow up with Government authorities , for which the sellers have to extend full co-operation so that it can be expeditiously converted into freehold , including signing of all documents etc. required in connection therewith. The funding was done by buyers for said conversion of land to freehold , such as payment of stamp duty, conversion charges etc. , but the same was paid out of the total sale consideration agreed upon in the agreement to sell , dated 15.07.2011 viz. Rs. 4,53,62,000/-, as is emerging from the records.

6.9 The agreement to sell , dated 15.07.2011 further provided that the period of validity of the agreement is 36 months and immediately thereafter , the agreement to sell shall stand rescinded , and the sellers will forfeit all the amounts paid by buyers under this agreement. The relevant clause in the agreement to sell , dated 15.07.2011 is reproduced hereunder:

> *"14. That the period of validity of this agreement to sell shall be thirty six (36) months from the date of execution of this agreement to sell. Immediately thereafter, this agreement to sell shall stand automatically rescinded and the entire amount paid by the second party under this agreement to sell shall stand forfeited by the first party.*
>
> *15. If due to unforeseen reasons (like government policies) the aforesaid property is not converted into freehold by the State Government in favour of the first party within 18 months from the date of execution of this agreement to sell , the Second Party shall forthwith pay a further sum of Rs. 1,10,00,000/- (Rupees one crore and ten lakhs only) to the first party and the First Party shall hand over possession of the property to the Second Party immediately thereafter. Further, on such an eventuality , the Second Party shall have the option , within the period of validity of this agreement to sell , of getting the transfer/sale deed executed in its favour by the First Party in respect of the aforesaid property on an " as is where is" basis without the land being converted to freehold . However, the balance amount of the sale consideration of Rs. 1,06,33,000/- (Rupees one crore six lakhs and thirty three thousand only) which is the balance of the freehold conversion charges, etc., shall be paid by the Second Party to the First*

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> *Party only when demand is raised by the State Government during the period of validity of this agreement to sell.*
>
> *16. The entire stamp duty, registration charges, etc. in respect of the transfer/sale deed, whenever executed by the First Party as provided herein , shall be paid by the Second Party. Further, in case there occurs any increase in the freehold premium, freehold conversion charges stamp duty , etc. which is demanded / required by the Government more than what has been provided hereinabove, the same will be paid by the Second Party to the First Party. "*

As is emerging from the above clauses that period of validity of agreement to sell is thirty six months and immediately thereafter, the amount paid under agreement to sell shall be forfeited by sellers . Under this eventuality Section 51 of the 1961 Act as was applicable for impugned ay shall got applicable and will take care of that eventuality . It is also provided in the agreement to sell that in case due to any unforeseen reasons such as government policy , the aforesaid property could not be converted into freehold within 18 months, then the buyers can pay the balance consideration of Rs. 1,10,00,000/- (exclusive of remaining unpaid freehold conversion charges, stamp duty etc as provided in agreement of sale) to the sellers and get the possession of the property in their favour and at their option get the transfer/sale deed executed in their favour. It also provided that in case, the freehold conversion charges, stamp duty etc. are increased by Government, then the buyers will pay for the same. This clause also takes care of the sellers getting assured net consideration for their property and since the period of agreement to sale is fairly long period of thirty six months, in the eventuality of change in government charges/ stamp duty, the buyers are to bear the same. In that eventuality, there will be adjustment in the sale consideration which will stood increased to that extent and consequently the deduction on account of cost/charges towards improvement to the property shall also go up, so much so that it will be tax neutral. These are terms agreed by two willing independent parties to contract and they are within their rights to arrange their affairs, so long as it does not result in defrauding Revenue or infringing statutory provisions . There is nothing unusual in

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these clauses, rather it strengthen the stand of the assessee that freehold conversion charges, stamp duty etc. are included in the sale consideration agreed upon by buyers and sellers, and are towards improvement of title to the property or for removing impediment in the transfer of the property, which are to be deducted while computing income from long term capital gains on sale/transfer of the aforesaid property. Thus, in our considered view the assessee has rightly claimed the deduction on account of improvement in the property being improvement in title of the property on being converted from leasehold Nazul land to freehold property , as property is bundle of rights and getting property converted from leasehold to freehold will certainly improve the title and marketability of the property and also it is a Nazul land , getting the property freehold will grant perfect ownership rights/title in favour of the existing lessee's , who will then be in a position to transfer/sell the property.

6.10 We have also carefully gone through the Freehold deed dated 13.03.2012, which is placed in paper book. The said freehold deed was executed in the name of His Excellency Governor of Uttar Pradesh as seller of the land and is executed/granted in favour of Mr. Sudip Kumar Majumdar, Shri Sudeb Majumdar, Shri Sujit Majumdar and Shri Sanjay Majumdar, wherein freehold rights with respect to this property granted by State of U.P. in favour of above parties. The entire description of the property and leaseholder/inheritor, from the date of grant of lease rights of the Nazul land in 1935 till the date of execution of freehold deed are found mentioned in the deed. Thus, the freehold conversion of the property was done by State of U.P. in favour of the existing leaseholders and not in favour of the buyers. This also strengthen the view that sale consideration included freehold conversion charges, stamp duty etc. and as agreed upon the funding was done by sellers but the payments were made out of the sale consideration found mentioned in the agreement to sell. Thus, the assessee has rightly claimed the deduction on

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account of his share of freehold conversion charges, stamp duty etc. for converting the said property into freehold, being improvement in the property or otherwise as paid for removing impediment in the transfer/sale of the property. Thus, provisions of Section 48 of the 1961 Act were rightly applied with by the assessee, while computing income from long term capital gains chargeable to tax.

6.11 We have also gone through sale deed , dated 25.04.2012 . This sale deed was executed by sellers in favour of the buyers, after the said property was converted into a freehold property. There is nothing in the registered sale deed which can led us to any conclusion other than that the freehold conversion charges, stamp duty etc. were borne by the buyers which form part of the sale consideration as is agreed upon. The agreement to sell was valid for 36 months and sale deed was executed after the property was converted into freehold property. It is the covenant agreed by and between two independent willing parties as to the agreed sale consideration for the property, mode of payment and manner in which it is to be discharged. The parties are within their rights to arrange their affairs in the manner best suited to them , so long it does not violate statutory provisions or led to defrauding of Revenue. There was an impediment to transfer this leasehold Nazul Property unless the property is converted into freehold and hence to obviate the same , the agreement to sell was entered into with long currency period of 36 months so that sellers can get the aforesaid leasehold property converted into freehold in their names , in accordance with policy of U.P.State Government and there is a mention of several of orders passed by U.P.State Government in connection with dealing with Nazul leasehold land and its conversion into freehold. There is no material on record to suggest that any attempt is made by assessee to defraud Revenue. The ld. PCIT is of the view that full value of consideration of the said property was Rs. 6,02,01,000/- , while agreed sale consideration (including freehold conversion charges, stamp duty etc.) was to the tune of Rs. 4,53,62,000/- . It is observed that

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while computing income from capital gains, the assessee has adopted his share of full value of consideration of Rs. 6,02,01,000/- and not the agreed sale consideration of Rs. 4,53,62,000/- which is in consonance with provisions of Section 50C of the 1961 Act and in our considered view there should not be any grievance to Revenue to that effect , as the assessee computed income from capital gains by adoption of his share of full value of consideration of Rs. 6,02,01,000/- and not the sale consideration of Rs. 4,53,62,000/- as found mentioned in agreement to sell. There could be a legitimate grievance that the sellers got the aforesaid Nazul property converted into freehold from U.P.State Government without disclosing that an agreement to sell is already entered into by them with the buyers, but firstly there is no material on record to that effect which conclusively prove that this fact was concealed from Government and secondly we are concerned with proceedings under the 1961 Act and our scope is limited to computing the income chargeable to tax under the provisions of the 1961 Act and consequentially income-tax payable by the assessee.

6.12. The ld. PCIT was of the view that AO has not conducted proper enquiries more-so no enquiries were conducted with the buyers and hence the assessment order is erroneous so far as is prejudicial to the interest of Revenue and hence revisionary proceedings u/s 263 of the 1961 Act were sought to be justified. In our considered view, the AO has made proper enquiries in the instant case. There was assessment proceedings going on for ay: 2013-14 and during the assessment proceedings for ay: 2013-14, two references were made by ITO , 1(5), Allahabad to Additional Commissioner of Income-tax,Range 1, Allahabad dated 30.10.2015 and 04.01.2016 , both u/s 144A of the 1961 Act in connection with sale/transfer of this property , which references were disposed of by Addl. CIT vide orders dated 18.12.2015 and 28.01.2016 respectively , which ultimately led to reopening of the assessment u/s 147/148 of the 1961 Act for the impugned ay: 2012-13. We have also gone through

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the reassessment order passed by AO u/s 147 read with Section 143(3) , dated 24.06.2016 and an order dated 27.02.2017 passed u/s 147 read with Section 143(3) and 154 of the 1961 Act and we are of the considered view that the AO has applied his mind before passing reassessment order. At the same time , we are in agreement with ld. CIT-DR that mistake has crept in reassessment order as cost of improvement is indexed by taking cost inflation index base of financial year 2012-13, while the entire payments were made for freehold charges / stamp duty etc in fy:2011-12. Thus, the cost inflation index base for fy: 2012-13 to be 852 was adopted while computing income from long term capital gains, while the cost inflation index for fy: 2011-12(ay:2012-13) was 785 which ought to have been applied to cost of improvement being freehold conversion charges, stamp duty etc. Rather, since the payment for freehold conversion charges, stamp duty etc. is made in the previous year relevant to impugned ay , there is no necessity of applying cost inflation index and actual payment made towards freehold conversion charges, stamp duty etc. ought to had been claimed/deducted while computing income chargeable to tax under the head income from long term capital gains. Similar , error crept in while indexing the cost of acquisition of the property by applying cost inflation index of 852 instead of 785 . Thus, to this extent the reassessment passed by AO was erroneous so far as prejudicial to the interest of Revenue which requires to be revised by AO and proceedings u/s 263 of the 1961 Act are upheld to this extent, as the aforesaid error in adopting cost inflation index of 852 instead of 785 is certainly an error which has caused prejudice to the Revenue, which now need to be rectified for which directions are hereby issued. Thus, in nut-shell ,we partly allow the appeal of the assessee and only to the limited extent of making correction in the base rate of cost inflation index for fy:2011-12(ay:2012-13) which was erroneously taken at 852 , instead of correct figure of 785 , while computing income chargeable to tax under the head 'Income from capital gains'. We order accordingly.

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7. In the result, appeal filed by the assessee is partly allowed, as indicated above.

(Order pronounced on 28/01/2021 at Allahabad in the open Court through Video Conferencing)

Sd/-	Sd/-
[VIJAY PAL RAO]	[RAMIT KOCHAR]
JUDICIAL MEMBER	ACCOUNTANT MEMBER

DATED: 28/01/2021
Aks/-

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2. Respondent –
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4. CIT
5. DR