

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI**

**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER**

ITA NO. 4420/MUM/2012 : A.Y : 2009-10

Likhiya Dilip Kanath Vs. ITO-21(3)(3),
G-24, Solaris-II, Opp. L&T Gate Mumbai (Respondent)
No. 6, Powai, Andheri (E),
Mumbai 400 072 (Appellant)
PAN : AHGPK2400D

**Appellant by : Shri Vijay Mehta
Respondent by : Shri Rajesh Kumar Yadav**

**Date of Hearing : 26/10/2017
Date of Pronouncement : 30/11/2017**

ORDER

PER G.S. PANNU, AM :

The captioned appeal by the assessee is directed against the order of CIT(A)-32, Mumbai dated 12.03.2012, pertaining to the Assessment Year 2009-10, which in turn has arisen from the order passed by the Assessing Officer, Mumbai dated 29.12.2011 under section 143(3) of the Income Tax Act, 1961 (in short 'the Act').

2. In this appeal, the solitary grievance raised by the assessee in its Memo of appeal is against the decision of the CIT(A) in upholding the

addition made by the Assessing Officer u/s 68 of the Act treating the sale proceeds of gold of Rs.4,75,011/- as being 'unexplained income'.

3. In brief, the relevant facts are that the assessee is an individual who is carrying on the business of manufacturing slotted angles under the name and style of Accuflex Systems. In the course of assessment proceedings, the Assessing Officer noted that assessee had declared Long Term Capital Gain on sale of property as well as on sale of gold jewellery. As per the tabulation in the assessment order, assessee was found to have, *inter-alia*, sold gold jewellery to one, M/s. Mamai Jewellers, Mumbai. In support, assessee furnished a purchase invoice raised by the said jeweller, as also the bank statement evidencing the receipt of sale proceeds by cheque amounting to Rs.4,75,011/-. The Assessing Officer was not satisfied as, according to him, the notice u/s 133(6) of the Act issued to the said jeweller at the stated address came back unserved. Secondly, the Assessing Officer records that the Inspector deputed for inquiry submitted a report pointing out that no such shop existed in the stated locality. Thirdly, the Assessing Officer further noted that assessee could not produce the jeweller, and for all the above reasons the credit of Rs.4,75,011/- was treated as 'unexplained' and added to the total income u/s 68 of the Act. The CIT(A) has also affirmed the addition primarily for the reasons ascribed by the Assessing Officer, against which the assessee is in further appeal before us.

4. Before us, the learned representative for the assessee pointed out that the transaction with M/s. Mamai Jewellers was clearly

evidenced by the purchase invoice as well as the bank statement of the assessee evidencing receipt of the proceeds through an account payee cheque. The learned representative pointed out that the assessee had also produced a confirmation from the said jeweller, which is placed at page 3 of the Paper Book which also mentions the PAN number. It is further pointed out that there was no justification in doubting the existence of the said party inasmuch as, upon verification of the Sales Tax records, the VAT registration of said M/s. Mamai Jewellers was found to be active, which justifiably proves the existence of the concern. Reference has been made to page 4 of the Paper Book wherein is placed a copy of the Certificate of Registration issued by the Maharashtra Value Added Tax authorities. It is pointed out that merely because the assessee could not produce the said party or that the said party was not available on inquiry would not make the impugned credit as 'unexplained'.

5. On the other hand, the Id. DR has relied upon the orders of the authorities below, which we have already noted in the earlier paragraphs and is not being repeated for the sake of brevity.

6. We have carefully considered the rival submissions. Ostensibly, the credit appearing in the books of account of the assessee is required to be satisfactorily explained and such onus is on the assessee in terms of Sec. 68 of the Act. In this context, what is expected of the assessee is to demonstrate the nature and source of the credit. In the present case, the invoice issued by M/s. Mamai Jewellers, which is placed at page 1 of the Paper Book, shows the purchase of gold ornaments from

the assessee. The bank statement furnished by the assessee also reflects the receipt of Rs.4,75,011/-. So far as the confirmation issued by the said jeweller and copy of the VAT Certificate of Registration issued by the Maharashtra VAT authorities is concerned, the said material was not before the lower authorities, but has been produced before us. The said material clearly brings out that the party does exist, and it cannot be said to be a non-existent party. Furthermore, the confirmation also gives the details of the cheque issued to the assessee, which can be co-related with the credit appearing in the bank account of the assessee. No doubt, the aforesaid evidences, namely, the confirmation of the ledger account of M/s. Mamai Jewellers and the Certificate of Registration issued by the Maharashtra VAT authorities are pieces of 'additional evidence' which were not before the lower authorities, and in normal circumstances we would have remanded the matter back to the file of the Assessing Officer. So however, considering the smallness of the amount, and the fact that the Certificate of Registration issued by the Maharashtra VAT authorities is a document available in the public domain, no useful purpose would be served by sending the matter back to the file of the Assessing Officer, and the only inference that can be drawn is that the party does exist, and cannot be considered as non-existent. At this stage, we may also point out that in the Tabulation of the Long Term Capital Gains referred by the Assessing Officer in the assessment order, three other instances of sale of gold ornaments have been listed, which have not been disputed. Though the other three instances of sale are on the same footing, the same are accepted and in any case, the factum of the assessee having raised funds by sale of gold ornaments during the year

in order to part-finance his acquisition of a new residential property is quite evident. Thus, considering the overall circumstances, we find no justifiable reasons to sustain the addition of Rs.4,75,011/- made by the Assessing Officer by invoking Sec. 68 of the Act.

7. At the time of hearing, the learned representative for the assessee also referred to an additional Grounds of appeal, which was not raised earlier, which reads as under :-

“a) The learned CIT(A) has erred in directing the Assessing Officer to give deduction of only Rs.34,29,500/- u/s 54F of the Act against Long Term Capital Gain of Rs.25,82,993/- only after having held on page 6-7 of his order as under :-

“3.3 I have considered the arguments of the Ld. AR and perused the assessment order. It is seen that most of the funds to acquire the old property which has been sold during the year was contributed by the appellant and new flats were also purchased by the appellant and the husband only contributed Rs.23 lacs out of total invest of 68 lacs that too was not his capital contribution but only as loan to appellant. Under these circumstances I do not find any justification to tax only 50% of capital gains in hands of appellant when the appellant also had disclosed LTCG on 100% capital gains in her hands only and claimed deduction of 100% of investment made in new asset. (Emphasis supplied).

b) The learned CIT(A) ought to have directed the Assessing Officer to tax entire capital gains arising on sale of transfer of flats as well as granting full deduction in the hands of the appellant u/s 54 and 54F of the Act.”

8. It has been pointed out that the additional Grounds of appeal now sought to be raised do not involve any fresh dispute, and is based on the findings of the CIT(A) himself. Explaining the rationale of raising

the Grounds, the learned representative took us through the background of the dispute.

9. Notably, in the assessment proceedings, the Assessing Officer has noted that assessee had derived Long Term Capital Gain on sale of flat as well as sale of gold jewellery of Rs.46,90,600/-, against which the assessee had claimed exemption u/s 54F of the Act of Rs.68,59,000/- on account of investment in acquisition of a residential house comprising of two flats, i.e. Flat no. 503A and 503B in Chandivali. Notably, it was noticed that assessee had sold the old flat at Chandivali, which was co-owned with her husband. Assessee explained that mentioning of her husband's name as co-owner was only for the sake of convenience, but otherwise said flat was purchased by the assessee only. The assessee also furnished the details of the payments made for the purchase of the flat, but the Assessing Officer concluded that since part of the funds were contributed by the assessee's husband also, assessee was liable for Capital Gains only in respect of 50% of the sale consideration in her hands. Thus, as against the total Capital Gains offered on the sale of the old flat at Chandivali of Rs.32,65,191/-, the Assessing Officer treated the Capital Gains in the hands of the assessee to the extent of 50%, i.e. Rs.16,32,595/- and, adding with the other Capital Gain, the total was determined at Rs.25,82,993/-. Secondly, the Assessing Officer noted that even the new residential house claimed to be purchased by the assessee comprised of two flats, i.e. Flat no. 503A and 503B jointly owned with her husband. Assessee asserted that though the two flats were purchased by two separate agreements, but they were in the nature of one dwelling unit only and hence, it should be treated as one

residential house. The Assessing Officer accepted that the new asset was purchased jointly in the name of the assessee and her husband after availing bank loan and assessee was holding 1/2 share in the property, but he did not accept the contention that the two flats represented only one residential house on the ground that they were purchased by two separate agreements. Accordingly, he denied the deduction claimed by the assessee u/s 54F of the Act. The CIT(A) has ultimately accepted the plea of the assessee for deduction u/s 54F of the Act. Firstly, the CIT(A) noted that most of the funds to acquire the old property, which has been sold during the year, was contributed by the assessee and the new flats were also purchased by the assessee, and that assessee's husband had contributed much less, and that too, in the form of loan to the assessee. Therefore, the CIT(A) concluded that *"Under these circumstances, I do not find any justification to tax only 50% of capital gains in hands of appellant when the appellant also had disclosed LTCG on 100% capital gain in her hands only and claimed the deduction of 100% of investment made in new asset."* After having held so, the CIT(A) went on to demonstrate that the action of the Assessing Officer in taxing only 50% share of Capital Gains in the hands of the assessee was a tax neutral exercise as it would logically mean that if the balance 50% Long Term Capital Gain was to be considered in the hands of the husband, then the corresponding deduction u/s 54F of the Act to the extent of 50% would also be liable to be considered in the hands of the husband of the assessee, which would make the whole scheme tax-neutral and, in any case, on the issue as to whether the two flats are one residential unit or not, the CIT(A) followed the ratio of the decision of the Special Bench of the Tribunal in the case of *Sushila N. Jhaveri, 107*

ITD 321 (SB) (Mum) and noted that both the flats have to be treated as part of one residential unit for the purposes of deduction u/s 54F of the Act. So if 100% LTCG were to be assessed in hands of appellant as claimed by appellant, then 100% of deduction u/s 54F is allowable in her hands and if 50% LTCG were to be assessed in hands of appellant as done by the AO, then also she would be still entitled for deduction 54F to the extent of 50% of the investments made in acquisition of new residential unit comprising of both the flats. None of the aforesaid findings of the CIT(A) are disputed by the Revenue inasmuch as there is no appeal preferred by the Revenue.

10. On this basis, the learned representative pointed out that once the CIT(A) clearly gives a finding that assessee was 100% owner and name of her husband was only mentioned as a matter of convenience, what was to follow was that the entire deduction u/s 54F of the Act was to be treated in the hands of the assessee only. The learned representative pointed out that the subsequent discussion, though in support of the ultimate conclusion of the CIT(A) that it is a tax-neutral exercise, has rendered a difficult situation which has been brought out in the application seeking admission of the additional Grounds, which reads as under :-

“6. It is submitted that recently i.e. in the month of March 2016 the assessment for A.Y 2009-10 in case of the husband of the appellant has been reopened by concerned Assessing Officer on the basis of findings recorded in the assessment and appellate order of the appellant. The said reassessment proceedings are not yet completed.

7. Therefore, in the interest of justice and avoid hardships to the appellant, it is imperative to arrive at conclusive finding about the 100% ownership of the appellant in respect of old as well as new residential premises – more so when the CIT(A) has held that the appellant is 100% owner of new as well as old residential property but gave contrary directions to the Assessing Officer.”

11. For the said reasons, it is canvassed that the findings of the CIT(A) that the entire Long Term Capital Gain was assessable in the hands of the assessee and also availing of the corresponding deduction u/s 54F of the Act has to be in the hands of the assessee be retained.

12. The Id. DR has pointed out that there was no justification for the present additional Grounds of appeal for the reason that it does not impinge the tax liability of the assessee.

13. We have carefully considered the rival submissions. The whole controversy revolves around the manner in which the CIT(A) has disposed off the assessee's Grounds before him. Notably, the assessee was aggrieved with the denial of deduction u/s 54F of the Act and the non-consideration of the entire Capital Gains in the hands of the assessee herself. In this context, we find that the findings of the CIT(A) is contained in para 3.3 of the order. While the CIT(A) clearly brings out, at the beginning of his findings, that the entire Capital Gains was liable to be considered in the hands of the assessee and so also the corresponding deduction u/s 54F of the Act, he thereafter makes a discussion in the penultimate portion, which we have reproduced above.

14. In our considered opinion, the discussion in the penultimate portion of the order does not distract from the initial findings of the CIT(A) that the entire Capital Gains was to be assessable in the hands of the assessee herself because the purport of the discussion in the penultimate portion of the order was merely to point out that the exercise carried out by the Assessing Officer was a tax-neutral exercise. Therefore, in our considered opinion, what emerges from the decision of the CIT(A) is that the Long Term Capital Gain is assessable in the hands of the assessee, and so also the corresponding deduction u/s 54F of the Act. Pertinently, the order of the CIT(A) has not been appealed against by the Revenue. So, however, for the present we are concerned with the additional Ground now sought to be raised by the assessee before us, which we have reproduced hereinabove. Pertinently, the additional Ground arises from an action taken in the hands of assessee's husband, which is not the subject matter before us. Thus, we are not in a position to evaluate the validity of the action of the Assessing Officer in the case of assessee's husband. Thus, we decline to adjudicate the additional Ground of appeal.

15. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 30th November, 2017.

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Sd/-
(G.S. PANNU)
ACCOUNTANT MEMBER

Mumbai, Date : 30th November, 2017

SSL

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "A" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai