

अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL, 'D' BENCH, CHENNAI
श्री ए. मोहन अलंकामणी, लेखा सदस्य एवं श्री धुव्वुरु आर.एल रेड्डी, न्यायिक सदस्य के समक्ष
BEFORE SHRI A.MOHAN ALANKAMONY, ACCOUNTANT MEMBER
AND SHRI DUVVURU RL REDDY, JUDICIAL MEMBER

आयकर अपील सं./I.T.A.No.366/Chny/2018

(निर्धारण वर्ष / Assessment Year: 2008-09)

Smt. Sasikala Raghupathy, New No.60, Old No.100, IV Street, Abhiramapuram, Chennai – 600 018.	Vs	The ACIT, Central Circle 3(1), Chennai.
PAN: AAAFR5481B		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by	:	Shri CA Jharna B. Harilal, FCA
प्रत्यर्थी की ओर से/Respondent by	:	Shri S. Bharath, CIT

सुनवाई की तारीख/Date of hearing	:	02.08.2018
घोषणा की तारीख /Date of Pronouncement	:	16.10.2018

आदेश / ORDER

Per A. Mohan Alankamony, AM:-

This appeal by the assessee is directed against the order passed by the Ld. Commissioner of Income Tax (Appeals)-19, Chennai dated 05.01.2018 in ITA No.95/16-17 for the assessment year 2008-09 passed U/s.250(6) r.w.s. 143(3) of the Act.

2. The assessee has raised several grounds in her appeal however the cruxes of the issues are as follows:

- (i) The Ld.CIT(A) has erred in confirming the order of the Ld.AO dated 31/03/2016 passed U/s. 153A r.w.s. 143(3) of the Act wherein deduction U/s.54F of the Act was denied on merits, though the Ld.AO on the earlier occasion vide Order dated 30.05.2012 passed U/s.143(3) r.w.s. 147 of the Act had granted deduction on the very same issue after due consideration.
- (ii) The Ld.AO in his order passed U/s.153A of the Act r.w.s 143(3) of the Act dated 31/03/2016 has further erred by adjudicating the issue with respect to the claim of deduction U/s.54F of the Act when on the very same issue proceedings U/s.263 of the Act was initiated and pending on the date of search which cannot be abated U/s.153A of the Act.

3. The brief facts of the case are that the assessee is an individual on whose premises a search & seizure operation U/s.132 of the Act was carried out on 18.02.2014. During the course of search, it was noticed by the Revenue that the assessee had sold shares of M/s. BGR Energy Systems Limited held by her for total consideration of Rs.111,07,20,000/-. The assessee had computed her Long Term Capital Gain after indexation and deduction of expenditure as

Rs.103,54,38,656/-. Further the assessee had invested in residential property for Rs.47,44,95,882/- and claimed deduction U/s.54F of the Act and the balance amount of Rs.55,82,82,845/- was invested in Long Term Capital Gain scheme account. On examining the claim of deduction U/s.54F of the Act, the Ld.AO observed that the assessee had constructed the residential building only in a minute portion of land and therefore disallowed the claim of deduction U/s.54F of the Act to the extent of Rs.46,19,92,974/- vide his order dated 31.03.2016 U/s.143(3) r.w.s. 153A of the Act. On appeal, the Ld.CIT(A) vide Order dated 05/01/2018 confirmed the order of the Ld.AO on merits and made addition by rejecting the plea of the assessee that the issue did not emanate from the search proceedings. While doing so the Ld.CIT(A) relied on the following decisions of higher Judiciary:-

- (i) The Supreme Court in the case of Sales Tax Commissioner V/s Modi Sugar Mills (AIR(1961)SC(1 047) observed as under:

“10 In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of

the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed that it cannot imply anything which is not expressed, it cannot import provisions in the statutes as to supply any assumed deficiency".

(ii) In case of Goodyear India Ltd V/s State of Haryana - (1990) 2 SCC 71):

"It has been said and said on numerous occasions that fiscal laws must be strictly construed, words must say what these mean, nothing should be presumed or implied, these must say so. The true test must always be the language used".

(iii) In case of UOI V/s Dharmendra Textile Processors (2008 (231) ELT 3 (SC):

"13. It is a well settled principle in law that the court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent".

- (iv) CIT(A) vs. St. Francis Clay Decor Tiles reported in 385 ITR 624 and CIT vs. Promy Kuriakose reported in 386 ITR 597 wherein it was held that even in the absence of search material proceedings U/s.153C of the Act can be initiated and the assessee is bound to file return in the scheme of the provision.
- (v) Canara Housing Developing Company reported in 274 CTR 122 wherein it was held by the Hon'ble High Court of Karnataka that order U/s.263 of the Act is infructuous in case where 153A proceedings are pending.

4. For the sake of convenience, the sequences of events are narrated herein below for easy reference:-

- (i) The assessee had filed her return of income U/s.139(1) of the Act for the assessment year 2008-09 on 30.07.2008 declaring total income of Rs.36,00,774/-. The assessee had also declared long term capital gain on sale of shares held by her as Rs.103,54,38,656/- & long term capital loss on sale of other shares Rs.26,59,929/- and claimed deduction, U/s.54F of the Act for Rs.47,44,95,882/- and on the investment made in capital gains accounts scheme for Rs.55,82,82,845/-.

- (ii) The case was reopened U/s.147 of the Act and notice U/s.148 of the Act was issued on 10.08.2011.
- (iii) Subsequently assessment was completed U/s.143(3) r.w.s.147 of the Act on 30.05.2012 accepting the returned income U/s.139(1) of the Act after duly examining the claim of deduction U/s.54F of the Act and the investment made in capital gain account scheme.
- (iv) Thereafter notice U/s.263 of the Act was issued to the assessee on 22.08.2012 of the Act initiating proceedings U/s.263 of the Act for the reason that the impugned assessment order dated 30.05.2012 allowing the claim of deduction U/s.54F of the Act and the transfer of expenses were without application of mind and without conducting necessary enquiries.
- (v) Subsequently consequent to search action initiated U/s.132 of the Act, CIT(A) dropped the proceedings U/s.263 of the Act on 18.02.2014 on the ground that the proceedings U/s.153A of the Act has overtaken the proceedings U/s.263 of the Act.
- (vi) Thereafter the Ld.AO passed order U/s.143(3) r.w.s. 153A of the Act vide order dated 31.03.2016 disallowing the claim of deduction U/s.54F of the Act to the extent of Rs.46,19,92,974/-

- (vii) On appeal, the Ld.CIT(A) vide his order dated 05.01.2018 confirmed the order of the Ld.AO by upholding the view that,
- (a) The Ld.CIT had rightly dropped the proceedings U/s.263 of the Act as infructuous since proceedings U/s.153A of the Act was initiated, (b) The Ld.AO in his Order dated 31/03/2016 U/s. 153A r.w.s.143(3) of the Act has judicially adjudicated the issue with respect to the claim of deduction U/s.54F of the Act on merits though on the issue there were no materials emanating from the search proceedings, and (c) though the issue was already examined and adjudicate on merits on the earlier occasion by the Ld.AO vide his Order dated 30/05/2012 passed U/s. 143(3) r.w.s 147 & 148 of the Act.

5. Before us the Ld.AR narrating the above sequence of events argued by stating that the Ld.AO in his order passed U/s.143(3) r.w.s. 153A of the Act dated 31.03.2016 has ventured in the issue with respect to claim of deduction U/s.54F of the Act when there was no incriminating material found during the course of the search or requisition of documents. Reliance was placed in the decision of the Hon'ble Rajasthan High Court in the case *Jai Steels (India) Jodhpur Ltd., Vs. JCIT (2014)* in ITA No.53/2011.

The Ld.AR further submitted that on the very same issue the Ld.CIT had initiated proceedings U/s.263 of the Act and thereafter search was conducted on the business premises and residence of the assessee and notice U/s.153A of the Act was issued. In such circumstances, the memorandum of explanation issued by CBDT vide Circular No.7 of 2003 dated 05.09.2003 in Para No.65 reported in 263 ITR 107 (ST) has clarified that the appeal, revision or rectification proceedings pending on the date of initiation of search U/s.132 of the Act or requisition shall not abate. It was therefore pleaded that in such situation the Ld.CIT ought to have passed order U/s.263 of the Act and the same issue cannot be revisited in the proceedings initiated U/s.153A of the Act. The Ld.AR relied in the decision rendered by the Hon'ble Apex Court in the case CIT Vs. Kelvinator of India Limited (2010) reported in 320 ITR 561 wherein it was held that revisiting an issue decided in an assessment shall amount to change of opinion which is not permissible. The Ld.AR further relied in the decision rendered in the case ACIT Vs. Kores (India) Ltd., in ITA No.5074/Mum/2009 vide order dated 09.09.2010 wherein it was held that once an issue is settled in the assessment prior to search, the same issue cannot be revisited in the assessment proceedings U/s.153A of the Act

because only a pending assessment shall abate on initiation of search and not concluded assessment. It was further submitted that similar view was also endorsed in the case ACIT Vs. M/s. Uttara S Shorewala (2011) in ITA No.5506/Mum/2009 and 5507/Mum/2009. Reliance was also placed in the decision of the Hon'ble Karnataka High Court in the case Canara Housing Development Company Vs. CIT (2014) in ITA No.38/2014. It was therefore pleaded that the addition made by the Ld.AO in his order passed U/s.143(3) of the Act r.w.s.153A of the Act dated 31.03.2016 by disallowing the claim of deduction U/s.54 of the Act which was further confirmed by the Ld.CIT may be deleted. The Ld.DR on the other hand relied on the orders of the Ld.Revenue Authorities and argued in support of the same.

6. We have heard the rival submissions and carefully perused the materials on record. On perusing the facts of the case and the legal issues raised and argued by the Ld.AR, we find merit in the same. The sequence of events recorded herein above is also not disputed by the Ld.DR. It is apparent on record that the assessment U/s.143(3) r.w.s. 147 & 148 of the Act was completed on 30.05.2012 and the claim of deduction U/s.54F of the Act was

allowed after due consideration. The gist of the decision is extracted herein below for reference:-

“3. On scrutiny it is found that the assessee sold her shares of BGR Energy Systems Limited in ITP (23,14,000 shares @ Rs.480/- each) for total sale consideration of Rs.111.07 Crore. The long term capital gain for the year is returned by the assessee as follows:

<i>Total consideration received</i>	<i>:</i>	<i>Rs.111,07,20,000/-</i>
<i>Long term capital gains on the sale of BGR shares:</i>		<i>Rs. 103,54,38,656/-</i>
<i>Less: long term capital loss on sale of other shares:</i>		<i>Rs. 26,59,929/-</i>
		<i>-----</i>
		<i>Rs.103,27,78,727/-</i>
<i>Less: amount invested in Mahabalipuram property:</i>		<i>Rs. 47,44,05.882/-</i>
<i>Less: amount invested in Capital Gains account scheme:</i>		<i>Rs. 55, 82,82,845/-</i>
		<i>-----</i>
<i>Net capital gain offered to tax during the year:</i>		<i>Rs. Nil</i>
		<i>-----</i>

4. The main issue involved in the above claim of the assessee is that the assessee has bought 43.56 acres of the land at Mahabalipuram for Rs. 47,44,95,882/- and constructed a house in some part of land and claimed exemption u/s 54F of the IT Act. On examining the huge area of the land for exemption, the AR of the assessee has asked to explain why the exemption should not be restricted to the construction area instead of the whole land. The AR of the assessee has replied that "in the provisions of the Incomes tax Act there is no restriction to the Word 'Land appurtenant to and forming part of House' and accordingly the assessee has rightly claimed the whole area of land along with house u/s 51 F of the IT Act, 1961. The AR of the assessee also mentioned that the assessee has many case laws in support of the claim made. The AR of the assessee has quoted the following case laws:

a. The decision of the ITAT, Delhi incase of 'Additional Commissioner of Incorne-Tax, Range-I, Dehardun, Vs. Narendra Mohan Uniyal [2009, 34, SOT 151 (Delhi)].

b. The decision of the High court of Madras in case of CIT T Vs. Smt. M.K.alapagam [93, Taxman 283(MAD)]

On perusal of the above cases, specially the decision of the Honourable ITAT, Delhi, the assessee can claim any extent of land appurtenant to building as long as it is continuous stretch of land.

In the present case also the whole area of 43.56 acres of the land is continuous and claim of the assessee has to be accepted inspite of large area of the land based on the above case laws mentioned by the assessee.

Hence, the assessment for the AY 2008-09 IS completed by accepting the return of income submitted by the assessee.”

Thereafter the Ld.CIT(A) initiated proceedings U/s.263 of the Act on the very same issue on 22.08.2012. Subsequently search action was initiated on the assessee U/s.132 of the Act. Consequent to the search, the Ld.ITO, headquarters intimated the assessee vide letter dated 29.01.2015 that the proceedings initiated U/s.263 of the Act are dropped as infructuous. This action of the Ld.Revenue Authorities does not seem to be appropriate. As contented by the Ld.AR, the memorandum of explanation issued by CBDT vide Circular No.7 of 2003 dated 05.09.2003 in para No. 65.5 states as follows:-

“65.5 The Assessing Officer shall assess or reassess the total income of each of these six assessment years. Assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years pending on the date of initiation of the search under section 132 or requisition under section 132A, as the case may be, shall abate. It is clarified that the appeal, revision or rectification proceedings pending on the date of initiation of search under section 132 or requisition shall not abate. Save as otherwise provided in the proposed section 153A, section 153B and section 153C, all other provisions of this Act shall apply to the assessment or reassessment made under section 153A shall be subject to

interest, penalty and prosecution, if applicable. In the assessment or reassessment made in respect of an assessment year under this section, the tax shall be chargeable at the rate or rates as applicable to such assessment year.”

6.1 Since it is clarified by the CBDT that in the case where revision or rectification proceedings are pending on the date of initiation of search U/s.132 of the Act the revision or rectification proceedings cannot be abated and therefore the Ld.CIT ought to have completed the proceedings and passed order U/s.263 of the Act with respect to the issue on which action U/s.263 of the Act was initiated even when the proceedings U/s.153A of the Act was initiated against the assessee. But in the case of the assessee, it appears that the Ld.CIT has passed on the baton to the Assessing Officer who had jurisdiction U/s.153A of the Act. This action of the Ld.Revenue Authorities is not appropriate. What proceedings are to be completed U/s.263 of the Act cannot be passed on to the proceedings initiated U/s.153A of the Act subsequently because proceeding U/s.263 of the Act cannot be abated in such situation. Moreover in the case of the assessee even the proceedings initiated U/s.263 of the Act is debatable considering the decision rendered in the case CIT Vs. Kelvinator of India Limited cited supra, wherein it was held that revisiting an issue decided in an

scrutiny assessment proceedings U/s.143(3) of the Act amount to change of opinion and the decision rendered by the Hon'ble Jurisdictional High Court in the case CIT V/s. Smt.M.Kalpagam reported in 227 ITR 0733 on merits. Further the Act does not sanction an issue to be revisited on scrutiny again and again invoking various provisions of the Act over a prolonged extended period of time which will frustrate the period of limitation provided under the various provisions of the Act. Hence we are of the considered view that the Ld.AO do not have jurisdiction U/s.153A of the Act to revisit and re-adjudicate an issue which was already examined and duly adjudicated in the scrutiny assessment U/s.143(3) of the Act on an earlier occasion. Moreover on merits also the issue is debatable by virtue of the decision of the Hon'ble Jurisdiction Madras High Court in the case CIT Vs. Smt. M. Kalpagam reported in 93 taxman 0283 wherein it was held as follows:

“In the asst. yr. 1975-76, the assessee sold his property situated at Thiruvanmiyur for a sum of Rs. 2,70,000. The extent of the property is 10 grounds and 29 sq. ft. The building occupies an area of 4,500 sq. ft. There is a pathway leading from the main road to the building. The pathway occupies an area of 6,750 sq. ft. There are sit outs, servant quarters, cow sheds etc. Apart from the area occupied by the main building, pathway, sit out, servant quarters and cow sheds etc. there is vacant land. The above said constructions are scattered over the area of 10 grounds and 29 sq. ft. Therefore, it cannot be said that apart from the main building in which the assessee is residing, the assessee is not using or utilising the rest of the open ground. The ITO relied upon the Urban Land Ceiling Act and considered that two grounds and 580 sq. ft. would

*form appurtenant to the main building and the rest of the land would be considered as separate unit. Accordingly he bifurcated the sale consideration of Rs. 2,70,000 into Rs. 1,10,000 for the value of the building and appurtenant land and the balance of Rs. 1,69,000 was taken as sale price relating to the value of the land which was not appurtenant to the building. But on considering the facts arising in the case and on looking into the plan submitted by the assessee relating to the property in question, the Tribunal has come to the conclusion that the entire 10 grounds and 29 sq. ft. was utilised by the assessee and therefore, the Tribunal was of the view that the entire area of 10 grounds and 29 sq. ft. would be appurtenant to the main building. If the building together with the land is treated as an indivisible or integral unit enjoyed as such by the person occupying the building, it is an indication that the entire extent of land is appurtenant to the building. On considering the facts arising in this case and after looking into the plan of the building, the Tribunal came to the conclusion that the entire extent of ten grounds and 29 sq. feet was used by the owner of the property by way of residence, pathway, sit-outs, servants quarters, cowsheds etc. Therefore, on reappraising the fact, the Court would not disturb the finding arrived at by the Tribunal on this aspect. It must also be remembered that this case is concerned with the assessment made in the asst. yr. 1975-76 which is about 20 years ago. Therefore, looking at the standard of living prevalent during those times, it cannot be said that a person living in a house situated with an area of ten grounds and 29 sq. ft. that too far away from the city, cannot be considered in the same standard in which one is looking at the extent of the property in the modern days. Thus, there is no infirmity in the order passed by the Tribunal in treating the entire extent of land of ten grounds and 29 sq. ft. as appurtenant to the main building.—CIT vs. Zaibunnisa Begum (1985) 46 CTR (AP) 48 : (1985) 151 ITR 320 (AP) : TC 22R.289, Larsen & Toubro Ltd. vs. Trustees of Dharmamurthy Rao Bahadur Calavala Cunnan Cheity's Chartties 1988 (4) SCC 260 and Kalipada vs. Tulsidas AIR 1960 Cal 467 **relied on**”*

6.2 We also place reliance in the decision of the following higher Judiciary cited by the Ld.AR:-

- (i) CIT Vs. Kelvinator of India Limited: Wherein it was held that the Assessing Officer cannot review his own order on issues already considered in an assessment unless the search has resulted in discovery of any incriminating material.

(ii) ACIT Vs. Kores (India) Ltd in ITA No.5074/Mum/2009 vide order dated 09.09.2010, wherein it was held that once an issue is settled in the assessment prior to search, the same item cannot be revisited in the assessment U/s.153A of the Act because only a pending assessment shall abate on initiation of search and not a concluded assessment.

(iii) ACIT Vs. Mrs. Uttara S. Shorewala (2011) ITA No.5506/Mum/2009 and 5507/Mum/2009 wherein it was held that once an assessment has been concluded and addition has been deleted, Department cannot re-agitate the same issue in an assessment U/s.153A of the Act.

6.3 To sum up, in the case of the assessee, action U/s.263 of the Act was initiated and dropped stating it to be infructuous since proceedings were initiated U/s.153A of the Act. It is obvious from the clarification made by the CBDT that revision or rectification proceedings pending on the date of initiation of search U/s. 132 of the Act shall not abate. Therefore in the proceedings U/s.153A of the Act, the issues racked up in proceedings U/s. 263 of the Act, cannot be revisited. Hence we are of the considered view that the Ld.AO in the case of the assessee ought not to have revisited and

re-adjudicated the issue with respect to deduction U/s.54F of the Act, against which proceedings U/s.263 of the Act was initiated especially when the Ld.AO on the earlier occasion has already adjudicated the issue in the scrutiny assessment proceedings U/s.143(3) r.w.s. 147 & 148 of the Act. Therefore we are of the considered view that the Order of the Ld. Assessing Officer dated 31/03/2016 regarding adjudicating the issue of deduction U/s.54F of the Act is erroneous. Hence we hereby direct the Ld.AO to delete the addition made by disallowing the deduction U/s.54F of the Act. Since we have adjudicated herein above the legal issue with respect to revisiting an issue in the subsequent proceedings U/s.153A r.w.s. 143(3) of the Act which was already adjudicated in the scrutiny assessment proceedings earlier U/s. 143(3) r.w.s 147 & 148 of the Act in favour of the assessee and were on the same issue proceedings U/s.263 of the Act was initiated and dropped, we restrain ourselves from adjudicating the issue with respect to deduction U/s.54F of the Act on merits since it is infructuous. Further it is pertinent to mention that the case laws relied and cited by the Ld.CIT(A) does not support the decision rendered by him considering the facts and circumstances of the case before us.

7. In the result appeal of the assessee is allowed.

Order pronounced on the 16th October, 2018 at Chennai.

Sd/-

(धुव्वुरु आर.एल रेड्डी)

(Duvvuru RL Reddy)

न्यायिक सदस्य /Judicial Member

Sd/-

(ए. मोहन अलंकामणी)

(A. Mohan Alankamony)

लेखा सदस्य / Accountant Member

चेन्नई/Chennai,

दिनांक/Dated 16th October, 2018

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|------------------------|--------------------------|------------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त/CIT | 5. विभागीय प्रतिनिधि/DR | 6. गार्ड फाईल/GF |