IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC-B" BENCH : BANGALORE

BEFORE SHRI JASON P BOAZ, ACCOUNTANT MEMBER

ITA No.2920/Bang/2018
Assessment year : 2010-11

Shri G. Muniraju, S/o. Late Shri Chikkaveeraiah, No.47, Uddanahalli Village, Tavarekere Village, Bengaluru South Taluk – 560 082. **PAN : AKAPM 4763 C**	Vs.	The Income Tax Officer, Ward – 7[2][4], 7th Floor, BMTC Building, 80 Feet Road, Koramangala, Bangalore – 560 095.
APPELLANT		RESPONDENT

Assessee by	:	Shri. B. S. Balachandran, Advocate
Revenue by	:	Smt. Lakshmi K, JCIT

Date of hearing	:	09.01.2019
Date of Pronouncement	:	15.02.2019

O R D E R

This appeal by the assessee is directed against the order of the CIT(A)-7, Bangalore, dated 09.08.2018 for Assessment Year 2010-11.

2. Briefly stated, the facts relevant for disposal of this appeal are as under:

2.1 The Assessing Officer (AO) states that he received information from JDIT (I & CI), Bangalore, that the assessee along with 27 other family members had sold property at Survey No.48/3, Chunchanakuppa Village, Tavarekere Hobli, Bangalore South Taluk vide sale deed dated 09.02.2010 for a consideration of Rs.3,41,25,000/- ; of which the assessee received an amount of Rs.37,50,000/-, being consideration for

his share in the said property. As the assessee had not filed his return of income for Assessment Year 2010-11 and on the basis of the above information received, the AO initiated proceedings u/s 147 of the Income Tax Act, 1961 (in short 'the Act') and after recording reasons that he had reason to believe that income of the assessee liable to tax for Assessment Year 2010-11 had escaped assessment, by failure on the part of the assessee to disclose capital gains arising in respect of the above property transaction, issued notice u/s 148 of the Act dated 24.03.2017. The assessee failed to file a return of income for Assessment Year 2010-11 in response to the aforesaid notice u/s 148 of the Act and to subsequent notice u/s 142(1) of the Act issued on 14.06.2017 calling for details. The AO then issued a letter to the assessee on 20.06.2017 proposing to tax the amount of Rs.37,50,000/-, received by the assessee as his share of consideration in the aforesaid property transaction under the head 'Capital Gains'; to which also there was no response from the assessee. The assessee vide letter dated 27.07.2017 requested for 2 weeks time to furnish details called for; but failed to do so. One more letter was issued on 17.08.2017 posting the case for hearing on 28.08.2017, but once again there was no response from the assessee. The AO then completed the assessment ex-parte u/s 144 of the Act vide order dated 26.12.2017 wherein the assessee's income was determined at Rs.37,50,000/- by taxing the entire consideration the assessee received as his share in the aforesaid sale of property at Taravekere Village, Bangalore South Taluk under the head 'capital gains'.

2.2 Aggrieved by the ex-parte order of assessment dated 26.12.2017 for Assessment Year 2010-11, the assessee preferred an appeal before the CIT(A)-7, Bangalore, which was dismissed vide the impugned order dated 09.08.2018. In this order, the CIT(A) also rejected the assessee's request for admission of additional evidence (pages 1 to 39) filed before him to buttress claims put forth for computation of capital gains and being allowed exemption u/s 54F of the Act. According to CIT(A), under 46A(1) of the Income Tax Rules, 1962 (in short 'the Rules'),

additional evidence can be filed before CIT(A) only in the following four circumstances:

(a) Where the [Assessing Officer] has refused to admit evidence which ought to have been admitted; or
(b) Where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the [Assessing Officer]; or
(c) Where the appellant was prevented by sufficient cause from producing any evidence which is relevant to any ground of appeal; or
(d) Where the [Assessing Officer] has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

2.3 According to the CIT(A), none of the aforesaid 4 conditions are satisfied in the case on hand and he therefore refused to admit the additional evidence. Consequently, he upheld the AO's addition of Rs.37,50,000/-; being the entire share of the assessee in the consideration for sale of the aforesaid property at Tavarekere Village, Bangalore South Taluk.

3. Aggrieved by the order of CIT(A)-7, Bangalore, dated 09.08.2018 for Assessment Year 2010-11, the assessee has preferred this appeal before the Tribunal, wherein he has raised the following grounds:

1. *The impugned assessment order is opposed to the acts of the case and the law and therefore, it is liable to be set-aside.*

NOTICE U/S.148.

2.1. *The Learned Assessing Officer ought to have appreciated that the as per the averments and recitals in the absolute sale deed dated; 09-02-2010, relied upon by him for issuing the Notice u/s.148, the property under reference came to devolve on the smaller HUF of the Appellant and not on the individual appellant, and accordingly it was the smaller HUF which sold the property and not the individual appellant, and consequently the question of escapement of income in the hands of the Appellant in his individual status did not arise.*

2.2. *In the light of the above Ground in No.2.1, there was no intelligible and close nexus with the material evidence (the absolute sale deed dated; 09-02-2010) and the reasons recorded, in so far there was no indication of escapement of income in the hands of individual Appellant and therefore, the Notice u/s.148 is bad in Law and liable to be cancelled as without jurisdiction.*

2.3. *In the light of the above Grounds in SI.Nos.2.1. & 2.2, the sanction stated have been accorded by the Learned Commissioner of Income Tax under section 151 of the Act is without application of mind and consequently, the Notice u/s. 148 is without jurisdiction and liable to be cancelled.*

DEDUCTION UNDER SECTION 54F.

3.1. *The Learned Commissioner of Income Tax (Appeals) has failed to appreciate that the alternative claim of deduction under section 54F was not made and evidences in this regard were not adduced before the Learned Assessing Officer for want of adequate and substantial opportunity of hearing and there was no willful failure on the part of the Appellant.*

3.2. *The Learned Commissioner of Income Tax ought to have appreciated that the evidences in support of claim of deduction u/s. 54F are admissible evidences as per Rule 46A of the IT Rules, subject to affording a right of rebuttal to the Learned Assessing Officer, and therefore, not to have rejected the claim for deduction under the said section.*

4. *The grounds are taken without prejudice to one another and the Appellant craves leave to add or delete or modify or revise any ground at the time of hearing before the Hon'ble ITAT.*

For these and other grounds that may be urged at the time of hearing, it is prayed that the Hon'ble ITAT may be pleased to allow the appeal in the interest of the equity and justice.

4. **Ground Nos. 1 and 4 –** being general in nature, no adjudication is called for thereon.

5. **Ground Nos. 2.1 to 2.3 - Notice u/s 148 of the Act**

5.1 In these grounds (supra), the assessee challenges the measures taken for assumption of jurisdiction for initiation of assessment proceedings as it is alleged that the notice issued u/s 148 of the Act is bad in law and liable to be cancelled. In the course of hearing, the learned AR for the assessee stated at the Bar that the assessee is not pressing these ground Nos. 2.1 to 2.3 (supra) raised in this appeal. As ground Nos. 2.1 to 2.3 are not pressed, they are rendered infructuous and consequently dismissed as not pressed.

6. **Ground Nos. 3.1 and 3.2 – Exemption u/s 54F of the Act**

6.1 In these grounds (supra), the assessee contends that the assessee is entitled to claim exemption u/s 54F of the Act in respect of the capital gains arising on account of his share on the sale of property at Tavarekere Village, Bangalore South Taluk, which the CIT(A) failed to consider. It is also submitted that CIT(A) ought to have appreciated the assessee's prayer and admitted the additional evidence (pages 1 to 39); sought to be admitted by the assessee, as it contains documents which factually would go to the root of the matter of correct computation of capital gains and the assessee's claim for exemption u/s 54F of the Act.

6.1.2 The learned AR for the assessee also reiterated the following contentions put forth in the written submissions dated 26.07.2018 before the CIT(A) for admission of additional evidence:

"4. The ld.A.O has concluded the assessment order u/s 144, without giving the sufficient opportunity to submit the evidence and made the entire share of his receipt as addition of Rs 37,50,000/-, without deducting the indexed cost of acquisition and benefit under section 54F.

5. Further, the appellant is an agriculturist and facing diabetics from couple of years, and during the course of scrutiny proceedings appellant had undergone treatment. Consequently he could not provide the vital documents for concluding the assessment during the course of scrutiny proceedings.

*6. With this back drop, I am herewith requesting Your*Honour to be kind enough to uphold the principle of natural justice by accepting the additional evidences and opportunity of being heard as per Rule 46A of Income Tax Act, 1961.*

7. The appellant wishes to submit that he did not file his return of income since there was no Tax payable by him on the Capital Gains Income.

8. The appellant wishes to submit that he has purchased an urban land and put up construction on the same for the purpose of exemption. The Land was purchased for a value of Rs.988,500 and a construction was put up on the same for Rs.34,78,000. Copies of Sale deed for purchase of the property and the copy of cost sheet from the builder as proof of construction cost are attached.

9. As per Section 54F, if assessee invests in a residential house, not less than the net consideration, the whole amount of capital gain is not charges, the relevant provisions of the section 54F is reproduced below;

54F: Capital Gain on transfer of certain capital assets not to be charged in case of investment in residential house-

(1) Where, in the case of an assessee being an individual, the capital gain arises from the transfer of any long-term capital asset, not being a residential house (hereafter in this section referred to as the original asset), and the assessee has, within a period of one year before or after the date on which the transfer took place purchased, or has within a period of three years after that date constructed, a residential house (hereafter in this section referred to as the new asset), the capital gain shall be dealt with in accordance with the following provisions of this section, that is to say, —

(a) if the cost of the new asset is not less than the net consideration in respect of the original asset, the whole of such capital gain shall not be charged under section 45;

(b) if the cost of the new asset is less than the net consideration in respect of the original asset, so much of the capital gain as bears to the whole of the capital gain the same proportion as the cost of the new asset bears to the net consideration, shall not he charged under section 45:

Provided that nothing contained in this sub-section shall apply where the assessee owns on the date of the transfer of the original asset, or purchases, within the period of one year after such date, or constructs, within the period of three years after such date, any residential house, the income from which is chargeable under the head "Income from house property", other than the new asset.

Explanation. — For the purposes of this section, —

(i) "long-term capital asset" means a capital asset which is not a short-term capital asset;

(ii) "net consideration", in relation to the transfer of a capital asset, means the full value of the consideration received or accruing as a result of the transfer of the capital asset as reduced by any expenditure incurred wholly and exclusively in connection with such transfer.

(2) Where the assessee purchases, within the period of one year after the date of the transfer of the original asset, or constructs, within the period of three years after such date, any residential house, the income from which is chargeable under the head "Income from house property", other than the new asset, the amount of capital gain arising from the transfer of the original asset not changed under section 45 on the basis of the cost of such new asset as provided in clause (a), or, as the case may he, clause (b), of sub-section (1), shall be deemed to be income chargeable under the head "Capital gains" relating to long-term capital assets of the previous year in which such residential house is purchased or constructed.

(3) Where the new asset is transferred within a period of three years from the date of its purchase or, as the case may be, its construction, the amount of capital gain arising from the transfer of the original asset not charged under section 45 on the basis of the cost of such new asset as provided in clause, (a) or, as the case may be, clause (b), of sub-section (I) shall be deemed to be income chargeable under the head "Capital gains" relating to long-term capital assets of the previous year in which such new asset is transferred.'.

10. From the extract as mentioned above, it is clear that the entire sale consideration has to be invested in order to claim full exemption. The

appellant has invested Rs 44,66,500 (sum of land purchase and construction cost) which is more than his share of the share consideration. A copy of IT computation is attached for your perusal. Also, a copy of Valuation report for proof of completion of construction is enclosed.

11. *Since there does not arise any tax liability in his case, the appellant did not file the return of income.*
12. *In view of the submissions made herein above, the appellant prays that addition may be deleted and if any other evidences or documents required to adjudicate the appeal, we are obliged to furnish the same.*

6.1.3 It was prayed by the learned AR that the additional evidence (pages 1 to 39) be admitted as the assessee was prevented by sufficient cause from producing evidence called for by the AO. Apart from the above, it was also submitted that u/R 46A(4), the CIT(A) has the power to direct production of any document to enable him to dispose off the appeal for any other substantial cause. The only prohibition in Rule 46A(3) is that the additional evidence should not be taken into account unless the AO is allowed reasonable opportunity to examine the additional evidence and produce any evidence in rebuttal to the additional evidence placed on record by the assessee. The learned AR therefore submitted that the order of the CIT(A) be set aside and the additional evidence filed with regard to the assessee's claim for exemption u/s 54F of the Act while computing the 'Capital Gains' on his share of consideration of Rs.37,50,000/- on sale of the aforesaid property at Tavarekere Village, Bangalore South Taluk should be remanded to the AO for fresh consideration in the light of the additional evidence.

6.2 The learned DR for Revenue supported the order of the CIT(A) and in this regard placed reliance on the decision of the Hon'ble Allahabad High Court in the case of Ram Prasad Sharma Vs. CIT (119 ITR 869) (Allahabad).

6.3.1 We have considered the rival submissions. We are of the view that the powers u/s 46A of the Act are conferred on the CIT(A) only for a purpose of enabling the

CIT(A) to consider evidence available with the assessee but not to produce before the AO. The fact that the assessee was suffering from diabetes for which he was under treatment for the last few years and, therefore, could not attend proceedings before the AO was not disbelieved by the CIT(A). In such circumstance, the CIT(A) should have come to the conclusion that the assessee was prevented by sufficient cause from producing evidence which he was called upon to produce by the AO or it could be said that evidence which is relevant to any ground of appeal could not be produced before the AO owing to sufficient cause. The case of the assessee would thus fall within the ambit of Rule 46A(1)(b) or (c) of the Rules. In any event under Rule 46A(4), the CIT(A) has inherent power to admit additional evidence. The only limitation on his part is that he cannot rely on the additional evidence without confronting the same to the AO and affording him right of rebuttal. It is also seen from the Assessment Order; where the reasons are recorded by the AO for initiation of proceedings u/s 147 of the Act for taking up the assessment for Assessment Year 2010-11; that the intention of the AO was to bring to tax income of the assessee that escaped assessment by virtue of the failure of the assessee to declare income from 'Capital Gains' arising on the assessee's share of consideration for transfer of the aforesaid property at Tavarekere Village. However, on a perusal of his ex-parte order shows that rather than doing so, the AO went on to erroneously tax the assessee on the entire consideration of Rs.37.50 lakhs as Long Term Capital Gains (LTCG). Sadly, the CIT(A) too has not appraised himself properly of the facts of the matter and without any application of mind, mechanically upheld the ex-parte order of assessment; without attempting to correctly compute the Capital Gains of the aforesaid sale of Tavarekere Village property; which was the main purpose for re-opening the assessment. Therefore, in my view, the CIT(A) wrongly refused to admit additional evidence filed by the assessee before him. With regard to the decision of the Hon'ble Allahabad High Court in the Case Rama Prasad Sharma (Supra), cited by the learned DR before us, I am of the view that the Allahabad High Court held that it was a discretion of the first appellate authority and the Tribunal to admit additional

evidence and that they have rightly exercised the discretion not to admit additional evidence because the assessee without reasonable cause failed to produce the evidence before the AO. It cannot be said that the ratio laid down in this decision is that additional evidences in all cases should be rejected. The power to admit additional evidence is at the discretion of first appellate authority and that discretion has to be exercised judiciously keeping in mind the spirit behind Rule 46A. In our view, on the facts and circumstances of the present case, the additional evidence ought to have been admitted by the CIT(A).

6.3.2 For the reason stated above, we set aside the order of the CIT(A), in so far as it relates to the addition of Rs.37,50,000/- being the Long Term Capital Gains / assessee's share in the consideration for transfer of the property at Tavarekere Village and direct the issue to be examined afresh by the AO in the light of the additional evidence (pages 1 to 39) filed by the assessee before the CIT(A). The AO will decide the issue afresh after taking into consideration additional evidence filed by the assessee. The AO will afford opportunity of being heard to the assessee and also allow assessee liberty to file any additional evidence that the AO may desire. The AO will decide the issue in accordance with law after considering the submissions / contentions of the assessee.

7. In the result, the assessee's appeal for Assessment Year 2010-11 is partly allowed for statistical purposes.

Order pronounced in the open court on this day of 15th February, 2019.

Sd/-
(JASON P BOAZ)
Accountant Member

Bangalore.
Dated: 15th February, 2019.
/NS/*

Copy to:

1. Appellants
2. Respondent
3. CIT
4. CIT(A)
5. DR
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.