

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'C' BENCH, KOLKATA**

(Before Sri J. Sudhakar Reddy, Accountant Member & Sri S.S. Viswanethra Ravi, Judicial Member)

ITA No. 1816/Kol/2016
Assessment Year: 2005-06

Mr. Ashwin Kr. Tulsidas & Jayant Kr. Tulsidas.....Appellant
Executor to the Estate of Late Tulsidas Khatau
C/o Jethabhai Khatau & Co.
176, Jamnalal Bajaj Street
Kolkata - 700 007
[PAN : AAABA 0406 G]

Income Tax Officer, Ward-43(1), Kolkata.....Respondent

Appearances by:

Shri P.J. Bhide, CA, appeared on behalf of the assessee.

Shri Saurav Kumar, Addl. CIT D/R, appearing on behalf of the Revenue.

Date of concluding the hearing : January 8th, 2019

Date of pronouncing the order : February 20th, 2019

ORDER

Per J. Sudhakar Reddy, AM :-

This appeal filed by the assessee is directed against the order of the Id. Commissioner of Income Tax (Appeals) - 13, Kolkata, (hereinafter the 'Id. CIT (A)'), passed u/s 250 of the Income Tax Act, 1961 (the 'Act'), dt. 28/02/2016, for the Assessment Year 2005-06, on the following grounds:-

"1. That on the facts and circumstances of the case, the Ld. Commissioner of Income tax (Appeals), Kolkata, erred in holding that the proceedings initiated by the Assessing Officer by notice U/s 148 of the Act is valid in Law.

2. That on the facts and circumstances of the case, the Ld. Commissioner of Income tax (Appeals), Kolkata erred in holding that the Assessing Officer was justified in determining the taxable Long Term Capital Gain of the Appellant at Rs.6,51,100/-.

3. That on the facts and circumstances of the case, the Ld. Commissioner of Income tax (Appeals), Kolkata, erred in holding that the Appellant was not entitled to deduction U/s 54 EC of the Act in respect of Capital Gain Bonds purchased by the Appellant on 31.5.2004.

4. *That on the facts and circumstances of the case, the Ld. Commissioner of Income tax (Appeals), Kolkata, erred in holding that the provision of section 168/4 were not applicable.*

5. *That the Order passed by the authorities below is bad in law.*

6. *That the appellant craves leave to urge further grounds of appeal at the time of hearing."*

2. The ld. Counsel for the assessee, Shri P.J. Bhide, submitted that the notice u/s 148 of the Act, was issued on the Estate of Late Tulsidas Khatau, whereas the assessment order was framed on Mr. Ashwin Kumar Tulsidas and Mr. Jayant Kumar Tulsidas, Executors of the estate of, Late Tulsidas Khatau and hence the assessment is not valid. He drew the attention of the Bench to the copy of notice at page 1 of the paper book and the assessment order. On the issue of determination of long term capital gain, he relied on the decision of the co-ordinate bench Mumbai Tribunal in the case of the co-owners i.e., *Estate of Krishnakumar J Khatau vs. ITO, in ITA No. 4223 & 4224/Mum/2014, Assessment Year 2005-06; order dt. 01/12/2014*, and submitted that the fair market value as on 19/04/1981 should be adopted at Rs. 110/- per square meter. On the issue of exemption u/s 54EC of the Act, he submitted that just because the investment was made in the said bonds from own source of funds and prior to the date of entering into agreement of sale and receiving advances the claim for deduction cannot be rejected. He relied on the Circular No. 359 dt. 10/05/1983, issued by the CBDT and submitted that the benefit should have been extended to the assessee.

2.1. The ld. D/R, on the other hand relied on the order of the Assessing Officer as well as of the ld. CIT(A) and submitted that the assessee has filed his return of income in response to notice u/s 148 of the Act, in the name of the executors of the estate and they also participated in the assessment proceedings. He distinguished the case-law cited by the ld. Counsel for the assessee and submitted that the assessment on the estate can be made in the name of the executors and that there is no major difference for the same. On the issue of determination of fair market value from 01/04/1981, he disputed the claim of the assessee and submitted that the ld. CIT(A) considered the issue and held that the value determined by the DVO has to be applied. On the issue of claim of deduction u/s 54E, he submitted that the investment on the bonds have been made by the assessee

much prior to the contemplation of the sale of the said property. He pointed out that the agreement for sale and earnest money was received by the assessee only on 27/11/2004 and whereas the investment in capital bonds were made prior to 31/05/2004 and 31/07/2004. He prayed that the order of the Id. CIT(A) be upheld.

3. We have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows:-

4. On the issue of validity of assessment, we find that the assessee in response to notice issued u/s 148 of the Act in the name of the estate of Late Tulsidas Khatau, has filed a return of income in the name of Mr. Ashwin Kumar Tulsidas, Executor of Late Tulsidas Khatau. They have participated in the assessment proceedings in the capacity of Executors of the Estate. In our opinion, the assessment order has been based on the estate of Late Tulsidas Khatau, represented by its executors. There is no infirmity in the same. The Id. CIT(A) has at para 13 of his order considered the issue and held as follows:-

"On Receipt of aforesaid information by the AO and also on receipt of the said return in response to notice u/s148, the case was taken up for scrutiny and notices u/s 143(2) and 142(1) calling for certain explanation was issued on 16.08.2012. The said notices were issued to Shri Ashwin kumar Tulsidas as he had claimed himself to be the Executor of the Estate of Late Tulsidas Khatau. It is another matter that subsequently during the course of hearing proceedings, it was noted that Late Tulsidas Khatau had in fact appointed Shri Ashwin Kumar Tulsidas as well as Shri Jayant Kumar Tulsidas, as the joint Executors to the Estate of his property. It is therefore established fact that while filing the return of income against notice u/s148, Shri Ashwin Kumar Tulsidas had claimed himself to be the sole executor and hence notices u/s 143(2) and 142(1), Shri B.B. Payra, Advocate, being appointed as the authorized representative on behalf of the assessee appeared from time to time and explained the return.

It is again worthwhile to mention here that the Power of Attorney appointing Shri B.B.Pyra as the authorized representative was also signed only by Shri Ashwin Kumar Tulsidas and not by Shri Jayant Kumar Tulsidas rightly issued notice under Section 148 to the Estate of late Sir Tulsidas Khatau. As per assessment record the appellant has complied through Shri Ashwin Kumar Tulsidas who claimed himself as a executor of the state. This fact is duly mentioned in the Assessment Order. Section 292B states that no notice assessment or other proceeding can be invalid if the same is in substance and effect in conformity with or according to the intent of the purpose. Similarly as per section 292BB any notice issued will be deemed to be valid if all has complied with the same and no objection was raised during the assessment. Considering the above position of law compliance of the assessee

made during the course of assessment as an representative executor of Sri late Tulsidas khatau. It is also matter of record that Sri Ashwin Kumar Tulsidas as an executor to the Estate as appeared in the entire proceeding and no objection was filed therefore, the notice issued is in conformity with according to the intent of purpose of this Act. The AO has rightly passed order in the name of Ashwinn Kumar Tulsidas and Jayant kumar Tulsidas too as executor to the Estate of late Sri Tulsidas Khatau. The ground of appeal has no substance and the same is dismissed."

4.1. We find no infirmity with this finding of the Id. CIT(A) and uphold the same.

5. Ground No. 2, is on the determination of fair market value as on 01/04/1981, for the purpose of computation of long term capital gain. Consistent with view taken by the 'SMC' Bench of the ITAT Mumbai in the case of another co-owner of the property [*Estate of Krishnakumar J Khatau vs. ITO (supra)*] we direct the Assessing Officer to give the benefit to the assessee by adopting the fair market value at Rs.110/- per sq. mtr. Accordingly, this ground of the assessee is allowed.

6. Ground No. 3 is on the issue of claim of deduction u/s 54EC of the Act, we find that the investment in capital bonds were made much prior to the date when an agreement for sale of property and receipt of the first installment. The circular of the board (supra), does not come to the rescue of the assessee for the reason that, the investment was not made out of advances from sale of property. The investment was made even before the sale was contemplated. Hence we uphold the findings at page 15 of the Id. CIT(A)'s order and dismiss this ground of the assessee.

7. Ground No. 4 alleges that the Id. CIT(A), erred in holding that provisions of Section 168(4) of the Act, are not applicable.

Section 168(4) of the Act, reads as follows:-

"(4) In computing the total income of any previous year under this section, any income of the estate of that previous year distributed to, or applied to the benefit of, any specific legatee of the estate during that previous year shall be excluded; but the income so excluded shall be included in the total income of the previous year of such specific legatee."

7.1. The assessee in this case claimed that the income of the estate for the impugned previous year was distributed or applied for the benefit of the specific legatee of the estate and that he same is included in the income of the specific legatee for that previous year. In fact in the return of income the assessee had not claimed any exclusion in terms of Section 168(4) of the Act. Under these circumstances, we find no infirmity in the order of the Id. CIT(A). Accordingly, this ground of the assessee is dismissed.

8. In the result, appeal of the assessee is allowed in part.

Kolkata, the 20th day of February, 2019.

Sd/-
[S.S. Viswanethra Ravi]
 Judicial Member

Sd/-
[J. Sudhakar Reddy]
 Accountant Member

Dated : 20.02.2019
 {SC SPS}

Copy of the order forwarded to:

1. ***Mr. Ashwin Kr. Tulsidas & Jayant Kr. Tulsidas***

***Executor to the Estate of LateTulsidas Khatau
 C/o Jethabhai Khatau & Co.
 176, Jamnalal Bajaj Street
 Kolkata - 700 007***

2. ***Income Tax Officer, Ward-43(1), Kolkata***

3. CIT(A)-

4. CIT- ,

5. CIT(DR), Kolkata Benches, Kolkata.

True copy
 By order

Assistant Registrar
 ITAT, Kolkata Benches