

**IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC-C” BENCH : BANGALORE**

BEFORE SHRI JASON P. BOAZ, ACCOUNTANT MEMBER

ITA No.64/Bang/2019
Assessment Year : 2009-10

Smt. Tupel Raja Iyengar Shakuntala, #25/4, Flat No.204, FF Mahaveer Aspen Apartments, 6 th Main Road, Yelachenahalli, K. P. Main Road, Bangalore – 560 078. PAN : BFGPS 4816 A	Vs.	The Income-Tax Officer Ward-7(2)(4), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri. V. Srinivasan, Advocate
Revenue by	:	Shri. Sumer Singh Meena, Addl. CIT

Date of hearing	:	22.04.2019
Date of Pronouncement	:	10.05.2019

ORDER

This appeal by the assessee is directed against the order of CIT(A) - 7, Bangalore, dated 07.12.2018 for Assessment Year 2009-10.

2. Briefly stated, the facts of the cases are as under:

2.1 The assessee, an individual, had sold a residential property situated at No.1200, 22nd A Cross, Banashankari II Stage, Bangalore – 560 070, vide sale deed dated 16.05.2008 (i.e., in the period relevant to Assessment Year 2009-10) for a consideration of Rs.46,65,000/-; but had not filed a return of income for Assessment Year 2009-10. The Assessing Officer (AO), on receipt of information initiated proceedings under section 147 of the Income Tax Act, 1961 (in short ‘the Act’) and after recording reasons that income exigible to tax, by

way of the above transaction of sale of property, had escaped assessment, issued notice under section 148 of the Act on 29.03.2016. There was no response from the assessee. The AO, thereafter, issued notice under section 142(1) of the Act on 05.08.2016 to which also there was no compliance. Finally, since there was no response from the assessee and since all notices sent to the assessee were returned unserved by postal authorities, the AO served notice by affixture on 13.08.2016 at the last known address of the assessee. Since there was no response thereto from the assessee, the AO completed the assessment ex-parte under section 144 r.w.s. 147 of the Act vide order dated 14.10.2016 taxing the entire sale consideration of Rs.46,65,000/- as income from capital gains.

2.2 According to the averments of the assessee, neither the order of assessment dated 14.10.2016 for Assessment Year 2009-10 nor any of the notices issued by the AO were received by the assessee since the last known address of the assessee was the residential property / house sold by the assessee vide sale deed dated 16.05.2008. It was only after the bank account of the assessee was attached by the Department, that the assessee approached the Department and obtained a copy of assessment order dated 16.05.2008 for Assessment Year 2008-09. Thereafter, the assessee filed an appeal before the CIT(A)-7, Bangalore, on 26.04.2017.

2.3 Before the CIT(A), the assessee submitted that after sale of the aforesaid property vide sale deed dated 16.05.2008 for Rs.46,65,000/-, she had purchased a new residential property at No.190/2, 7th Cross, Kathriguppe East, 4th Phase, BanashankarI III Stage, Bangalore, for a consideration of Rs.37,50,830/- vide sale / purchase deed dated 22.05.2008. Upon these documents being furnished before him, the CIT(A) called for a report from the AO thereon. The AO submitted a remand report dated 30.01.2018 to the CIT(A) (copy placed at pages 4 and 5 of paper book) stating that he had verified the documentary evidence tendered by the assessee; reported that the assessee had

claimed exemption under section 54 of the Act without filing the return of income for Assessment Year 2009-10 and finally submitted that the CIT(A) may decide the case on merits.

2.4 Thereafter, the CIT(A)-7, Bangalore, passed the impugned order dated 07.12.2018 dismissing the assessee's appeal. In the impugned order, the CIT(A) condoned the delay in filing the appeal on the basis of the explanations put forth by the assessee; i.e., *inter alia*, the non-receipt of impugned order of assessment dated 14.10.2016 for Assessment Year 2009-10. On merits, the CIT(A) noted the contentions advanced by the assessee, and the AO's remand report dated 30.01.2018. According to the CIT(A), the additional evidence furnished by the assessee could not be admitted in terms of Rule 46A of the Income Tax Rules, 1962 (in short 'the Rules'), since the assessee had not responded to notices issued by the AO and had not made a case of sufficient cause for admitting of additional evidence. In that view of the matter, the CIT(A) declined to interfere with the impugned ex-parte order of assessment dated 14.10.2016 for Assessment Year 2009-10 and dismissed the assessee's appeal; thereby upholding the assessment of the entire sale consideration of Rs.46,65,000/- received by the assessee in respect of the property sold on 16.05.2008 as capital gains.

3. Aggrieved by the order of CIT(A)-7, Bangalore, dated 07.12.2018 for Assessment Year 2009-10, the assessee has preferred this appeal before the Tribunal; wherein it has raised the following grounds:

1. *The orders of the authorities below in so far as they are against the appellant, are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.*
2. *The learned CT[A] is not justified in holding that the additional evidence tendered by the appellant to show that the entire capital*

gains were reinvested in the purchase of a new residential house entitling the appellant to claim exemption u/s. 54 of the Act in respect of the capital gains on the sale of the residential house during the year cannot be admitted in terms of Rule 46A of the I.T.Rules, in course of the appellate proceedings under the facts and in the circumstances of the appellant's case.

- 2.1 The learned CIT[A] ought to have appreciated that the assessment of the appellant was reopened after 6 years from the end of the assessment year and all the notices were admitted and reportedly served on the last known address of the appellant, which was the property sold by the appellant for which the reassessment proceedings were initiated and therefore, there was sufficient cause as well as inadequate opportunity in course of assessment proceedings and hence, the requirements of clause [c] and clause [d] of Rule 46A(1) were squarely attracted to the appellant's case and the rejection of the additional evidence tendered by the appellant is opposed to law and facts of the appellant's case.*
- 3. The learned CIT[A] is not justified in upholding the assessment of Long term Capital gains of Rs. 46,65,000/- on the sale of the residential house by the appellant during the year under appeal under the facts and in the circumstances of the appellant's case.*
- 4. The learned CIT[A] ought to have appreciated that the appellant was entitled to exemption claimed u/s.54 of the Act and hence, there was no capital gains chargeable to tax under the facts and in the circumstances of the appellant's case.*
- 5. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs.*

4. Ground Nos. 1 and 5 (supra), being general in nature, no adjudication is called for thereon.

5. Ground Nos. 2, 2.1, 3 and 4 – Claim of Exemption under section 54 of the Act

5.1 I have heard and considered the rival contentions of both the learned AR for the assessee and the learned DR for Revenue and perused the submissions put forth by the assessee before the CIT(A) vide letter dated 08.05.2017; along with the documents for purchase of the new residential house No.190/2, 7th Cross, Kathriguppe East, Bangalore, for consideration of Rs.37,50,830/- vide sale / purchase dated 22.05.2008; sale deed dated 16.05.2008 for sale of original property and purchase deed thereof dated 25.10.1985. I have also perused the AO's remand report dated 30.01.2018. Having considered the aforesaid, I proceed to dispose off these ground Nos. 2, 2.1, 3 and 4 (supra) hereunder.

5.2. These grounds (supra) relate to the only issue in this appeal with regard to the assessee's claim for exemption under section 54 of the Act on sale of the residential house at No.1200, 22nd A Cross, Banashankari II Stage, Bangalore – 560 070, vide sale deed dated 16.05.2008; i.e., during the period relevant to Assessment Year 2009-10. It is not in dispute that the assessee had not filed the return of income for Assessment Year 2009-10, disclosing the sale of the sale of the said residential property and claiming exemption under section 54 of the Act, within the time allowed under the Act. In that view of the matter, the AO had rightly initiated proceedings under section 147 of the Act, to re-open the assessment for Assessment Year 2009-10, on receipt of the information relating to sale of the residential house. However, as rightly contended by the assessee, all the notices issued by the AO in the course of assessment proceedings were sent by the AO to the last known address of the assessee; which is the said residential property sold by the assessee on 16.05.2008; almost 8 years later. Therefore, the fact that the assessee did not appear before the AO in the course of assessment proceedings in response to notices issued is understandable and due to sufficient and reasonable cause. In fact, the CIT(A) has also appreciated

this position while condoning the delay in filing the appeal before him, as can be seen at para 2 of the impugned appellate order. It is seen that the ex-parte order of assessment passed under section 144 r.w.s. 147 of the Act is dated 14.10.2016 and the appeal has been filed before the CIT(A) on 26.04.2017; which is more than 6 months after the order of assessment for Assessment Year 2009-10 was passed.

5.2.2 While the CIT(A) appreciated the reasonable cause put forth by the assessee for delay in filing the appeal, he has taken a different view in the matter of admission of additional evidence in terms of Rule 46A of the Rules. The CIT(A) held that there was no sufficient cause for admission of additional evidence which was also sought to be admitted on the ground that the assessee was not aware of the assessment proceedings and hence could not produce these documents before the AO. In my view, this approach of the CIT(A) appears to be incongruous and does not stand the test of reason. Rule 46A of the Rules prescribes circumstances under which additional evidence can be admitted after allowing opportunity to the AO. One of the conditions laid down in Rule 46A of the Rules is when there is sufficient cause for failure to produce the evidence before the AO. While evaluating sufficient cause for failure to produce evidence before the AO, the test of reasonableness and human probabilities must be applied so as to aid the object of assessment proceedings, i.e., determination of the income liable for taxation. Assessment proceedings and appellate proceedings under the Act, between the assessee and Revenue, are not adversarial proceedings. The ultimate object of assessment and appellate proceedings is to determine the correct income of the assessee liable for taxation and technicalities must not come in the way of determination of the correct total income. Therefore, the refusal by the CIT(A) to admit additional evidence, in the facts and circumstances of the case on hand, does not stand to reason, when it is factually clear that the assessee was not put on notice about assessment proceedings for Assessment Year 2009-10 as the notices issued in 2016 were

served on the last known address of the assessee; which property she had disposed off on 16.05.2008, almost 8 years earlier. In my view, this constitutes sufficient cause for admission of additional evidence put forth by the assessee, which the CIT(A) ought to have admitted.

5.2.3 Having held that the CIT(A) ought to have admitted the additional evidence filed by the assessee before him, u/R 46A of the Rules, it is seen that the assessee had filed the computation of capital gains before the CIT(A). As per this computation, it is seen that the assessee had computed the long term capital gains (LTCC) at Rs.19,54,873/- on the sale proceeds of the said property at Rs.46,65,000/-, after claiming indexed cost of acquisition. It is also seen that the assessee had purchased a residential property for a consideration of Rs.37,50,830/- on 22.05.2008, i.e., within 7 days from the sale of original property on 16.05.2008. I also find that the AO, after examination of details / documents filed by the assessee before the CIT(A); has reported in his remand report dated 30.01.2018, that the documents produced by the assessee have been examined. No adverse remarks have been made by the AO with regard to the computation of LTCG as well as the entitlement to claim exemption under section 54 of the Act. It is, therefore, clear that the AO was satisfied about the sale / purchase of the said properties and the investment benefit available to the assessee under section 54 of the Act. In the remand report, the AO has only remarked that there is a claim for exemption under section 54 of the Act and that no return of income has been filed by the assessee for Assessment Year 2009-10. In my view, this remark by the AO cannot be a factor to deny the assessee its legitimate claim for exemption under section 54 of the Act. There is no prohibition under the Act on the assessee in claiming exemption under section 54 of the Act in case it has not filed a return of income. Such a legal claim can be put forth at any stage of assessment / appellate proceedings and should be considered on merits in the light of the details / documents / corroborative evidence filed in this regard. Having considered the entire material on record on

this issue and taking into account the peculiar facts and circumstances of the case on hand, I am of the considered view that the assessee is entitled to exemption under section 54 of the Act and therefore the entire sale consideration of Rs.46,65,000/- assessed by the AO is hereby deleted. It is held and directed accordingly.

6. In the result, assessee's appeal for Assessment Year 2009-10 is allowed.

Pronounced in the open court on 10th May, 2019.

Sd/-
(JASON P. BOAZ)
Accountant Member

Bangalore.
Dated: 10th May, 2019.
/NS/*

Copy to:

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|-------------------------|---------------|
| 1. Appellants | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR, ITAT, Bangalore. | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.