IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR

BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER AND
SH. N.K.CHOUDHRY, JUDICIAL MEMBER

ITA No.430(Asr)/2017
Assessment Year:2008-09

Income Tax Officer, Ward-3(3), Srinagar	Vs.	Smt. Zeenab, W/o Ghulam Mohammad Bhat R/O House No, 15-16 Hig Colony Green Park, Bemina, Srinagar [PAN:ABGPZ 4507Q]
(Appellant)		**(Respondent)**

A N D

ITA No.433(Asr)/2017
Assessment Year:2008-09

Smt. Zeenab, W/o Ghulam Mohammad Bhat R/O House No, 15-16 Hig Colony Green Park, Bemina, Srinagar [PAN:ABGPZ 4507Q]	Vs.	Income Tax Officer, Ward-3(3), Srinagar
(Appellant)		**(Respondent)**

Appellant by: Sh. Bashir Ahmed Lone (Ld. CA)
Respondent by: Sh. Charan Dass (Ld. DR)

Date of hearing: 11.04.2019
Date of pronouncement: 04.07.2019

ORDER

PER N.K.CHOUDHRY, JM:

These cross appeals have been preferred by the Revenue Department and the Assessee against the order dated 15.03.2017 passed by the Ld. CIT(A)-J&K, Jammu U/s 143(3) of the I.T. Act, 1961 (hereinafter called as 'the Act'), for Asst. Year:2008-09.

2. The brief facts of the case are that the proceedings u/s 147 of the Act were initiated by the Assessing Officer on the ground that the assessee had made payment of Rs.79,88,824/- to the Govt. of J&K for acquiring Nuzul Land under Roshni Scheme launched by J&K, Govt. During the assessment proceedings, it was found by the Assessing Officer that the assessee was in possession of State owned lease land measuring 2 kanals, 19 marlas and 48 Sq. ft. situated at Estate Rampura at Bemina Crossing, Srinagar. The ownership over the land was conferred upon the assessee by the State Govt. under Roshni Scheme J&K, Govt. Order No.253-254/CRA/M/Revenue dated 18/08/2007 passed by the then Dy. CIT, Srinagar against payment of Rs.79,88,824/-. Out of the said piece of land the assessee sold 1 kanal and 17 marlas of land vide sale deed dated 28/01/2008 for a sale consideration of Rs.79,88,824/-, however the sale consideration has been undervalued and registered at Rs.1,00,000/- only as reflects from the sale deed. On confrontation by the AO, the assessee claimed to be in possession of the said land and submitted that since the assessee wanted to construct a house on the said land, however permission was not granted as there was no legal title over the said land. The J&K Govt. enacted a legislation i.e. J&K State vesting of ownership to occupants, Act 2001-07 (popularly known as Roshni Act) to give legal rights to the occupants and to generate income for State Govt. It was also stated that the assessee being an old

lady of 61 years of age with no savings and financial resources therefore was not in position to pay the amount of Rs.79,88,824/- which was required to be paid to the State Govt., therefore she entered into an agreement with Sh. Ghulam Mustafa Mir and Mr. Nazir Ahmad Mir R/o Chattabla, Srinagar on a consideration that entire premium of Rs.79,88 lacs would be deposited by them on behalf of the assessee and in lieu thereof, the assessee agreed to transfer 1 kanal and 17 marlas of land in their favour. Though Sh. Nazir Ahmad Mir in respect of notice u/s 143(6) of the Act filed a written reply on dated 13/02/2014 along with the Xerox copy of cheques through which the payment was deposited in the State Govt. account as a costs of land, Xerox copy of the bank statement detailing the cheques by way of which, payment was made by the vendee and xerox copy of the receipt by the vendee from the assessee amounting to Rs.4,00,000/- and Rs.3,00,000/- respectively. The entire proceeds of Rs.79,88,824/- was admittedly paid by the vandees. The assesee also submitted that she had borrowed Rs.7,00,000/- from her son namely Mr. Farooq Bhat and remaining sum of Rs.73,88,824/- was paid by the two vendees as named above.

However, the claim of the assessee did not find favour of the Assessing Officer and the Assessing Officer worked out the Short Term Capital gain at Rs.60,90,052/- and taxed the same accordingly by taking full value of the consideration in terms of section 50C of the Income Tax Act at Rs.1,11,00,000/- for the sale/transfer of 1 kanal and 17 marlas of land. Against the said addition the assessee preferred the first appeal before the Ld. CIT(A) who partly allowed the appeal of the assessee by holding as under:

"Ground of Appeal No.1: The appellant has stated that the assessment order passed u/s. 143(3)/147 of the Income tax Act was bad in law as the reasons recorded for reopening proceedings were not provided to the assessee despite made repeated requests. In this regard, the appellant has placed reliance on the decision of Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd. Vs. ITO 259 ITR 19 (SC) which was followed by various High Courts and Tribunals and assessment orders were quashed on the ground that AO had not provided the reasons for initiating proceedings u/s. 147 of the Income Tax Act.

The objection raised as above was forwarded to the ITO, Baramulla, the concerned AO, to furnish the evidence that the reasons for the reopening proceedings u/s. 147 were provided to the assessee on her request. The AO vide his office letter No.ITO/BMLA/16-17/2434 dated 30/01/2017 submitted the remand report as under:

Notice u/s 148 of the Income Tax Act; 1961 was issued in the case for the assessment year 2008-09 on 27.03.2013 requiring the assessee to file its return within 15 days from the date of service of the said notice. The assessee did not furnish any return at income within the time given in the notice u/s. 148. Although the assessee filed return on 26.12.2013 but the same was rightly treated as non-ast being bleated, neither within the time prescribed u/s 139(1) or the time given in the notice u/s 148. Since the assessee has not filed the return within the time allowed in notice u/s 148 and took nearly 9 months to furnish the same, as such the assessee cannot claim any relief in light of the judgment delivered by the Hon'ble Apex court in the case GKN Drivershalls (India) ltd 1/s *Income Tax Officer, 259 ITR 19(SQ). Although the assessee vide its reply dated 26.12.2013 has requested for copy of the reasons for issue of 148 notice and there is nothing on record to suggest whether the same has been provided or not but it is observed that the only issue for initiation off proceedings u/s 147/148 has been that the assessee has paid an amount of Rs.79,88,824/- towards J&K govt. for acquiring Nazul Land under Roshni Scheme during the relevant period and this issue was duly confronted/apprised to the assessee vide various communications even before the filing of the return on 26.12.2013. The entire assessment proceedings revolved round this issue before the filing of the return as well as after filing of the return and Assessee was duly apprised/confronted on the reasons for issue of the notice u/s 148 in her case and as such assessment has been completed in a fair and judicious manner, therefore the assessee does not deserve any favour on this issue."*

I have considered the remand report submitted by the AO. It is found from the remand report that the AO has not stated categorically whether reasons for reopening of assessment proceedings u/s. 147 of the Act have been provided to the assessee. The AO has also stated that the Supreme Court decision as held in the case of GKN Driveshafts (Supra) is not applicable in the case of the assesee as the assessee had not filed the return of income in time and the return filed by her in response to notice u/s. 148 of the Act was belated return and was treated as non-est. Secondly, since the assessee had fully cooperated with assessment proceedings by filing replied from time to time and produced documents in support of its claim, the assessee cannot take the plea at this stage that sicne the reasons of the reopening proceedings were not given to her, the assessment was bad in law.

I have considered the appellant's objection and the remand report on that. It is found that the objection raised by the appellant during the appellate proceedings was not correct in the legal sense as the assessee has fully cooperated with the assessment proceedings u/s.143(2)/147 of the Income tax Act by filing reply and counter reply and also the relevant documents. In view of the provisions of section 292BB of the Income tax Act, the objection raised by the appellant admissible. Now, coming to the Hon'ble Supreme Court decision in GKN Driveshaft (Supra.), The Hon'ble Apex Court has held that in order to get the reasons for„ the reopening proceedings u/s.147 of the Income tax Act, it is obligatory on the part of the assessee to file a valid return as per the provisions of section 139 of the Act. In the present case, though the return was filed by the-assessee in response to the notice u/s. 148 of the Act, the return was a belated return and as such the return was never filed by the assessee in the eyes of law. The appellant therefore, is not entitled to claim benefit as provided in the judgment of the Apex Court. Thus, the ground of appeal no. 1 raised by the appellant is rejected.

Ground of appeal No. 2: The AO had made the addition of Rs.7,00,000/- u/s. 69 of the Income tax Act, on the ground that the source of investment in the said property was not explained ;by the assessee. The appellant, on the other hand both during the assessment proceedings as. well as the appellate proceedings, has taken the plea that a sum of Rs.7,00,000/- was paid by her son which was the remaining amount in addition to the sales consideration received at Rs.73,88,824/- from the two vendees. The said payment of Rs.7,00,000/- was made by her son Mr. Mohd. Farooq Bhat who had made withdrawals from his concerns namely M/S. Kash Con. The appellant has also claimed that said amount was paid directly to the State Govt, through cheques. The

copy of bank account and the confirmation from her son were also produced by the appellant. The AO, oh the other hand, has stated in his remand report that the assessee has been changing her statement from time to time. Firstly, she claimed that the payments of Rs. 79.88 lacs were directly made to the State Govt, by the buyers of the property of 1 kanal 17 marla, Subsequently, she has come up with the explanation that Rs.73,88 lacs was paid by the vendee and Rs.7,00,000/- was paid by the son of the assessee and therefore, the contention of the appellant should not be accepted.

I have considered both the appellant's contention as well as the remand report submitted by the AO and it is found that the AO had already mentioned in the assessment order that a sum of Rs.73.88 lacs was paid by two vendees and Rs.7,00,000/- was paid by the son of the assessee. It is not material whether the AO had accepted the contention of the assessee, the fact remained that the assessee had, during the assessment proceedings, given the details of the payment made by the vendees and her son. The confirmation from the vendees and her son are already on record. The copy of the bank statement has also been filed which proved the genuineness of the transactions thus, the addition made by the AO u/s. 69 of the Income tax Act, amounting to Rs.7,00,000/- is deleted.

Ground of appeal No. 3 &4: The AO has made the addition on account of Short Term Capital Gain by taking the deemed value of the consideration in terms of section 50C of the Income tax Act as a result of sale/transfer of 1 kanal and 17 marlas of land @ Rs.60 lacs per Kanal being the cost approved by the State level Committee in terms of order No.253-254/CRA/N/Revenue dated 18/08/2007 issued by the Deputy Commissioner, Srinagar. The AO has also stated that the assessee became the legal owner of the said capital asset only on 18/08/2007.

The appellant on the other hand has stated that the AO has not considered the fact that assessee was in possession of said land/asset for more than 17 years and was enjoying all benefits of the said land rather restricted capital asset concept towards legal ownership. The appellant then referred to the provisions of section 2 (14) of the Income Tax Act 1961 where it is provided that the expression capital asset means property of any kind held by the assessee except sta cases which have been specifically excluded. The appellant then placed reliance on a number of judgments in support of her claim that it is not a short term capital gain.

I have considered the grounds for addition and also the appellant's submission stated as above. I am agreement with the contention of the. appellant that it is immaterial when the legal

title was conferred on her by the State Govt. the fact remained that the property in question was held by the assessee for last 17 years. This fact has not been denied by the AO. Thus, in view of the various decisions as cited by the appellant's counsel, the said property was a capital asset in terms of section 2(14) of the Income tax Act and duly held by the assessee for last 17 years. Thus, the addition made by the AO on account of Short Term Capital Gain is deleted.

Ground of appeal No. 5: The AO has denied the exemption u/s. 54F of the Income tax Act on the ground that the assessee had neither constructed any new house property nor had purchased any new house property as the title over the said property was only conferred in 2007 under Roshni Scheme and assessee became the legal owner of the property after making full consideration of Rs.79.88 lacs. Thus, according to the AO, it was simply a transfer of capital asset from one hand to another and assessee has not made any investment either in the construction of the new residence or has purchased another house property as required u/s. 54F of the Act. The appellant on the other hand, has referred to the CBDT Circular No.667 dated 18/10/1993 according to which residential house included the cost of the plot also as the cost of the land is an integral part of the cost of the residential house.

I have considered the rival submissions and I find that the AO has rightly denied the exemption claimed u/s. 54F of the Act as the assessee could not establish that the consideration received from the buyers of the property was actually invested either in the construction of the new house property or in the purchase of new house property for purpose of residence. The ground of appeal raised by the appellant is, therefore, rejected.

Ground of appeal No.6: is general in nature and does not require any adjudication.

3. The Revenue department on aggrieved against the order impugned herein preferred its appeal on the following grounds.

"1. Whether the Ld. CIT(A) was right in law and fact in allowing the appeal of the assessee by relying on the explanations of the assessee submitted during the appellate proceedings though nothing has been produced before the AO during Assessment Proceedings despite the fact that ample opportunities were provided to the assessee by the AO.

2. Whether the Ld. CIT(A) was right in law and fact in allowing the appeal of the assessee by relying on the explanations of the assessee submitted during the appellate proceedings without appreciating the fact that the AO has made the right addition of Rs.1,11,00,000/- u/s 50C of the Act in terms of cost approved by the competent revenue authority .

3. Whether the CIT(A) was in error deleting addition of Rs. 50,09,948/- by failing to appreciate that short term capital gains were exigible as relevant dates were date of acquisition of title and date of transfer and possession would not confer title.

4. Whether the Ld. CIT(A) was right in law and fact in allowing the appeal of the assessee by relying on the explanations of the assessee submitted during the appellate proceedings though the assessee has admitted the unexplained investment of Rs.7,00,000/- before the AO during Assessment Proceedings and later detracted."

3.1 Whereas the Assessee preferred its appeal on following grounds.

"1. That the Ld. CIT(Appeals) erred in both facts and laws by not treating the assessment order passed u/s 143(3)/147 of the Income Tax Act, 1961 as bad in law, as the AO has not provided copy of reasons despite request from Assessee.

2. That the CIT(Appeals) erred in both facts and laws by not considering the return filed by the Assessee in response to notice u/s 148 of the Income Tax Act, 1961 nor has considered the exemption of Rs.29,78,867/- claimed by the Assessee u/s 54F of the Income Tax Act, 1961."

4. Let us to decide first the appeal of the Revenue Department. The Revenue is aggrieved against the deletion of addition of Rs.50,09,948/- on account of Short Term Capital Gains and deletion of Rs. 7,00,000/- on account of unexplained investment.

4.1 Having perused the orders passed by the Authorities below. It revealed that the Assessing Officer added the amount of Rs.50,09,948/- on account of cost of acquisition of 1 kanal & 17 marlas of land purchased by the assessee @ Rs.27,08,080/- per kanal, the amount paid by the assessee to the J & K State Govt. under the Roshni Scheme for transfer of 2 kanals, 19 marlas & 48 Sq. Ft. situated in Estate Rampora under Khasra No.437/960. The Ld. CIT(A) observed that he is in agreement with the contention of the appellant that it is immaterial when the legal title was conferred on the assessee by the State Govt. the fact remained that the property in question was held by the assessee for last 17 years, This fact has not been denied by the AO. Thus, in view of the fresh decision as stated by the appellant counsel, the said property was a capital assets in terms of section 2(14) of the Income Tax Act and duly held by the assesse for the last 17 years thus, the addition made by the AO on account of Short Term Capital Gain is deleted.

4.2 In our considered view as it is not in doubt that the assessee was in possession of the land for the last around 17 years, however subsequently conferred the titleship of the land under Roshni Scheme of the J&K, Govt. Therefore, in any sense it cannot be said that the assessee has earned any Short Term Capital Gain and hence the action of the Ld. CIT(A) deserves to be upheld in deleting the Short Term Capital Gain.

The next issue relates to the deletion of addition of Rs.7,00,000/- u/s 69 of the Act. It was observed by the Assessing Officer that the amount of Rs.7,00,000/- was withdrawals from the assessee's sons concern namely M/s. Kash Con. and the appellant has also claimed that the said amount was paid directly to the State Govt. through cheques. However, the Assessing Officer did not

accept the explanation of the assessee and added the amount of Rs.7,00,000/- u/s 69 of the Act. The Ld. CIT(A) while deleting the said addition of Rs.7,00,000/- duly observed that during the assessment proceedings the assessee had given details of payment made by the vendees and her son. The confirmation from the vendees and her son are already on record. The copy of the bank statement has also been filed which prove the genuineness of the transaction thus the addition of rs. 7,00,000/-made by the AO u/s 69 of the Act is deleted. In our considered view, once the assessee has duly explained the amount under consideration and even the Assessing Officer received the confirmation qua transaction with copy of bank statement, then the genuineness of the transactions could not come under the suspicion as shown by the Assessing Officer, hence, the view of the Ld. CIT(A) in deleting the addition of Rs.7,00,000/- is liable to be upheld.

5. ***Now coming to the appeal of the assessee***.

5.1 The assessee did not press the below mentioned ground No.1 , hence, does not require any adjudication.

Ground No.2

"That the Ld. CIT(A) erred in both facts and laws by not treating the assessment order passed u/s 143(3)/147 of the Income Tax Act, 1961 as bad in law, as the AO has not provided copy of reasons despite request from Assessee."

5.2 Ground No.2:- The assessee is only challenging the action of the authorities below for not accepting the claim of the assessee qua exemption of Rs.29,78,867/- u/s 54F of the Act. The Assessing Officer denied the exemption u/s 54 of the Act on the ground that the assessee had neither constructed any new house/property nor

had purchased any new house/property. As the title over the said property was only confered in 2007 under the Roshni Scheme and the assessee became the legal owner of the property after paying full consideration of 79.88 lacs. However, the Assessing Officer find that it was simply transfer of capital asset from one hand to another and the assessee has not made any investment either in the construction or purchase of new residence, as required u/s 54 of the Act. The Ld. CIT(A) while considering the case of the assessee affirmed the action of the Assessing Officer in denying the exemption u/s 54 of the Act on the ground that the assessee could not establish that the consideration received from the buyers of the property was actually invested either in the construction/purchase of the new house for the purpose of residence. Before us it was contended by the Ld. AR that the assessee has already obtained permission for construction of building vide order No.767/AC-BP-07 dated 29/09/2007 issued by office of the Assistant Commissioner, Nazul, Srinagar and the permission for building vide DD-11BPC 3292-93 dated 18.11.2008 issued by office of the Executive Engineer, Sewerage and Drainage Division, 11-ND(SMC), Srinagar and submitted that the assessee has renovated the house by incurring the expenses as claimed u/s 54 of the Act, however, the same has not been considered by the Revenue Authorities below.

In our view, for substantial justice it would be appropriate to remand the instant issue to the file of the Assessing Officer to consider afresh while taking into consideration the facts and circumstances and documents already placed on record and or to be placed by the assessee during the proceedings. The assessee shall be under obligation to provide all relevant documents and/or

assistance for proper adjudication of the issue in hand by the Assessing Officer.

6. In the result, the appeal filed by the Revenue Department stands dismissed, whereas the appeal of the assessee is partly allowed for statistical purposes on the aforesaid reasons stated above.

Order pronounced in the open Court on 04.07.2019.

Sd/-	Sd/-
(SANJAY ARORA)	(N.K.CHOUDHRY)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated: 04.07.2019
/PK/ Ps.
Copy of the order forwarded to:

(1) Smt. Smt. Zeenab, W/o Ghulam Mohammad Bhat R/O House No, 15-16 Hig Colony Green Park, Bemina Srinagar
(2) The ITO, Ward 3(3), Srinagar
(3) The CIT(A)-J&K, Jammu
(4) The CIT concerned.
(5) The SR DR, I.T.A.T., Amritsar

True copy

By order