IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI B R BASKARAN, ACCOUNTANT MEMBER

ITA Nos.292 & 293/Bang/2019
Assessment year : 2013-14 & 2013-14

Shri Lokesh M **PAN: AALPL 5676J** & Shri Lokesh M, LR of Smt. Malathi Lokesh, **PAN: AALPL 5677K** U-44, Maruthi Extension, Palace Guttahalli, Bangalore – 560 003.	Vs.	The Principal Commissioner of Income Tax-2, Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri S.V. Ravi Shankar, Advocate.
Respondent by	:	Shri K. Devrathna Kumar, CIT(DR)(ITAT), Bengaluru

Date of hearing	:	08.10.2020
Date of Pronouncement	:	14.10.2020

O R D E R

Per N.V. Vasudevan, Vice President

These are appeals filed by the assessees against the separate orders passed u/s. 263 of the Income-tax Act, 1961 [the Act] by the Principal Commissioner of Income Tax, Bangalore-2, Bangalore [Pr.CIT] dated 26.3.2018 & 23.2.2018, both for the assessment year 2013-14 in respect of the assessee, Shri M. Lokesh in ITA No.292/Bang/2019 and he representing as LR of Smt. Malathi Lokesh, his wife, respectively.

2. There is a delay of 266 & 295 days day in filing these appeals respectively. The delay in filing of the appeals has been explained by the assessee in an application filed by the assessee for condonation of delay that these appeals are filed u/s. 263 of the Act. The assessee and his wife, Smt. Malathi Prakash sold a property in which they had half share each. The assesses filed their returns of income declaring long term capital gain on sale of property at Allalsandra Village, Yelahanka Hobli, Bangalore North Taluk [hereinafter referred to as 'the property'].

3. Both the assesses claimed deduction u/s. 54F of the Act which was allowed in the assessments completed u/s. 143(3) of the Act. By the orders impugned in these appeals, the Pr. CIT set aside the orders of AO allowing deduction to the assesses u/s. 54F of the Act and also on the issue of quantum of capital gain for *de novo* assessments by the AO in the light of observations made in the impugned orders.

4. According to the assessee, since in the impugned orders, the AO was directed to *de novo* assessments on the computation of long term capital gain and deduction u/s. 54F of the Act, the assessee's earlier tax consultant advised the assesses that the issues can be agitated in the order to be passed afresh by the AO u/s. 143(3) r.w.s. 263 of the Act. Later on, the AO passed the order u/s. 143(3) r.w.s. 263 of the Act dated 26.12.18 in which the issues raised in the 263 order were held against the Assessee. It has been stated that thereafter the present tax consultant was approached for filing the appeal against the order u/s. 143(3) r.w.s. 263 of the Act dated

26.12.2018. The new tax consultant advised the assessee that appeals ought to have been filed against the impugned orders u/s. 263 also. It has been explained that it is due to the aforesaid circumstances that the delay had occurred in filing the appeals. Reference was made to several judicial pronouncements for the proposition that in the matter of condonation of delay, a pragmatic approach should be adopted. The following decisions were cited in support of the plea of assessee that in the matter of condonation of delay, a liberal approach should be adopted:-

1. Ram Nath Sao & Ors. Vs Gobagrdhan Sao & Ors (2002) 3 SCC 195
2. Concord of India Insurance Co. Ltd. v. Nirmala Devi :& Ors (1979) 4 SCC 303
3. Collector, Land Acquisition & Ors. v. Mst. Katiji & Ors (1987) 2 SCC 107"

5. The ld. DR opposed the prayer for condonation of delay as according to him, there was no reasonable cause for the delay.

6. We have considered the rival submissions. The impugned orders u/s. 263 of the Act were passed on 23.2.2018 & 26.3.2018 and served on the assessee on 28.2.2018 & 29.3.2018 respectively. The appeals ought to have been filed by the assessee within 60 days from the date on which the impugned orders were served on the assessee. It seems that pursuant to the order u/s. 263, the AO completed the assessments u/s. 143(3) r.w.s. 263 on 26.12.2018 & 27.12.2018 respectively. Against those orders, appeals ought to be filed before the CIT(Appeals) within 30 days. It is at this juncture that the assessee claims that a new tax consultant was approached, who

advised the assessee to file appeals against the orders u/s. 263. These appeals have been filed before the Tribunal on 19.2.2019. Going by the sequence of dates and plea of assessee that it was owing to a different advice given by an earlier counsel that the appeals were not filed in time, in our view, has to be accepted. We therefore condone the delay in filing these appeals.

7. As far as merits of the appeal are concerned, the factual details that emerges from the record are that the Assessee and his deceased wife were co-owners of the property. By a sale deed dated 28.11.2012, they sold the property for a sale consideration of Rs.1,75,00,000/-. The Share of each of Assessees was Rs.87,50,000. The description of the property in the sale deed in the property schedule was that the property that was sold had an asbestos sheet roof house measuring 200 Sq.ft. built with brick and cement mortar in hollow blocks.

8. The Assessee and his deceased wife purchased two properties as follows:-

(i) Flat No.302 & 303, Pooja Apartments, Vittal Mallya Road, Bangalore, under a **sale deed dated 9.5.2012** for a sale consideration of Rs. 1,50,00,000 + registration and Stamp duty which was around Rs.1,50,590 and Rs.8,40,000 respectively. (hereinafter referred to as Flat at Pooja Apartment)

Total investments = 1,59,90,590

(Rs.1,50,00,000+1,50,590+8,40,000)

(ii) Flat No.1101 in building known as High Point Apartments in Palace Road, Bangalore under a **sale deed dated 17.10.2012** for a sale consideration of Rs.1,10,00,000 + registration and stamp duty charges of Rs.66,000 and Rs.1,10,620 respectively.(hereinafter referred to as flat at High Point Apartment)

Total investment = Rs.1,11,76,620

(Rs.1,10,00,00+66,000+1,10,620)

9. M.Lokesh filed return of income computing LTCG on sale of the property as follows:-

(i) Cost of Acquisition in the year 1994-95 Rs.1,06,723

(ii) Land levelling in the year 1994-95 Rs29,150

(ii) Compound wall and borewell with building in the year 1995-96 Rs.2,08,400

(iv) Salary of watchman at Rs.18000 per year for FY 96-97 to 1999-2000 and Rs.21,000 per year from FY 2000-01 to 2005-06 and at Rs.24,000/- from FY 2006-07 to 2010-11 and Rs.16,000 for FY 16000.

The total of all the above comes to Rs.6,78,273 and on indexation from the respective years, the indexed cost was Rs.16,86,707 and the LTCG was computed at Rs.1,58,13,293 (Rs.1,75,00,000 – Rs.6,78,273). The share of each of the Assessee in the LTCG was 79,06,640/-. The same computation of Long term capital gain(LTCG) has been repeated in the computation of LTCG of Mrs.Malathi Lokesh, deceased wife of M.Lokesh.

10. Both the Assessee's filed return of income in which they claimed deduction u/s.54F of the Act. In the computation of LTCG of M.Lokesh, the entire investment in High point investment has been claimed as deduction i.e., a sum of Rs.1,11,76,620/-.

11. The AO completed the Assessment by order dated 24.3.2016 in the case of M.Lokesh and 31.3.2016 accepting the claim for deduction made by both the Assessee's. In an office note to the order of assessment dated 31.3.2016 passed in the case of Mrs.Malathi, deceased wife of the M.Lokesh, the AO has observed as follows:-

> "This case is selected on a complete type of scrutiny. The issue is regarding deduction u/sec.54. The Assessee, Smt.L.Malathi Lokesh is deceased. The Death Certificate is placed on record. All the capital gains documents are verified and placed on record. The sale deed, purchase deed etc., are in joint names."

12. The Pr.CIT in exercise of his powers u/s.263 of the Act was of the view that the aforesaid orders of assessment were erroneous and prejudicial to the interest of the revenue for two reasons:-

(i) The salary of watchman cannot be allowed as deduction because it is neither cost of acquisition or cost of improvement or expenses incidental to the transfer of the capital asset within the meaning of sec.48 of the Act, which prescribes the mode of computation of capital gain. Consequent computation of LTCG was incorrect and need to be re computed and consequent deduction have to be considered u/s.54F of the Act on such recomputed LTCG.

(ii) **Exemption u/s.54F of the Act is not available where:**

(a) the assessee, —

(i) owns more than one residential house, other than the new asset, on the date of transfer of the original asset; or

13. The Pr. CIT in the impugned order gave three findings:-

(i) The cost of watchman salary was not an allowable deduction u/s.48 of the Act as it was neither of acquisition or cost of improvement or expenses incidental to the transfer of the capital asset. If the watchmen salary is excluded from computation of LTCG then the LTCG would be Rs.1,64,21,161/-.

(ii) U/s.54F of the Act if the value of investment in the new asset is less than the sale consideration received on transfer, then the deduction u/s.54F of the Act had to be allowed only on proportionate basis. In this regard the CIT took the investment in flat at pooja apartment as new asset on which deduction u/s.54F was claimed by both the Assessees and gave a finding that the investment in the new asset was Rs.1,59,90,590 and the capital gain was Rs.1,64,21,161. The proportional deduction to be allowed u/s.54F was only Rs.1,50,04,803 and consequently there would be a taxable capital gain on sale of the property of Rs.14.16,358 (Rs.1,64,21,161 – 1,50,04,803)

(iii) The CIT found that the Assessee M.Lokesh owned more than one residential house other than the new asset i.e., he owned residential apartment as on the date of transfer of the original asset. The CIT found that the Assessee owned Flat in High Point Apartment, flat at Pooja Apartment and house at Malleswaram as on the date of transfer of the original asset. The flat in high point

> apartment and flat at pooja apartment were purchased prior to the sale of the original asset. Since the Assessee owned more than one residential house other than the new asset as on the date of transfer of the original asset, the Assessee ought not to have been allowed deduction u/s.54F of the Act. In the case of Mrs.Malathi Lokesh, the CIT found that she was a co owner in all the properties referred to above with Lokesh and therefore she was also not entitled to deduction u/s.54F of the Act.

14. The Pr.CIT, after finding the aforesaid errors in the orders of assessment in the case of both the Assessees, has observed that the AO failed to make proper enquiries on the aforesaid aspects and finally concluded that the orders of the AO were erroneous and prejudicial to the interest of the revenue and he set aside those orders to be done afresh de novo in the light of the observations made in the impugned orders. Aggrieved by the aforesaid orders of the Pr.CIT the Assessee's have preferred the present appeals before the Tribunal.

15. We have heard the submissions of the learned counsel for the Assessee and the learned DR. The thrust of the argument of the learned counsel for the Assessee was on the note attached to the order of assessment in the case of Mrs.Malathi, wherein he has considered the claim of the Assessee u/s.54 of the Act and not u/s.54F of the Act. He pointed that under Section 45 of the Act, any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections **54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H,** be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place. He submitted that u/s.48 of the Act, income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing[66] as a result of the transfer of the capital asset the following amounts, namely :—

(*i*) expenditure incurred wholly and exclusively in connection with such transfer;

(*ii*) the cost of acquisition of the asset and the cost of any improvement thereto:

He submitted that Under Section 54 of the Act, if capital gain arises from the transfer of a long-term capital asset, being buildings or land appurtenant thereto, and being a residential house, the income of which is chargeable under the head "Income from house property" (hereafter in this section referred to as the original asset), and the assessee has within a period of one year before or two years after the date on which the transfer took place (a) purchased, or (b) has within a period of three years after that date constructed, a residential house;

then,

capital gain will be exempt to the extent of Long-Term Capital Gains OR to the extent of amount invested in the purchase or construction of the new residential house, whichever is **less.**

16. He submitted that u/s.54F of the Act, if capital gain arises from the transfer of any long-term capital asset, **not being a residential house** (hereafter referred to as the original asset), and the assessee has,

(i) within a period of one year before or

(ii) two years after the date on which the transfer took place (a) purchased, (b) or has within a period of three years after that date constructed, a residential house (hereafter referred to as the new asset),

the Assessee will get exemption proportionately i.e.,

Exemption = (Capital Gain X Amount Invested) ÷ Net Sale Consideration

Exemption is not available where:

(a) the assessee, —

(i) owns more than one residential house, other than the new asset, on the date of transfer of the original asset; or

(ii) purchases any residential house, other than the new asset, within a period of one year after the date of transfer of the original asset; or

(iii) constructs any residential house, other than the new asset, within a period of three years after the date of transfer of the original asset; and

(b) the income from such residential house, other than the one residential house owned on the date of transfer of the original asset, is chargeable under the head "Income from house property".

17. He pointed out the difference between a deduction u/s.54 and 54F of the Act, and submitted that if the deduction claimed by the Assessee is considered as one u/s.54 of the Act, then the condition of the Assessee owning more than one residential house as on the date of the original asset is not applicable and the condition that the entire sale receipts has to be invested in the purchase of new asset and proportionate deduction is not applicable. His further submission was that even if the watchman salary is to be excluded even then the investment by the Assessee in the new asset (both flat at High Point Apartment and Pooja Apartment put together) is more than the capital gain and therefore the order of the AO cannot be regarded as erroneous. His further submission was that the asset sold by the Assessees was a residential house and in this regard drew our attention to the description of the property in the sale deed. His submission was that this aspect is clear from the office note of the AO attachment to the order of assessment wherein he has referred to the claim of the Assessee as one u/s.54 of the Act. The learned DR relied on the order of the CIT. He submitted that the AO before concluding the assessment failed to make proper and adequate enquires on the claim for deduction u/s.54F

of the Act and therefore the order is erroneous and prejudicial to the interest of the revenue. His submission was that all issues sought to be agitated by the learned counsel for the Assessee are not relevant to the present appeal.

18. We have given a very careful consideration to the rival submissions. From a perusal of the orders of assessment in the case of both the Assessee's, it appears to us that before concluding the assessment proceedings the AO did not make any enquiries with regard to the deduction u/s.54F of the Act. However in the note attachment to the order of assessment, there is a reference to the claim of the Assessee having been examined u/s.54 of the Act and the factum of having verified all sale deeds and purchase deeds. Since the office note is not clear about what enquiries the AO made before concluding the assessment, we have to conclude that the findings of the Pr.CIT that the AO has not made adequate and proper enquiries before concluding the Assessment, is correct. The ld. Counsel for the assessee could not substantiate before us as to how the AO made enquiries on this issue before concluding the assessment, except by pointing out that all facts were laid before the AO and it can be presumed that he had taken note of this aspect while concluding the assessment. The fact that the AO himself initiated proceedings u/s.154 of the Act to rectify error apparent on record on the aspect of computation of LTCG goes to show that he had while completing the Assessment not made proper enquiries. The law is well settled that if there is a failure on the part of AO to make an enquiry on the issue which calls for an enquiry, that by itself will render the order of assessment erroneous and prejudicial to the interests of the revenue. It has been so held by the Hon'ble Delhi High Court in the case *of Gee Vee Enterprises Vs. DCIT 99 ITR 375 & 386(Delhi)*. The following passage from the said decision would explain clearly the legal position in this regard:-

"(13) Shri G.C. Sharma argued that the orders passed by Income-tax authorities under sections 34 and 33B of the old Act corresponding to sections 147, and 263 of the new Act stood on the same footing when they were challenged as being without jurisdiction by way of a writ petitions We do not, however, think that he can derive any assistance from the decision in Calcutta Discount Company's case. As pointed out by the Supreme Court in Mysore State Road Transport Corporation v. The Mysore Road Appellate Tribunal, (Civil Appeal No. 1801 of 1970 decided on August 8, 1974) (II) referring to an essay on "Determining the Ratio Decidendi of a case" by Dr. A. L. Goodhart, "the principle of a' case is determined by taking into account the facts treated by the Judge deciding a case as material and his decision as based thereon." The ratio of the decision in Calcutta Discount Company's (10) case cannot apply to the facts of the present case for the following reasons :-

(I) Under section 34, the duty of the assessed is only to state the material facts necessary for the purpose of .assessment. Once these facts are accepted and an assessment is made, the Income Tax Officer cannot reopen the assessment unless he had reason to believe that the material facts were not truly disclosed.. The reason why the reopening of the assessment is thus made somewhat difficult is to preserve the finality of the previous decision which should not be destroyed except for a good reason. Once it is found that the disclosure of facts was complete, no jurisdiction could arise for the reopening of the assessment.

(II) **On the other hand, the condition for the assumption of jurisdiction under old section 33B and the new section 263 is easier to fulfill. The reason is that it is not the Income Tax Officer but a superior Officer like the Commissioner who is exercising a revisional jurisdiction suo motu there under. The superior officer could be trusted with a larger power. The only requirement for the exercise of this power is that the Commissioner should consider that the order passed by the. Income Tax Officer is "erroneous in so far as it is prejudicial to the interests of the Revenue."** What is the meaning of "erroneous" in this context? It was argued for the assessees by Shri G. C. Sharma that the word "erroneous" means that the order must appear to be wrong on the face of it. In other words, he

equated the "error" with "error of law apparent on the face of record" which is a well-known ground for the review of a quasi-judicial order by this Court under Article 226. We are unable to agree with this interpretation. **The intention of the legislature was to give a wide power to the Commissioner. He may consider the order of the Income Tax Officer as erroneous not only because it contains some apparent error of reasoning or of law or of fact on the face of it but also because it is a stereo-typed order which simply accepts what the assessed has stated in his return and fails to make inquiries which are called for in the circumstances of the case.** Shri Sharma's contention that this would give the Commissioner the power to revise the order of the Income Tax Officer merely on the ground of suspicion is. untenable in view of the following two Supreme Court decisions which have already construed the old section 33B. contrary to Shri Sharma's contention. In Rampyari Devi Saraogi v. Commissioner of Income Tax, (1968)67 I.T.R. 84, the Income Tax Officer accepted the return of the assessed in respect of the initial capital, the gift received and the sale of jewellery, the income from business, etc., without any inquiry or evidence whatsoever. For this reason the Commissioner held the order to be erroneous. In revision, he cancelled the order and ordered the Income Tax Officer to make a fresh assessment. In his order the Commissioner had used certain new grounds which had not been disclosed to the assessed in the notice given to him to show cause why the order of the Income Tax Officer should not be revised. But apart from these new grounds, the Supreme Court observed at page 88 of the report that-

> "THERE was ample material to show that the Income Tax Officer made the assessments in undue hurry.....,...The assessed made a declaration giving the facts regarding initial capital, the ornaments and presents received at the time of marriage, other gifts received from her father-in law, etc., which should have put any Income Tax Officer on his guard. But the Income Tax Officer without making any inquiries to satisfy himself passed the assessment order ..... A short-typed assessment order was made for each assessment year.....No evidence whatsoever was produced in respect of the money-lending business done. .....No names were given as to the partics to whom the loans were advanced."

In Tara Devi Aggarwai v. Commissioner of Income Tax, (1973) 88 I.T.R. 323, also the Income Tax Officer, Howrah, while remarking that the source of income of the assessed was income from speculation and interest on investments stated that neither the assessed , able to produce the details and vouchers of the speculative transactions made during the accounting year nor was there any evidence regarding the interest received by the assessed from different parties on her investments. Notwithstanding these defects the Income Tax Officer did not investigate into the various sources but assessed the assessed on a total income of Rs. 9037.00. The inquiries made by the Commissioner revealed that the assessed did not reside or carry on business at the address given in the return. The Commissioner was also of the view that the Income Tax Officer was not justified in according the initial capital, the sale of ornaments, the income from business, the investments, etc.. without any inquiry or evidence whatsoever and that the order of assessment was erroneous and prejudicial to the interests of the Revenue. The High Court held that there were materials to justify the Commissioner's finding that the order of assessment was erroneous insofar as it was prejudicial to the interests of the Revenue. Shri Sharma tried to distinguish this decision on the ground that the address of the assessed in that case was given incorrectly. The decision of the High Court and that of the Supreme Court were not, however, based on that ground at all. On the contrary, the Supreme Court followed their previous decision in Rampyari Devi's (12) case and upheld the decision of the High Court precisely on the same grounds. These two decisions show that it is not necessary for the Commissioner to make further inquiries before cancelling the assessment order of the Income Tax Officer. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Income Tax Officer should have made further inquiries before accepting the statements made by the assessed in his return.

(14) The reason is obvious. **The position and function of the Income Tax Officer is very different from that of a civil court. The statements made in a pleading proved by the minimum amount of evidence may he accepted by a civil court in the absence of any rebuttal. The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which**

> **comes before it. The Income Tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. The meaning to be given to the word "erroneous" in section 263 emerges out of this contract. It is because it is incumbent on the Income Tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word "erroneous" in section 263 includes the failure to make such an inquiry. The order becomes erroneous because such an inquiry has not been made and not because there is any thing wrong with the order if all the facts stated therein are assumed to be correct**.

19. Since there was a failure on the part of AO to make necessary enquiry, we are of the view that the Pr.CIT was justified in invoking jurisdiction u/s. 263 of the Act in the facts and circumstances of the present case.

20. Since the issue of computation of LTCG has been remanded to the AO for de novo consideration by the Pr.CIT, we are of the view that the other observations of the Pr. CIT in the impugned order should not have any influence on the mind of the AO while completing the assessment pursuant to the order of the Pr.CIT or any other authority under the Act. The law is well settled that the claim made in the return of income, if it is shown to be incorrect, the correct provisions of law under which deduction has to be allowed should be the basis of completion of assessment. In the present case, if the claim of the Assessee is considered as one made u/s.54 of the Act, then the claim of the Assessee for deduction should be considered under that statutory provision. The difference between a claim u/s.54 and 54F of the Act is as follows:-

Section 54	Section 54F
To claim full exemption the entire **capital gains** have to be invested.	To claim full exemption the entire **sale receipts** have to be invested.
In case entire capital gains are not invested – the amount not invested is charged to tax as long-term capital gains.	In case entire sale receipts are not invested, the exemption is allowed proportionately. [Exemption = Cost the new house x Capital Gains/Sale Receipts]
	Assessee should not own more than one residential house at the time of sale of the original asset.

21. For Sec.54 of the Act to apply, the asset that was transferred should be a residential house. From the description of the property in the sale deed it appears that there was a house. As to whether the same can be said to be a residential house for the purpose of Sec.54 of the Act, is a matter that requires examination. The Assessee in this regard has drawn our attention to a decision of Hon'ble Karnataka High Court in the case of *CIT Vs. Dr. R.Balaji (2014) 222 Taxman 305 (Karnataka)*. We do not wish to go into those aspects because, we feel that the claim of the Assessee for deduction while computing LTCG has to be examined *de novo* without being influenced by any of the discussion in the impugned order of the Pr. CIT as the jurisdiction u/s.263 of the Act has been exercised by the Pr.CIT on the ground of the failure on the part of the AO to make proper enquiries before completing the assessment. The Assessee should also be allowed to substantiate his claim for deduction u/s.54 of the Act, because the liability to tax depends on the provisions of law and facts of a case and not on the basis of any admission or incorrect claim made by an Assessee. We therefore modify the order of the Pr. CIT in the terms indicated above,

i.e., the AO while completing the assessment pursuant to impugned orders should complete the assessment *de novo* and all issues referred to above, will be open for consideration before the AO. The impugned orders are accordingly modified as indicated above.

22. In the result, the appeals by the assesses are partly allowed.

Pronounced in the open court on this 14th day of October, 2020.

Sd/-	Sd/-
(B R BASKARAN)	(N V VASUDEVAN)
ACCOUNTANT MEMBER	VICE PRESIDENT

Bangalore,
Dated, the 14th October, 2020.

/Desai S Murthy /

Copy to:

1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.