

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES 'B' JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 272/JP/2020
निर्धारण वर्ष/Assessment Year :2015-16

Prakash Pandharinath Bakre, 1/1308, Malviya Nagar, Jaipur	बनाम Vs.	Principal Commissioner of Income Tax-1, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No. AAOPB3058M		
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent

निर्धारिती की ओर से/ Assessee by : Sh. Rajeev Sogani (CA) &
Miss Shivangi Samdhani (CA)
राजस्व की ओर से/ Revenue by : Sh. B. K. Gupta (CIT)

सुनवाई की तारीख/ Date of Hearing : 12/01/2021
उदघोषणा की तारीख/Date of Pronouncement: 15/02/2021

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Id. Pr. CIT-1, Jaipur dated 23.03.2020 wherein the assessee has raised the following grounds of appeal.

"1. *In the facts and circumstances of the case and in law, the Id. PCIT has erred in exercising the revisionary powers by passing the order u/s 263 of the Income Tax Act, 1961 setting aside the order passed u/s 143(3) dated 16.10.2017. The action of the Id. PCIT is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by quashing the revision order of Id. PCIT u/s 263.*

2. In the facts and circumstances of the case and in law, Id. PCIT has erred in observing that the assessee was not eligible for deduction under section 54 of the Income Tax Act, 1961. The action of the Id. PCIT is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by holding the observation of Id. PCIT as illegal, contrary to facts available on record and beyond jurisdiction. Accordingly, the revision order of Id. PCIT passed u/s 263 may please be quashed."

2. At the outset, it is noted that there is a delay in filing the present appeal by 26 days. After hearing both the parties and considering the affidavit filed by the assessee, the delay is hereby condoned and the appeal is admitted for necessary adjudication.

3. During the course of hearing, the Id. AR submitted that the assessee filed his return of income on 30.08.2015 declaring total income of Rs.42,13,860. The case of assessee was selected for limited scrutiny. The assessment was then completed u/s 143(3) vide order dated 16.10.2017 wherein the returned income of the assessee was accepted. The case of the assessee was then taken up for revisionary proceedings u/s 263 by Id. PCIT. The present appeal is against the order u/s 263 of the Act.

4. The Id. AR submitted that the case of the assessee was selected for limited scrutiny and two issues relating to deduction claimed under the head "Capital Gains" and Tax Credit mismatch were identified for examination. It was submitted that the assessee claimed deduction u/s 54 by selling a house property and by making investment in another house property. The assessee, before Id. AO, duly placed on record the following documents vide reply to Id. AO dated 26.09.2016:

- Sale Deed dated 24.11.2014, registered on 30.12.2014
- Purchase Deed dated 10.03.2014 which was containing the details of payment made prior to one year from the date of sale
- Possession Letter dated 31.05. 2014 for the property purchased

5. The Id. AO while framing the assessment applied his mind on the entire material placed before him. The fact that various payments were made prior to one year of date of sale was very much evident from the papers. Only on being satisfied with the claim of the assessee, after factual and legal assessment that the date of purchase and date of taking possession fall within one year prior from the date of sale, Id. AO accepted the claim of deduction u/s 54 of the Act.

6. In the revisionary proceedings Id. PCIT held that the order of Id. AO is erroneous. Ld. PCIT has held that Id. AO failed to apply her mind because necessary details were not examined. The deduction was allowed without any verification/ enquiry and, therefore, the issue that various payments were made before one year from the date of sale skipped the attention of Id. AO.

7. It is submitted that whether or not Id. AO had applied her mind is subjective and will depend upon factual matrix of each case. The AO can examine a claim or subject matter even without raising a written query where the issue relating to claim or subject matter is too apparent or obvious. In the present case Id. AO was conducting limited scrutiny and not complete scrutiny. It was not the case that a large number of complicated issues were involved or a large number of documents was placed on record, rendering it probable that the Id. AO had missed some facts. Only one issue was to be examined and all the facts with regard to same were evident from Purchase Deed and Sale Deed. Therefore,

concluding that Id. AO did not apply her mind is contrary and opposed to normal human conduct. The finding of Id. PCIT is fallacious as in the present case it is impossible for Id. AO to ignore the Purchase Deed (from which the details of payments are evident) which is the main document for claim of deduction. Whatever was required to examine the issue was already on record and on being convinced about the facts and legal position Id. AO did not feel the necessity of raising any query or making any discussion. Thus, question of lack of enquiry does not arise.

8. It was submitted that the Id. PCIT has held that no view was formed by Id. AO as the assessment order nowhere speaks on the issue of deduction and as to why the deduction was allowed to the assessee. It was submitted that there are no guidelines or the provisions which explains how an assessment order shall be drafted. Therefore, mere silence on the matter or absence of discussion in the order by itself would not conclude that the AO did not apply his mind. It has been the general experience that assessment orders are so drafted that they contain a discussion, in brief, only on the points on which there is a difference of opinion between the assessee and the AO. Where the contention or claim of the assessee is accepted, normally there is no discussion in the assessment order as to why it is being accepted.

9. It was further submitted that for exercising the jurisdiction of revisionary proceedings u/s 263, the order of Id. AO must be erroneous as well as prejudicial to the interest of Revenue. In the present case none of the two conditions are satisfied because of the following:

- i. Not Erroneous-
- ii. The legal position which allows the assessee to claim the benefit is very much clear from the plain language of the section 54. Further,

Hon'ble Bombay High Court in the case of Beena K Jain- [1996] 217 ITR 363, Hon'ble ITAT Mumbai Bench in the case of Sunil Shiv Khanna – ITA No. 5857/Mum/2016 and Ranjana R. Deshmukh – ITA No. 697/Mum/2017 squarely cover the case of the assessee in his favour.

Thus, Id. AO adopted the only view possible or at worst one of the plausible view. Reliance is placed on the decision of Hon'ble Supreme Court in the case of Max India Ltd [2007] 295 ITR 282

- iii. Not prejudicial to the interest of revenue- The view adopted by Id. AO is a judicial views.
- iv. Ld. PCIT erred in holding the order of Id. AO to be erroneous and in the disguise of the same has tried to replace her view with the view of Id. AO. The act of Id. PCIT is illegal.
- v. Ld. PCIT, in order to impose her view and to ignore the decision of Hon'ble Bombay High Court as relied upon by the assessee, flawed in stating that the matter has not attained finality because the tax effect was less than the prescribed limit for filing of appeal before Hon'ble Supreme Court as per section 268A. It is submitted that Id. PCIT neither distinguish the decision of Hon'ble Bombay High Court and the decisions of Hon'ble Tribunal nor brought on record any contrary judicial view.
- vi. Without prejudice to above it is submitted that Hon'ble Bombay High Court pronounced the matter in the year 1993. As on that day, section 268A was not finding mention in the statue books. Section 268A was introduced by Finance Act, 2008 with retrospective effect from 1.4.1999. Meaning thereby that the

Department had all the rights to knock the doors of Hon'ble Supreme Court and get a view in its favour.

- vii. The order of Id. AO was, thus, not erroneous as prejudicial to the interest of Revenue. Reliance is placed on the decision of Hon'ble ITAT Jaipur Bench in the case of Lata Phulwani – ITA No. 246/JP/20 wherein the Hon'ble Bench placed reliance on the decision of Hon'ble Rajasthan High Court in the case of Ganpat Ram Vishnoi 296 ITR 292 (Raj) and Hon'ble Delhi High Court in the case of D.G. Housing Projects Ltd 343 ITR 329 (Delhi).

In view of the above factual and legal position, Id. PCIT has grossly erred in assuming jurisdiction under section 263. Thus, the entire such proceedings initiated by the Id. PCIT deserves to be quashed.

10. Per contra, the Id. CIT/DR relied on the order of Id. Pr. CIT and his relevant findings are as under:-

"2. The case of the assessee was selected through CASS under the category 'limited scrutiny' for the reasons of Large Deduction Claimed under the head Capital Gains and Tax Credit Mismatch. The assessment was completed on 16-10-2017 u/s 143(3) of the I. T Act, 1961 (hereinafter referred to as 'the Act') by accepting the returned income of Rs. 42,13,860/-.

3. For the year under consideration, the assessee is a salaried person employed by the University of Rajasthan. During the previous year, the assessee earned long term capital gain by selling a property situated at 1/1308, Malviya Nagar, Jaipur for a consideration of Rs. 1,50,00,000/- to Shri Aditya Palnitkar on 24-11-2014. On examination of the assessment record it is seen that

the assessee claimed deduction of Rs. 40,34,075/- u/s 54 for investment in a new flat. On perusal of the sale deed relating to purchase of flat it is noticed that payment of Rs.36,70,320/- was made prior to the allowable window of one year reckoned up to the date of transfer of property; the property was sold on 24-11-2014 whereas the investment in the new property was made as under:

Rs. 51,000/- on 27-10-2012;

Rs. 2,91,700/- on 17-11-2012;

*Rs. 24,50,000/- on 09-09-2013 (sum of three payments);
and*

Rs. 8, 77,620/- on 05-10-2013.

3.2 Therefore, as the payments totaling to Rs. 36,70,320/- were made prior to one year before the date of sale of property i.e. 24-11-2013, the investment of Rs. 36,70,320/- in the new flat does not qualify for the deduction u/s 54 of the I.T. Act, 1961. However, the assessing officer allowed the deduction u/s 54 for the sum of Rs. 36,70,320/- as claimed by accepting the returned income. The assessee's wrong claim of deduction u/s 54 was allowed by the Assessing Officer without verifying the necessary details and without examining the fulfillment of the eligibility of the deduction by the assessee.

4. As a result of the aforesaid issue having been accepted without any verification/enquiry and inadmissible claim of deduction u/s 54 allowed by the Assessing Officer, the assessment order has

been rendered erroneous and prejudicial to Revenue, hence proceedings u/s 263 of the Act were initiated.

9. This aspect relating to the payments made prior to one year before the date of transfer of the original asset for computing the deduction u/s 54 in order to arrive at the capital gains was required to be examined by the AO. The records indicate that all the crucial aspects relating to the issue have not been examined by the AO.

10. The Assessing Officer was required to verify the eligibility of the assessee as per provisions of the law by conducting necessary enquiries and verification but has failed to do so and has also failed to apply her mind to the material available on record. This issue has, therefore, escaped the Assessing Officer's attention completely. This in turn has resulted in passing of an erroneous order by the Assessing Officer due to non-application of mind to relevant material, an incorrect assumption of facts which is prejudicial to the interest of the revenue and hence liable for revision under section 263 of the Act. The Hon. Supreme Court in the case of Malabar Industrial Limited V/s CIT 243 ITR has held as under-

"... An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind."

11. In view of the above, I hold the assessment order u/s 143(3) dated 16-10-2017 for A.Y.2015-16 passed by the Assessing Officer

to be erroneous as well as prejudicial to the interests of revenue in terms of provisions of clause (a) and clause (b) of Explanation-2 to Sec.263 of the Act. The order passed by the Assessing Officer, therefore, deserves to be set aside on the issue of deduction of Rs. 36,70,320/- u/s 54 of the Act. Accordingly, the assessment order is set aside to be made de novo in the light of the observation made in this order."

11. We have heard the rival contentions and perused the material available on record. During the previous year, the assessee earned long term capital gains by selling a property situated at 1/1308, Malviya Nagar, Jaipur for a consideration of Rs. 1,50,00,000/- to Shri Aditya Palnitkar vide sale deed dated 24-11-2014 duly registered with stamp duty authorities on 30.12.2014. The assessee claimed deduction of Rs. 40,34,075/- u/s 54 for investment in a new flat vide purchase deed dated 10.03.2014 and necessary documents in form of sale deed, purchase deed and possession letter were submitted during the course of assessment proceedings. The question that arises for consideration is whether such claim of deduction under section 54 has been wrongly allowed by the AO thus rendering the assessment order as erroneous in so far as prejudicial to the interest of the Revenue. The contention of the Id Pr CIT is that the payments towards the purchase of the new flat totaling to Rs. 36,70,320/- were made prior to one year before the date of sale of property i.e. 24-11-2013, the investment of Rs. 36,70,320/- in the new flat therefore does not qualify for the deduction u/s 54 of the I.T. Act, 1961 rendering the assessment order as erroneous in so far as prejudicial to the interest of the Revenue. In this regard, we refer to the provisions of section 54 which reads as under:

"54[1] Subject to the provisions of sub-section (2), where, in the case of an assessee being an individual or a Hindu undivided family], the capital gain arises from the transfer of a long-term capital asset, being buildings or lands 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 purchased or has within a period of three years after that date constructed, one residential house in India, then, instead of the capital gain being charged to income-tax as income of the previous year in which the transfer took place, it shall be dealt with in accordance with the following provisions of this section, that is to say,-

- (i) if the amount of the capital gain is greater than the cost of the residential house so purchased or constructed (hereafter in this section referred to as the new asset), the difference between the amount of the capital gain and the cost of the new asset shall be charged under section 45 as the income of the previous year; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be nil; or*
- (ii) if the amount of the capital gain is equal to or less than the cost of the new asset, the capital gain shall not be charged under section 45; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be reduced by the amount of the capital gain."*

12. On a plain reading of the aforesaid provisions, it is provided that benefit under section 54 is available to an individual who has transferred a long term capital asset being a 'residential House Property' and the assessee has either purchased one residential house in India within a period of one year before or two years after the date of transfer of the original asset or constructed one residential house in India within a period of three years from the date of transfer of the original asset. In the instant case, the purchase of the new flat is evidenced by the purchase deed dated 10.03.2014 which is within a window of one year before the date of transfer of the house property on 24.11.2014 and it thus satisfies the requirement and mandate for claiming exemption under section 54 of the Act. What is relevant to determine is the date of purchase and such date of purchase is evidenced by the purchase deed reflecting the final payment and taking over the possession of the flat. Merely because the assessee has made payments in instalments and some of the instalments were paid prior to one year window before the date of sale of the original assets would not debar the assessee from claim of deduction under section 54 of the Act. Our decision is fortified by the decision of the **Hon'ble Bombay High Court** in case of **Beena K Jain** (supra) wherein the Hon'ble High Court has held as under:

"2. Under section 54F in the case of an assessee if any capital gain arises from the transfer of any long-term capital asset, not being a residential house and the assessee has, within a period of one year before or two year after the date of which the transfer took place purchased a residential house, the capital gain shall be dealt with as provided in that section. As per the section certain exemption has to be allowed in respect of the capital gains to be calculated as set out therein. The department contends that the assessee did not purchase the residential house either one year

prior to or two years after the sale of the capital asset which resulted in long-term gains. According to the department, the agreement for purchase of the new flat was entered into more than one year prior to the sale. Hence, the petitioner is not entitled to the benefit under section 54F. In our view the Tribunal has rightly negated this contention and has held that the new residential house had been purchased by the assessee within two years after the sale of the capital asset which resulted in long-term capital gains. The Tribunal has held that the relevant date in this connection is 29-7-1988 when the petitioner paid the full consideration amount on the flat becoming ready for occupation and obtained possession of the flat. This has been taken by the Tribunal as the date of purchase. The Tribunal has looked at the substance of the transaction and came to the conclusion that purchase was substantially effected when the agreement of purchase was carried out or completed by payment of full consideration on 29.07.1988 and handing over of possession of the flat on the next day."

13. We are therefore of the considered view that all the relevant facts were on record, duly examined by the AO and the claim of deduction has been rightly allowed by the AO as per mandate of provisions of section 54 of the Act. The order so passed by the AO cannot therefore be held as erroneous in so far as prejudicial to the interest of the Revenue. Thus, the order of the Pr CIT is hereby set-aside and the order of the AO is sustained.

In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on 15/02/2021.

Sd/-
(संदीप गोसाई)
(Sandeep Gosain)
न्यायिक सदस्य / Judicial Member

Sd/-
(विक्रम सिंह यादव)
(Vikram Singh Yadav)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 15/02/2021

*Ganesh Kr.

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Prakash Pandharinath Bakre, Jaipur
2. प्रत्यर्थी / The Respondent- Pr. CIT-1, Jaipur
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 272/JP/2020}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar