

**IN THE INCOME TAX APPELLATE TRIBUNAL
CIRCUIT BENCH, VARANASI**

**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

ITA No. 211/Alld/2017
Assessment Year: 2014-15

Smt. Seema Shah, B-37/1F 2KH, Haijnatha, Birdopur, Varanasi- 221010,Uttar Pradesh	v.	Income Tax Officer, Ward -2(2) Varanasi, U.P.
PAN:AQPPS9465C		
(Appellant)		(Respondent)

Appellant by:	None
Respondent by:	Shri A.K. Singh, Sr. DR
Date of hearing:	23.05.2022
Date of pronouncement:	27.05.2022

ORDER

PER SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER:

This appeal, filed by assessee, being ITA No.211/Alld/2017 for assessment year(ay) 2014-15, is directed against the appellate order passed by learned Commissioner of Income Tax (Appeals), Varanasi (hereinafter called "the. CIT(A)"), for assessment year(ay):2014-15 in ITA No. 11/ITO/Ward-2(2)/VNS/2016-17, the appellate proceedings have arisen before ld. CIT(A) against the assessment order dated 08.12.2016 passed by the ld. Assessing

Officer(hereinafter called “ the AO”) u/s 143(3) of the Income-tax Act, 1961(herein after called “ the AO”) . This appeal was heard in Open court proceedings through physical hearing mode.

2. The grounds of appeal raised by assessee in memo of appeal filed with Income Tax Appellate Tribunal, Varanasi (hereinafter called “ the tribunal”) , reads as under :

- “1. *That in any view of the matter addition of Rs. 13,99,840/- under the head 'Capital Gain' made by the assessing officer and his action as confirmed by the Commissioner of Income Tax (Appeal) is highly, unjustified, incorrect and the appellant is liable to get benefit for investment made in the construction of another property while determining the 'Capital Gain'.*
2. *That in any view of the matter in respect of business activity, regular books of account have been maintained and in the books receipt from all sources and expenditures under various heads were found correct as the same are recorded and supported by the Vouchers but while computing the income, the expenditures incurred in construction of property was not properly considered as a result entire working of 'Capital Gain' as done by the two Lower Authorities is defective and declared, Capital Gain is liable to be accepted in the facts and circumstances of the case.*
3. *That in any view of the matter the appellant explained to the Lower Authorities about the investment made in construction of property who examined the books and found in order, hence addition under the head Capital Gain so made and maintained is unwarranted.*
4. *That in any view of the matter finding and in their orders observations of the two lower authority about the determination/working of capital gain is totally incorrect as the facts were not properly considered hence on this count the addition so made and confirmed is wrong and liable to be deleted.*
5. *That in any view of the matter the interest charged under different sections of the IT Act is highly unjustified and illegal in the facts and circumstances of the case.*
6. *That in any view of the matter the appellant reserves his right to take any further ground of appeal before hearing of the appeal.”*

3. This appeal is almost five years old. The appeal was first fixed for hearing on 21.12.2107 , when the Counsel of the assessee requested for adjournment before the Division Bench, and based upon the request of the assessee's counsel , the Division Bench was pleased to adjourn the appeal. Thereafter , the appeal was fixed for hearing before Division Bench on 19.07.2018 , and on this day none appeared on behalf of the assessee and the appeal was again adjourned by the Division Bench. The appeal was again fixed for hearing before Division Bench on 13.11.2018, and on this day fixed for hearing none appeared on behalf of the assessee, but on the written request of the assessee's counsel vide letter dated 10.11.2018 , hearing of the appeal was again adjourned by Division Bench. Thereafter, this appeal was again fixed for hearing before Division Bench on 06.05.2019 and none appeared on behalf of the assessee but on the written request of the assessee's counsel vide letter dated 03.05.2019, appeal was again adjourned by Division Bench. Thereafter, this appeal was again fixed for hearing before Division Bench on 15.10.2019, and again on the request of the assessee's counsel , the appeal was adjourned by Division Bench. Thereafter , this appeal again came up for hearing before Division Bench on 04.12.2020 and again written request dated 03.12.2020 was received from the counsel of the assessee that there is a marriage in the family and it is not possible for counsel to appear before the Bench , and again this appeal was adjourned by Division Bench. This appeal again came up for hearing before Division Bench on 11.11.2021 and again written request was received from the counsel of the assessee that certain details were further required to be filed and again prayers were made to the Division Bench to adjourn the hearing, the DB was again pleased to adjourn the hearing. Again this appeal came up for hearing before the Division Bench on 25.01.2022 and

counsel of the assessee again requested vide written letter dated 22.1.22 for adjournment and the Division Bench was pleased to adjourn the hearing to 22.03.2022. Again this appeal came up hearing before the Division Bench on 22.03.2022 and none appeared on behalf of the assessee before the Bench, but written request dated 21.3.22 was made by Id. Counsel of the assessee to adjourn the hearing, as in the view of the Id. Counsel for the assessee certain details were still required to be filed in this matter, and again the Division Bench was pleased to adjourn the hearing to 13.04.2022, with the direction that now this is the last opportunity provided to the assessee. Then this appeal again came up for hearing on 20.04.2022 and again none appeared on behalf of the assessee but written request dated 19.04.2022 was made by Id. Counsel for the assessee on the grounds that he is unwell, again the Division Bench was pleased to adjourn the hearing. Now, the matter came up for hearing before Division Bench on 23.05.2022. The written notice was sent by Registry via RPAD on 12.05.2022 as also e-mail was sent by Registry on 22.05.2022, which are placed on record, informing/intimating the assessee about the next date of hearing i.e. 23.05.2022. The RPAD notice was not received back by Registry and it can be presumed that it was served in normal course by postal authorities. When this appeal came up for hearing before the Division Bench on 23.05.2022, none appeared on behalf of the assessee nor any adjournment application was moved. Since this appeal is an old appeal which is pending before the Division Bench for last almost five years, and the assessee has sought adjournment(s) on last several occasions on one ground or the other, while earlier adjournments were not denied by the Division Bench keeping in view COVID-19 disease, but now the physical hearings have started /restored, but the again the assessee is continuously seeking

adjournment(s) on one ground or another. Even the last opportunity was granted to the assessee when the appeal came up for hearing before the Division Bench on 22.03.2022, but still the assessee is not willing to argue the matter. Thus, it is now abundantly clear that the assessee is not interested in pursuing this appeal and hence the appeal is now decided based upon the material on record, and after hearing Departmental Representative.

4. The brief facts of the case are that the assessee was owner of property being land Araj No.116-37 and house on the said land being house number B/37/1-F-2Kha, Birdopur, Ward Bhelpur, Varanasi, U.P.. The plot of land was purchased by the assessee for Rs. 5,50,000/- on 07.02.2007 and further amount of Rs. 57,600/- was paid by assessee as stamp duty and a further amount of Rs. 10,400/- was incurred by the assessee in the financial year 2006-07, thus total amount of Rs. 6,18,000/- was incurred by the assessee for purchase of aforesaid plot of land in the financial year 2006-07 (AY:2007-08). There is no dispute about the same. The assessee also claimed to have further spent an amount of Rs.3.00 lacs for constructing Boundary Wall and filing of soil, on the above plot. The assessee did not submit any evidence to substantiate that she spent an aforesaid amount of Rs. 3,00,000/-. The assessee during assessment proceedings submitted that the assessee is not having any evidence to substantiate expenses of Rs. 3,00,000/- on boundary wall and filing of soil, as the matter is more than six years old. The AO did not grant any benefit with respect to this expenditure of Rs. 3,00,000/- claimed by the assessee. Further, the assessee also claimed to have spent an amount of Rs.26.00 lacs on construction of 4000 sq.foot area as per the bills submitted by the contractor Shri Aditya Maloo of Varanasi, and the assessee has claimed to

have sold one part of the house of which the area comes to 2150 square feet which was claimed to have been sold by the assessee in the financial year 2013-14 (ay: 2014-15), on 22.10.2013. The AO observed that government circle rate for payment of stamp duty, of the portion of plot of land consisting of 1075 square feet sold is Rs. 11,98,920/-. The AO further observed that the government circle rate for stamp duty purposes, of house building (excluding land) consisting of 2150 square feet (2 floors) which was sold by the assessee, comes to Rs. 27,97,340/-. The total government circle rate for stamp duty purposes, of the land and building sold was Rs. 39,96,260/-, while the sale consideration of the land and building appurtenant thereto, was Rs. 40,00,000/-. The AO observed that the assessee has claimed cost of construction of Rs. 26,00,000/- as against the sold constructed area of 2150 square feet, as against the contractor bill of Rs. 26,00,000/- for total constructed area of 4000 square feet. The assessee filed reply before the AO that the contractor has given bill for only sold constructed area of 2150 square feet (duplex), but the AO was not convinced as the bill of contractor clearly stipulated that constructed area was 4000 square feet with total billed amount of Rs. 26 lacs. The AO gave benefit of proportionate deduction of cost of construction to the assessee, while computing capital gains chargeable to tax. The construction was done by the assessee in the financial year 2013-14 (ay: 2014-15), and the house was also sold in the financial year 2013-14 (ay: 2014-15), which leads to computation of short term capital gains on the sale of constructed house (Building/house, excluding land) by the AO and at the same time deduction u/s 54 was denied to the assessee on the short term capital gains so computed on sale of building/house, while the AO allowed the deduction u/s 54 to the assessee on long term capital gains

computed on the sale of land, as the plot of land was purchased in financial year 2006-07 which stood sold in financial year 2013-14 (AY: 2014-15). So far as sale of land is concerned the AO computed long term capital gains on sale of land and also allowed deduction u/s 54 of the 1961 Act, for investment made by the assessee in the new residential house property. The dispute between rival parties is concerning denial of deduction u/s 54 of the 1961 Act on the short term capital gains arisen from sale of constructed area (building /house , excluding land) which was constructed in the financial year 2013-14 and also sold in the same year.

5. The assessee being aggrieved filed first appeal before Id. CIT(A) who upheld the assessment order passed by Assessing Officer and dismissed the appeal filed by the assessee. **The Id. CIT(A) observed that the assessee's only grievance is as to denial of deduction u/s 54 of the 1961 Act on the capital gains being computed on the building / house (excluding land appurtenant thereto) being a short term capital gains , as the building/house was constructed on the plot of land in financial year 2013-14 and also sold on financial year 2013-14.** The Id. CIT(A) relied upon following decisions of Hon'ble High Courts , wherein it was held that if the land and constructed residential house thereon is sold , then in the case if the land is held for more than 36 months the capital gains arising therefrom shall be long term capital gains, and if the building constructed thereon is short term asset , then short term capital gains arising therefrom shall be brought to tax. Further, the deduction u/s 54 of the 1961 Act can only be allowed on the long term capital gains earned by the assessee. The Id. CIT(A)

relied upon the following decisions of the Hon'ble High Court, as detailed hereunder:-

- a) C.N.Ananthram v. ACIT in ITA no. 1012/2008(Kar. HC)
- b) CIT v. Dr. D L RamachandraRao 236 ITR 51(Mds.)
- c) CIT v. Vimal Chand Golecha 201 ITR 442(Raj.)
- d) CIT v. C.R.Subramanian 242 ITR 342(Kar.)

Thus, the ld. CIT(A) upheld the assessment order passed by the AO, and held that benefit of deduction u/s 54 cannot be allowed on short term capital gains arising from sale of building/house(excluding land) which was a short term capital asset held by the assessee.

6. The assessee still being aggrieved by appellate order passed by ld. CIT(A) has filed an appeal before the tribunal. None appeared on behalf of the assessee nor any adjournment application was moved on behalf of the assessee, when this appeal was called for hearing before the DB on 23.05.2022. We have elaborately discussed about the several adjournments sought by the assessee on earlier occasions, and finally taking up this appeal for final hearing on 23.05.2022, in para 3 of this order. The assessee has filed paper book containing 109 page. which is placed on record.

6.2 The ld. Sr. DR has vehemently supported the orders of the authorities below and submitted that the assessee was rightly denied the deduction u/s. 54 of the Act on the short term capital gain earned on the sale of residential building constructed on plot of land, as the said building/house(excluding land) was held by the assessee for less than thirty six months. The assessee

constructed the house in financial year 2013-14, which was sold in the financial year 2013-14 itself.

7. We have heard Id. Sr. DR and perused the material available on record. The brief facts of the case are that the assessee was owner of property being land Araji No.116-37 ,and residential house constructed on the said land being house number B/37/1-F-2Kha , Birdopur,WardBhelpur, Varanasi, U.P.. The plot of land was purchased by the assessee forRs. 5,50,000/- on 07.02.2007 and further amount of Rs. 57,600/- was paid as stamp duty and an amount of Rs. 10,400/- was incurred by the assessee in the financial year 2006-07 , thus total amount of Rs. 6,18,000/- was incurred by the assessee for purchase of aforesaid plot of land in the financial year 2006-07(ay:2007-08) . The assessee also claimed to have further spent an amount of Rs.3.00 lacs for constructing Boundary Wall and filing of soil, on the above plot. The assessee did not submitted any evidence to substantiate that she spent an aforesaid amount of Rs. 3,00,000/-, and hence the benefit of deduction of the cost of constructing Boundary Wall and filing soil was denied by the AO. The assessee conceded before the Id. CIT(A) that only issue of dispute is with respect to claim of deduction u/s 54 of the 1961 Act, but once again in grounds of appeal , the assessee has raised the issue of cost of construction. We have observed that no evidence whatsoever is filed by assessee with respect to construction of boundary wall and filing of soil, and merely it is stated before the AO that matter being old, no details are available. Thus, in view of this issue being conceded before Id. CIT(A) and no evidence whatsoever on record, plea of the assessee cannot be accepted. Further, the assessee also claimed to have spent an amount of Rs. 26.00 lacs on construction of 4000 sq.foot area as per the

bills submitted by the contractor ShriAdityaMaloo of Varanasi(bill is reproduced by ld. CIT(A) in its appellate order) , and the assessee has claimed to sold one part of the house of which the area comes to 2150 square feet along with land admeasuring 99.91 square meters (1075 square feet) which was claimed to have been sold by the assessee in the financial year 2013-14 , on 22.10.2013 for an aggregate value of Rs. 40,00,000 .The AO observed that government circle rate of portion of plot of land consisting of 1075 square feet sold is Rs. 11,98,920/- . The AO further observed that the government circle rate of house building (excluding land) consisting of 2150 square feet(2 floors) which was sold by the assessee, comes to Rs. 27,97,340/- . The total government circle rate of the land and building sold was Rs. 39,96,260/- (as per sale deed circle rate is rounded off to Rs. 39,97,000/- (page 17/pb)), while the sale consideration was Rs. 40,00,000/- . The AO observed that the assessee has claimed cost of construction of Rs. 26,00,000/- as against the sold constructed area of 2150 square feet, as against the contractor bill of Rs. 26,00,000/- for total constructed area of 4000 square feet. The bill of contractor is reproduced by ld. CIT(A) in its order. The assessee filed reply before the AO that the contractor has given bill for only sold constructed area of 2150 square feet(duplex), but the AO was not convinced as the bill of contractor clearly stipulated that constructed area was 4000 square feet with total billed amount of Rs. 26 lacs. The AO gave benefit of proportionate deduction of cost of construction to the assessee, while computing capital gains chargeable to tax. The assessee conceded before the ld. CIT(A) that only issue of dispute is with respect to claim of deduction u/s 54 of the 1961 Act, but once again in grounds of appeal before tribunal, the assessee has raised the issue of cost of construction. We have carefully gone through the bill of

contractor which is reproduced by ld. CIT(A) in its order, which clearly stipulate that constructed area was 4000 square feet , which also matches with the total constructed area of the house, and it is only one part of the house which was sold and not the entire house. Thus, there is no merit in the contention of the assessee, and is merely an afterthought which is rejected. Thus, in view of this issue being conceded before ld. CIT(A) and the evidence on record being against the assessee, plea of the assessee which is merely an afterthought cannot be accepted. Now, moving further, The construction was done by the assessee in the year 2013-14 , and the house was also sold in the year 2013-14, which leads to computation of short term capital gains on the sale of constructed house(Building/house excluding land) by the AO and at the same time deduction u/s 54 was denied to the assessee on the short term capital gains so computed, while the AO allowed the deduction u/s 54 to the assessee on long term capital gains computed on the sale of land, as the plot of land was purchased in financial year 2006-07 which stood sold in financial year 2013-14. So far as sale of land is concerned the AO computed long term capital gains on sale of land and also allowed deduction u/s 54 of the 1961 Act, for investment made by the assessee in the new residential property. The dispute between rival parties is concerning denial of deduction u/s 54 of the 1961 Act on the short term capital gains arisen from sale of constructed area (building /house excluding land) which was constructed in the financial year 2013-14 and also sold in the same year.The counsel for the assessee admitted before ld. CIT(A) as is emanating from para 4 of ld. CIT(A) order is that the only dispute between rival parties is with respect to claim of deduction u/s 54 . The ld. CIT(A) affirmed the assessment order of the AO, and denied the deduction u/s 54 on the short term capital gains earned on the sale of

house(excluding land), as the residential house was constructed in financial year 2013-14(ay: 2014-15) and sold in financial year 2013-14(ay:2014-15) itself. The Id. CIT(A) relied upon the following judgments and orders of Hon'ble High Courts, as under:

- a) Judgment and order of Hon'ble Karnataka High Court in the case of C.N.Ananthram v. ACIT in ITA no. 1012/2008(Kar. HC)
- b) Judgment and order of Hon'ble Madras High Court in the case of CIT v. Dr. D L RamachandraRao 236 ITR 51(Mds.)
- c) Judgment and order of Hon'ble Rajasthan High Court in the case of CIT v. Vimal Chand Golecha 201 ITR 442(Raj.)
- d) Judgment and order of Hon'ble Karnataka High Court in the case of CIT v. C.R.Subramanian 242 ITR 342(Kar.)

In our considered view, the Assessing Officer has rightly brought to tax gains on the sale of land as long term capital gain as the land was purchased in financial year 2006-07(ay: 2007-08) which was sold in financial year 2013-14(ay:2014-15) on which the Assessing Officer has rightly allowed the deduction u/s. 54 of the Act. So far as the residential building/house constructed on the said land is concerned, it was constructed in ay: 2014-15 on the aforesaid land, and the residential house was sold in ay: 2014-15 itself, the residential house was held for less than thirty six months, it is to be classified as short term capital asset and the gains arising therefrom shall be short term capital gains. The plain language of Section 54 clearly stipulate that deduction u/s 54 shall be allowed only on long term capital gains arising from sale of residential property, and the said deduction can no stretch of imagination be allowed on the short term capital gains. The Id. CIT(A) has rightly affirmed the assessment order passed by the AO, by relying upon the

decisions of Hon'ble High Court, as are mentioned in its appellate order. It is also undisputed that the property which was sold was an residential house property. Section 54 of the Act reads as under:

"Profit on sale of property used for residence.

*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,—*

***"

The Long term capital asset and short term capital assets are defined in Section 2(42A), which reads as under:

"2(42A) "short term capital asset" means a capital asset held by an assessee for not more than thirty six months immediately preceding the date of its transfer:

****"

The Long term capital asset is defined 2(29AA) of the 1961 Act, means a capital asset which is not a short term capital asset.

The long term capital gains is defined in Section 2(29B) means capital gains arising from the transfer of long-term capital asset,

while short term capital gains means gains arising from the transfer of short-term capital asset.

In taxing statute, if the language is clear , plain and simple, there is no scope for indentment , and it is well settled that taxing statute are to be strictly construed. The assessee has held land for more than thirty six months before its sale, the AO has rightly brought to tax gains arising from sale of land as long term capital gains after giving benefit of indexation. The residential house which was constructed by the assessee on the said land was constructed/built in financial year 2013-14(ay: 2014-15) and sold in the financial year 2013-14 itself, the AO has rightly classified the gains arising from sale of building/house as short term capital gains. The AO has allowed deduction u/s 54 on long term capital gains earned by the assessee on sale of land, the language of Section 54 is clear, plain and unambiguous and the benefit u/s 54 can only be allowed on long term capital gains earned by the assessee. So far as apportionment of the sale consideration between land and building, the AO has rightly apportion the total sale consideration keeping in view circle rate of government for stamp duty purposes for land and residential building , as also keeping in view the total sale consideration actually received by the assessee. The apportionment to be done between land and building was required to be done , as land is long term capital asset in the instant case, while constructed residential house was held for not more than thirty six months. Further, the asset sold is

composite being land and residential house constructed by the assessee, and hence for granting deduction u/s 54 of the 1961 Act, it is to be considered that the property sold was residential , and hence benefit u/s 54 will be available while reckoning the entitlement of the assessee for benefit u/s 54, while it is different matter, the same shall be restricted to long term capital gains arising on sale of land being long term capital asset for computing eligibility of deduction u/s 54 and its computation thereof, as the residential building/house constructed on the said land cannot be considered for grant of deduction u/s 54 , being a short term capital asset. Thus, this appeal filed by the assessee lacks merit and is dismissed. We order accordingly.

8. In the result, appeal of the assessee in ITA No. 211/Alld/2017 for ay: 2014-15 stands dismissed.

Order pronounced in Open Court on/05/2022at Varanasi, U.P

Sd/-
[VIJAY PAL RAO]
JUDICIAL MEMBER

Sd/-
[RAMIT KOCHAR]
ACCOUNTANT MEMBER

DATED: 27/05/2022

Copy forwarded to:

1. Appellant – Smt. Seema Shah, B-37/1F 2KH, Baijnatha, Birdopur, Varanasi-221010
2. Respondent –Income Tax Officer, Ward –2(2) Varanasi
3. CIT(A) , Varanasi, U.P.
4. CIT, Varanasi, U.P.
5. The CIT(A), Varanasi, U.P.
5. Sr. DR , ITAT, Varanasi, U.P.

Sr. P.S.