IN THE INCOME TAX APPELLATE TRIBUNAL
"F" BENCH, MUMBAI

BEFORE SHRI ABY T VARKEY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

ITA No.2315/Mum/2021
(A.Y. 2015-16)

Varun Gopinath E-2, 503, Bhimashankar CHS, Sec-19A Nerul, Navi Mumbai – 400706	Vs.	ITO, Ward 28(3)(1) Tower No. 6, Vashi Railway Station Commercial Complex, Vashi, Navi Mumbai 400703
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: ALBPG7827K		
Appellant	..	Respondent

Appellant by :	Darshan Jakaria
Respondent by :	Prabhat Kumar Gupta

Date of Hearing	12.07.2022
Date of Pronouncement	15.09.2022

आदेश / O R D E R

Per Amarjit Singh (AM):

The present appeal filed by the assessee is directed against the order passed by the ld. Pr. CIT-28, Mumbai which in turn arises from the order passed by the A.O u/s 143(3) of the Income Tax Act, 1961, for A.Y. 2015-16. The assessee has raised the following grounds before us:

> *"1. The Learned Pr. CIT erred in holding that the assessing officer has failed to verify the claim of exemption u/s 54 ignoring that during the course of assessment proceedings, all the details and documents relating to the sale of property and purchase of another property entitling to exemption of long*

term capital gains u/s 54 were submitted before the assessing officer along with the revised computation (which included the claim of exemption u/s 54) and the exemption u/s 54 has been allowed by the assessing officer only after careful consideration of the material available on record.

2. *The Learned Pr. CIT erred in holding the assessment order as erroneous within provisions of section 263 ignoring that as per the explanation 2 to section 263 an order is said to be erroneous in case where the same is passed without making inquiries or verification or a relief is allowed without enquiring into the claim and in this case all the necessary information and documents for substantiating the eligibility of exemption u/s 54 were submitted before the assessing officer and only after careful consideration of the same, the assessing officer took a view that the assessee is eligible for exemption.*

3. *The Learned Pr. CIT erred in ignoring that the assessing officer has taken a plausible view on the issue and therefore cannot be said to be erroneous.*

4. *For this and any other grounds that may be raised before or during the course of hearings, it is prayed that relief be granted."*

2. During the course of appellate proceedings before us the assessee has filed a petition for condonation of delay of 577 days vide affidavit filed on 08.10.2021. The assessee submitted that assessment order u/s 143(3) was passed on 28.12.2017 vide which A.O has allowed the claim of exemption u/s 54 after considering the relevant material filed, however, the Pr. CIT had passed order u/s 263 of the Act and directed the A.O for fresh assessment on the issue of exemption u/s 54 of the Act. The time limit for filing appeal before the Tribunal was 60 days from the receipt of order worked out to 10.05.2020, however, because of outbreak of Covid-19 the Hon'be Supreme Court vide suo moto order dated 23.03.2020 extended the limitation period w.e.f 15.03.2020 till further order. It is submitted that ITAT had also issued the order dated 30.03.2020 for postponing filing of appeal until further order. In continuation to the earlier order the Hon'ble Supreme Court passed order on 23.09.2020 and extended the period between 15.03.2020 and 02.10.2021 and further 90 days from 03.10.2021 up to 31.12.2021. The

assessee has also placed the decision of the Hon'ble Supreme Court dated 10.01.2022 regarding excluding of the period from 15.03.2020 till 28.02.2022 for computing the period of limitation The assessee also submitted that because of advice of the consultant he could not take timely action for filing appeal. We have also considered the decision of Hon'ble Supreme Court in the case of collector Land Acquisition Vs MST Katigir Ors. Civil Appeal No. 460 of 1987 dated 19.12.1987 where held that sufficient cause for the purpose of condonation of delay showed he interpreted with a view to do even handed justice on merit in preferences to the approach which scuttles a decision on merit. Therefore in order to adjudicate the impugned issue on merit after considering the fact reported by the assessee and submission of the ld. Counsel we condone the delay in filing this appeal.

3. The fact in brief is that assessment u/s 143(3) of the act was completed on 28.12.2017 and total income was assessed at Rs.23,74,537/-. Subsequently, the ld. Pr.CIT passed order u/s 263 of the Act stating that AO has failed to verify the claim of the assessee for exemption u/s 54 of the Act. The ld. Pr.CIT also observed that assessee has not claimed the exemption in the return of income therefore, after referring the decision of Hon'ble Supreme Court in the case of Goetze (I) Ltd Vs. CIT, 264 ITR 323 treated the assessment order as erroneous insofar as it is prejudicial to the interest of the revenue.

4. During the course of appellate proceedings before us the assessee filed paper book comprising copies of document and detail of information filed during the course of assessment proceedings. The ld. counsel vehemently submitted that the case was selected for scrutiny and all the information and documents necessary for assessment called by the A.O

were submitted. The ld. Counsel also submitted that during the course of assessment it was brought to the notice of the A.O that assessee had made investment in purchasing new residential house out of the sale proceeds of the original residential house which was more than the sale proceeds of original residential house and by applying provision of Section 54 of the Act it had not resulted any capital gain to the assessee. All the aforesaid facts along with supporting document were brought to the notice of the A.O and the A.O after examination of the document did not make any addition. The ld. Counsel also submitted that Article 265 of the Constitution of India and Circular No. 14(XL-35) issued by the CBDT emphasized that A.O is duty bound to assess correct income and while doing so he may also grant relief if the assessee is entitled too. The ld. Counsel has also placed reliance on the decision of ITAT, Mumbai in the case of Chicago Pneumatic India Ltd. VS. DCIT, 15 SOT 252.

On the other hand the ld. D.R. supported the order of the lower authorities.

5. Heard both the sides and perused the material on record. The ld. Pr. CIT held that the order passed u/s 143(3) of the Act is erroneous insofar as it is prejudicial to the interest of the revenue since the A.O has failed to verify the claim of the assessee while allowing exemption u/s 54 of the Act. The Pr.CIT also stated that assessee had not claimed the said exemption in the return of income and as per the decision of Hon'ble Supreme Court in the case of Goetze (I) Ltd Vs. CIT, 264 ITR 323 that claimed deduction/exemption is allowable only if the same is claimed in the return of income. We have perused the material on record. The assessee in its submission submitted that the case of the assessee was selected for limited scrutiny and the assessment was taken up

specifically to examine the issue of cash deposit as per copy of notice issued u/s 143(2) of the Act. The ld. Counsel placed reliance on the judicial pronouncements of ITAT, Mumbai in the case of Topnotch Buildcon LLP Vs. Pr. CIT, ITA No. 524/Mum/2021, dated 17.11.2021 wherein held that when the subject matter of assessment was limited scrutiny then exercising of jurisdiction u/s 263 is not sustainable in law.

On the other hand the ld. D.R has supported the order of lower authority.

Notwithstanding the contention of the ld. Counsel that the case was selected for limited scrutiny it is noticed that in response to the query relating to purchase of property it was submitted by the assessee with supporting document that the source of purchasing the property was out of the sale proceeds from the sale of property vide submission made on 03.11.2017, 09.11.2017, 14.11.2017, 22.11.2017 and 15.11.2017 along with related claim of deduction. The ld. Counsel submitted that on the identical issue the coordinate bench of ITAT, in the case of Chicago Pneumatic India Ltd. VS. DCIT, 15 SOT 252 after taking into consideration the decision of Hon'ble Supreme Court in the case of Goetze (I) Ltd Vs. CIT (2016) 264 ITR 323 and also after considering the CBDT Circular No. 14 (XL-35) has adjudicated the issue in favour of the assessee. With the assistance of the ld. Representatives we have perused the decision as referred supra the relevant operative para at para 49 page no. 12 & 13 of the ITAT order is reproduced as under:-

> *"During the course of assessment proceedings, the assessee revised its claim which the AO did not take into cognizance as the assessee had not filed revised return to this effect. The learned CIT(A) also confirmed the action of AO. Prima facie, the ratio of the decision of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. (supra) is squarely applicable to the facts of the case because as per the law, the onus lies on the assessee to make right claim and such claim must be made within the framework of provisions of Act. However, this situation,*

though, it is perfectly in consonance with the position of law may result into genuine hardship to the assessees as the assessee would be left with the option only to proceed under s. 264 that too in case they have not gone into appeal before the learned CIT(A) on the same issue or the learned CIT(A) has not admitted those issue. Other option would be to approach CBDT under s. 119 of the Act for getting the specific relief. Both these options involve time as well as engagement of other administrative authorities which can be otherwise devoted to other important issues. This situation has compelled us to look into the duties of the assessing authorities rather than powers of assessing authorities because Government is entitled to collect only the tax legitimately due to it otherwise the tax so collected would be violative of the art. 265 to the Constitution of India In such pursuit, we have found that the CBDT as back as in 1955 issued Circular No. 14 (XL-35), dt. 11th April. 1955 as to what should be a Departmental attitude towards refund and reliefs to the assessees.

In this Circular, the Board has recognized the fact that responsibility for claiming refunds and reliefs rests with the assessee as imposed by Law even then the Board has directed the officers to draw the attention of the assessees in respect of any refunds or reliefs to which they are eligible, which they have not claimed for some reason or the other. The Board has also given few examples in this regard and has specifically clarified that, these examples are not exhaustive. Further, the Board also issued Circular F. No. 81/27/65-IT(B), dt. 18th May, 1965 defining the duties of P.R.Os. in providing assistance to the public. In this circular, the Board has also advised the P.R.O. to visit the Government/commercial establishments to provide them assistance in filing correct returns and making eligible claims. These Circulars issued by the Board almost 4-5 decades before cast a duty on the assessing authorities to collect only the legitimate tax. Starting from late 1980s, the Government has focused on voluntary compliance by the assessees and, therefore, Government has reduced the number cases selected for compulsory scrutiny and has also reduced the tax rates. This policy of the Government has resulted into higher tax revenues and simplification of laws. It is a settled position that the Circulars issued by the Board are binding on the subordinate IT authorities and if CBDT issues directions which are beneficial to the assessees although the same may not be directly in consonance with the provisions of law, even then these instructions have to be given effect and adhered to by the concerned authorities Thus, there is a strong case for reciprocity to be shown by the Revenue Authorities while completing assessments and to avoid administrative hardships to the assessee. As far as the decision of the Hon'ble apex Court in the case of Goetze (India) Ltd. (supra) is concerned, there is no dispute that the same is binding on everybody concerned. In the said decision, the Hon'ble apex Court has also ruled that Tribunal may adjudicate the issue if a claim is made by any party subject to satisfaction of prescribed rules, hence, even the Hon'ble apex Court has not barred the assessee raise it's legal claim before Appellate Authorities. However, such process would result into undue hardships, delay and multiplicity of proceedings The Hon'ble apex Court, on numerous occasions has laid the proposition that the assessing authorities are bound to compute the correct income only and collect only legitimate tax, hence, merely for a procedural lapse or technicalities, in our opinion, the assessee should not be compelled to pay more tax than what is due from him Therefore, this situation has necessarily to be looked upon from the

angle of duties of assessing authorities as stated earlier, CBDT is the apex body for tax administration and it can also issue directions which are for the benefit of the assessee's though such directions may not be in consonance with the provisions of law, hence, if a circular is now issued directing the assessing authorities to grant reliefs/refunds while completing the assessment proceedings, even though such circular may be at variance with the law, as pronounced by the Hon'ble Supreme Court, but the same would be binding on the subordinate IT authorities. In our opinion, therefore, circulars of same nature which have been already issued would not become irrelevant or can be ignored. Admittedly, the circular issued in 1995 has not been withdrawn, hence, it has got binding force on the subordinate authorities even as on date. Accordingly, we hold that the AO is bound to assess the correct income and for this purpose, the AO may grant reliefs/refunds suo motu or can do so on being pointed out by the assessee in the course of assessment proceedings for which assessee has not filed revised return."

During the course of assessment proceedings the assessee vide letter dated 23.11.2017 made submission to the A.O. in response to the hearing held on 22.11.2017 that he had sold Patel Heritage Property as per the sale deed submitted. It was informed that the 50% of share of the assessee of sale proceeds of Rs.49,75,000/- was invested in property at Kesar Harmony (Rs.61,00,000/-). Since, the entire sale proceeds was invested in the new flat therefore, long term capital gain tax liability was Rs.nil. The assessee has also provided other relevant detail pertaining the exempted capital gain on the sale of the property. Thereafter again during the course of assessment proceedings as directed in the hearing held on 30.11.2017 the assessee explained with relevant particulars that entire capital gain on transfer of the original asset was exempted under Section 54 of the Act along with copy of Return of Income of the co-owners Mr. Uma Gopinath wherein exemption was claimed in the Return of Income. The assessee with aforesaid evidences brought to the notice of the A.O that there was no tax evasion. We have also perused tdhe copy of computation of total income paced at page no. 26 of the paper book computing nil taxable income under the head Income from Capital gain after making investment in the new Residential House. All the aforesaid

material facts along with relevant evidences were brought to the notice of the ld. Pr. CIT during the course of proceedings under Section 263 of the Act, however, the ld. Pr. CIT has not disproved these facts and relevant supporting evidences already filed before the A.O in support of the claim of deduction u/s 54 of the Act.

In the light of the above facts and circumstances it is clear that A.O had made verification on the genuineness of claim of deduction made u/s 54 of the Act, however, the ld. Pr. CIT has neither suggested out any further inquiries nor pointed out any deficiency in the inquiries already made by the A.O. Therefore, after following the decision of coordinate bench as referred above wherein the decision of Hon'ble Supreme Court in the case of Goetze (I) Ltd Vs. CIT (2016) 264 ITR 323 was considered on the similar fact and identical issue, we consider that decision of the ld. PCIT(A) in treating the assessment order passed by the A.O as erroneous insofar as prejudicial to the interest of revenue is not justified. Therefore, we set aside the impugned order passed u/s 263 of the Act, accordingly, the appeal of the assessee is allowed.

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

Order pronounced in the open court on 15.09.2022

Sd/-	Sd/-
(ABY T. VARKEY) JUDICIAL MEMBER	(AMARJIT SINGH) ACCOUNTANT MEMBER

Mumbai, Dated 15.09.2022
PS: Rohit

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,
सत्यापित प्रति //True Copy//

(Asst. Registrar)
ITAT, Mumbai