आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"A" JAIPUR

डॉ. एस.सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA. No. 387/JP/2022
निर्धारण वर्ष/Assessment Years : 2017-18

Pramod Kasliwal A-6, Mahaveer Marg Opp. Kamani House, C-Scheme, Jaipur	बनाम Vs.	ITO Ward 6(2), New Central Revenue Building, Bhagwan Dass Road, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ACBPK 4374 N		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

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निर्धारिती की ओर से/ Assessee by : Sh. Pramod Patni (CA)
राजस्व की ओर से/ Revenue by : Sh. A. S. Nehra (Addl.CIT)

सुनवाई की तारीख/ Date of Hearing : 15/12/2022
उदघोषणा की तारीख/Date of Pronouncement : 02/01/2023

आदेश/ ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

These two appeals are filed by the assessee aggrieved from the order of the National Faceless Appeal Centre, Delhi [Here in

after referred as NFAC] for the assessment year 2017-18 dated 02/09/2022 which is arising out of two separate orders. In turn one was from the order passed u/s 143(3) of the Act dated 21/11/2019 and another for the same A.Y i.e., 2017-18 for which separate order u/s 154 of the Act dated 30/01/2020 passed by the ld. AO.

2. Aggrieved from the orders of the ld. AO in both the matters, the assessee has preferred an appeal before ld. CIT/NFAC.

3. Feeling aggrieved and not satisfied with the order of CIT/NFAC, the assessee has raised these appeals before us and the grounds taken are as under:-

ITA No. 387/JP/2022

> "1. The Learned CIT(A)- NFAC, Delhi, has grossly erred on facts and in law in not dealing with the Grounds of Appeal filed against AO's Order u/s 154 of ITA dt. 30.01.20 which Order of AO in response to Rectification Application dt. 12.12.2019 by the Assessee was Summarily disposed off without any discussions on the mistakes apparent from record in the Order u/s 154 dt. 30.01.20 drawn attention to in the Rectification application viz., w.r.t. explicit claim of extended benefit of holding since the death of original owner of asset attracting Long term Capital Gains in terms of Explanation 1(b) to Sec.2(42A) read with sec. 49(1) of ITA.
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> 2. The learned CIT(A)- NFAC, Delhi, has further erred in law in sustaining the view of the AO in passing Order u/s 154, holding that since an Appeal contesting the Order in assessment u/s 143(3) of ITA, was pre filed by the Assessee in which all the issues raised in the Rectification application were already included, the Rectification

Application was not valid and accordingly rejected. While concluding on the issue in the case, the CIT(A)'s has not appreciated the fact that both the proceedings viz., pursuant to Order u's 143(3) and the proceedings initiated by filing a Rectification application u/s 154, have different scope, object and purpose and in peculiar cases such as the present one, both these proceedings can be contested parallelly.

3. The learned CIT(A)- NFAC, Delhi has further erred on facts as well as in law in declining to entertain the benefit of Sec. 54 of ITA pursuant to the assessee claiming Exemption only with respect to investment in cost of One Flat totaling to Rs. 1,70,50,000/- and not with reference to 5 Residential Flats, which number of Flats was only for the purposes of determination of total quantum of income under the head Long Term Capital Gains and not for the purposes of claiming Exemption benefit u/s 54 of ITA.

4. The Appellant prays leave to add to, alter and/or amend the grounds of appeal at or before the time of hearing of appeal"

ITA No. 388/JP/2022

"1. The Learned CIT(A)- NFAC, Delhi, AO has grossly erred on facts and in law in not dealing with the Grounds of Appeal filed against AO's Order dt. 21.11.19 u/s 143(3) of ITA and in not expressly discussing the law and the facts of the case as submitted by the Assessee more than once in the course of assessment proceedings as also vide Written Submissions made in the course of Appeal on March 6, 2021 and passing Order in appeal wrongly copying/ replicating the Appeal Order of same date (02.09.2022 in Sec. 154 proceedings).

2. The learned CIT(A)- NFAC, Delhi, has erred in fact and in law in not granting benefit of indexation in respect of the residential house asset received by inheritance from Late Father by Will and despite such undisputed fact of inheritance, denying to go by rule of law and declining benefit of Indexation from date of death of Father under given facts of the case and instead considering the period of holding from the date of Mothers death and in doing so ignoring 2. Explanation 1(b) to Sec.2(42A) read with sec. 49(1) of ITA viz., the date of acquisition in the hands of the previous owner viz., father. And in this manner bypassing all the existing tax jurisprudence on the issue without assigning any reasons and giving finding.

3. The learned CIT(A)- NFAC, Delhi has further erred on facts as well as in law in denying the benefit of Sec. 54 of ITA pursuant to the assessee Reinvestment into ONE New Flat so being built by the Developer explicitly for self use which fact disclosed right since the

beginning and all through the proceedings, in the Development Agreement, in ITR filed and in the course of various submissions made in the assessment proceedings and without controverting such fact and giving any finding on the said facts and rather on his own considering 5 Flats total consideration to be received by the Assessee towards Assessee's share in total construction by the builder.

4. The learned AO has further erred in law and on facts in wrongly calculating the tax and interest payable by the assessee firm based on aforesaid wrong calculations.

5. The Appellant prays leave to add to, alter and/or amend the grounds of appeal at or before the time of hearing of appeal."

4. Since the issues raised in the assessee's appeal for both the years are almost identical and therefore, these two appeals were heard together with the agreement of both the parties and are being disposed off by this consolidated order.

5. The fact as culled out from the records is that the assessee has filed original return of income electronically on 24.07.2017 declaring total income at Rs. 1,05,46,290/-. The assessee derive income from business and capital gain during the year under consideration. The case of assessee was selected for limited scrutiny assessment under CASS (Computer Aided Scrutiny Selection) with the reason of "1. Deduction/exemption from capital gains. 2. Capital gains/loss on sale of property." Accordingly notice

u/s 143(2) was issued on 08.08.2018 by the ITO, Ward-6(2), Jaipur, which was duly acknowledged by the assessee. Thereafter, jurisdiction of this case was transferred ward 5(5) vide Pr. CIT-2, Jaipur's order no. Pr. CIT-2/JPR/127/2019-20/948 dated 10.07.2019. Thereafter, notice u/s 142(1) of the I.T. Act, 1961 was issued online on 30.08.2019 and 16.10.2019. In response thereto, the assessee e-filed the necessary details and information, which have been examined.

6. During the assessment proceedings, the assessee was asked to show cause notice on the following issues:-

> "i. Why should the indexation of property offered for development under the Development Agreement be not w.e.f. 22.06.2008 which is the date of death of Mother and not w.e.f. 01.04.1981, as claimed by the Assessee in his ITR in terms of Explanation (i) to sec. 48 of ITA? And further
>
> ii. Why not the Income under the head Long Term Capital Gains be calculated at Rs. 3,85,79,110/- as against Rs. 97,35,600/- calculated in the Computation and ITR of the Assessee.?"

7. In response to the above show cause notice, the assessee submitted that proposed the action of the ld. AO is against the provisions of law and various judicial decisions of High Courts and Benches of ITAT and the deduction for indexed cost of acquisition

should be considered as cost to the previous owner and not to date from where the assessee inherited the property. In support of the contention, the ld. AR of the assessee has relied on the following judgments as under:-

> "Judgments relied in support of the above are:
> 1. [2018] 96 taxmann.com 204 (Mumbai- Trib.) ITO v. Smt. Nita Narendra Mulani
> 2. [2011] 16 taxmann.com 42 (Bombay) CIT v. Manjula J. Shah
> 3. [2014] 48 taxmann.com 381 (Kamataka) CIT v. Smt. Asha Machaiah
> 4. [2017] 88 taxmann.com 784 (Chennai - Trib.) ITO v. Mrs. Saroja Naidu.
> 5. [2010]4 ITR(T) 44 (Chennai) ACIT v. Syed Maqbul Hussain
> 6. [2012] 18 taxmann.com 261 (Delhi) Arun Shungloo Trust v. CIT
> 7. [2015] 57 taxmann.com 19 (Punjab & Haryana) DCIT v. Sushil Kumar
> 8. [2013] 40 taxmann.com 542 (Bombay) CIT v. Smt. Nita Kamlesh Tanna
> 9. [2013] 38 taxmann.com 42 (Gujarat) CIT v. Gautam Manubhai Amin"

8. The ld. AR of the assessee further submitted that the capital gain cannot be computed at Rs. 3,85,79,110/-, it should be Rs. 2,67,85,6001/- and that is also subject to claim of deduction u/s 54 of the I.T. Act for this contention the ld. AR of the assessee filed a detailed submission before the ld. AO vide his letter dated 14th November, 2019. The same is reproduced herein below.

"The Income Tad Officer, 14th Nov, 2019
Ward 6(2),
Jaipur

Dear Sir,

Sub: PRAMOD KASLIWAL PAN: ACBPK4374N Assessment Year 2017-18

Limited Scrutiny- Further Show Cause Notice (SCN) dt. 08.11.19 for Reply by 15.11.19 on The issue of Indexation to be w.e.f. 22.06.2008 and not w.e.f. 1981 as claimed by Assessee In terms of Explanation (iii) to sec. 48 and thus arriving at higher Value of Long term Capital Gains at Rs. 3,85,79,110/- as against assessee offering based on his calculation at Rs. 2,67,85,600/-

Refr. To earlier Submissions: Dt. 28.09.18 under Ack. No.; Dt 17.11.18 under Ack. No. 17111810740353: dt 05.09.19 under Acknowledgement Number: 05091911553083 and dt 07.11.19 under Acknowledgement Number 07111912017706

Kindly refer to your aforesaid SCN dt. 08.11.19 vide which you have asked us to show cause on the following issues in brief.:

i. Why should the indexation of property offered for development under the Development Agreement be not w.e.f. 22.06.2008 which is the date of death of Mother and not w.e.f. 01.04.1981, as claimed by the Assessee in his ITR in terms of Explanation (i) to sec. 48 of ITA? And further

ii. Why not the Income under the head Long Term Capital Gains be calculated at Rs. 3,85,79,110/- as against Rs. 97,35,600/- calculated in the Computation and ITR of the Assessee.?

In reply to aforesaid, we at the outset object to any such proposed action by you, being against the Law and present legal jurisprudence on the issue on the basis of judgements of various High Courts and the Benches of ITAT. Besides, the reference of Rs. 97,35,600/- in your SCN too is misplaced and should be instead be Rs. 2,67,85,600/- which was/is the Gross Value of income from Long term Capital Gains before claiming deduction u/s 54.

For justifications in support of our aforesaid contentions, we would like to submit as under;
1. In continuation to our submission vide para 6 and 7 of 5th Reply dt. 07.11.19 where we had mentioned as under:

"when the period of Holding of such Gifted asset has to be considered in the hands of the previous owner, in case of Gifts/Succession, in terms of Explanation 1(b) to Sc. 2(42A) for arriving at the income from Long Term capital Gains pursuant to sec. 2(47) on entering into the DA with the Builder, the indexation to be from 1981- 82 in respect of land cost which land was acquired on 17 Oct, 1952 by Late Father which in turn was received by way of family partition & by way of inheritance from him by the Assessee."

2. In the absence of any intention to the contrary expressed in sec. 48 wr.t. the expression 'asset held by the assessee' in clause (ii) of the Explanation to Section 48 of the Act has to be construed in consonance with the meaning given in Explanation 1(1)(b) to Section 2(42A) of the Act. Thus the Courts (High Court of Mumbai and Karnataka and ITAT Benches of Mumbai and Chennai etc.) have held as under.

i. While considering the similar question of law have held that capital gains arising on transfer of a capital asset acquired by assessee under a gift or will, indexed cost of acquisition has to be computed with reference to year in which previous owner first held asset and not from the year in which the assessee became the owner of the asset.

ii. In Section 48 of the Act, the expression 'asset held by the assessee' is not defined and, therefore, in the absence of any intention to the contrary the expression asset held by the assessee' in clause () of the Explanation to Section 48 of the Act has to be construed in consonance with the meaning given in Section 2(42A) of the Act. If the meaning given in Section 2(42A) is not adopted in construing the words used in Section 48 of the Act, then the gains arising on transfer of a capital asset acquired under a gift or will be outside the purview of the capital gains tax which is not intended by the legislature. A harmonious reading of sections 48 and 49 read with Section 2(42A) makes it clear that for the purpose of "Indexed Cost of Acquisition', it has to be understood as the first year in which the previous owner held the said property.

iii. Apart from the above, Section 55(1)(b)(2)(i) of the Act provides that where the capital asset became the property of the assessee by any of the modes specified under Section 49(1) of the Act (viz. under a Gift or Will), not only the cost of improvement incurred by the assessee but also the cost of improvement incurred by the previous owner shall be deducted from the total

consideration received by the assessee while computing the capital gains under Section 48 of the Act.

The question of deducting the cost of improvement incurred by the previous owner in the case of an assessee covered under Section 49(1) of the Act would arise only if the period for which the asset was held by the previous owner is included in determining the period for which the asset was held by

the assessee. Thus, it is right to hold that in the case of an assessee covered under Section 49(1) of the Act, the capital gains liability has to be computed by considering that the assessee held the said asset from the date it was held by the previous owner and the same analogy has also to be applied in determining the indexed cost of acquisition.

iv. Judgments relied in support of the above are:

1. [2018] 96 taxmann.com 204 (Mumbai- Trib.) ITO v. Smt. Nita Narendra Mulani
2. [2011] 16 taxmann.com 42 (Bombay) CIT v. Manjula J. Shah
3. [2014] 48 taxmann.com 381 (Kamataka) CIT v. Smt. Asha Machaiah
4. [2017] 88 taxmann.com 784 (Chennai - Trib.) ITO v. Mrs. Saroja Naidu.
5. [2010]4 ITR(T) 44 (Chennai) ACIT v. Syed Maqbul Hussain
6. [2012] 18 taxmann.com 261 (Delhi) Arun Shungloo Trust v. CIT
7. [2015] 57 taxmann.com 19 (Punjab & Haryana) DCIT v. Sushil Kumar
8. [2013] 40 taxmann.com 542 (Bombay) CIT v. Smt. Nita Kamlesh Tanna
9. [2013] 38 taxmann.com 42 (Gujarat) CIT v. Gautam Manubhai Amin

3. Thus to conclude, your argument otherwise as in your SCN, runs counter to the legislative intent and hence cannot be accepted.

4. On the issue w.r.t. the reference by you of Rs. 97,35,600/- in your SCN too is misplaced and against the actual figure of Rs. 2,67,85,600/- which is the Gross Value of income from Long term Capital Gains declared before claiming deduction u/s 54 of ITA

5. Further the reference of date of 22.06.2008 which was the date of demise of Mother is again misconceived since the asset was received in family partition and/or Will of father who died on 12.08.1987 which land he (Late

Father) acquired on 17th Oct., 1952. Copy of said Sale Deed for purchase of said Plot of land by Late Shri G.C. Kasliwal is attached marked "1952Deed" and Late Shri G.C. Kasliwal death Certificate is attached Mraked "DeathCert" for your perusal.

6. The cost of such asset (the Land) would be the cost in the hands of the Assessee or its replaced Fair Market Value as at 01.04.1981 pursuant to Explanation 1(b) to Sc. 2(42A) read with Sec. 49(1) and Explanation (ii) to Sec. 48 as per Govt. Approved Valuer and accordingly even the indexation would be eligible of such an asset w.e.f. 01.04.1981 itself and not from 22.06.2008 or 12.08.1987, as proposed by you.

Sir, with the aforesaid submissions, I am sure your SCN stands satisfactorily replied.

This read with earlier submissions made from time to time against you different Notices u/s 142(1) in the above Limited Scrutiny Case would be able to conclude the assessment proceedings without any adverse / unwarranted action.
Thanking You

Your faithfully
For Shah Patni & Co.
Chartered Accounts

(Pramod Patni)
Partner

9. While passing the order u/s 143(3) of the Act, the ld. AO has not allowed the cost of indexation from 1981 and also not allowed the deduction u/s 54 of the Act as calimed. Since the AR of the assessee was of the view that the ld. AO has misconceived the provisions of the Act and it should have been considered but has left the attention. Therefore, he has preferred an application u/s

154 of the Act which was rejected by ld. AO vide his order dated 30.01.2020 and the contentions of the ld. AO is as under:-

"In the assessee case, assessment was completed u/s 143(3) on 21.11.2019 at total income of Rs. 3,93,89,795/-. Further the assessee has filed rectification application on 12.12.2019 which is summarized as under:

"year of indexation as to be w.e.f. 1981-82 as claimed or w.e.f. FY 2008-09 as allowed or w.e.f. 1987-88 which is the year of death of father (12.08.1987) from whom the asset under reference was inherited by the assessee.

Deduction u/s. 54 for reinvestment into One flat for residential purpose use viz: Flat No. DP 701. And short TDS Credit of Rs. 1200/- allowed."

The application of the assessee has been considered. As per details available on record it is noticed that all the issues covered in assessment order itself and self explanatory therefore aforesaid mistake has not been found apparent from record. The assessee has already filed appeal before CIT(A)-2, Jaipur on 20.12.2019 where all the above issues have been raised. Therefore, the assessee's application is not found acceptable and the rectification application request filed by the assessee is hereby rejected."

10. As from the facts hereinabove, there were two appeals, one is against the order passed u/s 143(3) of the Act dated 21/11/2019 and another for the same A.Y i.e., 2017-18 for which separate order u/s 154 of the Act dated 30/01/2020 passed by the ld. AO.

11. The ld. CIT/NFAC has disposed of both the appeals and did not adjudicate the appeal of the assessee on merits and he has in both the appeals given similar findings as it is recorded in the order passed consequent two appeals filed u/s 154 of the Act.

12. We believe that this mistake is on account of oversight and the lower authorities on account of two separate appeals by the same assessee for the same assessment year. The quantum appeal filed in response to the order u/s 143(3) of the Act is not disposed on merits of its case which ought to have been disposed off after hearing the party on merits.

13. The ld. AR of the assessee vehemently argued since the lower authorities has not given justice the same may please be given up at this stage to avoid the delay in justice.

14. Per contra, the ld. DR accepted the apparent mistake in the order of the ld. CIT/NFAC and contended that since the issue is not decided by the ld. CIT/NFAC on merit it would be fair enough to restore this matter of quantum appeal to the file of the ld. CIT/NFAC so that the contentions raised by the ld. AR of the assessee can be disposed of on its merits.

15. We have heard the rival contentions and perused the material placed on record and the orders of the lower authorities. The

Bench has observed that the issue in both appeals is only for the allowance deduction u/s 54 of the Act and consideration of indexation of cost of acquisition and it's date from where the previous owner has acquired the asset. The ld. AR of the assessee placed on record various judgments to support their contentions for allowing the cost of indexation. The bench also noted that the ld. CIT(A)/NFAC has also not considered the submission on merits and has passed similar order for both the years even though the assessee filed a detailed written submission on merits in quantum appeal but the ld. CIT(A)/NFAC has not disposed of the appeal of the appeal of the assessee on merits. The ld. CIT(A)/NFAC should have decide the issue on merits which has not been decided by passing a speaking order in the quantum appeal filed by the assessee. Considering the present set of facts as argued by both the parties in both appeal we feel that the grievance of the assessee will be resolved if the ld. CIT(A)/NFAC decide the issue on its merits which has not been done while disposing the appeal but the content of the appeal filed in response to the order passed u/s. 154 of the Act. Therefore, we direct the ld. CIT(A)/NFAC to consider the submissions of the assessee and contentions raised

for its claim for of indexation and also deduction as claimed u/s 54 of the Act and decide both the issues in accordance with law after giving proper opportunity of being heard to the assessee.

In terms of the observations, both appeals of the assessee are allowed statistically.

Order pronounced in the open Court on 02/01/2023.

Sd/-	Sd/-
(डा॰ एस. सीतालक्ष्मी)	(राठोड कमलेश जयन्तभाई)
(Dr. S. Seethalakshmi)	(Rathod Kamlesh Jayantbhai)
न्यायिक सदस्य / Judicial Member	लेखा सदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 02/01/2023.
*Ganesh Kumar
आदेश की प्रतिलिपि अग्रेशित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Sh. Pramod Kasliwal, Jaipur
2. प्रत्यर्थी / The Respondent- ITO, Ward 6(2), Bhagwan Dass Road, 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 Nos. 387 & 388/JP/2022}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar