

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "A", BANGALORE**

Before Shri Laxmi Prasad Sahu, Accountant Member

ITA No.1080/Bang/2022 : Asst.Year 2006-07

Sri Thimme Gowda Shekar #230, Neethi Marga Siddartha Layout Mysore-570 011 PAN : DFIPS5643F	v.	Income tax Officer, Ward-1(2) Mysore
(Appellant)		(Respondent)

Appellant by : Sri V.Srinivasan, Advocate
Respondent by : Sri Ganesh R.Ghale, Standing Counsel

Date of Hearing :03.02.2023	Date of Pronouncement : 08 .02.2023
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ORDER

Per Laxmi Prasad Sahu, AM :

This is an appeal by the assessee is directed against the order of the National Faceless Appeal Centre (NFAC), Delhi, DIN & Order No. ITBA/NFAC/S/250//2022-23/1047150003(1) dated 09.11.2022 for the assessment year 2006-07. On the following grounds of appeal:-

- 1. The orders of the authorities below in so far as they are against the appellant are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.*
- 2. The authorities below are not justified in completing the assessment and appellate proceedings without giving sufficient and effective opportunity to the appellant and therefore, the orders passed by them deserves to be vacated.*

3. *The learned CIT(A) ought to have appreciated that after receipt of the notice from the DDIT (Inv.), Mysore, the appellant had shifted his residence and thus did not receive any notices issued to him in course of the assessment proceedings under the facts and in the circumstances of the appellant's case.*
4. *The learned CIT(A) ought not to have refused to allow the exemption claimed u/s. 54B of the Act on the ground that the appellant had not filed ITR or furnished details before the AO with regard to the reinvestment made under the facts and in the circumstances of the appellant's case.*
5. *For the above other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs.*

2. The brief facts of the case are that as per the information available with the Department the assessee entered into Development Agreement with the Developer Shri R.Veeresh, residing in Mysore. As per the agreement executed on 01.03.2006, the assessee transferred five acres of land situated at Survey No.351, Hanchya Village, Kasaba Hobili, Mysore. From the verification of records, it was observed that for the relevant assessment year 2006-07, the assessee did not disclose this transaction nor any capital gains arising on the transfer of aforesaid agricultural land. The assessee did not file return of income for the AY 2006-07 u/s 139. The case was reopened by issuing notice u/s. 148 on 28.03.2013 and an opportunity was granted to the assessee for filing return of income in spite of he did not file any return of income and several opportunities were also granted to the assessee for filing return of income and even did not appear for personal

hearing on different dates, notice u/s. 142(1) was issued and last opportunity was also granted to the assessee in spite of he did not appear before the AO. Thereafter, the AO computed the assessment u/s. 144 on the basis of materials available with him. As per the documents available in regarding to transfer of agricultural land to the developer, the developer paid Rs. 35,25,000/- to the owners to obtain the right of development on the agricultural land. Accordingly, the AO treated the entire transaction as “transfer” in terms of section 2(47)(v) of the I.T.Act. The AO also relied on the judgment of the Hon’ble Supreme Court in the case of Chaturbhuj Dwarkadas Kapadia vs. CIT (2003) reported in 266 ITR 491. Since no any document was filed by the assessee for determination of the cost of acquisition, the AO made reference to the Sub Registrar to obtain copy of the purchase deed. The Sub Registrar, North Mysore, Mysore vide letter No...../RGN/261/2013-14 dated 26.02.2014 forwarded copy of the purchase deed, as per the deed the assessee purchased the property on 29.09.2005 for sale consideration of Rs.7,50,000/-, accordingly, the cost of acquisition benefit of the property determined by the AO at Rs.8,25,585/- & short term capital gain was determined at Rs. 26,99,420/-.

3. Aggrieved from the above order, the assessee filed appeal before the Id.CIT(A)/NFAC. Before the Id.CIT(A)/NFAC, the assessee filed written submission & claimed exemption from the capital gain u/s. 54B of the I.T.Act. The Id.CIT(A)/NFAC, Delhi issued show-cause notice on 13.10.2022 requiring the

assessee to respond on or before 28.10.2022, but the assessee did not respond till date of order. Accordingly, he confirmed the order of the AO.

4. Aggrieved from the above order of the Id.CIT(A)/NFAC, Delhi, the assessee filed appeal before the Income tax Appellate Tribunal.

5. The Id.AR submitted that being an agricultural person, the assessee was not aware about the proceedings of the Income tax Act. Therefore, he could not file return of income within due date specified and he also submitted that for claiming exemption u/s 54B the assessee was required to file return of income. The assessee purchased two agricultural lands on different dates which are qualified for exemption as per the section 54B of the I.T.Act. Therefore, merely non filing of return of income, the exemption should not be denied to the assessee. He filed paper book containing page Nos. 1 to 57 and these all documents were submitted before the Id.CIT(A)/NFAC as per the certification in the paper book. The Id.AR also submitted that it is a beneficial provision to the assessee for giving exemption, he also submitted that for getting exemption u/s. 54B of the Act, nowhere sated in the section that filing of return of income is mandatory & he requested that the matter should be send back to the AO for verification of purchase of agriculture land for giving exemption as per section 54B of the Act. .

6. On the other hand, the Id.DR relied on the order of the lower authorities and he submitted that the assessee did not file return of income in response to the notice issued u/s. 148 of the Act, even several opportunities were granted to the assessee in spite of he did not appear before the AO and he did not submit any reply of the show-cause notice issued by the NFAC, Delhi/Id.CIT(A) whereas sufficient time was granted to the assessee. He further submitted that for getting exemption u/s. 54B of the I.T.Act, the return is required to be filed as per the section 139(1) and he also referred to the sixth Proviso of the section 139(1) and as per the provisions for getting exemption u/s. 54B of the I.T.Act, the assessee is require to file the return of income in the prescribed form and verified in the prescribed manner within the due date and also referred to section 80C of the I.T.Act. In regard to claiming the exemption u/s. 54B of the I.T.Act, the investment should be made as per section 54B of the Act. Though the assessee purchased the said land but there is no information about the nature of crops produced as oer the paper book page No.46. He further submitted that as per the paper book page no.22, the sold property was dry agricultural land. Therefore, it cannot be said that the land sold & purchased by the assessee were the agricultural lands and fulfills the conditions as per section 54B of the I.T.Act. Therefore, the assessee is not eligible for exemption as per section 54B of the I.T.Act. In support of his argument, the Id. DR relied on the following judgment of the Jurisdictional High Court of the Karnataka in the case of Gopal S.Pandit vs. CIT in ITA No.34/2017, order

dated 25.06.2018, he referred to para No.9 to 12 which is as under-

9. The second issue raised by the learned Counsel for the Assessee is with regard to claim of deduction u/s. 54B of the Act with regard to sale of agricultural land by him. The Authorities below have found against the Assessee that since the land in question situated at Adyar Village, Mangalore, sold by the Assessee in the relevant period was never used as agricultural land, for a period exceeding two years, therefore the Assessee was not entitled to the benefit of deduction u/s. 54B of the Act. For this reason also, the said finding of fact which is upheld by the two Appellate Authorities as well, we are of the opinion that no substantial question of law arises. We quote below the provision of [Section 54B](#) of the Act for ready reference.

"54B.: Capital gain on transfer of land used for agricultural purposes not to be charged in certain cases.

(1) [Subject to the provisions of sub-section (2), where the capital gain arises] from the transfer of a capital asset being land which, in the two years immediately preceding the date on which the transfer took place, was being used by the assessee or a parent of his for agricultural purposes [(hereinafter referred to as the original asset)], and the assessee has, within a period of two years after that date, purchased any other land for being used for agricultural purposes, 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 land so purchased (hereinafter 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, 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, the cost shall be reduced, by the amount of the capital gain.]

(2) The amount of the capital gain which is not utilised by the assessee for the purchase of the new asset before the date of furnishing the return of income under [section 139](#), shall be deposited by him before furnishing such return [such deposit being made in any case not later than the due date applicable in the case of the assessee for furnishing the return of income under sub-section (1) of [section 139](#)] in an account in any such bank or institution as may be specified in, and utilised in accordance with, any scheme which the Central Government may, by notification in the Official Gazette, frame in this behalf and such return shall be accompanied by proof of such deposit; and, for the purposes of sub-section (1), the amount, if any, already utilised by the assessee for the purchase of the new asset together with the amount so deposited shall be deemed to be the cost of the new asset :

Provided that if the amount deposited under this sub-section is not utilized wholly or partly for the purchase of the new asset within the period specified in sub-section (1), then,—

(i) the amount not so utilised shall be charged under [section 45](#) as the income of the previous year in which the period of two years from the date of the transfer of the original asset expires; and

(ii) the assessee shall be entitled to withdraw such amount in accordance

10. It would be also appropriate to quote the findings of the Assessing Authority in this regard, who has clearly found that the land in question was not used as agricultural land for a period of more than two years.

"5.9.1. Disallowance of exemption claimed u/s 54B of the I.T.Act.

5.9.2. In the return of income filed, the assessee computed the short term capital gain of Rs.11,97,996/- from sale of Adyar Property treating the same as capital asset and claimed exemption u/s 54B of the I.T.Act. The assessee also in his letter dated 03.05.2010 pleaded that he is eligible for exemption u/s 54B of the I.T.Act as he has invested the capital gain from sale of land used for Agricultural purposes for purchase of any other land for being used for agricultural purpose. Accordingly, the assessee claimed that he has purchased an agricultural land in Moodabidri. However, on perusal of the sale deed for purchase and sale of Adya land, it is noticed that the assessee sold this land within two years from the date of its purchase. The date of purchase of this land was 03.09.2002 and date of sale was 15.07.2004. Therefore, the assessee was holding this land for one year and 315 days only. As per the provisions of [section 54B](#) of the I.T.Act, the assessee or the assessee's parents have to use the land for agricultural purposes for a minimum period of two years. Here in this case, the assessee has not used the land for agricultural purposes for a minimum period of two years before its sale. Moreover, from the expenses incurred as reproduced above, it can be proved that the said land was never used for agricultural purposes after it was purchased by the assessee as the assessee was concentrating on its improvement rather than cultivation. Moreover, the assessee, in his submissions vide dated 03.05.2010 has stated that the Adyar site was purchased for the purpose of making a farm house and guest house for him and his family and it was not a commercial transaction. This submission of the assessee also shows that the assessee has not used this property of agricultural purposes. Therefore, conditions specified in [section 54B](#) of the I.T.Act for claiming exemption is not fulfilled in this case and accordingly the exemption claimed under that section is not allowable to the assessee."

11. The said findings have been upheld by the two Appellate Authorities, namely, Commissioner of Income Tax [Appeals] as well as the learned Tribunal.

12. In view of the aforesaid provisions and facts, we are of the clear opinion that no substantial question of law arises in the present case.

7. On the rejoinder the ld. AR submitted that in paper book page No. 22 it has been mentioned that it was unirrigated land, therefore, it has been mentioned as "Dry Agriculture Land" in the sale deed , in fact it was agriculture land, therefore, the allegation made the ld. DR is baseless. The case

law relied by the ld. Dr is distinguishable on facts of the present case.

8. After hearing both the sides and perusing the entire materials on record and order of the authorities below, it has been observed that assessee transferred five acres of land situated at Survey No.351, Hanchya Village, Kasaba Hobili, Mysore for consideration of Rs.35,25,000/- to Shri R.Veeresh and the JDA(joint Development Agreement) was executed as per the terms & conditions set out therein. There is no dispute that the property has been transferred within the meaning of section 2(47)(v) of the I.T.Act. The assessee did not file his return of income for the relevant assessment year at all and in the assessment proceedings the assessee also did not appear before the AO. Before the ld.CIT(A)/NFAC, he filed additional documents as well as for the purchase of new agricultural lands (Deed of Sale dated 10.03.2006 & 25.09.2008) for claiming exemption u/s 54B of the Act. Since the assessee did not file return of income, therefore, the CIT (A) did not entertain his claims for exemption. Considering the documents filed by the assessee, it has been observed that he has purchased two piece of lands against which he wanted to claim of exemption u/s. 54B of the I.T.Act, but this fact has not been examined by the any of the authorities below. The ld.DR has raised the point that the assessee is not eligible for getting exemption on investments in new asset because he did not file his return of income within the due date as per the amendment in sixth Proviso of section 139(1).

8.1. I observed on the amendment in section 139(1) of sixth Proviso, section 54, section 54B or section 54D or section 54EC or section 54F or section 54G or section 54GA or section 54GB were inserted by the Finance Act, 2019 which is effective from 01.04.2020, but the impugned case on hand is related to the AY 2006-07. It indicates that the exemption u/s 54B can be claimed without filling of return of income , now it has been amended by the Finance Act. 2019. Therefore, the arguments advanced by the ld. DR. will not support the case of the revenue regarding compulsory filing return of income for getting exemption u/s. 54B of the I.T.Act r.w.s. 80C & 139(1). Considering the totality of the facts of the case, issue is remitted back to the file of the AO for the purpose of verification whether the assessee has fulfilled the conditions of section 54B of the I.T. Act for getting exemption or not and the assessee is directed to provide necessary documents for substantiating his claim before the AO and further directed not to seek unnecessary adjournments for early disposal of case. The AO shall give three effective opportunities to the assessee and decide the issue as per law.

9. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced on this 08th day of February, 2023.

Sd/-
(Laxmi Prasad Sahu)
ACCOUNTANT MEMBER

Bangalore; Dated : 08th February, 2023.
Thirumalesh, Sr.PS

Copy to :

1. The Appellant.
2. The Respondent.
3. The CIT(A), Bangalore
4. The CIT(A)/NFAC, Delhi
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore