

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE**

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No.56/Ind/2023
(Assessment Year:2017-18)

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| Hafiz Shaikh 32/2, laxmi Park Moti Bunglow Dewas | Vs. | ITO Ward-1 Dewas |
| (Appellant / Assessee) | | (Respondent/ Revenue) |
| PAN: AJUPS6986 L | | |
| Assessee by | Ms. Richa Parwal, AR | |
| Revenue by | Shri Ashish Porwal, Sr. DR | |
| Date of Hearing | 25.05.2023 | |
| Date of Pronouncement | 29.05.2023 | |

O R D E R

Per Vijay Pal Rao, JM:

This appeal by the assessee is directed against the order dated 26.12.2022 of Ld. Commissioner of Income Tax (Appeals) (in short Ld. CIT(A), National Faceless Appeal Centre, Delhi for Assessment Year 2017-18. The assessee has raised following grounds of appeal:

1. That the Hon. CTT (A) has grossly erred in law, in confirming an addition of Rs.15475988/- by disallowing exemption u/s 54B of the Act claimed from the Long term Capital Gain arising from deeming provision u/s 45(3) of the Act:

1.1. By holding that the land in reference has not been shown as used for agricultural purpose and that nothing has been brought on record to show that the land was being cultivated prior to its sale, being completely on a wrong set of facts and in gross contradiction with the Assessment order where no such observation has been made.

1.2. By overlooking and not considering the entire documents, records furnished during the course of the Assessment proceedings that sufficiently prove that the land in reference was cultivated from last many years prior to its sale

1.3. By not issuing a show-cause to the Appellant and providing a reasonable opportunity of being heard when in the impugned order addition was being confirmed on a different interpretation and reasoning than the original Assessment Order

14. By not disposing the grounds so raised by the Appellant judiciously by way of a speaking order and by not commenting/ observing anything about the righteousness of the availability of exemption u/s section 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H of the Act against LTCG under subsection (3) of section 45

2. The assessee craves to add/alter any of the grounds of appeal on or before the date of hearing

2. The solitary issue arises in this appeal of the assessee is whether the ld. CIT(A) is justified in upholding denial of claim of deduction u/s 54B of the Act in respect of the capital gain arising from transfer of land by the assessee to the partnership firm. The assessee is a partner of partnership firm M/s Dewas Life Style. The assessee filed his return of income for the year under consideration on 31.03.2018 declaring total income of Rs.4,01,630/- and agricultural income of Rs.2,10,405/-. During the scrutiny assessment, the AO noted that the assessee has transferred a capital asset to the partnership firm and claimed deduction u/s 54B of the Act. The AO denied the claim of deduction on the ground that since the transfer in the case falls in ambit of section 45(3) of the Act and therefore, the claim of exemption/deduction u/s 54B is not allowable. The assessee challenged the action of the AO before the Ld. CIT(A). The Ld. CIT(A) has confirmed the disallowance of deduction u/s 54B of the Act on the ground that the assessee has not satisfied the condition provided u/s 54B as land in question was no more agricultural land.

3. Before the Tribunal Ld. AR of the assessee has submitted that the AO has committed an error in denying the deduction u/s 54B while making reference to section 45(3) of the Act. Ld. AR has submitted that the provision of section 45(3) contemplates deemed consideration in case

the capital asset is transferred to the partnership firm. She has further contended that Id. CIT(A) has confirmed the disallowance on the ground that the land transferred to partnership firm was not agricultural land without issuing any show cause notice to the assessee or giving any opportunity to assessee on this point before passing the impugned order. She has submitted that the assessee has been earning agricultural income from the agricultural operations from the land in question which is not disputed by the AO. Therefore, the nature of agricultural land cannot be disputed. The assessee has purchased another agricultural land within the prescribed period as per Section 54B of the Act. The details of which produced before the Ld. AO but the AO has made the disallowance without disputing the fact of purchase of agricultural land by the assessee.

4. On the other hand, Ld. DR has submitted that though the AO has made disallowance on the ground of transfer falls u/s 45(3) however, the CIT(A) has rightly considered the claim of the assessee and found that land transfer by the assessee was no more an agricultural land and therefore the deduction u/s 54B is not allowable. He has relied upon the impugned orders of the Ld. CIT(A).

5. We have considered the rival submissions and relevant material on record. The AO has disallowed the claim of deduction u/s 54B of the Act as under:

“(4) In compliance to the above final show-cause notice u/s 142(1) dated 06/12/2019, Shri Sunil Kataria attended and filed written reply on 16/12/2019, which examined and placed on record. The such reply of the assessee considered but not acceptable, looking to the provision of section 45(3), as there is no provision for exemption u/s 54B as provided in section 45(1) as Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H, be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place. Hence, in view above provision, assessee have wrongly claimed exemption u/s 54B of Rs.1,54,75,988/- from long term capital gain u/s 45(3) of Rs. 1,54,75,988/-, which is liable to be disallowed. The assessee declared long term capital gain u/s 45(3) on transfer of capital assets in the firm as capital, which is deemed long term capital gain without receiving any consideration. The

assessee has claimed exemption u/s 54B of Rs.1,54,75,988/- on such deemed long term capital gain, wherein no sale consideration has been received by the assessee. Therefore the investment of Rs.1,54,75,988/- for claim of exemption u/s 54B out of deemed long term capital gain u/s 45(3) of Rs.1,54,75,988/- is not at all possible. Looking to the facts of the case, the claim of the assessee for exemption u/s 54B is totally wrong. Therefore, in view of the above, wrong claim of exemption u/s 54B of Rs. 1,54,75,988/- is hereby disallowed and accordingly added to the total income of the assessee for the F.Y. 2016-17 relevant to A.Y. 2017-18. I am satisfied that assessee under reporting income as per provision of section 270A of the Income Tax Act, 1961. Therefore, on this initiate penalty proceedings u/s 270A is being initiated separately.

6. The provision of section 45(3) contemplates only the deemed consideration in case of transfer of capital asset by the partner to the partnership firm. Therefore, the claim of deduction u/s 54B cannot be denied only because the transfer of the capital asset falls under the provision of section 45(3) of the Act. On appeal the Ld. CIT(A) has confirmed the disallowance on the ground that the assessee has sold the land to the partnership firm for real estate development and therefore, the intention of the assessee in selling land in question and purchasing another land was trading activity in land. The relevant finding of the Ld. CIT(A) are as under:

“7. I have considered the facts of the case, written submission of the appellant and the order of AO. In the instant case, the land under reference has not been shown as used for agricultural purposes. There is nothing to show that the land was being cultivated prior to its sale. The only evidence furnished by the assessee in this regard was copy of return of income for A.Y. 2015-16 & 2016-17, in which total income included the income from Agricultural operations.

8. Further, the income of past two years from agricultural activities were not justified by way of producing the documents of nature of the land, the crops cultivated on the land, evidences of labour work, labour payment, bill of agricultural purchases and proof of other agricultural activities. There is no mention of the crops grown on the land and the activities undertaken by the assessee for cultivation of crops on the land. This shows that there was no cultivation of crop/agricultural activity on the land owned by the assessee in the past two years preceding the date of sale. Bills were never produced either before the Assessing Officer or during the appellate proceedings. The assessee has failed to prove that the land was agricultural land and he had cultivated crops in the land. There is a

difference in the meaning of agricultural land and land put to agricultural use for the purpose of exemption u/s 54B.

9. Reliance is placed on the judgment of Hon'ble Delhi High Court in the case of Rajiv Dass v. Deputy Commissioner of Income-tax, OSD, New Delhi wherein the Hon'ble High Court confirmed the disallowance of exemption under section 54B made by the AO. Assessee sold and transferred land to a real estate developer and claimed exemption under section 54B. Assessing Officer and Commissioner (Appeals) dismissed his claim holding that said land was not used for agricultural purposes during preceding two years before date of transfer of land.

10. Further, in the judgment of Hon'ble Kerala High Court in the case of Smt. Asha George v. Income-tax Officer, Ward 2(1), Thrissur in ITA No. 114 OF 2012 dated JANUARY 16, 2013, it was held that unless assessee establishes that land sold was actually being used for agricultural purposes during two years prior to date of transfer, exemption under section 54B would not be available.

11. Furthermore, in the instant case the land was held by the partner of the firm. The appellant along with other family members constituted a partnership firm under the name Dewas Life Style, with its business of real estate as developers and colonizers vide partnership Deed dated 20.12.2015. Soon, as per the deed, the appellant transferred the said land as capital contribution. The land was sold only for the business purpose of real estate as developers and colonizers. The Parliament has enacted the law for the purpose for promotion of agricultural activities for farmers and that is why, benefit u/s 54B is provided. The AO has quoted section 54B as per which, capital gain on transfer of land used for agricultural purposes is not to be charged, if before transfer, it was being used for agricultural purposes and within two years, the appellant had purchased any other land for being used for agricultural purpose. Hence, the AO gave show case as per para 3 and 4 of the assessment order. The manner and the mode of bringing the land into partnership held out the intention of the petitioner that it never intended to use the land in question for agricultural purpose. The intention of the appellant was trading activity in land. Since the land had lost or never was of the character of agricultural land, therefore, it is held that the AO had rightly disallowed the exemption claimed by the appellant u/s 54B of the I.T. Act. Ground No. 1 of the appellant is dismissed.

7. As it is manifest from the impugned order that the Ld. CIT(A) has denied the claim of deduction u/s 54B of the Act on entirely different ground to that of AO and that to without issuing show cause notice to the assessee or giving an opportunity to the assessee to reply on such query

or ground proposed by the CIT(A) for making disallowance. This is a clear case of violation of principle of natural justice while making the disallowance of claim. Accordingly in the facts and circumstances of the case and in the interest of justice, we set aside the impugned order of the Ld. CIT(A) and the matter is remanded to the record of the AO for fresh adjudication after verification and examination of the relevant facts on the point whether the assessee has satisfied the conditions as provided u/s 54B of the Act or not. Needless to say assessee be given an appropriate opportunity of hearing before passing the fresh order.

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

Order pronounced in the open court on 29 .05.2023.

Sd/-
(B.M. BIYANI)
Accountant Member

Sd/-
(VIJAY PAL RAO)
Judicial Member

Indore, 29.05.2023

Patel/Sr. PS

Copies to: (1) *The appellant*
(2) *The respondent*
(3) *CIT*
(4) *CIT(A)*
(5) *Departmental Representative*
(6) *Guard File*

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore