IN THE INCOME TAX APPELLATE TRIBUNAL,

DELHI BENCH: 'H' NEW DELHI

BEFORE SHRI SAKTIJIT DEY, VICE-PRESIDENT AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA No. 371/Del/2021
Assessment Year: 2012-13

Satyamurti Ramasunder, D-502, IVY Complex, Sushant Lok, 1-BlockA, Gurgaon (PAN: AAAPR0741H)	Vs.	ACIT, Circle 4(1), Gurgaon (Haryana).
(Appellant)		**(Respondent)**

Present for:

Appellant by : Shri Satyen Sethi & Arta Trana Panda, Advs.

Respondent by : Shri Ram Dhan Meena, Sr. DR

Date of Hearing : 03.07.2023
Date of Pronouncement : 03.07.2023

O R D E R

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of learned Commissioner of Income-tax(Appeals)-1, Gurgaonvide appeal No.763/CIT(A)-1/GGN/2018-19,dated 18.02.2020 against the reassessment order passed under Section 147 r.w.s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the "Act"), dated 23.12.2018 for assessment year 2012-13, passed by ACIT, Circle-4(1), Gurgaon.

2. There is a delay of 347 days in filing the present appeal. Impugned order by learned Commissioner of Income-Tax(Appeals) is dated 18.02.2020 which is claimed to have been received on 18.02.2020. Assessee has filed the present appeal on 31.03.2021 along with a petition for condonation of delay, dated 12.07.2021. The said period for filing the present appeal falls during the pandemic of COVID-19 for which Hon'ble Supreme Court in the case of *suo moto*Writ Petition (C) No.3 of 2020 dated 10.01.2022 has excluded the period from 15.03.2020 to 28.02.2022 for the purpose of taking into account the limitation. Vide this order, a further period of 90 days has been granted for providing the limitation, from 01.03.2022. Accordingly, considering the said decision and fact of the case, aforesaid delay is condoned and the appeal is admitted for adjudication.

3. Grounds taken by the assessee are as under:

1. That on the facts and circumstances of the case and in law, the Asst. Commissioner of Income-tax, Circle-4(1), Gurgaon [briefly 'the Assessing Officer"] has erred in assuming jurisdiction under section 147 of the Income Tax Act, 1961 "the Act").

2. That on the facts and circumstances of the case and in law, the jurisdiction to reassess the income was bad in law, for proviso to section 147 of the Act was applicable in the present case, inasmuch as, the original assessment was made under

Section 143(3) and the notice under Section 148 of the Act was issued after the expiry of four years from the end of the assessment year and there was no failure on the part of the Appellant to disclose fully and truly all material facts necessary for the assessment.

3. That on the facts and circumstances of the case and in law, the learned Commissioner of Income-Tax(Appeals)-!, Gurgaon [briefly 'the CIT(A)"] has erred in upholding the assessment under Section 147 read with section 143(3) of the Act at the income of Rs.2,27,63,318/-. The Appellant denies its liability to be assessed at the long term capital gain of Rs.2,27,63,318/-.

4. That on the facts and circumstances of the case and in law, the CIT(A) has erred in holding that the Appellant was not entitled to exemption/deduction under Section 54 of the Act allegedly for the reason that the new asset (residential house) was purchased prior to one year from the sale of original asset and that the new asset was not "purchased" but was constructed".

5. That on the facts and circumstances of the case and in law, the authorities below have erred not appreciating that:

(i) the new asset was purchased on 19.1.2011, which was with-in one year from the sale of the original property that took place on 5.8.2011.

(ii) the Appellant did not book the new assets in any scheme floated by any builder, rather he purchased the new asset from Mrs. Lipi& Mr. Ratanjit Das, who endorsed their flat (new asset) in IVY group housing complex in favour of the Appellant with the permission of the Developer Company.

6. That on the facts and circumstances of the case and in law, the CIT(A) did not apply mind to the disputed issue inasmuch as though the issue involved related to the exemption/deduction under Section 54 of the Act, however, the CIT(A) has approached the issue from the point of view of deduction under Section 54F of the Act.

That on the facts and circumstances of the case and in law, the CIT(A) has erred in applying two different set principles in deciding the question by applying rule of consistency.

4. Facts of the case as submitted by the assessee in the briefsynopsis are reproduced as under:

"Factual Background:

Capital gain: During the relevant previous year, the Appellant earned capital gain of Rs.2.26.21.178/- on sale of residential House No.7 in DLF City, Phase-1, Gurgaon ("the original asset"). It was sold by the Appellant and his wife Mrs. Geetha Rama Sundar for Rs 4,00,05,000/- vide sale deed dated 5.8.2011 (page 7 to 14 of paper book)

Purchase of net asset: Vide conveyance deed dated 19.01.2011, the Appellant purchased another residential flat No.502, Garden Court D, Sector 28, Gurgaon ("the new property") having super area of 3819 sq.ft. (page 15 to 31 of paper book).

Ms. Lipi Das & Mr. Ratanjit Das were the original allottees of the new property. In terms of agreement dated 7.7.2010 between Ms. Lipi Das & Mr. Ratanjit Das and the Appellant, out of agreed sale consideration of Rs.2,60,00,000/-, Rs.2,44,34,630/- was to be paid to original allottees (paid on 7.7.2010 & 24.7.2010 - page 33-36 r/w 37) and Rs.15,65,369/- was to be paid to M/s. Green Max Estate Pvt. Ltd ("the developer" - paid on 24.7.2010).

Possession of new property. The possession was handed over on 16.1.2011 (page 32).

7.7.2010	Agreement to purchase new property was entered into with original allottees.
7.7.2010 & 24.7.2010	Rs. 2,44,34,630/-(30,00,000+ 2,14,34,631) were paid to the original allottees
24.7.2010	A sum of Rs.15,65,369/- was paid to the developer.
31.7.2010	The original allottees endorsed the new property to the Appellant (page 45).
2.12.2010	The developer offered the possession of the new property to the Appellant.
16.1.2011	The possession was handed over to the Appellant.
Thus, new property was purchased within one year of sale of original asset i.e. 5.8.2011	

Return of income-Return for AY 2012-13 was filed on 28.09.2012, declaring income of Rs1,65,43,230/- (page 2 to 6 of paper book). In computing the income, deduction of Rs 2,2763,318/- was claimed u/s 54, for the Appellant has purchased new property within a period of 'one year prior to the transfer of the original asset.

Assessment order- Assessment u/s 143(3) was made vide order dated 163.2015, whereby, deduction claimed u/s 54 was allowed with the following observations:

"3. Apart from above incomes, there were long term capital gains of Rs.2.27,63,318/- from sale of residential house property owned by him. This property located at Gurgaon was purchased for Rs.84,75,000 in FY 2000-01. The indexed cost of acquisition is Rs.1,63,86,392/- and the amount of brokerage paid was Rs.855290/-. The resultant LTCG is Rs.2,27,63,318 He claimed exemption u/s 54 of IT Act, 1961 since he purchased another residential house property in the previous year 2010-11 for Rs.2,70,17,697/-

4. In support of the transactions relevant for exemption u/s 54, assessee submitted the copy of title deeds of both the properties along with copy of bank statements highlighting the transactions related to sale and purchase of property purchased and sold"

Notice as 154-Notice u/s 154 dated 16.02.2017 seeking to withdraw deduction u/s 54 was issued for the reason that there was mistake in granting deduction because the new property was purchased on 24.7.2010 ie before one year of transfer of the original asset, which was transferred on 58.2011 (page 48 & 49 of paper book). Date of purchase of new property was taken as on 24.7.2010 on the basis of payment.

Response to notice u/s 154: The Appellant vide letter dated 01.03.2017 submitted that deduction u/s 54 was correctly claimed, inasmuch as, the new property was purchased on 19.1.2011 Le the date of conveyance deed. Since the original asset was transferred on 5.8.2011, therefore, the new property was purchased with-in one year of transfer of original asset (page 50 of paper book)

Notice /s 148- Notice u/s 148 was issued on 27.9.2017 Le after the expiry of four years from the end of assessment year 2012-13 (page 51 of paper book).

Reasons to believe - The assessment was reopened for the reason that "the assesser claimed and was allowed deduction of Rs.2,27,63.318/- u/s 54 of the Act for making investment of Rs.2,70,17,697/- in new residential house in 24.7.2010 i.e. prior to the period of one year before the date of transfer of original asset. Since the assessee had utilized the funds in residential

house much before the period of one year from the date of transfer of original asset, assessee was not entitled for deduction of Rs.2,70,17,697/- u/s 54 of the Act, 1961." (page 52)"

5. In respect of the jurisdictional issue of reassessment proceedings under Section 147 of the Act, learned counsel for the assessee has made multi-fold propositions which we will deal seriatim, and the same are noted as under:

i) During pendency of proceedings under Section 154, reassessment proceedings cannot be initiated;
ii) Alleged escapement of income was not on account of omission or failure on the part of the assessee to disclose fully and truly all the material facts necessary for assessment;
iii) Jurisdiction under Section 147 was assumed on the basis of objection of audit party.

6. On the aforesaid first proposition, learned counsel for the assessee referred to notice dated 16.02.2017 issued under Section 154 by the learned Assessing Officer to point out the nature of mistake proposed to be rectified. The said notice is placed at page 48 of the paper book. Nature of mistake proposed to be rectified as stated in the said notice is reproduced as under:

"Section 54 provides that Long Term Capital Gain arise from sale of residential house is exempted subject to

utilization of Long Term Capital Gain for acquiring new residential house. Assessee sold residential house on 05.08.2011 and received sales consideration 4000500/- against which long term capital gain arise 22763318/- after reducing indexing cost of 16386392/-. Deduction u/s. 54 allowed for whole capital gain as assessee made investment of 27017697/- in purchase of unit no. 502 in Garden Court-D, Sector 28, Gurgaon. Entire payment made between 07.07.2010 to 24.07.2010.

As per condition of section 54, ready built house can be purchased before one year or within two years from date of transfer of original assets. In this case, original asset was transferred on 05.08.2011. Where ready build house purchased on 24.07.2010 which was purchased beyond the period of one year (to be purchased from 06.08.2010). Omission had resulted in incorrect computation of Long Term Capital Gain of 22763318/- involving tax effect 6377370/- including interest of 1688127/- u/s. 234B for 36 months."

6.1 In response to the above notice, assessee submitted his reply vide submission dated 01.03.2017 placed at page 50 of the paper book. After this submission, there is nothing on record to establish that the proceeding initiated by issuing notice under Section 154 had been concluded by passing appropriate order under the said section or have been dropped/vacated. However, subsequently, a notice under Section 148 was issued on 27.09.2017. In this reference, learned counsel also pointed out to the audit memo and the annotated report thereto in which reference is made to the notice issued under Section 154 by mentioning it as a

clarificatory letter. In response to the said clarificatory letter, reply of the assessee is reproduced in the annotated report, the contents of which are verbatim extracted from the reply of the assessee dated 01.03.2017 which was made consequent to notice under section 154 of the Act. Learned counsel thus, asserted strongly that impugned reassessment proceedings initiated during the pendency of proceedings under Section 154 and the passing of impugned reassessment order is bad in law and without jurisdiction. He placed reliance on the decision of Hon'ble Supreme Court in the case of S.M. Overseas Pvt. Ltd. Vs. CIT (2023) 450 ITR 1 (SC) wherein it has been held that during pendency of proceedings under Section 154, it was not permissible for revenue to initiate reassessment proceedings under Section 147/148. Relevant findings given by the Hon'ble Court are extracted below:

> *"4. Having heard learned counsel appearing on behalf of the respective parties and having gone through the impugned judgment and order passed by the High Court, we are of the opinion that the High Court has committed serious error in observing and holding that the notice under Section 154 was in valid as the same was beyond the period of limitation as prescribed/provided under Section 154(7) of the Act. It is required to be noted that the proceedings under Section 154 of the Act were not the subject matter before the High Court. Nothing was on record that, in fact, the notice under Section 154 of the Act was withdrawn on the ground that the same was beyond the period of limitation prescribed under Section 154(7) of the Act. In the absence of any specific order or withdrawal*

of the proceedings under Section 154 of the Act, the proceedings initiated under Section 154 of the Act can be said to have been pending.

5. In that view of the matter, during the pendency of the proceedings under Section 154 of the Act, it was not permissible on the part of the revenue to initiate the proceedings under Section 147/148 of the Act pending the proceedings under Section 154 of the Act. The High Court has erred in presuming and observing that the proceedings under Section 154 were invalid because the same were beyond the period of limitation.

6. In view of the above and for the reasons stated above, the impugned judgment and order passed by the High Court is unsustainable and the same deserves to be quashed and set aside. The impugned judgment and order passed by the High Court is hereby quashed and set aside. The order passed by the ITAT is hereby restored."

6.2 On the above submission, learned Sr. DR contended that learned Assessing Officer has considered the reply of the assessee against the notice issued under Section 154 before issuing notice under Section 148 for the impugned reassessment proceedings. On a specific query by the Bench as to the status of any order passed under Section 154, nothing positive was brought on record by the learned Sr. DR.Further, there was a specific direction by the Bench to furnish a factual report from the learned Assessing Officer on this aspect which has also not been complied with.

6.3We have heard the rival contentions and perused the material on record. We have also given our thoughtful consideration to the submissions made by both the parties. Considering the factual matrix and respectfully following the decision of the Hon'ble Supreme Court in the case of S.M. Overseas Pvt. Ltd. (supra), we are in agreement with the aforesaid first proposition made by the learned counsel.

7. On the second proposition, in respect of failure on the part of the assessee to disclose fully and truly all the material facts necessary for assessment, learned counsel submitted that the reasons recorded do not refer to which material fact was not disclosed. Thus, the pre-condition of proviso to section 147 was not met and, therefore, the jurisdiction is invalidly assumed for issuing notice under Section 148 of the Act. On this aspect, learned counsel placed reliance on the decision of jurisdictional High Court of Delhi in the case of Global Signal Cables (I) Pvt. Ltd. Vs. DCIT[2014] 68 ITR 609 (Del) wherein it was observed that reasons must specifically indicate as to which material fact was not disclosed by the petitioner in the course of its original assessment. He also placed reliance on the decision of Atma Ram Properties Ltd. Vs. DCIT[2012] 343

ITR 141 (Del) and Hindustan Lever Ltd. Vs. ACIT[2004] 268 ITR 332 (Bom).

7.1 We note that the basis of notice under Section 154 and the proceedings under Section 147 is the details of payments to the original allottee and the developer company which was furnished during the original assessment proceeding. In this respect, learned counsel has placed on record certified true copies of order sheet entries of assessment made under Section 143(3) along with typed version of the same. Ongoing through the order sheet entries, it has been evidently demonstrated by the learned Counsel that all the material facts and details were furnished by the assessee during the original assessment proceeding which were considered by the learned Assessing Officer in completing the said assessment. Also, on perusal of the reasons to believe recorded by the learned Assessing Officer, it is noted that there is no reference to any specific material which was not disclosed by the assessee. Considering the facts on record and the judicial precedents referred by the learned counsel as noted above, we do find force in the submissions made by the learned counsel to hold that there

was no failure on the part of the assessee to disclose fully and truly all the material facts necessary for assessment.

8. On the third proposition that jurisdiction under Section 147 was assumed on the basis of objection of audit party, learned counsel for the assessee referred to the communication made by the learned Assessing Officer to the Sr. Audit Officer, Office of the Principal Director of Audit (Central), Sector 17, Chandigarh, dated 27.09.2017 whereby an annotated report was submitted for further action in compliance to the audit memo no. Audit That/Waiting/2016-17/226-228 dated 24.01.2017. From the annotated report, learned counsel referred to the gist of the objections raised by the Sr. Audit Officer and the reply of the learned Assessing Officer in response to the objection.The same is verbatim contained in the reasons to believe recorded by the learned Assessing Officer for the purpose of initiating the proceedings under Section 148 r.w.s. 147 of the Act. Based on these materials, learned counsel asserted that assessment cannot be reopened on the basis of audit party objection. To buttress this proposition, learned counsel placed reliance on several decisions of the Hon'ble jurisdictional High Court of Delhi and

others other Hon'ble High Courts, including Xerox Modi Corps Ltd. Vs. DCIT[2013] 350 ITR 308 (Del) and Sun Pharmaceutical Ind. Ltd. Vs. DCIT[2016] 381 ITR 387.

8.1 We have perused the material referred by the learned counsel and also considered the judicial precedents cited before us and are convinced on the proposition so made. Resorting to reassessment proceedings at the behest of audit party objection tantamount to borrowed satisfaction on the part of the learned Assessing Officer which is not permissible under the Act.

9. Having discussed and dealt with the aforesaid three propositions on the jurisdictional issue in the above paragraphs, we convincingly allow ground nos. 1 and 2 raised by the assessee to hold that jurisdiction to reassess the income was not validly assumed by the learned Assessing Officer resulting in quashing of the impugned reassessment order.

10. Even though the jurisdictional issue has been held to be in favour of the assessee in terms of our above observations and findings, we find it proper to deal with the merits of the case also, raised by the assessee vide ground nos. 3 to 6 on the claim of deduction made under Section 54 of the Act.

10.1 Important facts to deal with the merits of the case are in respect of chronology of events to establish when the possession of the new property was taken by the assessee. In this respect, the same is tabulated as under:

7.7.2010	Agreement to purchase new property was entered into with original allottees.
7.7.2010 & 24.7.2010	Rs. 2,44,34,630/-(30,00,000+ 2,14,34,631) were paid to the original allottees.
24.7.2010	A sum of Rs.15,65,369/- was paid to the developer.
31.7.2010	The original allottees endorsed the new property to the Appellant (page 45).
2.12.2010	The developer offered the possession of the new property to the Appellant.
16.1.2011	The possession was handed over to the Appellant.
Thus, new property was purchased within one year of sale of original asset i.e. 5.8.2011	

10.2 Admittedly, it is a fact that possession was handed over to the assessee on 16.01.2011. Assessee had sold his original asset on 05.08.2011. Thus, the new property was purchased within one year of the sale of original asset which fulfils the requirement of sec. 54 of the Act. Learned counsel for the assessee made a reference to the decision of Co-ordinate Bench of ITAT, Mumbai in the case of Bastimal K. Jain vs. ITO [2016] 76 taxmann.com 368 (Mum) to submit that deduction under Section 54 was rightly allowed because for purchase of new property, what is relevant is “handing over of possession” and not “payment of consideration”. Learned counsel had also

pointed out that learned Assessing Officer had denied the deduction under Section 54 for the reason that new property was not purchased but was constructed and that construction within one year prior to the sale of original asset is not eligible for deduction under Section 54 of the Act. In this respect, the correct fact in the present case is that assessee had purchased a new property from the original allottee i.e. Miss Lipi Das and Mr. Ratanjit Das vide agreement dated 07.07.2010 and the possession was handed over on 16.01.2011. Therefore, purchase of new property was within one year of transfer of original asset. Conveyance Deed was executed on 19.01.2011.

10.3 From the above stated factual matrix and considering the decision of Co-ordinate Bench of ITAT, Mumbai in Bastimal K. Jain (supra), claim of the assessee under Section 54 is allowed. Accordingly, ground nos. 3 to 6 in this respect are allowed.

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

Order pronounced in the open court on 07 .07.2023.

Sd/- (SAKTIJIT DEY)	**Sd/- (GIRISH AGRAWAL)**
VICE-PRESIDENT	**ACCOUNTANT MEMBER**

Dated: 07 July, 2023
Mohan Lal

Copy forwarded to:

1. Applicant
2. Respondent
3. CIT
4. CIT(A)
5. DR Asst. Registrar, ITAT, New Delhi