

आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत
IN THE INCOME TAX APPELLATE TRIBUNAL, “SMC” BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER

आ.अ.सं./ITA No.416/SRT/2023 (AY 2011-12)

(Hearing in Virtual Court)

Shri Dhaval Rajkumar Jain Plot No.12, “Mahvir” Airport Road, Nani Daman, Daman- 396210 PAN No: AEDPJ 9192 B	Vs	Income Tax Officer, Ward-Daman, Hotel Diwanji Building, Devkanand, Daman- 396210
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent

निर्धारिती की ओर से /Assessee by	Shri Rajesh Upadhyay, AR
राजस्व की ओर से /Revenue by	Shri Vinod Kumar, Sr-DR
अपील पंजीकरण/Appeal instituted on	16.06.2023
सुनवाई की तारीख/Date of hearing	14.08.2023
उद्घोषणा की तारीख/Date of pronouncement	14.08.2023

Order under section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by assessee is directed against the order of National Faceless Appeal Centre, Delhi [for short to as “Ld. NFAC/Ld.CIT(A)”] dated 24.05.2023 for assessment year 2011-12, which in turn arises from the addition made by the Income Tax Officer, Ward-Daman /Assessing Officer in assessment order passed under section 144 r.w.s 147 of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) dated 30.11.2018.

The assessee has raised the following ground of appeal:-

“1. Ld. CIT[A], NFAC, DELHI has erred in erred in law and on facts to upheld A.O’s addition of Rs.10,65,003/- u/s 69A being appellant’s investment in plot no.21 and 22 of survey no 261/1 located at Keshar Industrial Estate, Village-Bhimpor, Daman

ignoring the fact that the said plots were purchased in A.Y 2009-10 and entire investment is disclosed in books of account.

2. Ld. CIT[A], NFAC, DELHI has erred in law and on facts to uphold A.O's addition of Rs.1,04,997/- being 1/7th share in STCG on sale of plot no.21 and 22 at Keshar Industrial Estate, Village Bhimpor, Daman."

2. Brief facts of the case are that case of assessee was re-opened under section 147 for assessment year 2011-12. The case was reopened on the basis of information that assessee has sold immovable property during the financial year 2010-11 and assessee has not shown capital gains in his regular return of income filed on 31.03.2012. The assessee has filed return of income declaring income of Rs.3,62,260/-. The Assessing Officer on the basis of information recorded the reasons for re-opening. Notice under section 148 dated 27.03.2018 was issued to the assessee. The Assessing Officer recorded that assessee has not filed returned of income in response to notice issued under section 148, despite several reminders. The Assessing Officer recorded that, he left no option but except to make assessment order under section 144 of the Act. The Assessing Officer while passing assessment order under section 144 r.w.s 147 made various additions including addition on account of unexplained investment in property of Rs.10,65,003/- by taking view that assessee has purchased property along with six other co-owners but no share of investment is described in the sale

deed. Accordingly, investment in the property was taken equal and the share of investment in the share of assessee was calculated at Rs.10,65,003/-. On appeal before Ld. CIT(A) the assessee challenged all the additions including addition of unexplained investment as well as share of assessee, including in taxing Short Term Capital Gains (STCG) on sale of impugned land. The assessee also filed various submission and documentary evidence and made prayer to admit additional evidence under Rule 46A of the Income Tax Rules, 1962, on taking plea that the Assessing Officer passed assessment order under section 144 of the Act. The assessee also stated that he has no occasion to file such evidence in assessment proceedings completed under section 144. And that such evidence are essentials in order to decide various issues. The assessee on merit of addition of unexplained investment submitted that he has filed copy of investment account and copy of passbook. The assessee also filed copy of advertisement issued by Maharashtra State Financial Corporation ("MSFC" for short) about auction sale of land, which was purchased by assessee along with other six co-owners. The assessee stated that he owned only 10% of share in the said land, purchased in assessment year 2010-11. The assessee has also furnished copy of audited balance-sheet showing that he has disclosed investment about the plots / land

in his books of account. The assessee also prayed for deleting such addition on taking assessee's share at 1/7th of total land. The assessee submitted that his share is only 10% and assessee made payment of his share on 05.11.2008 and possession was also handed over in the month of November, 2008 and the action should be considered as Long Term Capital Gains instead of STCG. The assessee also prayed for indexation benefit.

3. The Ld. CIT(A) after considering the submission of assessee held that notice issued under section 148 was served upon assessee and returned of income was not filed by assessee thereafter assessment was completed under section 144 of the Act. The assessee purchased immovable property during the year under consideration and transaction was registered before Sub-Registrar, Daman on 24.04.2010 and total sale consideration of Rs.70.00 lakhs, stamp duty of Rs.4,20,000/-, registration charges of Rs. 35,025/- was incurred. Hence, total investment for purchasing said property is Rs.74,55,025/- and property was purchased by assessee with six other co-owners and no share about investment is mentioned in the sale deed. Accordingly, total shares were treated as "equal". On the above observation, the addition of unexplained investment was upheld as it is. However, the other additions made by Assessing Officer was deleted by Ld. CIT(A). However, he has not expressed any

thing in his finding whether additional evidence was admitted or any whether remand report was called from Assessing Officer. Further aggrieved, assessee has filed present appeal before Tribunal.

4. I have considered the submission of Ld. Authorized Representative (Ld. AR) for the assessee and Ld. Senior Departmental-Representative (Ld. Sr-DR) for the Revenue and the orders of lower authorities carefully. The Ld. AR for the assessee submits that assessee is an individual and residing in Daman. Besides running three proprietary concerns, he is doing other activities. In the month of August, 2008, Maharashtra State Financial Corporation (MSFC) issued publication for sale by Auction of industrial units / plots, possession, which was taken under section 29 of State Financial Corporation Act, 1951, total area of land was 1400 square meters. A copy of publication of newspaper is filed at page 23 of paper book. The assessee along with other six co-owner including Shir Prakash M. Lunawat (HUF) acquired / purchased such land. The assessee along with other six co-owner made representation to MSFC that they have made the payment of Rs.70.00 lakh for against the purchase cost of plot No.21 & 22 at Survey No.261/1,(21) 61/1(22) Kesar Industrial Estate, Bhimpore. The assessee alongwith other co-owners also informed the

shareholding pattern of all purchasers. The proposal of assessee and their other co-owners were accepted of MSFC. The assessee made payment through demand draft which was drawn on Oriental Bank of Commerce on 05.11.2028 for a consideration of Rs.7,01,966/- on account of consideration of his share in respect of said plots. The possession of said plots were handed over on 11.11.2008. The assessee has shown investment in his audited books of account in financial year 2009-10. The MSFC executed sale deed in favour of assessee and other six co-owners, however, by due to inadvertence, the ratio of share of all the owners are not fully explained in the sale deed. The Ld. AR for the assessee submits that fact remain that same share of assessee is only 10%, and all the details of history about auction sale is mentioned in the sale deed dated 24.04.2010. The sale deed also contains the reference that possession of the property was handed over to the purchaser on 11.11.2008. The Ld. AR for the assessee submits that the said land was sold by assessee along with other six co-owners to Suresh Ranchhod Tandel and Naresh Ranchod Tandel in the current assessment year and on sale of plot / land the assessee and other six co-owner earned a profit of Rs.4,62,502/-only and as per shareholding @ 10%, the assessee earned only Rs.46,250/-, which has correctly shown in the working of profit sharing at

page 65 of paper book. Such share profit sharing was furnished by other co-owners, namely, Suresh Tandel, Naresh Tandel, Smt. Puspa P Lunawal, P.M. Lunawat (HUF), Shri R. Merchant, Shri Milined R Jain to their respective Assessing Officer on 27.11.2013, in response to query issued by their Assessing Officer vide notice dated 15.11.2023, as the cases of all other co-owners were also reopened by department. On furnishing such details, their case was closed.

5. The Ld. AR for the assessee submits that Ld. CIT(A) though on considering the additional evidence deleted other addition, however, on the main addition of unexplained investment, has not considered the submissions as well as evidence produced. The Ld. CIT(A) simply uphold the order of Assessing Officer by holding that the assessee along with other six co-owner purchased the property without considering the fact that the assessee owned only 1/10th share and has paid 1/10th consideration of the land, which is clearly evident from his bank account (copy of which filed at page 21 of paper book). The Assessing Officer treated the gain as STCG instead of LTCG, in fact, capital gains are to be considered from the date of substantial / entire payment made in the month of November, 2008 and on taking possession on 11.11.2008 and not from the

date of registration of sale deed which was made only in the month of April, 2010.

6. On the other hand, Ld. Sr-DR for the Revenue supported the order of lower authorities and submits that as has not filed complete details in order to any return of income in response to notice issued under section 148. The Assessing Officer in absence of detailed complete assessment under section 144 and Ld. CIT(A) while passing appellate order has not considered such evidence. The assessee has not relied on such evidences, which is filed by assessee as additional evidence under Rule 46A. the ld Sr DR submits that the assessee cannot be allowed relief at this stage. In the alternative submission, the ld SR DR for the revenue submits that in case the Bench is of the view that the evidence filed by the assessee required consideration, the issue may be set aside/ restored back to the file of Assessing Officer for considering such evidence. On the shareholding of assessee, Ld. Sr-DR for the Revenue submits that neither any submission was made for explanation of such shareholding nor any evidence was filed, therefore lower authorities have no option but to expect to decide assessee's case on the basis of material available on record.
7. I have considered the submission of both the partis and perused the order of lower authorities carefully. I find that the Assessing

Officer made the addition of unexplained investment by taking view that assessee has not filed any detailed before lower authorities I find that before NFAC/Ld. CIT(A) assessee filed detailed written submission along with application for additional evidence under Rule 46A. The assessee also furnished various evidence including copy of notice of auction for sale of impugned plot. I find that assessee furnished acceptance of auction purchased by MSFC and copy of possession letter dated 11.11.2008. On perusal of such evidence, I find that assessee has paid Rs.7,01,966/- and total value of auction purchased was Rs.70.00 lakh as has been mentioned in the sale deed, thus, assessee has paid only 1/10th of the value of land, which is 1/10 share of the total sale consideration. The investment of assessee is duly reflected in his audited balance-sheet, copy of which is available on record. I find that before Ld. CIT(A) assessee in para-5 of his submission has clearly stated that his shareholding is 10% and he has incurred cost of Rs.7,72,750/- and such expenses are duly disclosed in his books of account of earlier year. All such fact was not considered by Ld. CIT(A) despite taking such facts on record. The NFAC/Ld. CIT(A) candidly ignored all the facts and upheld the action of Assessing Officer. I am of the considered view the order of Ld. CIT(A) is not justified in not considering the material evidence. Further the ld

CIT(A) has not given express finding that additional evidence is not being considered or was considered. In my considered view, evidence furnished by assessee was having direct relevance with issues in appeal before Ld. CIT(A). I further find that assessee has made specific prayer in application under Rule 46A that he has no option to file evidence as the order of Assessing Officer under section 144.

8. On appreciation of evidence on record, I also find that assessee having 1/10th share in the impugned plot / land and the date of acquisition for the purpose of working of capital gains be considered as on 11.11.2008, which is the date when possession was obtained by assessee and other six co-owners and entire consideration was paid by them. Hence, I direct the Assessing Officer to delete the addition of Rs.10,65,003/- and to consider the share of assessee as 1/10th instead of 1/7th and workout taxable capital gains accordingly.
9. In the result, the appeal of the assessee is allowed.

Order pronounced in open court on 14th August,2023.

Sd/-
(PAWAN SINGH)
[न्यायिक सदस्य JUDICIAL MEMBER]

सूरत/Surat, Dated: 14/08/2023
Dkp. Out Sourcing Sr.P.S

Copy to:

1. Appellant-
2. Respondent-
3. CIT(A)-
4. CIT
5. DR
6. Guard File

// True Copy //

By order

Senior Private Secretary/ Private
Secretary/Assistant Registrar, ITAT,
Surat