

**IN THE INCOME TAX APPELLATE TRIBUNAL  
'A' BENCH : BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER AND  
SHRI BEENA PILLAI, JUDICIAL MEMBER**

ITA No.708/Bang/2023
Assessment year : 2016-17

Shri Pankaj Kapur, No.60, Kandan Complex, St. Johns Cross Road, Pukmini Colony, Bengaluru-560 042.  <b>PAN - AGFPK 7336 J</b>	Vs.	The Asst. Commissioner of Income-tax, Circle-1(2)(1), Bengaluru.
ASSEESSEE		RESPONDENT

Assessee by	:	Shri S Parthasarathi, Advocate
Revenue by	:	Shri Nischal B, Addl. CIT (DR)

Date of hearing	:	28.11.2023
Date of Pronouncement	:	30.11.2023

**ORDER**

***Per Beena Pillai, Judicial Member***

Present appeal arises out of order dated 02/08/2023 passed by NFAC, New Delhi for assessment year 2016-17.

*1. On the facts and in the circumstances of the case, the learned Commissioner of Income-tax (A) erred in upholding the assessment.*

*2. The learned Commissioner (A) had failed to consider the written submission and the case law cited while dismissing the appeal and the order of the Commissioner (A) accordingly is opposed to law and to the principles of natural justice and accordingly liable to be set aside.*

3.The learned Commissioner (A) ought to have appreciated that the cost of improvement claimed by the appellant while computing the capital gains was fully supported by evidence and accordingly the claim of deduction towards cost of improvement as inflated by the cost inflation index ought to have given deduction while computing the capital gains.

4.The learned Commissioner (A) erred in upholding the disallowance of exemption claimed under sec 54F of the Act by the appellant.

5.The learned Commissioner (A) erred in not considering the proof of investment made by the appellant for considering the deduction under sc 54F of the Act.

6.The learned Commissioner (A) ought to have appreciated that though the appellant claimed the exemption under sec 54(l) in the return of income, subsequently the claim was corrected and rightful deduction under sec 54F was claimed in the course of assessment proceedings and accordingly the deduction as claimed ought to have been allowed.

7.The learned Commissioner (A) ought to have appreciated that even in the return of income the claim for exemption has already been made and it was only the section under which the claim is required to be allowed has been modified in the course of assessment proceedings and there was no violation with regard to the claim made to deny the benefit of exemption as claimed.

8.The learned Commissioner (A) ought to have appreciated the principle laid down by the Hon'ble Supreme Court in the case of Goetze (India) Ltd., vs. CIT reported in 284 ITR 323 has no application for the case of the appellant.

9.The learned Commissioner (A) ought to have appreciated that the claim of deduction has been made in the return as filed, the same is required to be entertained even when the deduction claimed through an alternative provision in the course of assessment proceedings.

10.The learned Commissioner (A) ought to have appreciated that it was not a case of no claim for deduction in the return of income to apply the principles laid down by the Hon'ble Supreme Court in the case of Goetze (India) Ltd., vs. CIT reported in 284 ITR 323.

11. Even otherwise the learned Commissioner (A) ought to have appreciated that the judgment in the case of Goetze

*has no application in the appellate proceedings and the Commissioner (A) was entitled to consider the claim of the appellant when the material evidence is available before him.*

*12.The learned Commissioner (A) ought to have appreciated that the claim of deduction is on legal principle and can be raised for first time before the Commissioner (A) for which even there is categorical approval in the judgment of the Supreme Court in Goetze's case.*

*13.The learned Commissioner (A) grossly erred in not considering the various case law supporting the claim of the appellant as cited before him while denying the benefit under section 54F as claimed by the appellant.*

*14.The learned Commissioner (A) ought to have appreciated the claim of deduction under section 54F as made by the appellant has been fully supported by evidence which has been placed before him and accordingly he ought to have directed the assessing authority to allow the deduction under sec 54F as claim by the appellant.*

*15.Without prejudice the disallowances are excessive, arbitrary and unreasonable and liable to be deleted in full.*

*16.The learned CIT(A) erred in confirming the interest charged under sec 234A and 234B and 234C of the Act.*

*234A = Rs.382120, 234B = Rs.1240426, 234C = Rs.18796/-*

*17.For these and other grounds that may be urged at the time of hearing of the appeal the appellant prays that the appeal may be allowed. Total tax effect – Rs.43,74,390/-”*

2. The brief facts of the case are that the assessee filed its return of Income on 21.07.2017 declaring total income of Rs. 1,30,69,910/-. The return was processed u/s 143(1) of the Act. The case was selected under CASS for limited scrutiny. Notices u/s 143(2) and 142(1) along with detailed questionnaire were issued. After considering the responses filed by the assessee, the Ld AO went ahead to pass the Assessment Order u/s 143(3) of the Act and made the disallowances mentioned below:

A. Disallowance of Rs. 5,81,318/-

3. The Assessee had sold a property, Site No. 221, Koramangala , S.T. Bed, Bangalore vide sale deed executed on 19.08.2016 for a

consideration of Rs. 3,24,00,000/-. The Assessee had acquired the said property vide gift deed executed in his name on 22.05.2014 by the donor Mrs. Sushma Kapur who is the mother of the Assessee. The Assessee, while computing the long term capital gain arising from the sale of the said capital asset had claimed for improvement charges which are computed at indexed cost at Rs.5,81,318/-. The Ld. AO disallowed the cost of improvement claiming that the assessee had not provided any substantial material evidence for incurring the expenses. The Assessee submits that all the evidences , pertaining to the expenses incurred attached herewith as "ANNEXURE B" for your perusal. Further, the assessee submits that all the evidences against the expenses incurred towards improvement may kindly be considered. All the bills against the expenses incurred are attached & a break up of such expenses are provided in page 77 of the paper book.

Disallowance of Rs. 40,00,000/-

4. Further, to the above disallowance, the assessee submits that he had claimed deduction under section 54 for the above mentioned property sold. The assessee had claimed deduction u/s 54 of the income tax act to have purchased a residential flat for Rs.1,40,00,000/-. In support of the said claim, the assessee furnished a copy of the allotment letter of flat in Project Elegant Ozone Promenade from Elegant properties on payment of Rs.1,00,00,000/- vide cheque dated 27.08.2015. The assessee also furnished a copy of the agreement sent to sale executed on 18.11.2017 between the assessee and the seller. Further, the seller, vide his letter dated 20.11.2017 stated that the will have to pay GST and registration charges of Rs. 30,00,000/- (approximately) as per GST rates, however since the construction was not complete the

assessee did not incur such charges and the same was agreed upon by the assessee and thus a disallowance to the extent of Rs. 40,00,000/- was made by the AO.

C Disallowance of Rs.1,00,00,000/-

5. The Ld. AO, vide his assessment order dated 27.12.2018 states that Subject to the provisions of sub-section (2). Where in the case of an Assessee being an individual or a Hindu Undivided Family, the capital gain arises from the transfer of a long-term capital asset, being buildings or lands appurtenant thereto, and being a residential house, the income of which is chargeable under the head "Income from house property" (hereafter in this section referred to as the original asset), and the assessee has within a period of one year before or two years after the date on which the transfer took place purchased, or has within a period of three years after that date on which the transfer took place purchased, or has within a period of three years after that date constructed, residential house in India, then, instead of the capital gain being charged 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..."

6. Therefore for eligibility for deduction under section 54 of the Act, one of the primary and necessary conditions is that the capital asset sold should be a residential house. However, in the case of the assessee this primary condition is itself not fulfilled. The Capital asset sold by the assessee on which long term capital gain has arisen to the assessee is not a residential house but a vacant site. Therefore, the entire claim of deduction of assessee under section 54 of " Act is not allowable. In view of the same, a show cause

notice was issued to the assessee on why such claim under section 54 of the I.T Act of the assessee should not be disallowed.

In response to the show cause notice issued, the assessee in his reply dated 13.12.2018 has agreed he had in fact made a wrong claim in his ITR and has requested to consider his claim u/s 54F of the IT Act. The assessee had requested to allow a proportionate claim of Rs.95,68,335 u/s 54F of the IT act for the amount of Rs.1,00,00,000 incurred by the assessee in booking the flat.

7. The Ld.AO proceeded to observe that the referenced cases made by the assessee were not acceptable as none of the facts of the cases are comparable with the assessee's own case. Moreover, there is no provision under the Income Tax Act wherein an assessee can make an amendment in the return of income by making an application at the assessment stage without revising the return.

Reliance was placed on the Apex Court's judgment in Goetze (India) Ltd. vs CIT, (2006) 204 CTR SC 182, 2006 284 ITR 323 SC, wherein the Supreme Court ruled that the assessing officer has no power to entertain a claim for deduction otherwise than an by the assessee's claim by filing a revised return.

8. Based on the above observations made by the AO, he went ahead to make a disallowance for claiming exemption under an incorrect section of the Act.

9. Further to the disallowance made by the AO, the assessee wishes to submit that the he relies on various judgments mentioned below:

- a. Kamadenu Builders and Developers (ITAT Mumbai)
- b. Thermal Power Corporation Ltd (229 ITR 383)
- c. Jai Kumar Gupta(HUF) (ITAT Mumbai)
- d. Emerson Network Power India (P) Ltd (ITAT Mumbai)

10. In the judgments stated above, it clearly mentions that "Merely because the , by ignorance of law or mistake has claimed deduction u/s 54F of section 54 of the Act, such ignorance of law/ mistake on the part of the assessee cannot be utilized to its disadvantage by the assessing officer, the duty of the assessing officer is to correctly compute the real income of the assessee in accordance with the statutory provisions. While the assessing officer is empowered to disallow any deduction claimed by the assessee if it is not in accordance with the provision of the Act, in the same manner, he is duty bound to allow deduction to the assessee if the assessee is eligible for such deduction under the provisions of the Act."

11. The assessee further submits that, in the case of "Emerson Network Power India(P) Ltd., (ITAT Mumbai) it clearly mentions that "any claim made at the time of assessment but not made in the original return nor made by way of valid revised return cannot be denied, the AO is obliged to give due relief to the assessee or entertain its claim if admissible as per law even though the assessee had not filed revised returns. Also, it was further held by the Hon'ble ITAT that the legitimate claim of the assessee should not be rejected on technical grounds" . The Hon'ble ITAT through its order made an observation stating that the legal claim even if not made in the original return or even in the revised return but made by the assessee before the AO completing the assessment should be allowed

12. Needless to say that proper opportunity of being heard must be granted to the assessee.

**Accordingly, the appeal filed by the assessee is sent back to the file of CIT(A) for *denovo* consideration.**

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

Order pronounced in court on 30<sup>th</sup> day of November, 2023

Sd/-

**(CHANDRA POOJARI)**  
Accountant Member

Sd/-

**(BEENA PILLAI)**  
Judicial Member

Bangalore,  
Dated, 30<sup>th</sup> November, 2023  
/ vms /

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore