

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. 208/Ind/2022
Assessment Year : 2009-10

Shri Ramkunwar Patidar, Village Salliya, Post Bawadia Kalan, Bhopal (Appellant/Assessee)	<u>बनाम/</u> Vs.	Income-tax Officer, 2(4), Bhopal (Respondent/Revenue)
PAN: BLXPP4909C		
Assessee by	Shri S.S.Solanki, CA & AR	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	15.01.2024	
Date of Pronouncement	22.02.2024	

आदेश / O R D E R

Per B.M. Biyani, A.M.:

Feeling aggrieved by appeal-order dated 28.06.2022 passed by learned Commissioner of Income-Tax (Appeals)-NFAC, Delhi ["CIT(A)"], which in turn arises out of assessment-order dated 29.11.2016 passed by learned ITO-2(4), Bhopal ["AO"] u/s 147 read with section 143(3) of Income-tax Act, 1961 ["the Act"] for Assessment-Year ["AY"] 2009-10, the assessee has filed this appeal on following grounds:

Original grounds raised in Form No. 36:

- 1. That in the facts and circumstances of the case the Ld. CIT(A) and Ld. AO has made addition of Rs. 30,46,354/- as income from capital gains in the hands of appellant which is erroneous and should be quashed.*

2. *That in the facts and circumstances of the case the Ld. CIT(A) and Ld. AO has considered sale consideration at Rs. 34,66,666/- based on market value of the property sold without making an further enquiry or investigation of the stamp duty value of the said land which is bad and unjust.*
3. *That in the facts and circumstances of the case the Ld. CIT(A) and Ld. AO did not bother to give the appellant a proper opportunity to provide documents in support of his claim of share in the property which is unjust and unwarranted.*
4. *That in the facts and circumstances of the case the Ld. AO during the assessment proceedings did not consider appellant's claim of mistakenly reporting low cost of acquisition in the return so filed and considered the low cost of acquisition so final cost of acquisition even after submission of the documents made by the appellant.*
5. *That in the facts and circumstances of the case the Ld. CIT(A) and Ld. AO rejected appellant's claim of exemption u/s 54F even after knowing the fact that the payment for purchase of property was made before the date of registry and also that the appellant has purchased the house within the period specified of 2 years by the Income-tax Act, 1961.*
6. *That in the facts and circumstances of the case the appellant has acted bona fide by investing capital gains amount in purchase of house within the period specified u/s 54F and also offered the rest amount as capital gain, exemption has been denied merely on the fact that the amount was not deposited in the CGAS which is bad in law and unjust.*
7. *The appellant craves leave to add, amend, alter vary and or delete all or any of above grounds.*

Additional grounds raised vide application dated 26.07.2023:

8. *That the Ld. CIT(A) erred in maintaining reopening done by the AO u/s 148 inspite of the fact that the assessee has replied the queries raised on the basis of AIR satisfactorily. It is settled law that case cannot be reopened for roving enquiries.*
9. *That the Ld. CIT(A) erred in confirming AO's action of making addition on the ground other than the ground mentioned in "reason to believe" in notice issued u/s 148.*
10. *That the Ld. CIT(A) erred in maintaining reopening made by the AO u/s 148 on the basis of borrowed satisfaction. The case so reopened being illegal and wrong the order, therefore, require to be quashed.*

2. The background facts leading to present appeal are such that the assessee-individual filed her original return of income on 31.03.2011 declaring total income of Rs. 1,86,150/- and agricultural income of Rs. 1,20,000/- which was assessed. In the return so filed, the assessee declared her 1/3rd share in taxable long-term capital gain at Rs. 1,86,107/- on sale of an agricultural land jointly owned by three persons i.e. assessee and other two co-owners. The said land was sold for a total consideration of Rs. 67,00,000/- vide registered sale-deed dated 27.12.2008, having market value of Rs. 1,04,00,000/-. Subsequently, the AO, on the basis of an information received from Annual Information Return (AIR) that the assessee had sold an immovable property for Rs, 1,04,00,000/-, recorded reasons on 22.03.2016 and issued a notice u/s 148 on 22.03.2016 to re-open the assessment of assessee. Ultimately, the AO completed assessment determining taxable capital gain at Rs. 32,32,461/- and thereby making an addition of Rs. 30,46,354/-, being the differential of capital gain Rs. 32,32,461/- determined by AO and the capital gain of Rs. 1,86,107/- already declared by assessee. The comparative figures of working made by assessee and made by AO are given below for a ready reference:

	As computed by assessee	As computed by AO
Assessee's 1/3 rd share in Sale Consideration of Rs. 1,04,00,000/-	32,00,000	34,66,666
Less: Indexed cost of acquisition	2,34,205	2,34,205
Less: Exemption u/s 54 on account of investment in new house	30,13,893	Nil
Taxable capital gain	1,86,107	32,32,461

Aggrieved, the assessee carried matter in first appeal but did not get any relief. Now, the assessee has come in next appeal before us.

3. Ld. AR for assessee drew our attention to the comparative figures of working of taxable gain made by assessee and AO, as noted above, and submitted that there are three-fold modifications made by AO:

- (i) The assessee has taken 1/3rd share in sale-consideration of Rs. 1,04,00,000/- at Rs. 32,00,000/- but the AO has taken the same at Rs. 34,66,666/-.
- (ii) The assessee took indexed cost of acquisition at Rs. 2,34,205/- but during re-assessment proceeding, the assessee furnished a revised cost at Rs. 5,19,738/- and requested the AO to allow the same. However, the AO turned down assessee's request.
- (iii) The assessee made investment of Rs. 27,79,688/- in new residential property and claimed exemption u/s 54F. However, the AO rejected assessee's claim for the reason that the property was purchased on 25.03.2010 which was after 31.07.2009 being the due date for filing of return u/s 139(1).

4. With regard to (i), Ld. AR for assessee himself made a clear assertion standing at the bar that the AO has computed exact 1/3rd of Rs. 1,04,00,000/- and accordingly taken the figure of Rs. 34,66,666/- as

assessee's share. Ld. AR asserted that the assessee has no grievance by this modification made by AO.

5. With regard to (ii), Ld. AR submitted that the assessee filed details of cost at Rs. 5,19,738/- and claimed before AO, hence the AO ought to have allowed assessee's claim. Immediately, it emerged during discussions that in view of decision by apex court in *CIT Vs. M/s Sun Engineering Works (P) Ltd. AIR 1993 (SC) 43*, an assessee cannot raise a new claim or even re-agitate a claim or seek review of a claim already concluded in original assessment. Therefore, the assessee claim of newer cost is rightly rejected by AO. For this reason, we are upholding the action of AO.

6. With regard to (iii), Ld. AR submitted that the assessee sold agricultural land on original asset on purchased new residential property on 27.12.2008 and purchased new property on 25.03.2010 which is within the time-limit of 2 years prescribed in section 54F(1). Further, it is also before 31.03.2010 i.e. the date for furnishing return u/s 139(4). Therefore, the new investment was very much eligible for exemption u/s 54F. To support this proposition, Ld. AR relied upon the decision of *Hon'ble Punjab & Harayana High Court in CIT Vs. Ms. Jagriti Aggarwal (2011) 339 ITR 610 (P&H)*, the relevant paragraphs are re-produced below:

"The assessee sold her house property for Rs. 45 lacs and claimed deduction under Section 54 of the Income Tax Act, 1961 (for short 'the Act'). The assessee was served with a notice under Section 142(1) of the Act, as to why the amount deducted be not added to her income as long term capital gain, as the assessee failed to deposit the amount in Capital Gain Account Scheme and also failed to purchase house property before the due date of filing the return of income. The assessee contested the claim of the Revenue and asserted that she is not liable to deposit the amount in Capital Gain Deposit Scheme and that the due date of filing the return of income tax is not as specified in Section 139(1) but as specified in Section 139(4) of the Act. The Assessing Officer declined the claim of the assessee and returned finding that the assessee has concealed her particulars of income and initiated proceedings for penalty as well.

The appeal against the said order was accepted by the Commissioner of Income Tax (Appeals). It was found that the appellant has purchased new residential property on 2.1.2007 and the due date as per Section 139(4) is 31.3.2007 and thus, the assessee has complied with the provisions of Section 54 of the Act. It was held that Section 139 includes Sub Section (4) as well. The said order of the Commissioner of Income Tax has been affirmed in appeal as well.

It may be noticed that the assessee sold her residential house on 13.1.2006 for a sum of Rs. 45 lacs and purchased another property jointly with Mr. D. P. Azad, her father-in-law on 2.1.2007 for a consideration of Rs. 95 lacs. The due date of filing of return as per Section 139(1) of the Act was 31.7.2006, but the assessee filed her return on 28.3.2007 and that extended due date of filing of return as per Section 139(4) is 31.3.2007.

Section 54 of the Act contemplates that the capital gain arises from the transfer of a long term capital asset, but if the assessee within a period of one year before or two years after the date on which the transfer took place purchases residential house, then instead of the capital gain, the income would be charged in terms of provisions of Sub Section (1) of Section 54. As per Sub-Section (2), if the amount of capital gains is not appropriated by the

assessee towards the purchase of new asset within one year before the date on which the transfer of the original asset took place, or which is not utilized by him for the purchase or construction of the new asset before the date of furnishing the return of income under Section 139, the amount shall be deposited by him before furnishing such return not later than due date applicable in the case of 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. Relevant Sub-Section (2) of Section 54 of the Act reads as under:

"(2) The amount of the capital gain which is not appropriated by the assessee towards the purchase of the new asset made within one year before the date on which the transfer of the original asset took place, or which is not utilized by him for the purchase or construction 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 utilized in accordance with, any scheme which the Central Government may, by notification in the Official Gazettee, 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 utilized by the assessee for the purchase or construction 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 or construction of the new asset within the period specified in Sub-Section (1), then,-

(i) the amount not so utilized shall be charged under Section 45 as the income of the previous year in which the period of three 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 with the scheme aforesaid."

The question which arises is; whether the return filed by the assessee before the expiry of the year ending with the Assessment Year is valid under Section 139(4) of the Act.

Learned counsel for the revenue has argued that the assessee was required to file return under Sub section (1) of Section 139 of the Act in terms of Sub section (2) of Section 54 of the Act. It is contended that Sub section (4) is not applicable in respect of the assessee so as to avoid payment of long terms capital gain.

On the other hand, learned counsel for the respondent relies upon a Division Bench judgment of Karnataka High Court reported as Fathima Bai vs. Income Tax Officer (2009) 32 DTR 243, where in somewhat similar circumstances, it has been held that time limit for deposit under Scheme or utilization can be made before the due date for filing of return under Section 139(4) of the Act. Learned counsel for the respondent also relies upon a Division Bench judgment of Gauhati High Court reported as Commissioner of Income Tax vs Rajesh Kumar Jalan (2006) 286 ITR

274. Having heard learned counsel for the parties, we are of the opinion that Sub-Section (4) of Section 139 of the Act is, in fact, a proviso to Sub-Section (1) of Section 139 of the Act. Section 139 of the Act fixes the different dates for filing the returns for different assesses. In the case of assessee as the respondent, it is 31st day of July of the Assessment Year in terms of clause (c) of the Explanation 2 to Sub-Section 1 of Section 139 of the Act, whereas Sub-Section (4) of Section 139 provides for extension in period of due date in certain circumstances. It reads as under:

"(4) Any person who has not furnished a return within the time allowed to him under Sub-Section (1), or within the time allowed under a notice issued under Sub-Section (1) of Section 142, may furnish the return for any previous year at any time before the expiry of one year from the

end of the relevant assessment year or before the completion of the assessment whichever is earlier;

Provided that where the return relates to a previous year relevant to the assessment year commencing on the 1st day of April 1988, or any earlier assessment year, the reference to one year aforesaid shall be construed as a reference to two years from the end of the relevant assessment year". A reading of the aforesaid Sub-Section would show that if a person has not furnished the return of the previous year within the time allowed under Sub-Section (1) i.e. before 31st day of July of the Assessment Year, the assessee can file return before the expiry of one year from the end of the relevant Assessment Year.

The sale of the asset having been taken place on 13.1.2006, falling in the previous year 2006-2007, the return could be filed before the end of relevant assessment year 2007-2008 i.e. 31.3.2007. Thus, Sub-Section (4) of Section 139 provides extended period of limitation as an exception to Sub-Section (1) of Section 139 of the Act. Sub-Section (4) is in relation to the time allowed to an assessee under Sub-Section (1) to file return. Therefore, such provision is not an independent provision, but relates to time contemplated under Sub-Section (1) of Section 139. Therefore, such Sub-Section (4) has to be read along with Sub-Section (1). Similar is the view taken by the Division Bench of Karnataka and Gauhati High Courts in Fatima Bai and Rajesh Kumar Jalan cases (supra) respectively.

In view of the above, we find that due date for furnishing the return of income as per Section 139(1) of the Act is subject to the extended period provided under Sub-Section (4) of Section 139 of the Act.

Consequently, the question of law is answered against the Revenue and in favour of the assessee. Thus, the present appeal is dismissed."

7. Ld. AR submitted that although the above decision of Hon'ble P&H High Court deals a case of section 54 but the provision of section 54F is at parity with section 54 so far the controversy involved is concerned. Further, the decision has also been followed by ITAT, Benches in following cases while deciding identical controversy in the matter of section 54F:

- (i) ITAT, Mumbai in Anil Kumar Omkar Singh Aurora Vs. ITO, ITA No. 4648/Mum/2013 order dated 06.11.2013
- (ii) ITAT, Chennai in Shri R.K.P. Elayarajan Vs. DCIT, ITA No. 106/Mds/2012 order dated 15.06.2012

Therefore, as per settled decisions, the benefit of exemption u/s 54F cannot be denied to assessee.

8. We find that the controversy involved in present case as to whether the assessee is entitled for exemption u/s 54F on the strength of investment made in new house after due date u/s 139(1) but within the time allowed for filing return u/s 139(4) is settled in favour of assessee by aforesaid

decisions. Therefore, respectfully following those decisions, we are of the view that in the present case, the assessee is entitled to exemption. We accordingly direct the AO to allow exemption to assessee.

9. Since we have already decided the grievances of assessee on merit as raised in Form No. 36 and given a legally permissible adequate relief to assessee, we are not going into additional grounds; those grounds are treated as infructuous at this stage.

10. Resultantly, this appeal is allowed.

Order pronounced in open court on 22.02.2024.

Sd/-
(VIJAY PAL RAO)
JUDICIAL MEMBER

sd/-
(B.M. BIYANI)
ACCOUNTANT MEMBER

Indore

दिनांक /Dated : 22.02.2024.

CPU/Sr. PS

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

By order

Assistant Registrar
Income Tax Appellate Tribunal
Indore Bench, Indore