

IN THE INCOME TAX APPELLATE TRIBUNAL “F” BENCH MUMBAI
BEFORE SHRI PAVAN KUMAR GADALE, JUDICIALMEMBER
AND
SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA No.517/MUM/2024
Assessment Year: 2010-11

Seema Heera M/s Y. K. Desai & Co., 510-513, Apeejay House, 130, Mumbai Samachar Marg, Near Lion Gate, Fort, Mumbai – 400023 (PAN: ACIPH0078D)	Vs.	Assistant Commissioner of Income Tax (OSD) (IT) - 2(2)(1), Mumbai
(Appellant)		(Respondent)

Present for:

Assessee : Shri Dharan Gandhi, Advocate
Revenue : Ms. Rajeshwari Menon, Sr. DR

Date of Hearing : 22.05.2024
Date of Pronouncement : 10.07.2024

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of Ld. CIT(A)-56, Mumbai vide order no. ITBA/APL/S/250/2023-24/1058549399(1), dated 07.12.2023, passed against the assessment order by Assistant Commissioner of Income Tax (OSD) (IT) - 2(2)(1), Mumbai, u/s.144 r.w.s. 147 of the Income-tax Act, 1961 (hereinafter referred to as the “Act”), dated 26.12.2017 for AY 2010-11.

2. Grounds taken by the assessee are reproduced as under:

1. *“The assessment order u/s 144 r.w.s 147 dated 26.12.2017 is bad in law and without jurisdiction.*
2. *The reassessment proceeding initiated by issuing notice u/s 148 of the Act is bad in law.*

3. *The Ld. CIT(A) erred in upholding the notice u/s 148 of the Act issued by the Ld. AO as no valid notice was served upon the appellant under section 148 of the Act and, hence the reassessment proceedings are null and void.*
4. *The Ld. CIT(A) erred in confirming the action of the Ld. AO in making addition of Rs. 2,00,00,000/- in respect of capital gains on sale of immovable property*
5. *The Ld. CIT(A) erred in not even allowing the deduction of indexed cost of acquisition while computing capital gains and in not treating the capital gains as long term capital gains.*
6. *The Ld. CIT(A) erred in not allowing deduction u/s 54 of the Act in respect of investment in new residential house property.*
7. *The Ld. AO erred in initiating notice of penalty u/s 274 read with section 271 and 271F of the Act dated 26.12.2017. The Appellant prays that the penalty proceedings u/s 274 read with section 271 of the Act be dropped.*
8. *The Ld. CIT (A) has erred upholding the action of the Ld. AO in the levying interest u/s 234A, 234B and 234C of the Act.”*

3. Brief facts of the case are that assessee is a non-resident. She did not file her return of income for the year under consideration. From the data available with the Department, Ld. Assessing Officer noted that assessee had transferred an immovable property being flat No. 202, 2nd floor, Vasundhara, Janki Kutir, Juhu Tara Road, Mumbai – 400 0494, for a consideration of ₹ 2,00,00,000/- on 29.03.2010. Case of the assessee was taken up for scrutiny assessment u/s. 147 by issuing notice u/s. 148 on 31.03.2017. Assessee neither filed her return in response to notice u/s. 148 nor did she comply with various notices issued by the Ld. Assessing Officer. Assessment order was passed ex parte by the Ld. Assessing Officer, who treated the entire receipt of ₹ 2,00,00,000/- as unexplained short-term capital gain and added it to the total income of the assessee. Aggrieved, assessee went in appeal before the Ld. CIT(A).

4. Before the Ld. CIT(A), assessee furnished all the details and documentary evidences in respect of sale of immovable property by her as well as in respect of new residential flat purchased by her, for claiming deduction u/s. 54 of the Act against long-term capital gain accrued on the sale of immovable property. These submissions were made in compliance with Rule 46A which were admitted and accepted by the Ld. CIT(A). In this respect a remand report was called from the Ld. Assessing Officer which was submitted by him on 10.02.2020. In the remand report, though the Ld. Assessing Officer had objected to admission of additional evidences, however, in para 9.1.5 of the remand report, Ld. Assessing Officer stated that *“as evident from the above, the assessee is satisfying all the conditions of Section 54 of the Act for claiming of exemption and therefore the assessee was entitled for claiming deduction under Section 54 of the Act in her return of income of Assessment Year 2010–11.”*

4.1. In conclusion, in the remand report, ld. Assessing Officer stated that since assessee had not filed her return of income, claim of assessee for deduction u/s. 54 of the Act is not allowable. For this reliance was placed on the decision of Hon'ble Supreme Court in the case of Goetze (India) Ltd vs. CIT [2006] 284 ITR 323 (SC).

5. CIT(A), after considering the submissions made assessee and since assessee did not file the return of income, held that her claim of deduction u/s. 54 amounting to ₹ 93,17,462/- is not an allowable. Aggrieved, assessee is in appeal before the Tribunal.

6. In respect of non-filing of return by the assessee, Ld. counsel submitted that assessee was of the view that there was no taxable long-term capital gains and hence it was not necessary to file the

return for the year under consideration. Further, it was submitted that assessee had made an application with the office of ITO(IT)-3(1) for issuance of certificate u/s. 197 of the Act which was issued on 17.03.2010 for 'Nil' TDS on the impugned sale transaction. It was submitted that by making this application, assessee had disclosed the impugned sale transaction of the immovable property and thus there was no intention to conceal any income on this account by the assessee.

6.1. For the non-compliance of statutory notices issued by the Ld. Assessing Officer, it was submitted that notices were not received by the assessee since the address with the Department was of Hong Kong, namely Flat D – 12, F Wing, On Court 24, Homantin Hill Road, Hammantin, Hong Kong. Assessee came to know for the first time that the re-assessment proceedings u/s. 147 r.w.s. 144 had been concluded from the information from various mutual fund AMCs about the initiation of recovery proceedings u/s. 226(3), dated 26.03.2018.

6.2. According to the Ld. Counsel, the sole basis of not allowing the claim of the assessee of the deduction u/s. 54 is non filing of return by the assessee. In this respect, Ld. counsel for the assessee referred to para 4 of the decision in Goetze (India) Ltd (supra) to submit that additional claim can be raised before the Appellate authorities. In paragraph 4, Hon'ble Supreme Court noted, "*However, we make it clear that the issue in this case is limited to the power of the assessing authority and does not impinge on the power of the Income Tax Appellate Tribunal u/s. 254 of the Income Tax Act, 1961.*" He, thus submitted that claim of deduction u/s. 54 of the Act ought to be allowed for the assessee, since Ld. Assessing Officer, himself has

accepted in the remand report that all the conditions of section 54 for claiming of deduction are satisfied.

7. Per contra, Ld. Sr. DR placed reliance on the orders of the authorities below and submitted that assessee is a non-filer of return, both the regular return as well as return in response to notice under Section 148 of the Act. Once return has not been filed by the assessee, there cannot be any claim of deduction u/s. 54 of the Act which can be allowed to the assessee at the appellate stage.

8. We have heard both the parties and noted that the facts stated in the orders of the authorities below are undisputed and uncontrolled. Even in the remand report furnished by the Ld. Assessing Officer at the direction of the Ld. CIT(A), the accepted facts in respect of sale of immovable property, long-term capital gain arrived thereon and claim of deduction u/s. 54 are elaborately captured. The same are reproduced for ease of reference.

“9.1 The assessee had purchased a residential house property i.e. Flat No. 202. 201 floor, Vasundhara, Janki Kutir, Juhu Tata Road, Mumbai 100 010 from Mr. Mein B Marwah vide deed of transfer dated 170106 107 for a consideration of Rs 52,00,000/- and registration charges of Rs 20,110/- and stamp duty of Rs 1,74,777 mentioned on the said deed. Accordingly, total cost of acquisition of this flat comes at Rs. 55,94,810/-

9.1.1 The assessee had sold out the above mentioned property to Mr. Minor V Pimple and Mrs Alpa K. Vora vide registered deed of sale dated 29.03.2010 for a consideration of Rs. 2,00,00,000/- and as per bank statement submitted by the assessee the cheque of the said amount was credited on 31.03.2010 in the joint bank account of the assessee and his husband Mr. Sameer Belani having account no. 0000005133702520 maintained with M/s DNP Paribas.

9.1.2 The assessee had purchased an immovable property being residential house (i.e. Flat No. 14, 8th floor, Nav Reshma Apartment CHS Ltd., Pali Hill. Bandra- West, Mumbai-400050) from Mr. Samir Narain Bhojwani vide registered deed of sale dated 10.05.2010 for a consideration of Rs. 10,00,00,000/- and registration charges of Rs. 30,900/- and stamp duty of Rs. 49,82,600/- was mentioned on the said deed. As per the copy of bank statements submitted, the assessee had made following payments for purchase of this new residential house property:

S. No.	BNP Paribas Bank Account No.	Name of the Account Holder/s	Date Payment	Amount in Rs.)
1	0900905133702520	Sameer Belani Seema Heera	05.04.2010	1,00,00,000/-
2	0900905133702520	Sameer Belani / Seema Heera	05.05.2010	1,00,00,000/-
3	0900905133702617	Sameer Belani Seema Heera TV Products(HK) Ltd.	05.05.2010	8,00,00,000/-
Total Amount of Purchase Consideration				10,00,00,000/-

9.1.3 It is also seen from various documents/details submitted by the assessee that the name of the assessee is also shown as Mrs. Kanchan Sameer Belani. In order to verify the same, details were called for from the assessee and as per copy of passport submitted by the assessee it is seen that the assessee's maiden name is Seema Heera and her name after marriage is Mrs. Kanchan Sameer Belani.

9.1.4 The assessee also submitted a copy of certificate u/s 197 of the Act issued on 17.03.2010 in the name of Mrs. Alpa Vora and Mr. Minar Pimple by the erstwhile ITO(IT)-3(1), Mumbai wherein the rate of TDS was given at Nil in respect of the sale of immovable property of the assessee (i.e. Flat No. 202, 2nd floor, Vasundhara, Janki Kutir, Juhu Tara Road, Mumbai-400 049). A copy of the same was also marked to the assessee with a direction that she is required to file her return of income for A.Y. 2010-11 on or before the due date. However, the assessee had not followed the direction mentioned in the said certificate as she had not filed her return of income for A.Y. 2010-11 on or before the due date as mentioned u/s 139(1) or even as per time limit allowed u/s 139(4) of the Act.

9.1.5 The assessee had submitted a statement of computation of long term capital gain for A.Y. 2010-11 wherein after taking indexed cost of acquisition, long term capital gain calculated at Rs. 93,17,462/- against which deduction u/s 54 of the Act had been claimed in respect of investment made in the new residential house as mentioned in para no. 9.1.2 above and resultant long term capital gain is shown at Nil. Now, coming to the provisions of section 54 of the Income Tax Act, 1961 which states that:

“54. 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 constructed, one residential house in India), then), instead of the capital gain being charged to 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, that is to say,

- i. if the amount of the capital gain [is greater than the cost of the residential house)] so purchased or constructed (hereafter in this

section referred to as the new asset)), the difference between the amount of the capital gain and the cost of the new asset shall be charged under section 45 as the income of the previous year, and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be nil, or
....”

On the basis of details available on record the following facts are emerges:

- (1) The assessee is an individual.
- (ii) The assessee had earned long term capital gain of Rs.93,17,462/- on sale of long term capital assets as the property which was sold had been held by the assessee for more than 03 years.
- (iii) The assessee had made investment of Rs.10,00,00,000/- during F.Y. 2010-11 for purchase of new residential house and the registration of new residential house property was made on 10.05.2010 which are falls within the stipulated time as available u/s 54 of the Act and it also before the due date of filing return of income for A.Y. 2010-11. The investment made by the assessee in purchase of new residential house property is greater than the amount of LTCG arise on sale of old
(iv) house property of the assessee.

As evident from the above, the assessee is satisfying all the conditions of section 54 of the Act for claiming of exemption and therefore the assessee was entitled for claiming deduction u/s 54 of the Act in her return of income of A.Y. 2010-11.

8.1 Working of long-term capital gain and deduction claimed under section 54 of the Act as given by the assessee is reproduced:

Particulars	Date	Amount	Amount
Sale Consideration	29-03-2010		2,00,00,000
Less: Cost of Acquisition			
Purchase Cost	18-06-1997	52,00,000	
Stamp Duty	13-06-1997	3,74,700	
Registration Charges	18-06-1997	20,110	
Total Purchase Cost		55,94,810	
Index Rate of F.Y. 2009-10		632	
Index Rate of F.Y. 1997-98		331	
Indexed Cost			1,06,82,538
Long Term Capital Gain			93,17,462
Less: Deduction u/s. 54			
Investment in Residential Flat	10-05-2010	10,00,00,000	
Stamp Duty	06-05-2010	49,82,600	
		10,49,82,600	
Restricted to Capital Gains			93,17,462
Taxable Long Term Capital Gains			-

9. We are in agreement with the submissions made by the Ld. counsel in reference to paragraph 4 of the decision of Hon'ble Supreme Court in the case of Goetze (India) Ltd (supra) as quoted above that it does not impinge on the power of the Appellate Authorities. In the present set of facts, it was established by the assessee before the First Appellate Authority that long term capital gain on the sale of immovable property was utilised for the purchase of another residential property within the permissible time and the consideration for the purchase of new house was much more than the amount of sale consideration received by the assessee on transfer of her immovable property on which capital gain had accrued.

9.1. Conditions specified for claiming deduction u/s. 54 against the long-term capital gain accruing on transfer of a residential house property has been stated to be satisfied by the Ld. Assessing Officer in his remand report. Admittedly, assessee had failed to claim the benefit in her return but made all the efforts by furnishing the required details with corroborative documentary evidences before the First Appellate Authority as well as before the Ld. Assessing Officer in the remand proceedings. These are admitted facts and the denial of the claim is only on technical grounds that assessee had not furnished return of income claiming such deduction. Substantively, when law confers benefit on the assessee under statute, it cannot be taken away by the authority on mere technicalities. In this regard, reference is made to Article 265 of the Constitution of India in terms of which it is a settled position of law that no tax can be levied / recovered without the authority of law.

9.2. Similar issue came up before the Hon'ble High Court of Jammu and Kashmir in the case of Sneh Lata Jain v. CIT [2004] Taxman 156 (J&K) wherein Hon'ble court held that assessee being entitled to exemption u/s. 54F on the evidence produced before the Revisional Authority, the Revisional Authority ought to have considered the matter instead of rejecting the petition on technical grounds. According to the Hon'ble Court assessee being not liable to tax, imposition of tax on her was violative of Article 265 of the Constitution of India. Thus, ld. Assessing Officer was directed to reassess the taxable income after considering the benefit under Section 54F. The relevant observations and finding of the Hon'ble Court in this regard is extracted below:

“Though the assessing authority was not aware of the purchase of the property by the petitioner and proceeded on the basis of the admitted facts disclosed in the return, however, the revisional authority could not be oblivious of its duty to accept the contention of the assessee when the facts were brought to its notice about the capital gain being not chargeable to tax under law. What to say of its duty to advise the assessee the revisional authority rejected the contention of the petitioner only on technical grounds. When the substantive law confers a benefit on the assessee under a statute, it cannot be taken away by the adjudicatory authority on mere technicalities. It is settled proposition of law that no tax can be levied or recovered without authority of law. Article 265 of the Constitution of India and s. 114 of the State Constitution imposes an embargo on imposition and collection of tax if the same is without authority of law. Admittedly, on the basis of facts disclosed before the revisional authorities and this Court, the petitioner is not liable to tax on the capital gain. Once it is found that the petitioner has no tax liability, the respondents cannot be permitted to levy the tax and collect the same in contravention to Art. 265 of the Constitution of India, which provides a constitutional safeguard on levy and collection of tax. It is true that this Court is not to act as Court of appeal while exercising the writ jurisdiction, but at the same time where the admitted facts disclosed non-exercise of jurisdiction by an adjudicatory authority and a citizen is subjected to tax not payable by him, interference by this Court is warranted. The respondent No. 2 is directed to reassess the taxable income of the petitioner, by taking into consideration the benefit available to her under s. 54F of the IT Act and pass appropriate order.”

9.3. Ld. Counsel also referred to Taxpayers' Charter dealt by section 119A of the Act. From the same, we note that there are two parts to it, first being commitment by the Income Tax Department and second being expectations from the Taxpayers. Clause 6 and clause 9 from

the commitment by the Income Tax Department are relevant to the present case which are as under:

Clause 6. Collect the correct amount of tax

The Department shall collect only the amount due as per the law.

Clause 9. Hold its authorities accountable

The Department shall hold its authorities accountable for their actions.

9.4. Similarly, clause 1 and clause 5 are relevant in the present case from the expectations from Taxpayers which are as under:

Clause 1. Be honest and compliant

Taxpayer is expected to honestly disclose full information and fulfil his compliance obligations.

Clause 5. Respond in time

Taxpayer is expected to make submissions as per tax law in timely manner.

9.5. Keeping the above two parts in juxtaposition, we note that the Department shall collect only the amount due as per the law and hold its authorities accountable for their actions whereas it is expected from the taxpayer to fulfil the compliance obligation and make submissions in timely manner.

10. Considering the facts on record as narrated above, observations and finding of the Ld. Assessing Officer in the remand report, judicial precedents referred and discussed above along with the relevant clauses of the Taxpayers' Charter, we direct the Ld. Assessing Officer

to recompute the taxable total income of the assessee by taking into consideration the benefit available to her under section 54 of the Act. Accordingly, grounds taken by the assessee on the merits of the case in ground No. 4, 5 and 6 are allowed. Since the appeal of the assessee is allowed on the merits of the case in terms of our observations and finding noted above, the legal issues raised by the assessee in ground No. 1, 2 and 3 need no separate adjudication.

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

Order is pronounced in the open court on 10 July, 2024

Sd/-
(Pavan Kumar Gadale)
Judicial Member

Sd/-
(Girish Agrawal)
Accountant Member

Dated: 10 July, 2024

MP, Sr.P.S.

Copy to :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. Guard File
5. CIT

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai