

**IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD “A” BENCH, AHMEDABAD**

**BEFORE SMT. ANNAPURNA GUPTA, ACCOUNTANT MEMBER AND
Ms. SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA No.20/Ahd/2020
Assessment Year: 2011-12**

Tanvi Sandeep Mathur, C/o. M.S. Chhajed & Co., “Kamal Shanti”, Beside Bank of Baroda, Nr. Sardar Patel Under Bridge, Naranpura, Ahmedabad – 380 014. [PAN – ANFPM 6538 D]	Vs.	The Deputy Commissioner of Income Tax, Circle – 7(1), Ahmedabad.
(Appellant)		(Respondent)
Assessee by	Shri Hem Chhajed, AR (VH)	
Revenue by	Shri Sanjay Kumar, Sr. DR	
Date of Hearing	11.07.2024	
Date of Pronouncement	15.07.2024	

ORDER

PER SUCHITRA KAMBLE, JUDICIAL MEMBER :

This appeal is filed by the assessee against order dated 31.10.2019 passed by the CIT(A)-7, Ahmedabad for the Assessment Year 2011-12.

2. The assessee has raised the following grounds of appeal :-

- “1. *The order of the Ld. CIT(A) is bad, illegal and violation of nature justice.*
2. *The Ld. CIT(A) has erred in Law and on facts in upholding the validity of Reopening of the assessment.*
3. *The Ld. CIT(A) has erred in Law and on facts in upholding reopening of assessment when approval under Section 151 of the Act is not obtained in prescribed manner.*
4. *The Ld. CIT(A) has erred in Law and on facts in upholding order of the Ld. AO in considering LTCG as STCG of Rs.50,77,490/-“*

3. The assessee filed return of income for the Assessment Year (A.Y.) 2011-12 on 30.09.2011 declaring total income at Rs.30,83,479/-. Processing under Section 143(1) of the Income Tax Act, 1961 was completed on 22.12.2011. After that the case was selected for scrutiny assessment and a notice under Section 143(2) of the Act was issued on 07.08.2012. The assessment under Section 143(3) of the Act was completed on 25.02.2014 accepting returned income at Rs.30,83,479/-. Subsequently, assessment proceedings under Section 147 of the Act were initiated by issue of a notice under Section 148 of the Act after recording reasons under Section 148(2) of the Act. After taking statutory approval under Section 151(2) of the act, notice under Section 148 dated 22.03.2018 was issued and duly served upon the assessee. In compliance to notice under Section 148 of the Act the assessee e-filed her return of income on 08.08.2018 declaring total income of Rs.29,97,080/-. Thereafter, notice under Section 143(2) of the Act dated 20.08.2018 was issued and served to the assessee. The assessee called for reasons recorded and the Assessing Officer submitted the same. The Assessing Officer observed that during the year under consideration the assessee was earning income by way of income from salary, capital gain and other sources. The details filed by the assessee which includes the aspects related to tax in respect of transfer of property. The Ld. AR of the assessee responded show cause notices and submitted the reply/submissions. The Assessing Officer, held that the property in question and its possession should be taken from the date of Sale Deed dated 18.01.2011 as the said property was registered on 07.03.2009 as mentioned in Sale Deed dated 18.01.2011. The share allotment date was 13.03.2009. Thus, the Assessing Officer observed that the ownership of the bungalow (yet to be constructed) can be said to be vested in the assessee only after execution of the registered agreement after the amendment in Registration Act and this is the reason that sale deed refers only to the allotment date i.e. 07.03.2009 and, therefore, the working of Short Term Capital Gain (STCG) comes to Rs.77,00,000/-. Thus, the Assessing Officer charged the assessee's income to tax as STCG thereby not allowing the deduction of Rs.47,00,000/- claimed under Section 54 of the Act.

4. Being aggrieved by the Assessment Order, the assessee filed appeal before the CIT(A). The CIT(A) dismissed the appeal of the assessee.

5. As regards to ground no.1, the same is general in nature. As regards to ground no.2 relating to validity of reopening of the assessment and ground no.3 relating to reopening of assessment wherein the approval under Section 151 of the Act was not obtained in prescribed manner as contemplated by the assessee, the Ld. AR submitted that the reopening of the assessment is bad and illegal as reopening is on the basis of review of assessment records without any fresh tangible material on record. It is clear that the Assessing Officer has reopened the assessment by verifying the case records and no new tangible material came to the possession of the Assessing Officer to assume jurisdiction under Section 147 of the Act. The present case is coming under the specific clause that of reopening beyond four years. The Ld. AR submitted that the verification of the case records which were available at the time of original assessment proceedings amounts to review of case records which is not permissible under the Act. The Ld. AR relied upon the following decisions:-

- 1) *Hon'ble Supreme Court has dismissed the SLP in the case of Deputy Commissioner of Income Tax, Circle-1(1) vs. Bajaj Allianz Life Insurance Company Limited [2021] 278 taxman 104 (SC)*
- 2) *Hon'ble High Court of Bombay in the case of Bajaj Allianz Life Insurance Company Limited vs. Deputy Commissioner of Income Tax, Circle-1(1) [2020] 269 taxman 208 (Bombay)*
- 3) *Hon'ble Apex Court in the case of Kelvinator India Limited [2010] 187 Taxman 312 (SC)*
- 4) *Hon'ble Supreme Court of India in the case of Income Tax Officer, Ward No.16(2) vs. Tech Span India (P) Limited [2018] 92 taxmann.com 361 (SC)*
- 5) *Hon'ble High Court of Gujarat in the case of Siddhi Developers and Builders vs. Assistant Commissioner of Income Tax, Circle No.3(3) [2021] 129 taxmann.com 117 (Gujarat)*
- 6) *Hon'ble Gujarat High Court in the case of Gujarat Power Corporation Limited vs. Assistant Commissioner of Income Tax (2012) 26 taxmann.com 51 (Guj)*
- 7) *Hon'ble Gujarat High Court in the case of Vishwanath Engineers vs Assistant Commissioner of Income Tax 354 ITR 211 (Guj)*
- 8) *Hon'ble High Court of Bombay in the case of Commissioner of Income Tax vs. Amitabh Bachchan [2013] 33 taxmann.com 535 (Bombay)*

- 9) *Hon'ble High Court of Delhi in the case of Commissioner of Income Tax, Delhi-XI vs. Batra Bhatta company [2008] 174 Taxman 444 (Delhi)*
- 10) *Hon'ble High Court of Madras in the case of Commissioner of Income Tax , Corporate Ward 3(4), Chennai vs. B Suresh Kumar [2021] 430 ITR 60*
- 11) *Hon'ble ITAT Mumbai in the case of Abbot India Limited vs. Assistant Commissioner of Income Tax, Circle-2(1), Mumbai [2017] 81 taxmann.com 456.*

6. The Ld. AR further submitted that the Assessment Order passed by the Assessing Officer fails to establish that the assessee has not disclosed truly and fully all material facts as the reopening of the assessment is beyond the period of four years from the end of the relevant assessment year. The Ld. AR submitted that the Joint Commissioner of the Income Tax, Range-13, Ahmedabad had passed Assessment Order under Section 143(3) of the Act on 14.02.2014 by accepting the returned income. The Assessing Officer reopened the assessment of the assessee after completion of four years from the end of the assessment year merely on the basis of scrutiny records. In the reasons recorded for reopening of the assessment, the Assessing Officer has alleged that there is failure on the part of the assessee to disclose truly and fully all material facts. In the absence of such satisfaction and when the assessment is completed under Section 143(3) of the Act, the Assessing Officer cannot take any action under Section 147 of the Act against the assessee after four years from the end of the relevant assessment year. The Ld. AR relied upon the following decisions :-

- 1) *Hon'ble Supreme Court of India in the case of New Delhi Television Limited vs. Deputy Commissioner of Income Tax [2020] 116 taxmann.com 151 (SC)*
- 2) *Hon'ble Supreme Court of India in the case of Calcutta Discount Co. Limited vs. Income Tax Officer [1961] 41 ITR 191 (SC)*
- 3) *Hon'ble Gujarat High Court in the case of Harikishan Sunderlal Virmani vs. Deputy Commissioner of Income Tax, Circle-2(1) [2017] 394 ITR 146 (Gujarat)*
- 4) *Hon'ble Gujarat High court in the case of Anil Hassan and Gajwani vs. Income-tax Officer 223 Taxmann 126 (Guj)*

- 5) *Hon'ble Gujarat High Court in the case of Shree Chatthan Vibhag Khand vs. Dy. CIT 376 ITR 419 (Guj)*
- 6) *Hon'ble Gujarat High Court in the case of MAPS Enzymes Ltd. v. Deputy Commissioner of Income-tax 222 Taxmann 128*
- 7) *Hon'ble Gujarat High Court in the case of Gujarat Power Corpn. Ltd. vs. Assistant Commissioner of Income-tax (2013) 350 ITR 266 (Guj)*
- 8) *Hon'ble Gujarat High Court in the case of Jivraj Tea Ltd vs. Assistant Commissioner of Income-tax, Circle-1(1)(2) [2020] 426 ITR 146 (Gujarat)*
- 9) *Hon'ble Gujarat High Court in the case of Vodafone West Ltd. vs. Assistant Commissioner of Income-tax (2013) 354 ITR 572 (Gujarat)*
- 10) *Hon'ble High Court of Madras in the case of Commissioner of Income-tax, Chennai vs. India Cements Ltd. [2020] 424 ITR 410 (Madras)*
- 11) *Hon'ble High Court of Bombay in the case of Idea Cellular Ltd. vs. Deputy Commissioner of Income Tax [2008] 301 ITR 407 (Bom)*
- 12) *Hon'ble ITAT Ahmedabad Bench in the case of CD. Singh vs. Income-tax Officer (2010) 129 TTJ 495*
- 13) *Hon'ble ITAT Ahmedabad in the case of Mrs. Sejal J. Panchal v. Income-tax Officer. Ward-10(4), Ahmedabad [2018] 90 taxmann.com 305.*

7. The Ld. AR further submitted that the reopening is not permissible where the issue has been examined at original assessment stage even if there is no discussion in Assessment Order. During the course of original assessment proceedings, the issue of capital gain is verified by the then Assessing Officer and thus the examination of the same issue by reopening of assessment is not tenable in the eyes of law. The Ld. AR relied upon the following decision:

- 1) *Hon'ble Gujarat High Court in the case of Vishal Fabrics Pvt Ltd vs. DCIT (Special Civil Application No.86 of 2016)*

8. The Ld. AR further submitted that the CIT(A) was not right in upholding the validity of reopening of the assessment when approval under Section 151 of the Act is not obtained in the prescribed manner. The reopening of the assessment is bad and illegal as the approval granted by the PCIT is borrowed and dictated satisfaction instead of independent satisfaction. In the instant case, the Assessing

Officer has taken approval under Section 151 of the Act from the Additional CIT and PCIT. According to the provisions of Section 151 of the Act, if an assessment is reopened after the expiry of four years, then the approval is to be obtained from PCIT only. It is trite law that if the law requires the act to be done in a particular manner, more particularly acts conferring jurisdiction like the present one, then such act has to be done in that manner alone. The Ld. AR submitted that Section 151 of the Act clearly demarcates the situation in which approval is required from different authorities and in the present case authorisation was required to be taken from the PCIT alone. The Addl. CIT had no locus standi in the present case and was, therefore, not competent to grant his satisfaction. It is established principle of law that if a particular authority has been designated to record his/her satisfaction on any particular issue, then it is that the authority alone who should apply his/her independent mind to record his/her satisfaction and further mandatory condition is that the satisfaction recorded should be independent and should not be borrowed or dictated satisfaction. The Ld. AR relied upon the following decisions:

- 1) *Hon'ble High Court of Delhi in the case of Commissioner of Income Tax vs. SPL'S Siddhartha Limited (2012) 345 ITR 223*
- 2) *Hobe High Court of Bombay in the case of Ghanshyam K Khabrani vs. Assistant Commissioner of Income Tax Circle-1 [2012] 20 taxmann.com 716 (Bom)*
- 3) *Hon'ble ITAT Mumbai in the case of ACIT Circle (1)(2), Mumbai vs. Bharti Axa Life Insurance Company Limited (2021) 189 ITD 450*
- 4) *Hon'ble ITAT Lucknow in the case of Jai Prakash Ahuja vs. Income Tax Officer-2(2) Kanpur (2015) 152 ITD 592 (Lucknow Trib).*

9. As regards ground no.4 related to merit of the case, the Ld. AR submitted that the CIT(A) erred in upholding order of the Assessing Officer in considering LTCG as STCG of Rs.50,77,490/-. During the year under reference, the assessee sold property on 18.01.2011 for Rs.90,00,000/- and has shown LTCG of Rs.26,22,505/- in the return of income. The Assessing Officer made addition alleging that LTCG shown by the assessee is STCG and also disallowed deduction claimed under Section 54 of the Act. The assessee submitted the dates of events as follows :

<i>Particulars</i>	<i>Date</i>
<i>Allotment letter issued by Someshwara Darshan Co-op Housing Society Limited</i>	<i>16.04.2007</i>
<i>Construction agreement between appellant and Shreenathji Developers</i>	<i>03.03.2009</i>
<i>Sale Deed</i>	<i>18.01.2011</i>

10. The Ld. AR submitted the date of such allotment would be relevant date for the purpose of capital gain tax as a date of acquisition i.e. 16.04.2007. Such allotment is final unless it is cancelled or the allottee withdraw from the scheme and such allotment would be cancelled only under exceptional circumstances. The allottee gets title to the property on the issue of allotment letter and the payment of instalments was only a follow up action and taking the delivery of possession is only a formality. Therefore, the date of allotment of the property should be reckoned for the purpose of computing the capital gain. The Ld. AR submitted that several decisions of Hon'ble Apex Court and other Hon'ble High Courts wherein it is held that the date of allotment should be considered for calculating the holding period. Thus, the Ld. AR submitted that the order passed by the Assessing Officer treating the gain from sale of flat as a STCG asset is incorrect and it should be treated as a LTCG asset and benefit of indexation should be given and deduction under Section 54 of the Act. The Ld. AR relied upon the following decisions:

- 1) *Hon'ble Bombay High Court in case of Principal Commissioner of Income Tax vs. Vembu Vaidyanathan [2019] 413 ITR 248 (Bombay)*
- 2) *Hon'ble Supreme Court has dismissed SLP filed by Department [2019] 108 taxmann.com 339 (SC)*
- 3) *Hon'ble Gujarat High Court in case of Commissioner of Income Tax vs. Jindas Panchand Gandhi [2005] 279 ITR 552 (Guj)*
- 4) *Hon'ble Gauhati High Court in the case of CIT vs. Anilaben Upendra Shah (2003) 262 ITR 657.*
- 5) *Hon'ble Madras High Court in the case of South India Minerals Corporation vs. Assistant Commissioner of Income Tax, Circle-XIV, Chennai (2019) 417 ITR 306 (Madras)*

- 6) *Hon'ble Punjab & Haryana High Court in case of Ms. Madhu Kaul vs. Commissioner of Income Tax [2014] 43 taxmann.com 417 (Punjab & Haryana)*
- 7) *Hon'ble ITAT Ahmedabad in case of ITO vs Kashmiraben M. Parikh [1993] 66 Taxman 31 (Ahd) (Mag)*
- 8) *Hon'ble ITAT Mumbai in the case of Anita D Kanjani vs. ACIT 23(1) Mumbai (2017) 79 taxmann.com 67.*

11. The Ld. DR relied upon the Assessment Order and the order of the CIT(A). As regards validity of reopening, the Ld. DR submitted that there is no change of opinion and in fact the reason for reopening was that the assessee did not provide complete set of documents during the original assessment proceedings and, therefore, the Assessing Officer who got the statutory approval from the PCIT has reopened the case of the assessee. As regards the contention of not following the procedure as per Section 151 of the Act, it can be seen that and in fact as admitted by the assessee that approval was taken/granted by the PCIT and therefore, the reopening is justified. As regards merit of the case is concerned, the registration date is that of 07.03.2009 in respect of the said transaction and, therefore, the allotment date which is prior to the registration (16.04.2007) will not be taken into account while determining the capital gain.

12 We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that the contention of the Ld. DR that the assessee has not provided complete set of documents appears to be not correct and in fact the assessee has provided all documents during the original assessment proceedings under Section 143(3) of the Act. The reasons recorded for reopening of the assessment is on a very same issue upon which the original assessment has taken cognisance thereby asking the assessee related to the capital gain. There was no new material found by the Assessing Officer. Thus, in the light of the decisions of Hon'ble Apex Court in the case of Kelvinator India Limited (supra) and also that of the decision of Bajaj Allianz Life Insurance Company Limited (supra), the reopening itself is bad in law. As regards approval of PCIT, contention of the Ld. AR that the approval should be only from PCIT will suffice when there is a delay in the approval granted by the PCIT in the assessee's case as per Section 151 of the Act but it appears that the PCIT has

mechanically granted the approval which is not envisaged as per Section 151 of the Act where reopening is after expiry of four years. Thus, ground nos.2 & 3 of the assessee's appeal are allowed.

13. Though it is not necessary to comment on the merits since the assessment itself becomes nonest after deciding the said issues, it will be appropriate to comment on the merit as allotment letter issued by the Housing Society dated 16.04.2007 clearly reveals that the assessee is holding the property since April 2007. Though the construction agreement is dated 03.03.2009 and the registration date is 07.03.2009 the provisional allotment of the said property is with the assessee since 2007 and, therefore, the assessee has rightly treated the same as LTCG asset. Indexation benefit in such matters can be given and deduction under Section 54 of the Act should have been allowed by the Assessing Officer as well as by the CIT(A). Hence, on merit as well the assessee succeeds.

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

Order pronounced in the open Court on this 15th July, 2024.

Sd/-
(ANNAPURNA GUPTA)
Accountant Member

Sd/-
(SUCHITRA KAMBLE)
Judicial Member

Ahmedabad, the 15th day of July, 2024

PBN/*

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
Ahmedabad benches, Ahmedabad