IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, AHMEDABAD

BEFORE SHRI T.R. SENTHIL KUMAR, JUDICIAL MEMBER &
SHRI NARENDRA PRASAD SINHA, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 698/Ahd/2024

(**निर्धारण वर्ष /** Assessment Year : 2018-19)

Kothari Sanjay Manilal, HUF Sushil-Suraj, Lane No.17, 385/A, Satyagrah Chhawani, B/h. Hotel Court Yard Marriot, Ramdev Nagar Cross Road, Satellite, Ahmedabad- 380015	**बनाम**/ Vs.	**The DCIT** Circle 3(1)(1), Ahmedabad
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. : AAAHK7059K		
(**Appellant**)	..	(**Respondent**)

अपीलार्थी ओर से/**Appellant by :**	Shri S. N. Soparkar, Sr. Advocate & Shri Parin Shah, A.R.
प्रत्यर्थी की ओर से/**Respondentby:**	Shri M. Anand Kumar, Sr. DR

Date of Hearing	29/10/2024
Date of Pronouncement	08/11/2024

ORDER

PER SHRINARENDRA PRASAD SINHA, AM:

Thisappeal is filed by the assessee against the order of the National Faceless Appeal Centre (NFAC), Delhi, (in short 'the CIT(A)'),dated 10.11.2023for the Assessment Year 2018-19.

2. There was a delay of 94 days in filing this appeal. Shri Sanjay Manilal Kothari, Karta of the assessee HUF has filed an affidavit explaining that the order of the Ld. CIT(A) was received on the registered email ID Pashwakothari@yahoo.in

which was of his nephew and the second email ID belonged to his consultant. He has stated that no physical copy of the order of the Ld. CIT(A) was received and that the order was sent online only. Due to inadvertent mistake of nephew and the consultant who didn't inform about receipt of the order of the Ld. CIT(A) in their email account, there was a delay in filing of this appeal. It is found that the email ID mentioned in the Form No.35 was Pashwakothari@yahoo.in, which is stated to be belonging to the nephew. Considering the explanation to the assessee, the delay in filing the appeal is condoned.

3. The brief facts of the case are that the assessee had filed its return of income for A.Y. 2018-19 on 31.10.2018 declaring total income of Rs.1,92,89,740/-. The case was selected for limited scrutiny to examine the deduction from income from other sources and capital gains deduction claimed. The assessment was completed under Section 143(3) of the Income tax Act, 1961 (in short 'the Act') on 17.03.2021, wherein the following additions were made:

(i)	*Addition on account of long term capital gain –*	*Rs.12,26,32,248/-*
(ii)	*Disallowance of interest expenses claimed u/s.57 of the Act –*	*Rs.58,40,796/-.*

4. Aggrieved with the order of the AO, the assessee had filed an appeal before the First Appellate Authority, which has been decided vide the impugned order and the appeal of the assessee was dismissed.

5. Now, the assessee is in second appeal before us.The following grounds of appeal have been taken in this appeal:

> *"1. The order passed u/s.250 on 10.11.2023 for A.Y.2018-19 by Commissioner of I. Tax (Appeals) - NFAC, Delhi upholding the additions of Rs. 12,26,32,248/= in respect of LTCG and disallowance of interest expenses of Rs.58,40,796/= made by AO is wholly illegal, unlawful and against the principles of natural justice.*
>
> *2. The Ld. CIT (A) has grievously erred in law and or on facts in not considering fully and properly the submissions made and evidence produced by the appellant with regard to the impugned additions.*
>
> *3. The Ld. CIT (A) has grievously erred in law and or on facts in F not appreciating fact that impugned additions are made on point which have never been raised in Limited Scrutiny.*
>
> *4. The Ld. CIT (A) has grievously erred in law and on facts in determining the sale consideration of Rs. 12,31,77,000/= instead of consideration received of Rs. 6,16,49,843/= by virtue of relinquishment of right in land in favor of societies which were subsequently sold by societies.*
>
> *5. The Ld. CIT (A) has grievously erred in law and on facts in confirming disallowance made by Ld. AO of claim of deduction of Rs. 4,15,14,798/= made u/s 54F by Appellant.*
>
> *6. The Ld. CIT (A) has grievously erred in law and on facts in confirming disallowance made by Ld. AO of interest expenses of Rs. 58,40,796/= claimed u/s 57 by Appellant.*
>
> *7. The appellant craves liberty to add, amend, alter or modify all or any grounds of appeal before final appeal."*

5. The first three grounds taken by the assessee are general in nature and were not pressed by Shri S. N. Soparkar, Ld. Sr. Advocate appearing for the assessee. Otherwise also, the issues raised in Ground No.1 are covered by the specific ground as subsequently taken by the assessee. Hence, these grounds are dismissed.

6. Ground No.4 pertains to determining the sale consideration at Rs.12,31,77,000/- by the AO as against the consideration of Rs.6,16,49,843/- only received by the assessee on relinquishment of right in land in favour of the societies. Shri S. N. Soparkar, Ld. Sr. Advocate appearing for the assessee explained that assessee was holding rights in a land admeasuring 2374 sq. mtr. in New Chhatra Chhaya Co-op Housing Society Limited (NCCCHSL) and also in other land admeasuring 1948 Sq.mtr. in New Chhaya Co-op Housing Society Limited(NCCHSL). The members of both the societies, including the assessee, had relinquished their rights in the respective plots of lands in favour of the societies in accordance with the resolution passed in this respect. Both the societies had, in turn, sold the entire land to M/s. Cloud 9 Infraspace LLP (Cloud 9) vide a common coneyance dated 29.06.2017 for a consideration of Rs.46,71,15,000/-. Thereafter, the two socieites had distrbiuted the sale consideration of land among the members of respective societies and accordingly, the assessee had received total sum of Rs.6,16,49,843/- (Rs.2,58,53,928/- from NCCHSL and Rs.3,57,95,915/- from NCCCHSL). The Ld. Senior Counsel explained that the amount received by the assessee from the two societies was after adjusting the outstanding loans granted by the assessee to the two societies, which was as per the terms of the agreement made with the societies. Thus, the sale consideration received by the assessee for relinquishment of rights in the lands was the actual amount of Rs.6,16,49,843/- as received by the assessee. The Ld. Counsel explained that the assessee had computed long term capital gain (LTCG) after deducting the indexed cost of

acquisition and claiming deduction u/s.54 of the Act and had accordingly offered LTCG in the return of income. The AO, however, computed the sale consideration by adoptingthe rate at which the land was sold by the societies, which was not correct.According to the Ld. Senior Counsel, the assessee had not sold the land but had only relinquished its right in the land, the consideration for which couldn't have been computed by adopting the rate on which the lands were sold by the societies. He submitted that the assessee had correctlty disclosed the consideration for relinquishment of rights as per the actual amount received by the assessee from the societies.

6. Per contra, M. Anand Kumar, the Ld. Sr. DR supported the orders of the AO & Ld.CIT(A). He submitted that the consideration for relinquishment of rights in the land was rightly taken as per the value as realised on the sale of the land.

7. We have carefully considered the rival submissions. A copy of the sale deed for sale of land by NCCCHSL & NCCHSL to Cloud 9 has been brought on record. The AO had adopted consideration of the right in the land relinquished by the assessee to the two socieites, as per the sale rate of land as appearing in the sale deed, which was Rs.28,500/- per sq.mtr. By applying this rate, the AO had worked out the sale consideration of Rs.12,31,77,000/- for computation of capital gain derived by the assessee, which was upheld by the Ld. CIT(A). However, the assessee was not a party to the sale deed for the lands. Therefore, the rate at which the land was sold by the two societies as per the common deed, could not have been

adopted to compute the sale consideration of relinquishment of assessee's rights. Neither the assessee had sold the land directly to Cloud 9 nor it was a party to the sale deed made by the two societies. The assessee has submitted that the capital gain arising on sale of land was already disclosed by the two societies in their respective returnsand has brought on record a copy of return filed by them. As explained by the assessee, it had relinquished its right in the land in favour of the two societies.Therefore, the consideration for the relinquishment of rights was required to be worked out on the basis of the amounts/consideration as received by the assessee from the two societies. If the AO had any doubt about the consideration as disclosed by theassessee, then enquiry should have been made by the AO with the two societies to find out the exact consideration paid by them to the assessee for relinquishment of its right in the lands.

8. The assessee had submitted that the consideration received for relinquishment of its right was after adjusting the outstanding loans advanced by the assessee to the two societies. The assessee has filed a ledger copy of the account with the two societies as per which the repayment of loan advanced by the assessee to the two societies was adjusted withthe payments received. This fact was, however, not independently verified by the Revenue at any stage. The AO had mechanically adopted the land rate to work out the considetion for the rights transferred without making any effort to find out the exact consideration received by the assessee from the two societies, which was wrongly upheld by the Ld. CIT(A).The assessee, apart from

copy of resolutions, has not filed any independant confirmation from the two societies regarding the actual amount of consideration received for relinquishment of its right and whether the consideration so received was after adjusting the outstanding loan amount. We will, therfore, have to consider as to what was the consideration received by the assessee from the two societies for relinquishmnets of its right in the land, as per these resolutions.

9. The assessee has provided a copy of the resolution passed by the two societies which was in Gujarati language and an English translation of the relevant part of the resolution was filed in the course of hearing on 29.10.2024. The relevant resolution number-5 made by New ChhatraChhaya CHSL reads as under:

> RESOLUTION NO.5
> Previously in the General Meeting of the members, we had resolved that if our society wants to sell the land, then before executing the said sale deed, the amount fixed in the resolution passed in the General Meeting to be given to each member and until the said full amount is paid to the each member by the society, the members will have the charge and lien upon the said land of the society and until the society pays such amount, each and every member will have his ownership right on the property of the society allotted to him and from the date on which such full amount is paid by the society, the allottee right of the members shall be transferred in favour of the society (relinquished) and his lein/charge shall be treated as over.
>
Sr. No.	Name	Amount receivable from the Society
….		
(7)	Sanjay M Kothari HUF	5,94,29,861.00
…..		

> It is unanimously resolved and requested by the Committee of the ExecutiveMembers that simultaneously the remaining amount shall be paid before 15-08-2017. As such assurance was given, the above

mentioned members release their charge upon the land of the society and also upon the sale consideration amount of the land and they hearby relinquish their individual and common rights upon the land of the property of the society in favour of the society.

The resolution passed unanimously.

10. The relevant resolution number-4 in the case ofNew Chhaya CHSL was as under:

In the meeting held on today the society discussed for selling the land.Before executing the sale deed, as reserved in the General Meeting for selling, the society should pay the amount to each and every member and until the said amount is not fully paid to the member of the society, the members will have their charge upon the land of the society and also upon the sale price and until the said amount is paid by the society, each and every member will have the ownership right upon the property of the society allotted to him and from the date of making full payment of the said amount by the society, the allottee right of the members shall be relinquished and transferred in favour of the society and charge thereof shall be released and over.

In the society the existing members have been paid some amount as per the following table and the remaining amount shall be paid in short period:

Sr. No.	*Name of the Members*	*Amount receivable from the Society*
……		
(2)	Sanjay M Kothari HUF	4,90,98,759.00
……		

11. It is thus found that as per resolution passed by the two societies each member was to be paid the amount an mentioned in the resolution for relinquishing their individual and common rights upon the land of the propery of the society, in favour of the society.Accordingly the assessee had received Rs. 5,94,29,861/- from New Chhatra Chhaya CHSL and Rs. 4,90,98,759/- from New Chhaya CHSL. Thus the total consideration receivable by the assessee

from the two societies was **Rs.10,85,28,620/-.** There was no mention in the resolutions that the payments as agreed upon will be made after adjusting the outstanding loan advanced by the members to the society. In the ansence of any stipulation in the resolutions that the outstanding loan of the members would be adjusted from the payments as agreed upon, the contention of the assessee that only the net amount (after adjusting the outstanding loan) should be considered as the sale consideration, can't be accepted. The resolutions made it explicitly clear that the total amount of Rs.10,85,28,620/- was the consideration received by the assessee for relinquishment of its rights in the lands in favour of the societies. Accordingly, **the AO is directed to take the amount of Rs.10,85,28,620/- as the sale consideration for computation of capital gains on the relinquishment of its right in lands, in favour of the societies**.The ground taken by the assessee is parly allowed.

12. The next ground pertains to disallowance of deduction of Rs.4,15,14,798/- claimed u/s.54F of the Act.The Ld. Senior Counsel explained that the consideration for relinquishment of rights of the two plots was invested by the assessee by booking two adjoining flats with M/s. Cloud 9 Infraspace LLP, in respect of which deduction u/s.54F of the Act was claimed in the return of income. The AO had disallowed the claim of the assessee for the reason that the purchase of the new asset was not completed within two years from the date of transfer to the original asset and neither the construction of the new asset was completed within 3 years from the date of transfer, which was upheld by the Ld. CIT(A). The Ld. Senior Counsel explained

that the assessee had entered into an agreement of sale dated 26th October, 2018 with Cloud 9 and the payments were also made to the builder. Once having made the payment, the assessee had no control over the completion of the work by the builder. According to the Ld. Senior Counsel, the assessee was eligible for deduction u/s.54F of the Act, in spite of delay in completion of the house by the builder, as the payments were already made by the assessee within the stipulated time period. He relied upon the following decisions in the regard:

i. Kamlesh Chandrakant Patel vs. ACIT in ITA No.634/Ahd/2014, dated 20.01.2020
ii. CIT vs. Smt. B. S. Shanthakumari, 233 Taxman 347 (Karnataka)

13. Per contra, the Ld. Sr. DR submitted that the assessee had not fulfilled the conditions as stipulated u/s.54F of the Act and, therefore, the claim for deduction made by the AO was rightly disallowed by the AO. He strongly supported the orders of AO & Ld. CIT(A).

14. We have carefully considered the rival submissions. As regarding the condition of completion of construction within 3 years from the date of transfer of original asset, *Hon'ble Karnataka High Court* had held that in the case of *Smt. B. S. Shanthakumari (supra)* that once it was established that the assessee had invested entire net consideration in construction of residential house within the stipulated period, it would meet the requirement of Section 54F of the Act and the assessee would be entitled to get benefit of Section 54F of the Act. The *Co-ordinate Bench of this Tribunal* in the case of *Kamlesh*

Chandrakant Patel (supra) had also held that delay in the completion of construction of the house will not be a bar to the assessee for claiming the exemption provided u/s.54F of the Act. In view of these decisions, we are of the considered opinion that the Revenue was not correct in disallowing the claim for deduction u/s.54F of the Actonly on the ground that the construction of the house was not completed within the stipulated period of 3 years from the date of transfer of the original asset.

15. However, the AO had also given a finding that the claim for deduction of Rs.4,15,14,798/- u/s.54F of the Act also included legal charges of Rs.38,44,440/-, which was not eligible for deduction. From the copy of agreement to sale made by the assessee with M/s. Cloud 9 Infraspace LLP brought on record, it is found that the total consideration of two adjoining flats A-1401 & A-1402 was Rs.2,47,60,800/- only. Further, as per this agreement, the assessee had made payment of Rs.2,45,13,192/- only and the balance amount of Rs.2,47,606/- was to be paid on the possession / excution of sale deed. Thus, the total investment in the new property as per the agreement of sell was to the extent of Rs.2,45,13,192/- only. From the ledger account of M/s. Cloud 9 Infraspace LLP filed by the assessee in the paper book, we find that other payments were on account of stamp paper and registration fee, extra work, legal charges etc. For the extra work payment a separate agreement dated 26th October, 2018 was entered into by the assessee.However, for the payment in respect of legal charges no agreement has been brought on record. The advance maintenance charges deposited

by the assessee are recurring in nature for the period post occupation of the property and can't be included in the cost of acquisition of the property.Further, the payment for stamp and registration charges is required to be made to the Govt. Authority at the time of registration of the property. No payment for stamp duty and registration charge could have been made when the flat had not yet been constructed and property not yet registered. In view of these facts, the AO is directed to verify the correctness of the deduction u/s.54F of the Act as claimed by the assessee. The ground taken by the assessee is partly allowed.

16. The next ground pertains to disallowance of interest expenses of Rs.58,40,796/- u/s.57 of the Act. Shri S. N. Soparkar, Ld. Senior Counsel submitted that the assessee had shown interest income of Rs.94,57,637/- on deposits against which expense of Rs.1,11,13,576/- was claimed. He explained that the assessee has taken loan from Kothari Finance in F.Y. 2010-11 which continued during the year and on which interest of Rs.1,11,13,576/- was paid. The AO had held that loan to the extent of Rs.5,96,55,233/- only was utilized for giving advances on which interest income was earned and offered to tax. Therefore, the AO had disallowed the proportionate interest of Rs.58,40,796/-. The Ld. Senior Counsel explained that the AO had wrongly considered the opening balance of loan taken from Kothari Finance at Rs.12,57,36,873/- as on 01.04.2017 to work out the disallowance. He submitted that the assessee had repaid loan to the extent of Rs.4,15,76,025/- during the year and outstanding closing balance of Kothari Finance was

Rs.8,41,60,848/- only. He further submitted that the assessee had advanced loan of Rs.2,36,33,946/- to New Chhatrachhaya Co-op Housing Society Limited and Rs. 2,32,44,831/- to New Chhaya Co-op Housing Society Limited for purchase of land which was repaid during the year. It was further submitted that the assessee had earned interest income on the loan advanced to the two societies in the earlier years but as the loan was repaid in the current year, no interest income thereon was received during the year. Ld. Senior Counsel also relied upon the decision of Hon'ble *Apex Court* in the case of *CIT vs. Rajendra Prasad Moody (1978) 115 ITR 519 (SC)*and submitted that the interest expenses borrowed for earning of income has to be allowed even though the income may not be earned during any particular year.

17. Per contra, the Ld. Sr. DR submitted that the assessee was entitled for deduction of interest only if the entire borrowed fund was utilized for the purpose of earning of income. He submitted that in the present case, the assessee had not utilized the entire borrowing for earning of income and, therefore, the AO had rightly disallowed the proportionate interest expenditure. The Ld. Sr.DR strongly supported the order of the Ld. CIT(A).

18. We have carefully considered the rival submissions. The provision of Section 57 of the Act stipulates that any expenditure laid out or expended wholly and exclusively for the purpose of earning the inocme, is liable for deduction. We have to, therefore, examine as to whether the interest expenditure for

which deduction was claimed under the head 'income from other source', was laid out or expended wholly and exclusively for earning of the income, which was offered for tax under the head 'income from other source'. There is no dispute to the fact that the opening balance of loan taken from Kothari Finance was Rs.12,57,36,853/- on which interest expenditure of Rs. 1,11,13,576/- was claimed by the assessee. The assessee has furnished the following chart showing utilization of borrowed funds for advancing loans:

Sr. No.	Name of Party	Opening Balance as on 01-04-17	Rate of Interest	Interest received and offered for tax	TDS Deducted	Loan repayment	Closing Balance as on 31-03-18
1	Vivan Infrastructure	21,84,595	16.50%	2,62,151	26,215	-	24,20,531
2	Kothari Wealth Management	82,17,070	12.00%	9,86,048	-	-	92,03,118
3	Mahavir Co-op Housing Societes	4,92,53,568	12.00%	81,26,838	-	-	5,73,80,406
4	Chatra Chhaya Co.op.Hou.Soc.	2,36,33,946	-	-	-	2,36,33,946	-
5	New Chatra Chhaya Co.op.Hou.Soc.	2,32,44,831	-	-	-	2,32,44,831	-
	TOTAL	10,65,34,010		93,75,037	26,215	4,68,78,777	6,90,04,055

19. It is seen from the above chart that the opening balance of amount utilized by the assessee for earning income was Rs.10,65,34,010/- only. Thus, the entire borrowed funds of Rs.12,57,36,873/- was not utilized for earning of income. Further on the total sum of Rs.4,68,78,777/- advanced to the two Co-oeprative Societies, no interest income was earned during the year. The repayment of this loan during the year cannot be the reason for not charging the interest, particularly when the interest was received in the earlier years. As explained by the assessee, this amount was advanced to the societies for purchase of land. Therefore, the interest in respect of these loans to the societies has to be treated as capital expenditure,

which was not eligible for deduction u/s.57 of the Act. In view of these facts, the Revenue was correct in disallowing the proportionate interest expenditure. However, certain amount of loan taken from Kothari Finance was repaid during the year. Therefore, the AO was not correct in disallowing the interest on the basis of opening balance. **The AO is directed to rework the disallowance by taking into account the closing balance of loan taken from Kothari Finance as well as the closing balance of the loans utilized for earning of interest income.**

20. The reliance of the assessee on the decision of *Rajendra Prasad Moody (supra)* is found to be misplaced. It was held by the Hon'ble Supreme Court in that case that interst paid on money borrowed for investment in shares, which had not yielded any dividend was admissible for deduction u/s.57(iii) of the Act. In essence, the interest expenditure can be allowed as deduction if the entire borrowed fund is utilized and even though there is no corresponding income earned during the year out of such utilization. In the present case, however, the entire borrowed fund was not utilized or applied for earning of any income. Therefore, the ratio of decision of the Hon'ble Supreme Court in the abovementioned case cannot be applied to the facts of the present case.

21. In view of the above facts, the matter is set aside to the file of the AO to rework the disallowance as per direction given in para-19above. The ground taken by the assessee is partly allowed for statistical purposes.

22. In the result, the appeal filed by the assessee is partly allowed.

This Order pronounced on 08/11/2024

Sd/-	Sd/-
(T.R. SENTHIL KUMAR)	(NARENDRA PRASAD SINHA)
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad; Dated 08/11/2024

S. K. SINHA

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad