

**IN THE INCOME TAX APPELLATE TRIBUNAL,
AGRA BENCH, AGRA**

**BEFORE : SHRI SUNIL KUMAR SINGH, JUDICIAL MEMBER
AND
SHRI MANISH AGARWAL, ACCOUNTANT MEMBER**

ITA No. 241/Agr/2024
Assessment Year: 2015-16

Alauddin, 21/22, Ghatiya Mamu Bhanja, Thana-Mantola, Agra-282003 (UP)	Vs.	Income-tax Officer, Ward 1(1)(1), Agra.
PAN : AAUPA2351G		
(Appellant)		(Respondent)

Assessee by	Sh. Rajesh Malhotra, C.A.
Department by	Sh. Shailendra Srivastava, Sr. DR

Date of hearing	19.05.2025
Date of pronouncement	20.06.2025

ORDER

PER : SUNIL KUMAR SINGH, JUDICIAL MEMBER:

This appeal has been preferred by assessee against the impugned order dated 01.05.2024 passed in Appeal No. NFAC/2014-15/10137403 by the Ld. Commissioner of Income-tax (Appeals), NFAC, Delhi u/s. 250 of the Income-tax Act, 1961 (hereinafter referred to as "the Act") for the assessment year 2015-16, wherein the Id. CIT(Appeals) has dismissed assessee's first appeal.

2. Briefly stating, the facts, leading to the present appeal, are that the assessee filed his return of income in ITR-4S on 26.03.2018, declaring an income of Rs.3,98,560/-. Subsequently, an information was received by the

Assessing Officer from ADIT/DDIT(Inv.)-1, Agra that the assessee had sold an immovable property for a consideration of Rs.45,00,000/- which fetches capital gain tax payable in the year under consideration. However, the Assessing Officer on verification of ITR and other records, noticed that the assessee had neither disclosed any capital gain as per sec. 2(14) of the Act on the sale of the said immovable property nor provided any details of such capital gains in his return of income filed in ITR-4S.

3. Based on the aforesaid facts, Ld. Assessing Officer initiated proceedings u/s. 147 by issuing notice dated 31.03.2021 u/s. 148 of the Act after taking prior approval of the Id. PCIT as per provisions of section 151 of the Act. The statutory notice dated 31.03.2021 issued u/s. 148 and subsequent notice issued u/s. 142(1) with questionnaire dated 15.11.2021 stood un-responded by the assessee. The assessee, however, submitted his reply dated 20.02.2022 in response to notice u/s. 142(1) dated 24.12.2021, which as per Assessing Officer, was not found satisfactory. Thereafter, show cause notice dated 19.03.2022 was issued to the assessee, in response to which the assessee submitted his reply dated 21.03.2022, stating that the appellant/assessee had sold residential properties No. 15/28, 15/29 and 15/30 registered in the joint names of assessee and his wife, Smt. Shahnaz Begum at Bari Athai, Nai Ki Mandi, Agra on 29.08.2014 for a consideration of Rs.45,00,000/-, on which no

capital gain is exigible to tax, as the appellant/assessee had purchased two new residential house properties bearing No. 19/180 (in his name) and 19/01(jointly with his wife), situated at Tila Ajmeri Khan, Ghati Mamu Bhanja, Agra on 04.02.2014 for Rs.8,50,000/- and Rs.28,00,000/- respectively, hence, in terms of deduction envisaged u/s. 54 of the Act, there would be no capital gain payable by the assessee on the sale of immovable property.

4. The contention of the assessee with regard to deduction u/s. 54 of the Act did not find favour with the Learned Assessing Officer on the following premise:

(i). that as per respective conveyance deed, the second property bearing No. 19/1, consisting of 4 shops on ground floor and one room on the top floor purchased by the assessee for the consideration of Rs.28,00,000/-, cannot be treated as residential house property for the purpose of claiming deduction u/s. 54 of the Act;

(ii). that as per details of house properties furnished by assessee before the DDIT(Inv)-Unit-2, the assessee had shown to have purchased two separate immovable properties on 04.02.2014, which are now being claimed as one residential unit.

(iii). that the selling parties of both the properties purchased on 04.02.2014 were different and situated at different places; and

(iv). that the assessee failed to establish with corroborative documentary evidence to establish as to how he has claimed the entire long-term capital gain as exempt from tax.

5. Learned Assessing Officer, therefore, disallowed the claim of the assessee and computed the long term capital gain on sale of immovable properties as under :

Price Indexed for F.Y. 2005-06: (497) (Purchase value Rs. 3,71,000/-)
Price indexed for F.Y. 2014-15 (1024)
Sale consideration of property for the year 2014-15: Rs. 45,00,000/-
Less: Indexed cost of acquisition = $371000 \times 1024/497 =$ Rs. 764394/-
of property for the year 2014-15.
Long Term Capital Gain for 2014-15: **Rs. 37,35,606/-**

6. However, while giving benefit of deduction claimed by assessee u/s. 54 of the Act from the capital gain of Rs.37,35,606/-, learned Assessing Officer allowed deduction to the extent of Rs.9,31,060/- (sale consideration of Rs.8,50,000/- plus Stamp Duty of Rs.81,060/-) pertaining to purchase of first new residential house property No. 19/180, Tila Ammeri Khan, Ghati Mamu Bhanja, Agra, treating it as a new residential house property, but disallowed the balance claim of Rs.28,04,546/- made by the assessee with respect to purchase of second new property No. 19/1, situated at Tila Ajmeri Ghati Mamu Bhanja, Agra consisting of 4 shops and one room, treating it as a commercial property and added the same to the total income

of the assessee, vide assessment order dated 30.03.2022 passed u/s. 147 r.w.s. 144 and 144B of the Act.

7. Aggrieved, the assessee preferred an appeal before the Id. CIT(Appeals), who dismissed the appeal on the premise that during the A.Y. under consideration, the assessee was entitled for claim of deduction in respect of only one residential house property purchased within the stipulated period, where as in the year under consideration, the assessee had claimed deduction in respect of two separate and distinct properties, which as per Assessing Officer and conveyance deeds are sold by different sellers and situated at different locations. Ld. CIT(Appeals) further observed that the provision of section 54 amended by Finance Act, 2019 w.e.f. 01.04.2020, allowing the option of such deduction with respect to two house properties, is applicable from A.Y. 2020-21. Learned CIT(Appeals) has also affirmed the stand of the Assessing Officer regarding commercial character of second property No. 19/1, Tila Ajmeri, Ghati Mamu Bhanja, Agra.

8. This appeal has been preferred on the following grounds :

“1-BECAUSE, upon the facts and in overall circumstances of the case, the appellant denies its liability in terms of Notice dated 31/03/2021 issued under section 148 of the Income Tax Act which was only uploaded on Portal and was not served on the Appellant by other modes of services as mentioned in section 282 of the Act.

2- WITHOUT PREJUDICE TO ABOVE, BECAUSE, upon the facts and in overall circumstances of the case the appellant denies its

liability in terms of Notice dated 31/03/2021 issued under section 148 of the Income Tax Act as the reasons recorded by the Id Jurisdictional Assessing officer (JAO) are infact no reasons in the eyes of law. There was no income chargeable to tax was escaped assessment, therefore section 147 has been wrongly invoked by the Id Assessing officer.

3- BECAUSE, upon the facts and in overall circumstances of the case, the appellant denies its liability in terms of Notice dated 31/03/2021 issued under section 148 of the Income Tax Act as the notice issued under section 148 is barred by limitation given in section 149 of the Act. Since there was no escapement of any income chargeable to tax of an amount of Rs. One lakh or more therefore clause (b) of sub section (1) of section 149 does not apply.

4- BECAUSE, upon the facts and in overall circumstances of the case, the appellant denies its liability in terms of Notice dated 31/03/2021 issued under section 148 of the Income Tax, as no approval was taken from the Principal Commissioner of Income Tax 1 or alternatively the approval was granted by the Ld PCIT in a casual and mechanical manner. The approval of the Id PCIT was not provided to the Assessee during the course of Assessment proceedings.

5- Because upon the facts and in overall circumstances of the case the Notice issued under section 148 and 142(1) of the Income Tax Act issued by Jurisdictional Assessing Officer (JAO) are invalid and bad in law and are in gross violation of provisions of section 151A of the Income Tax Act.

6-BECAUSE, upon the facts and in overall circumstances of the case the appellant denies its liability as per Impugned Assessment order as the same has been passed without complying to the provisions of section 144B of the Income Tax Act.

7-BECAUSE, upon the facts and in overall circumstances of the case the Id Commissioner of Income Tax (Appeals) NFAC was wrong and unjust in confirming the addition made by the Id Assessing officer without properly appreciating the facts of the case and ignoring the submission made and evidences filed during the course of assessment and appellate proceedings.

8-BECAUSE, upon the facts and in overall circumstances of the case the Id Commissioner of Income Tax (Appeals) NFAC was wrong and unjust in confirming the amount of long term capital gain wrongly computed by the Ld Assessing officer, taking incorrect amount of sale, cost of acquisition and indexed cost of acquisition into consideration while calculating the amount of long term capital gain.

The Ld AO also failed to appreciate the fact that the share of the Assessee in the residential house sold was only 50%, however he had calculated the amount of capital gain taking into consideration the 100% of sales consideration.

9-BECAUSE, upon the facts and in overall circumstances of the case the Id Commissioner of Income Tax (Appeals) NFAC was wrong and unjust in not allowing the benefit of section 54 of the Act ignoring the vital fact that the Assessee had invested in two residential house property which were adjoining to each other and was in fact a single residential unit. The said residential house in fact was owned and sold by one Owner.

10- BECAUSE, upon the facts and in overall circumstances of the case the Id Commissioner of Income Tax (Appeals) NFAC was wrong and unjust in not allowing the benefit of section 54 of the Act on the wrong appreciation of the fact that the new property purchased by the Assessee was commercial property. In fact the property purchased by the Appellant was residential property and being used by the Assessee for his residential purposes. Though it is mentioned in registered sale deed that there were shops at the ground floor and residential house at first floor, but in fact this was residential property at both the floors and being used by the Appellant for its residential purposes.

11. Because the order appealed against is illegal, contrary to the facts, material on record, law and principle of natural justice. The appellant craves leave to add or alter one more ground(s) during the course of proceedings.”

9. Perused the records and heard learned representative for the assessee and learned departmental representative for the Revenue.

10. Based on the aforesaid grounds, the following points are to be determined :

- (i) Whether the proceedings initiated u/s. 147 and notice issued u/s. 148 are invalid, being barred by limitation, having been based on mechanical approval by competent authority and without proper service of notice u/s. 148 in terms of section 282 of the Act ?

- (ii) Whether CIT(Appeals) has erred in confirming the assessment order, denying the claim of assessee u/s. 54 of the Act ?

11. Learned representative for the appellant/assessee has reiterated all the grounds taken in the appeal in general, however, specifically submitted that the Revenue has denied the claim of the assessee for the benefit of section 54 of the Act mainly on the ground that one of the properties purchased is commercial property, whereas the nature of the property mentioned in the sale deed dated 04.02.2014 is residential. Learned AR has further submitted that the share of the assessee in the residential house sold by sale deed dated 29.08.2014 was only 50%, whereas the Revenue has computed the capital gain on 100% sale consideration. Prayed to set aside the impugned order and allow assessee's claim u/s. 54 of the Act in respect of the same.

12. Learned DR has submitted that the Revenue has already allowed benefit of section 54 in respect of one of the residential properties No. 19/180, Tila Ajmeri, Ghati Mamu Bhanja, Agra whereas the purchase deed dated 04.02.2014 with respect to second property No. 19/1, Tila Ajmeri, Ghati Mamu Bhanja, Agra specifically shows that there are 4 shops built at ground floor with one room at top floor, hence, the property not being residential, the assessee's claim u/s. 54 in respect of this commercial property has rightly been denied by the impugned order.

13. It is pertinent to give findings on the aforesaid issues formed on the basis of 11 grounds raised in the appeal. We first take up the point No. 1. This issue is framed in such a manner so as to cover the grounds No. 1 to 6. Assessee has neither raised these legal grounds before the learned Assessing Officer nor before Ld. CIT(Appeals). However, keeping the nature of these grounds as legal, we deem it fit to adjudicate on these legal grounds (issue) first.

14. We have gone through the entire records and find that the matter relates to the assessment year 2015-16. It will not be out of place to mention that the procedure for reopening assessment under the old regime has been substantially overhauled by the Finance Act, 2021 w.e.f. 01.04.2021. The proceedings u/s. 147 have been initiated by issuance of notice dated 31.03.2021 u/s. 148 of the Act in the instant case, hence, the old regime, i.e., prior to the Finance Act, 2021 will apply. Examining the assessment proceedings chronologically, we notice that the Id. Assessing Officer has specifically mentioned that on the basis of an information received by the Jurisdictional Assessing Officer from ADIT/DDIT(Inv)-1, Agra, it was noticed that the assessee had sold immovable properties for Rs.45,00,000/-, on which capital gain tax was payable during the financial year 2014-15 relevant to assessment year 2015-16. Learned Assessing Officer verified the Income-tax return, which was filed by the assessee on

26.03.2018 declaring an income of Rs.3,98,560/-. It was further noticed by the Revenue that the assessee did not show capital gain as per section 2(14) of the Act. Finding no details of capital gain tax on sale of immovable property, learned jurisdictional Assessing Officer framed his reason to believe that the income has escaped assessment and with the prior approval of the jurisdictional Principal Commissioner of Income-tax u/s. 151 of the Act, issued notice dated 31.03.2021 u/s. 148 of the Act. Ld. AR has failed to show the illegality in framing the reasons to believe before initiating the proceedings u/s. 147 of the Act. It shows that the Id. Assessing Officer followed the procedure for reopening of assessment by first framing the reasons to believe that the income in the form of capital gains chargeable to tax has escaped assessment.

15. In the old regime, section 149(ii) prescribes the time limit for issuing notice u/s. 148 as four years, but not more than six years from the end of the assessment year if the income chargeable to tax, which has escaped assessment amounted to or was likely to amount Rs.1,00,000/- or more. In the instant case, Id. Assessing Officer found that the income/sale consideration of Rs.45,00,000/- under the head capital gain, which was not depicted in assessee's ITR, was surely over one lakh rupees. Hence, notice dated 31.03.2021 issued u/s. 148 of the Act before six years from the end

of the assessment year 2015-16, falls within the time limit prescribed u/s. 149 of the Act of the old regime.

16. It further transpires from the perusal of the assessment order that prior approval of the jurisdictional Principal Commissioner of Income-tax was taken in accordance with section 151 of the Act of the old regime before initiating assessment proceedings u/s. 147/148 of the Act. Learned AR has, though, mentioned that such approval was casual and in a mechanical manner, however, failed to elaborate the same. The assessee has not made any efforts to procure the said approval either through the process of this Tribunal or by any other mode available under law. Hence, it cannot be accepted that the approval/sanction was given in a casual or mechanical manner by the sanctioning authority.

17. As regards service of notice u/s. 148 dated 31.03.2021, it is an admitted fact that the Revenue issued notice through electronic platform on assessee's email ID available with the department in consonance with section 282 r.w.s. 292BB of the Act. All modes of service of notice are not required to be effected. The service through either of the given modes of service is sufficient. It also transpires that the assessee participated in the assessment proceedings, which were being proceeded in the faceless manner u/s. 144B of the Act and entire procedure of faceless assessment of income escaping assessment was adopted by the Assessing Officer as

provided u/s. 151A of the Act. We accordingly, do not find any illegality or invalidity either in the notice u/s. 148 r.w.s. 142(1) of the Act or at any stage of the assessment proceedings. In view of the aforesaid discussion, the first point is accordingly determined against the assessee and in favour of the department.

18. Now, we advert to the second core point covering the remaining grounds No. 7 to 11, on merit as to whether an immovable property consisting predominantly four shops at the ground floor along with a single room at the first floor, can be treated as a “residential house” within the meaning of section 54 of the Act, thereby qualifying for exemption of capital gains. Admittedly, the assessee has claimed deduction u/s. 54 of the Act in respect of capital gains arising from the transfer of a long term capital asset on the ground that the assessee had invested in other residential properties within the stipulated period. One of such two properties purchased by the assessee comprises four shops at the ground floor and one room at the first floor. The Id. AR contends that the property qualifies as a residential house for the purpose of section 54, and thus, the capital gain arising from the sale of capital asset is also eligible for exemption under the said section.

19. A perusal of section 54 of the Act shows that this section provides exemption from capital gains tax if the capital gains arise from the transfer

of a long-term capital asset being a residential house (buildings or lands appurtenant thereto), the income of which is chargeable under the head “income from house property”, and the assessee has, within the prescribed time, invested in the purchase or construction of another residential house. The term “residential house” is not specifically defined under the Act, but the legislative intent makes it clear that the nature and usage of the property are key determinants of the true character of the said property. The property should not be predominantly commercial in character. In the present case, the immovable property in question admittedly consists of four shops at ground floor and one room at first floor, which is also substantiated by the conveyance deed dated 04.02.2014 submitted by the assessee through his paper book. In common parlance, shops are not capable to be characterized as residential house. Based on the composition and functional usage of the property, it is evident that the property purchased by the assessee was predominantly commercial in nature. The presence of a single room at the first floor of the commercial structure does not alter the dominant character of the property as the same is expected to be used for incidental and ancillary activities/for commercial purposes. The primary usage and income generation from the property appear to be from commercial activity and not from residential house, thereby disqualifying the eligibility of capital gains for exemption u/s. 54 of

the Act. The Id. AR has utterly failed to adduce any corroborating evidence like electricity bills, municipal records etc. to justify the property in question to be a residential house. Hence, we do not find any infirmity in the findings of the revenue authorities that the investment in second new property does not qualify for exemption from capital gain tax.

20. The sale deed dated 29.08.2014, which is part of assessee's paper book at page 8 to 24 shows that the assessee Hazi Alauddin and his wife Smt. Hajjan Shahnaz Begum are shown to be the joint sellers/owners of the property. Hence, the share of the assessee in the sale consideration of Rs.45,00,000/- is half, whereas the Revenue has computed the capital gain after considering the entire sale consideration of Rs.45,00,000/- in the hands of the assessee. The Revenue seems to have ignored this fact that only 50% of the sale consideration can be taken into account for computation of capital gains in the hands of the assessee. For this limited point, the Assessing Officer is directed to re-compute the capital gain on 50% share of the aforesaid sale consideration in the hands of assessee. The second point is accordingly determined partly in favour of the assessee. The impugned order is, therefore, not sustainable in part to this extent only.

21. In the result, the appeal is partly allowed for statistical purposes.

Order pronounced in the open court on 20.06.2025.

**Sd/-
(MANISH AGARWAL)
ACCOUNTANT MEMBER**

**Sd/-
(SUNIL KUMAR SINGH)
JUDICIAL MEMBER**

Dated: 20.06.2025

*aks/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, Agra