

आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर
IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE

BEFORE SHRI C.M. GARG, JUDICIAL MEMBER
AND SHRI O.P. MEENA, ACCOUNTANT MEMBER
I.T.A. No. 246/Ind/2015
Assessment Year 2008-09

Dy.Commissioner of Income Tax

Ratlam :: अपीलार्थी/Appellant

Vs

Shri Anil Jhalani

Ratlam

PAN – ABCPJ – 3376K :: प्रत्यर्थी/Respondent

CO No. 36/Ind/2015
Arising out of ITA No. 246/Ind/2015
Assessment Year 2008-09

Shri Anil Jhalani

Ratlam :: अपीलार्थी/Appellant

Vs

Dy.Commissioner

of Income Tax, Ratlam :: प्रत्यर्थी/Respondent

राजस्व की ओर से/Revenue by	Shri Mohd. Javed
निर्धारिती की ओर से/Assessee by	Shri Avinash Gour
सुनवाई की तारीख Date of hearing	29.3.2017
उद्घोषणा की तारीख Date of pronouncement	30.3.2017

आदेश / O R D E R

PER BENCH

The appeal has been filed by the Revenue whereas the assessee has filed the cross objection against the order of the learned CIT(A), Ujjain, dated 30.1.2015 in First Appeal No. U-156/2014-15 for the assessment year 2008-09.

2. The grounds of appeal raised by the revenue read as under :-

“On the facts and in the circumstances of the case, the ld. CIT(A) is erred in –

(a)Allowing deduction u/s 54F of the Act as the assessee has not deposited the amount into the capital gain scheme account before filing return of income and as such not fulfilled the condition as provided 54F(4) of the Act.

(b)Allowing deduction u/s 54F as the assessee has already own two houses as such the assessee is not eligible for deduction as per proviso (a)(i) of section 54F(1) of the Act.”

3. The facts, in brief, are that the assessee is an Individual and derives income from civil contractorship, income from long term capital gain and agricultural income. The return of income

declaring total income at Rs.3,88,662/- has been filed by the assessee. The Assessing Officer made the addition of Rs.75,55,894/- on account of long term capital gain, Rs.8,72,925/- on account of short term capital gain and Rs.2,48,108/- on account of interest and added the same to the total income of the assessee. On appeal, the learned CIT(A) observed as under :-

“From the above it is clear that the transfer of the property has been taken place within the meaning of section 2(47)(V) on the taking over of possession by the transferee from the transferer. The capital gain is chargeable in the year in which the possession was handed over by the appellant Shri Anil Jhalani to M/s Shubham Construction. The A.O. has worked out the chargeable long term capital gain at Rs.75,55,894/-. The appellant has not agitated in respect of the quantum of the addition. As it is previously narrated that the long term capital gain of Rs. 75,55,894/- is chargeable in the A.YU. 2008-09 i.e. year under consideration.

4.1.1 The appellant has made the claim of deduction u/s 54F of the ILTE Act on the long term capital gain. The A.O.

denied the claim of deduction u/s 54 on the ground that he has not made claim in the original return of income filed or return filed in response to notice u/s 148. The A.O. has not cited any reason for denying the claim of deduction u/s 54F. In the present case the appellant has transferred the capital asset pertaining to A.Y. 2008-09. The appellant as per the sale agreement has received the consideration as under :-

1.	बैंक ऑफ इंडिया	चैक नं. 29601	दिनांक 06.07.2009	रु. 15,00,000/-
2.	बैंक ऑफ इंडिया	चैक नं. 29602	दिनांक 06.07.2009	रु. 15,00,000/-
3.	बैंक ऑफ इंडिया	चैक नं. 29603	दिनांक 06.07.2009	रु. 15,00,000/-
4.	बैंक ऑफ इंडिया	चैक नं. 29604	दिनांक 06.07.2009	रु. 15,00,000/-
5.	बैंक ऑफ इंडिया	चैक नं. 29605	दिनांक 06.07.2009	रु. 7,00,000/-
			योग	रु. 67,00,000/-

विक्रय मूल्य रु. 25,00,000/- के भुगतान के चैक मेसर्स शुभम कन्स्ट्रक्शन रतलाम द्वारा बैंक ऑफ इंडिया चैक नं. 029733 दिनांक 06.07.2009 रु. 25,00,000/- दिया गया था ।

The above schedule of payment has been mentioned in the registered deed between the purchaser and seller along with cheque no. and date. Therefore, it is clear that the appellant has received the money as per above schedule in the A.Y. 2010-11. The appellant has made the deposit in

the capital gain account of Canara Bank in order to claim the deduction u/s 54F of the IT Act.

रु. 12,50,000/-	दिनांक 20.11.2009
रु. 12,50,000/-	दिनांक 20.11.2009
रु. 12,50,000/-	दिनांक 20.11.2009
रु. 12,50,000/-	दिनांक 20.11.2009
रु. 50,00,000/-	योग

The appellant has further made the deposit of Rs.17,00,000/- in the long term capital gain account no.2467101013655 with Canara Banbk on 20.11.2009. Therefore, in the balance sheet as on 31.03.2010 the appellant has shown the capital gain deposit account at Rs.17,09,917/- + Rs.50,16,541/- including interest. Since appellant has made the investment in the capital gain account immediately after receipt of the money as per sale deed, the appellant is entitled for exemption u/s 54F. By merely the appellant has not claimed the exemption u/s 54F he cannot be denied the benefit of exemption if he has followed the procedure for claiming exemption undisclosed income/s 54F. The appellant has not claimed the exemption in the original refund because he has not offered the capital gain during the year under consideration on the

assumption that it is not taxable in the year under consideration. The conclusion of the A.O. that it is taxable during the year under consideration is correct but at the same time he should have considered the exemption in respect of 54F. The various judicial authorities dealt regarding the chargeability of the long term capital gain when sale consideration is not received :-

- i. CIT vs. Smt. Najoo Dara Deboo (2013) Taxmann 743 it has been held that capital gain is charged only on receipt of sale consideration and not otherwise. Person cannot pay capital gain if he has not received any amount.*
- ii. IOTAT Hyderabad in case of Gulf Oil Corporation Ltd. vs. ACIT reported on 39 CCH 023 held that same item of income cannot be taxed in two different assessment years.*
- iii. Mahesh Nemichand Ganeshwade & Others vs. Income Tax Officer case reported on (2012) 147 TTJ 488, ITAT Puna – In this case the Hon'ble ITAT Puna Bench held as under :-*

Capital gain – Exemption u/s 54EC – Assessee claimed exemption under s. 54EC for having made investment within 6 months from the date of receipt of sale consideration – A.O. & CIT(A) allowed exemption only upto Rs.25,00,000/- but denied in respect of Rs.12,50,000/- and Rs.37,50,000/- made on 3.8.2007 and 27.10.2007 on the ground that the investment in eligible bonds was not made by the assessee within the stipulated period of 6 months from the date of transfer of land – Held, CBDT in consultation with the Ministry of Law decided that period of six months for making investment in specified assets for the purpose of ss.54EA, 54EB and 54EC should be taken from the date when stock in trade is sold or otherwise transferred in terms of s. 45(2) though the taxability of capital gain was on the basis of transfer as understood in s. 45(2) – Having regard to the impossibility of performance to invest the amount in specified assets within six months from the date of transfer i.e. the date of conversion of

capital asset into stock in trade, the period of six months for making investment in specified assets has to be reckoned from the date of the sale of such stock in trade when the right to collect sale consideration in such cases arose. Appeal of the assessee on this issue is allowed.

- iv. The board issued the circular no. 791 dated 02.06.2000 wherein it has been held that appellant can make the investment in the specified assets for the purpose of section 54EA, 54EB and 54EC with in six month from date of consideration received.*
- v. The Hon'ble Bombay High Court in the case of CIT vs. Smt. Beena K. Jqain (1994) 75 Taxmann 145 held that section 54F of the Income Tax Act, 1961 – Capital gains Exemption – In case of investment in residential house Assessee sold office premises on 23.7.1987 which resulted in long term capital gain ofRs.24,05,050/- - Prior to this assessee had entered into an agreement dated 4.9.1985 for purchase of a residential flat for a total consideration of*

Rs.12,26,751 which agreement of sale was registered on 27.10.1985 – Assessee paid consideration amount on 29.7.1988 and was put in possession of sold flat on 30.7.1988 – Assessee claimed benefit of exemption under section 54F – Whether new residential house was purchased by the assessee within two years after the sale of the capital asset which resulted in long term capital gains – Held, yes – Whether a question of law arose from the Tribunal's order allowing exemption of Rs. 11,04,423/- under section 54F considering date of possession of new residential premises instead of date of sale agreement and date of registration – Held, no.

4.1.2 Following the above decisions it is concluded that the date of reckoning of the investment start from the receipt of the consideration in the hands of the appellant. In the present case the appellant has utilised the sale consideration within a stipulated time in scheme of Central Government made in that behalf. Therefore, appellant is eligible for exemption u/s 54F

of the IT Act. Therefore, the A.O. is directed to allow exemption u/s 54F of the IT Act on the amount deposited by the appellant in the capital gain account amounting to Rs.67,00,000/-. Therefore, the appeal on this ground is partly allowed.”

4. We have heard arguments of both the sides and carefully perused the relevant material placed on record of the Tribunal, inter-alia, assessment order, impugned first appellate order and other relevant documents. The learned Departmental Representative (DR) supporting the action of the Assessing Officer, contended that the assessee has not shown long term capital gain amounting to Rs.75,55,894/- and short term capital gain of Rs.8,72,925/- in the original return of income or in the return filed in response to notice u/s 148 of the Income Tax Act, 1961 (in short ‘the Act’). The learned DR drew our attention towards paragraph 9 of the assessment order and submitted that on the basis of entire documents placed on record of the Assessing Officer, it was clear that the assessee, Shri Anil Jhalani, was the sole owner of the property on the date of execution of the sale deed and accordingly

the entire sale consideration was assessed in the hands of the assessee. The learned DR vehemently contended that the Assessing Officer clearly noticed that the assessee never made the claim of deduction u/s 54F of the Act in the original return of income or in the return of income filed in response to notice u/s 148 of the Act. Accordingly, the Assessing Officer was quite correct in not allowing the deduction u/s 54F of the Act. Lastly, the learned DR submitted that since the learned CIT(A) has granted relief to the assessee without any justification and basis, the impugned order may kindly be set aside by restoring that of the Assessing Officer.

5. Replying to the above, the learned counsel for the assessee supporting the order of the learned CIT(A) took us through the operative part i.e. para 4.1 of the first appellate order and submitted that the assessee has made deposit in the capital gain account with Canara Bank in order to claim deduction u/s 54F on 20.11.2009 and the assessee received the entire consideration on 6.7.2009. The learned counsel for the assessee further submitted that in view of the above, the assessee has made investment in capital gains account immediately after the receipt of the money as per sale deed and, therefore, the assessee is entitled to exemption

u/s 54F of the Act. The learned counsel for the assessee contended that merely because the assessee has not claimed exemption u/s 54F of the Act in the original return, he cannot be denied benefit of exemption for which he is entitled u/s 54F of the Act. Explaining the cause of non-claiming the deduction in the original return of income, the learned counsel for the assessee submitted that the assessee has not offered the capital gain during the year under consideration on the assumption that it is not taxable in the year under consideration under the bonafide belief. Therefore, the assessee cannot be denied the benefit of exemption for which he is entitled under the provisions of the Act, due to bonafide omission in claiming the same in the original return of income. The learned counsel for the assessee further drew our attention towards Board Circular No. 791 dated 2.6.200 and submitted that the assessee can make investment in the specified assets for the purpose of claiming deduction within six months from the date of the consideration received. Therefore, the assessee cannot be denied exemption u/s 54F of the Act and, therefore, the conclusion drawn by the learned CIT(A) is sustainable and thus the same may kindly be upheld.

6. On careful consideration of the above rival submissions, from the relevant operative part of the assessment order i.e. paras 9 to 12, we observe that the main allegation of the Assessing Officer is that the assessee neither claimed deduction in the original return of income nor claimed the same in the return filed in response to notice u/s 148 of the Act. However, the learned Assessing Officer noted in the end of para 9 that the assessee, Shri Anil Jhalani, was the sole owner of the property sold on the date of execution of the sale deed and accordingly the entire sale consideration is assessed in the hands of the assessee.

7. From the relevant operative part of the first appellate order we find that the learned CIT(A), after elaborately discussing the issue in paras 4.1, 4.1.1 and 4.1.2 (supra) has granted relief to the assessee with the direction to the Assessing Officer to allow exemption u/s 54F of the Act on the amount deposited by the appellant in the capital gain account amounting to Rs.67,00,000/-.

8. In view of the above, at the very outset, we may point out that the Assessing Officer himself has accepted the fact that on the date of execution of sale deed, the assessee, Shri Anil Jhalani, was the sole owner of the property. When we logically analyse the

observations recorded by the learned CIT(A) then we observe that for granting relief to the assessee, the learned CIT(A) has noted a very relevant fact that the assessee has made investment of entire sale consideration in the capital gains account immediately after receiving the money as per the sale deed. Therefore, the assessee is entitled to exemption u/s 54F of the Act. On the totality of the facts and circumstances of the case, we are in agreement with the conclusion drawn by the learned CIT(A) that merely because the assessee has not claimed exemption u/s 54F of the Act in the original return of income and subsequent return filed in response to notice u/s 148 of the Act, the assessee cannot be denied the benefit of exemption. We may also point out that when the assessee has deposited the entire sale consideration in the capital gains account within the prescribed time i.e. within six months after receipt of the sale consideration as per sale deed then the assessee is entitled to exemption u/s 54F of the Act.

8. In view of the above, we are unable to see any ambiguity, perversity or any other valid reason to interfere with the impugned first appellate order and, hence, we uphold the same.

9. Before we part with the order, we may point out that the revenue department in the second part of the ground raised before the Tribunal has challenged the conclusion of the learned CIT(A) by alleging that the learned CIT(A) was not correct in allowing the deduction u/s 54F of the Act as the assessee already own two houses and as such the assessee is not eligible for deduction/exemption as per proviso (a)(i) of section 54F(1) of the Act. From a careful reading of the assessment order we are unable to see any such allegation against the assessee that he is not entitled for deduction u/s 54F of the Act as he has already owned more than one residential house other than the new asset on the date of transfer of the original asset. This proviso applies to the cases wherein the assessee claims deduction u/s 54F of the Act on account of purchase of new residential house from the sale consideration received which brings long term capital gain to the assessee. Since in the present case as we have already concluded that the assessee did not claim deduction u/s 54F of the Act on account of purchase of new residential house and the claim of the assessee u/s 54F of the Act has been based on the premise that the assessee deposited sale consideration within the prescribed time

limit in the capital gains account with Canara Bank, therefore, second part of the ground raised by the revenue is irrelevant and, hence, we dismiss the same.

10. During the course of arguments, the learned counsel for the assessee fairly submitted that the cross objection of the assessee has been filed merely with an object to support the conclusion of the learned CIT(A) in favour of the assessee. Since by the earlier part of this order we have dismissed the appeal of the revenue, therefore, the cross objection of the assessee becomes academic and thus the same is dismissed as having become infructuous.

11. In the result, the appeal of the revenue as well as the cross objection of the assessee are dismissed.

The order has been pronounced in open Court on March 30, 2017.

Sd/-

sd/-

लेखा सदस्य
(O.P.Meena)
Accountant Member

न्यायिक सदस्य
(C.M. Garg)
Judicial Member

March 30th 2017.

Dn/

