

आयकर अपीलीय अधिकरण “ए” न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH, PUNE

BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.895/PUN/2019
निर्धारण वर्ष / Assessment Year : 2014-15

Muzaffer Mahmood Khan,
Diamond General Batteries,
Diamond Complex, Silk Mill Colony,
Paithan Road, Aurangabad-431001

PAN : ARBPK8682L

.....अपीलार्थी / Appellant

बनाम / V/s.

Pr. Commissioner of Income Tax-2,
Aurangabad

.....प्रत्यर्थी / Respondent

Assessee by : Shri K. Srinivasan
Revenue by : Shri S.B. Prasad

सुनवाई की तारीख / Date of Hearing : 02-12-2019
घोषणा की तारीख / Date of Pronouncement : 10-01-2020

आदेश / ORDER

PER S.S. VISWANETHRA RAVI, JM :

This appeal by the assessee against the order dated 19-03-2019 passed by the Pr. Commissioner of Income Tax (Appeals)-2, Aurangabad u/s. 263 of the Act for assessment year 2014-15.

2. The assessee raised as many as ground Nos. 1 to 5 involving the only issue, challenging the initiation of the proceedings u/s. 263 of the Act, consequently to quash the order dated 19-03-2019 passed by Pr. CIT in the facts and circumstances of the case.

3. The brief facts of the case as emanating from the record are that the assessee is an individual engaged in trading of batteries and coolers and conducts his business under the name and style of "M/s. Diamond General Batteries." He filed his return of income declaring a total income at Rs.8,52,907/- and was selected for limited scrutiny. The AO issued notices u/s. 143(2) and 142(1) of the Act and in response to such notices an authorized representative on behalf of the assessee appeared before the AO and filed written submissions and explained income returned. The AO accepted the return of income filed by the assessee and completed scrutiny assessment vide its order dated 20-12-2016 u/s. 143(3) of the Act.

4. As matter stood thus the Pr. CIT-2, Aurangabad on verification of assessment records for the year under consideration show caused assessee why the assessment order passed by the AO u/s. 143(3) of the Act should not be treated as erroneous and prejudicial to the interest of revenue for following reasons:

- i. *Firstly*, for showing investment in two residential units; and
- ii. *Secondly*, for showing purchase price of said property at Rs.70,00,000/- which is 1346% above market price of Rs.4,84,000/-

5. In reply, it was explained that the developer/builder M/s. Golden Dreams Buildcon Pvt. Ltd. executed Deed of Assignment (Sale Deed) on

31-07-2014 in favour of assessee and the said date is to be considered as date of purchase of residential unit. Further, for the second query it was explained the value ascertained by the Stamp Valuation Authority is only to facilitate the payment of stamp duty for registering the sale deed is always varies from market value. Supporting the same, sample sale transactions in a tabular form were submitted. The Pr. CIT-2, Aurangabad found the submissions of assessee are not acceptable and held the claim allowed by the AO u/s. 54F violated the conditions and the AO failed to examine the issue. Regarding the second issue of market price the Pr. CIT-2, Aurangabad held the AO should have verified the issue by examining the flats nearby, and he held the assessment order passed u/s. 143(3) of the Act is erroneous and prejudicial to the interest of revenue.

6. Having aggrieved, the assessee is now before us challenging the action of Pr. CIT in holding the assessment order passed by the AO u/s. 143(3) of the Act is erroneous and prejudicial to the interest of revenue. The assessee filed paper book containing pages 1 to 288 certifying that all documents therein were before lower authorities.

7. Heard both parties and perused the material available on record. The contention of Shri K. Srinivasan, the ld. AR that it was a limited scrutiny and the AO issued notice dated 10-08-2016 u/s. 142(1) along with a questionnaire and specifically asked to furnish details of low capital gain with respect to sale consideration and substantial increase in capital in a year. We note that the notice dated 10-08-2016 issued u/s. 142(1) of the Act is placed at page No. 256 of the paper book and the questionnaire is at page 255 of the paper book. On perusal of the same, it shows that a

question was raised by the AO at point No. 3, in response to the said notice the assessee gave reply dated 22-08-2016 which is at page No. 205 of the paper book wherein it was specifically stated that the assessee sold the jointly held inherited agricultural land and the assessee received Rs.2.97 crores being 22% of share in accordance with the Sharia/Mohammaden Law. It was claimed that the assessee has made certain investments from the sale proceeds of agricultural land and supported the allowability of claim u/s. 54B and 54F of the Act along with all details of sale proceeds and its reinvestment.

8. On perusal of deed of Agreement to Assign which is at page No. 182 of the paper book wherein it has been executed between M/s. Golden Dreams Buildcon Pvt. Ltd. and Mr. Muzaffar Mahmood Khan viz. assessee before us being owner/assignor and purchaser/assignee, respectively wherein it was agreed to allot undivided area/ two units admeasuring 200 sq. ft. built up area in IT building No. IT-1 in IT Park known as “Premchand Infocity” for a total consideration of Rs.2,00,000/-. Further, it was agreed to assign two residential unit of “Premchand Infocity IT Park” in Cluster “A” building No. A-7, bearing No. 701 & 702 located on sixth floor for a total consideration of Rs.68,00,000/-. Further, the said Agreement speaks that the undivided area of 200 sq. ft. of IT Unit and Residential Unit in IT Park are inseparable and the assessee shall not be entitled to transfer undivided area in IT Building and Residential Unit separately. Therefore, it is clear that the assessee made investments in two IT Units and two Residential Units. Though, the Agreement to Assign said to have been before the AO, it appears from assessment order no reference whatsoever made by the AO in terms of claim u/s. 54F of the Act.

9. Shri S.B. Prasad, the Id. DR contended that this is a case of lack of enquiry by the AO and the AO failed to examine the issue deriving the assessment proceeding and referred to para No. 4 of order of Pr. CIT. He, further, submits that the assessee himself submitted vide written submissions that a token amount of Rs.5,00,000/- against total consideration of Rs.70,00,000/- and considering the issue in detail in terms of submissions made by the assessee, the Pr. CIT has taken the date of payment of token money i.e. 16-03-2010 as the date of purchase and held the claim allowed by the AO violated the conditions stipulated in the provision u/s. 54F of the Act.

10. On perusal of the Agreement to Assign reveals that the assessee invested in two residential units, in our opinion, is not the condition stipulated to make claim u/s. 54F of the Act. Sub-section (1) of Section 54F of the Act relevant to year under consideration explains the capital gain arises on the transfer of any Long Term Capital Gain assets to be invested within a period of one year before the date on which the transfer took place or as within a period of three years after that the date constructed, a residential house. As discussed above, we find that the assessee made investments in two residential units along with two IT unit for a total consideration of Rs.70,00,000/- which is evident from internal page 8 of Agreement to Assign at main page at 185 of paper book, thereby, we find the AO assumed incorrect facts to satisfy the requirement u/s. 54F of the Act which supports the finding in showcasing of the Pr. CIT in its impugned order at page No. 1 that the assessee have shown investment in two residential units and the said residential units were purchased on 16-03-2010 which was beyond the allowed period of one year before sale of

capital asset. Therefore, we find force in the arguments of ld. DR that it is a lack of enquiry by the AO in terms of claim made u/s. 54F of the Act.

11. Further, to the second query about substantial increase of sale price shown by the assessee vis-à-vis the value of price ascertained by Stamp Valuation Authority, it is observed from the impugned order i.e. page No. 8, the AO said to have been referred to the Assistant Valuation Officer for valuation of land and for the cost of acquisition as on 01-04-1981, it appears by the time of framing of assessment, the said reply from the Assistant Valuation Officer has not been received by the AO and without considering the same he completed assessment and allowed the claim of assessee u/s. 54F of the Act without referring and recording the same in the assessment order. In our opinion, in the present case having no report from the Valuation Officer, the AO allowed the claim of assessee establishes that the AO failed to examine the claim of assessee in terms of law contemplated therein.

12. Coming to the decision as relied on by the ld. AR it was submitted with reference to the decision of Hon'ble High Court of Bombay in the case of CIT Vs. M/s. Fine Jewellery (India) Ltd. in Income Tax Appeal No. 296 of 2013 order dated 03-02-2015 that in respect of query raised by the AO, the assessee submitted all details and considering the same the AO allowed claim which indicates the application of mind by the AO. The ld. DR submitted that the claim therein was examined by the AO and held some amount as capital expenditure and remaining as revenue expenditure shows the AO examined the claim of miscellaneous expenses aggregating to Rs.2.94 crores. He argued that AO in the present case, no discussion

have been made by the AO. We find force in the arguments of ld. DR for the reason a specific query was raised by the AO regarding expenditure claimed under the head “miscellaneous expenses” aggregating to Rs.2.94 crores. Out of which the AO held Rs.17.98 lakhs is in the nature of capital expenditure and the remaining amount of Rs.1.76 crores as revenue expenditure, whereby, it clearly shows that the AO applied his mind and disallowed some part of claim of assessee. In the present case, the assessment order is consisting of two pages wherein we find no reference or whatsoever regarding the steps taken by the AO in respect of claim u/s. 54F of the Act. Therefore, in our opinion it is a case of lack of enquiry and the ratio laid down by the Hon’ble High Court of Bombay in the case of M/s. Fine Jewellery (India) Ltd. (supra) is not applicable to the facts of the preset case.

13. In the case of Deccan Paper Mills Co. Ltd. Vs. CIT in ITA Nos.1013 & 1635/PUN/2014 for the A.Ys. 2009-10 & 2010-11 order dated 10-10-2017 as relied by the ld. AR it was argued with reference to para Nos. 11, 12,, 20, 22 and 26, the said case was selected scrutiny under CASS to verify the claim of deduction u/s. 80IB(10) of the Act, the AO after examining the evidences filed by the assessee held that the assessee is entitled to claim deduction u/s. 80IB(10) of the Act, wherein we note that the AO mentioned that the assessee had entered into various Joint Venture and into real estate business and the details relating to claim u/s. 80IB(10) of the Act in support of claim u/s. 80IB(10) have been verified. Coming to the present case as discussed above, the AO neither mentioned the details of evidences concerning the claim u/s. 54F of the Act nor any examination regarding the evidence in support of claim in the assessment order. In view of the

same we find the facts in the present case are not similar to the case in Deccan Paper Mills Co. Ltd. (supra) and is not applicable to the facts and circumstances of the present case.

14. Regarding the decision of Rajesh Chandrakant Shah (HUF) Vs. Pr. CIT in ITA No. 1028/PUN/2016 for A.Y. 2011-12 order dated 06-02-2019 as relied on by the ld. AR, it was submitted that 263 proceedings have been initiated on the proposal initiated by the AO to substitute his original opinion and this Tribunal set aside the order made u/s. 263 of the Act. The ld. DR pointed that there was no proposal made by the AO in the present case, the Pr. CIT on its own on examination of assessment record initiated proceedings u/s. 263 of the Act. We note that in the said case the AO applied his mind and has made queries with respect to source of investments by recording statements of unsecured creditors. In the original proceedings, the AO did not find any discrepancies in the statements made by the unsecured creditors and the explanation furnished by the assessee, but however to substitute original opinion taking the shelter of paucity of time for conducting detailed enquiries, the AO proposed initiation of 263 proceedings. Having considering the facts and circumstances of the case the Co-ordinate Bench of this Tribunal held the provisions of section 263 cannot be allowed to be misused by the AO to super impose opinion different from the one taken at the time of original assessment proceedings. In present case, taking into consideration the assessment order, we find no opinion whatsoever expressed by the AO in allowing the claim of assessee u/s. 54F of the Act. Therefore, the order of this Tribunal in the case of Rajesh Chandrakant Shah (HUF) (supra) as relied on by the ld. AR is not applicable to the present case.

15. In respect of order of this Tribunal as relied on by the ld. AR in the case of Lalitkumar Kesarimal Jain Vs. Deputy CIT in ITA No. 1345/PUN/2017 for A.Y. 2012-13 order dated 24-09-2019 it was submitted that the assessee utilized sale proceeds arising out of original asset before due date of filing of return of income and the claim u/s. 54F of the Act cannot be denied only on the reason that no possession have been delivered to the assessee within the stipulated period. The ld. DR submitted that in the said case the genuineness of transactions for procurement of new residential flats were remained uncontroverted and in the present case the genuineness of transaction itself is not clear in respect of purchase, construction and possession in terms of provisions of section 54F of the Act. On perusal of said order of this Tribunal we find that the Tribunal by placing reliance on the decision of Hon'ble Supreme Court in the case of Fibre Boards (P.) Ltd. Vs. CIT reported in 62 taxmann.com 135 held the exemption u/s. 54F of the Act is to be allowed when the amount has been utilized before the due date of filing of return of irrespective of the delivery of possession of new asset within the stipulated period. In the present case we note that no discussion whatsoever regarding the transactions satisfying the conditions of provisions u/s. 54F of the Act by the AO. The sequence of events such as sale, purchase and other consequential transactions has not been discussed by the AO in assessment proceedings which is clear from the assessment order in terms of provision u/s. 54F of the Act. Therefore, the order of this Tribunal in the case of Lalitkumar Kesarimal Jain (supra) is not applicable to the facts and circumstances of the present case.

16. Coming to the decision of Hon'ble High Court of Himachal Pradesh in the case of Virbhandra Singh (HUF) Vs. Pr. CIT reported in 400 ITR 530 as relied on by the ld. DR we note that the Hon'ble High of Himachal Pradesh was pleased to hold that sub-section (1) of section 263 confers sufficient powers upon the Commissioner to decide all the issues of law by recording its satisfaction. The said power is wide enough to take in its sweep action of modifying, cancelling or directing fresh assessment, particularly when it is a case of no inquiry. Further, it was held any inquiry without application of mind is non est. We find the submissions of ld. AR that all the details for furnished before the AO in respect of limited scrutiny under CASS, but however, the AO without any inquiry in respect of the claim in terms of provisions u/s. 54F of the Act accepted the return of income as submitted by the assessee, clearly shows no inquiry at all conducted by the AO as it is evident from assessment order or in the computation of income as reflecting in the last page of assessment order. Therefore, the AO did not apply his mind at all in respect of claim made by the AO, when there is no application of mind, the Pr. CIT rightly exercised its jurisdiction u/s. 263 of the Act. Therefore, the ratio laid down by the Hon'ble High Court Himachal Pradesh in the case of Virbhadra Singh (HUF) (supra) is applicable to the facts and circumstances of the case.

17. Coming to the decision of Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. Vs. CIT reported in 243 ITR 83 as relied on by the ld. DR wherein it was held an incorrect assumption of facts or an incorrect application of law will satisfy the requirement u/s. 263 of the Act render the order being erroneous. Therefore, in our opinion the AO failed to apply his mind to the case in all perspective in terms of conditions

contemplated in provisions u/s. 54F of the Act. He accepted the claim of assessee in the absence of any inquiry, in our opinion, the Pr. CIT rightly held its jurisdiction u/s. 263 of the Act and it is justified. Thus, the grounds raised by the assessee are devoid of any merit and are dismissed.

18. In the result, the appeal of assessee is dismissed.

Order pronounced in the open court on 10th January, 2020.

Sd/-
(Anil Chaturvedi)
ACCOUNTANT MEMBER

Sd/-
(S.S. Viswanethra Ravi)
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 10th January, 2020
RK

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The Pr. Commissioner of Income Tax-2, Aurangabad
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, “ए” बेंच,
पुणे / DR, ITAT, “A” Bench, Pune.
5. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति// True copy //

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary,
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune