IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "SMC" BENCH
(Conducted Through Virtual Court)
Before: Shri Waseem Ahmed, Accountant Member
And Shri Siddhartha Nautiyal, Judicial Member

ITA No. 11/Ahd/2019
Assessment Year 2011-12

Vinodkumar S. Totla, 201, Prathmesh Apartment, Near Chapaner Society, Usmanpura, Ahmedabad PAN: AAVPT3335J (Appellant)	Vs	The ITO, Ward-7(1)(4), Nature View Building, Off Ashram Road, Ahmedabad (Respondent)

Assessee by: **Shri S.N. Divetia, A.R.**
Revenue by: **Shri R.R. Makwana, Sr. D.R.**

Date of hearing : 30-03-2022
Date of pronouncement : 08-04-2022

आदेश/ORDER

PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-

This is an appeal filed by the assessee against the order of the ld. Commissioner of Income Tax (Appeals)-7, Ahmedabad in Appeal no. CIT(A)7/78/2016-17 vide order dated 14/12/2018 passed for the assessment year 2011-12.

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

"1.1 The order passed u/s. 250 on 14-12-2018 by CIT(A)-7 Abad confirming the order passed u/s. 154 on 03.08.2016 by ITO, Wd-7(1)(4), Abad for A.Y.2011-12, rectifying the order of original assessment passed u/s.!43(3) on 30.12.2013 of withdrawing exemption/s 54 by holding the capital gain on sale of land as STCG is wholly illegal, unlawful and against the principles of natural justice.

1.2 The Ld. CIT(A) has grievously erred in law and or on facts in not appreciating that the impugned rectification u/s.154 was illegal and unlawful.

1.3 That in the facts and circumstances of the case as well as in law, the Ld. CIT(A) ought to have held that the impugned rectification u/s.1.54 was illegal and unlawful.

1.4 The Ld. CIT(A) has grievously failed to appreciate that there was no mistake apparent on record of holding the land bearing FP No. 31 of block no. 279 of vill. Gota was a long term capital asset and allowing exemption u/s 54.

2.1 The Ld. CIT(A) has grievously erred in law and or on facts in holding that the appellant had not become owner of the said land on 23-2-1987 but on 8-12-2009 when the transfer deed was executed so that the said land was a short term capital asset. The Ld. CIT(A) has grievously erred in law and or on facts in rejecting the evidence produced by the appellant towards possession and ownership of said land acquired prior to 08.12.2009.

2.2 That in the facts and circumstances of the case as well as in law, the Ld. CIT(A) ought not to have held that the appellant had not become owner of the said land on 23-2-1987 but on 8-12-2009 when the transfer deed was executed so that the said land was a short term capital asset.

3.1 The Ld. CIT(A) has grievously erred in law and or on facts in upholding withdrawal of the exemption claimed u/s.54F of Rs.49,71,478/- and instead assessing it as STCG of Rs.56,11,000/-.

3.2 That in the facts and circumstances of the case as well as in law, the Ld. CIT(A) ought not to have upheld withdrawal of the exemption claimed u/s.54F of Rs.49,71.478/- and instead assessing it as STCG of Rs.56,11,000/-.

It is therefore prayed that the order passed u/s. 154 and the addition of Rs. 56,11,000/- as STCG may be deleted."

3. The brief facts of the case are that the assessee filed its return of income for A.Y. 2011-12 declaring total income of Rs. 2,44,449/-. During the course of assessment proceeding, the ld. A.O. noticed that the assessee has not shown interest income of Rs. 28,110/- earned from Essan Marketing in the return of income and therefore added the same to the income of the assessee. However, subsequently the ld. A.O. initiated 154 proceeding on the grounds that the assessee had claimed deduction of Rs. 49,71,478/- u/s. 54F of the Act on long term capital gain on sale of property, whereas on a perusal of records it is found that immovable property sold by the assessee was not long term capital asset but it was a short term capital asset and therefore section 54F deduction had been incorrectly allowed to the assessee. During the 154 proceeding, the assessee submitted that he had entered into banakhat and irrevocable general power of attorney (GPA) to purchase the said plot of agricultural land with seller which was registered on 23-02-1987. From the terms of the GPA, various sanctions, permissions were to be obtained such as permission to sell the land u/s. 26 of the Urban Ceiling Act, 1976, its conversion into non-agricultural land from additional collector

under the land revenue laws, title clearance certificate etc. The assessee submitted gram panchayat tax bills before the ld. A.O. for the period 1988-89 to 2004-05 in the assessee's name in support of the contention that the effective control of the property was with the assessee. The assessee submitted that the above agricultural land was converted into non-agricultural land vide order dated 19-11-2008 and the plot of land got transferred in the name of assessee on 08-12-2009 for a consideration of Rs. 4,00,000/-. Hence, the assessee has sold long term capital asset held by him since 23-02-1987. The assessee subsequently sold this plot of land for Rs. 60,11,000/- on 14-10-2010 and claimed exemption u/s. 54F of the Act in respect of such long term capital gains. The ld. A.O. held that assessee was in possession of the plot from 08-12-2009 (date of registration of the plot of land in assessee's name) to 14-10-2010 (date of sale of land by the assessee) i.e. for 10 months only and therefore capital gains earned was a short term capital gain and ld. A.O. vide 154 order dated 03-08-2016 rejected the claim of deduction of the assessee made u/s. 54F of the Act and added a sum of Rs. 56,11,000/- as short term capital gain to the income of the assessee.

4. The assessee filed appeal before the ld. CIT(A) who dismissed the assessee's appeal vide order dated 14-12-2018 by holding that:

(a) The final purchase deed executed on 08-12-2009 did not make mention of the power of attorney or possession given on that date i.e. 23-12-1987.
(b) The entire consideration of Rs. 4 lakhs, there was no reference to payment mentioned in agreement made in 1987.

(c) There cannot be transferred in favour of the non-agriculturalist which required permission and it was taken by land owners vide order dated 19-11-2008 wherein no name of the appellant was mentioned.

(d) Since agreement of 1987 and the power of attorney were not considered, there was mistake apparent from record.

While passing the order, the ld. CIT(A) observed as below:-

"5.5 On careful consideration of relevant documents and agreements available on record it is observed that Appellant has claimed that he was holding the land sold during the year from 1987 whereas AO was contending that said land was purchased by Appellant only on 8th December, 2009. While passing the original Assessment Order AO has accepted the claim made by Appellant in return of income and allowed deduction under Section 54 of the Act. It is a matter of fact that Appellant has claimed cost of acquisition of asset sold during the year at Rs. 4 lacs and entire payment of such sum was made through account payee cheque on 7th December, 2009 i.e. one day prior to the date on which sale deed is executed. The Appellant has relied upon irrevocable power of attorney executed with sellers in 1987 but such power of attorney does not make Appellant owner of the property. The Appellant has also relied upon possession-cum-declaration and agreement to sale dated 23rd February, 1987 and claimed that he has become owner of the property and possession has also been obtained on such date. In this agreement to sell it is mentioned that sale value is Rs.21,780 and against such amount first amount towards bana was Rs. 2178 and sale consideration of Rs. 6,534 and Rs.8,712 was received in cash. It is pertinent to note that final sale deed executed in 2009 nowhere refers to above referred power of attorney, agreement to sale or possession receipt of 1987. The sale deed clearly mentions the fact that possession is given on the date on which sale deed is executed and not in the year 1987. The entire sale consideration of Rs. 4 lacs as stated herein above is paid one day prior to execution of sale deed and there is no reference of payment of Rs.2,178, Rs.6,534 or Rs. 8,712, as mentioned and claimed by Appellant in agreement to sale.

Even if claim of Appellant that purchase was made in 1987 is accepted, fair value of property was Rs. 21,780 but sale deed is executed for Rs. 4 lacs hence such claim of Appellant cannot be accepted. If possession is given in 1987, then why such fact is not mentioned in sale deed is not explained by Appellant. Even legally, the appellant could not have purchased or become an owner of an agricultural land. What the appellant could not have done legally cannot be claimed as a legal document. Though the appellant has claimed the ownership of land at the time of alleged agreement to sale made in 1987, the impugned land could not have been sold at the time of such alleged agreement to sale, because, under the relevant provisions as applicable for transfer of agricultural land in the State of Gujarat, such land cannot be sold to a non-agriculturist. It is also pertinent to state that it is always the seller i.e. the agriculturist who applies for the permission to convert the agricultural land into non-agricultural land when he wants to sell the agricultural land to a non-agriculturist. In the present case also, it is the venders who have got the permission for sale of land. Even order of converting agricultural land into non-agricultural passed by Collector, Ahmedabad, on 19th November, 2008 was in the name of sellers and not in the name of Appellant. The reason of passing of such order in the name of sellers is also not explained by Appellant. It is a matter of fact that even though land was converted into NA in 2008, registered sale deed was executed in December 2009 i.e. almost after one year and if Appellant is de-facto owner of the property on conversion of land, such sale deed would have been executed immediately. So far as claim of Appellant that there cannot be substantial increase in the value from Rs.4 lacs to Rs.60.11 lacs in one year, it is observed that though Appellant has executed purchase deed for Rs,4 lacs on 8th December, 2009 wherein stamp duty is mentioned at Rs.2,49,750/- and Jantri value of above property works out at Rs.50,96,938/- which makes the appellant liable for provisions of Section 56(2)(vii)(b) of the Act and therefore increase in value by approximately Rs.10 lacs is reasonable within one year hence the contention of Appellant that there is phenomenal increase in value of land if it is held that land is purchased in 2009 cannot be accepted. From the facts discussed herein above it is apparent that Appellant has not become owner of the property in 1987 and registered purchase deed and sale deed clearly prove that Appellant has held the land for less than 36 months

hence assets sold by Appellant is short term capital asset on which deduction under Section 54 cannot be allowed.

So far as contention of Appellant that above issue cannot be adjudicated by passing Rectification Order, it is observed that non-mentioning of agreements or PoA executed in 1987 and amount paid in 1987 by Appellant to sellers is missing in final sale deed clearly prove that these agreements executed in 1987 were not considered or taken into account by either of the party which is nothing but mistake apparent on record and AO was correct in passing Rectification Order under Section 54 of the Act. Thus, withdrawal of deduction claimed in return of income was rightly withdrawn by passing order under Section 154. Therefore, the ***related ground of appeal is dismissed."***

5. Before us, the ld. counsel for the assessee submitted that the assessee had entered into a registered banakhat with the seller on 23-02-1987. He drew our attention to pages 42 to 49 of the paper book stating that in the Gota Gram Panachayat tax bills for the period 1988-89 to 2004-05, the assessee's name was appearing which showed that the assessee had effective right over the property since 1987. The ld. counsel for the assessee submitted that when we look at the combined effect of chain of events like entering into a registered banakhat in 1987, the initiation of process of conversion of agricultural land into a non-agricultural land as per terms of banakhat, payment of gram panchayat tax bills by the assessee and execution of final sale deed between the same parties, it is evident that what the assessee sold was a long term capital asset held for over 20 years and not a short term capital asset held for a period of 10 months as held by the ld. A.O. in the 154 order. Without prejudice to the above, the ld. counsel for the assessee challenged the validity of the order passed u/s 154 of the Act by submitting that the ld. A.O. in the instant set of facts did not have the

jurisdiction to pass order u/s. 154 of the Act in the present set of facts since the issue was examined by the ld. A.O. during the course of original proceeding and the issue involved a detailed analysis and interpretation of facts and fell outside the purview of rectification u/s. 154 of the Act, which can be invoked only to rectify "mistakes apparent from the record" and in the 154 order, the ld. A.O. has done a detailed analysis to come to the conclusion that the assessee has earned a short term capital gain and hence is not entitled to the benefits of section 154 of the Act. In response, the Ld. DR placed reliance on the observations of Ld. Pr. CIT in the order passed u/s 263 of the Act.

6. Before dealing with the merits of the case, in our view, it is first imperative to we would first dwell upon the issue, whether in the instant set of facts, an order can be passed u/s 154 of the Act to correct a 'mistake apparent from record'. In the case of **T.S. Balaram, ITO v. Vokart Bros. [1971] 82 ITR 50**, the Supreme Court, while considering the scope of section 154, categorically laid down that mistake apparent on the record must be obvious and patent mistake and not something which can be established by long-drawn process of reasoning on points on which there may be conceivably two opinions. Supreme Court further held that a decision on a debatable point of law is not a mistake apparent from the record. In the case of **CIT v. Gujarat State Export Corpn. Ltd. 279 ITR 477 (Guj)**, the Gujarat High Court held that a mistake apparent on record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may be conceivably two opinions. In the case of **CIT v. Bhawani Prasad**

Girdhari Lal & Co. 187 ITR 257 (Allahabad), the Allahabad High Court Section 154 does not give power to the ITO to change his opinion and review his order. The Bombay High Court in the case of **Sidhramappa andannappa Manvi v. CIT [1952] 21 ITR 333 (Bombay)** held that the power of the Tribunal to rectify the mistake is undoubtedly a limited power; it is not a power of revision or review, but it is limited to correcting only those mistakes which are apparent on the record. A mistake must be patent on the record; it must not be a mistake which can be discovered by a process of elucidation, or argument, or debate. In the case of **K. Parameswaran Pillai v. Addl. ITO [1955] 28 ITR 885 (Kerala)**, Kerala High Court held the income-tax authority cannot resort to a revision and reassessment in the guise of a rectification proceeding and such an order could not stand.

6.1 Now coming to the facts of the case, the issue before us whether it can be said that the facts are straightforward enough to come to an unmistakable conclusion that the assessee has earned short term capital gains and assessee held the asset only for a period of 10 months, as held by the Ld. AO in the 154 order. We note from the facts that in the original assessment order, the Ld AO called for details of exemption claimed u/s 54F of the Act and after due application of mind, allowed the assessee's claim for exemption u/s 54F of the Act. However, in the 154 order, the Ld. AO has come to the conclusion that the assessee has earned short term capital gains and hence not eligible for deduction u/s 54F of the Act. In our view, perhaps after a long drawn debate, we may come to the conclusion that the assessee did in fact earn short term capital gains and is not eligible for exemption u/s 54F of the Act which is available on sale of asset held for more than 36

months. However, in our view, this decision would not qualify as a 'mistake apparent from the record'. There are few factors which need to be considered while taking a view in the matter. Firstly, the assessee entered into a Banakhat with the seller in 1987 in respect of a piece of land, which was duly registered. Secondly, the said piece of land was converted from agricultural to non-agricultural with the object to effectuate the Banakhat referred to above. Thirdly, the assessee has produced copies of Gota Gram Panachayat tax bills for the period 1988-89 to 2004-05 with the assessee's name was appearing which showed that the assessee had effective right over the property since 1987. The above seems to suggest that assessee had secured the right to purchase the property after completing necessary formalities. Fourth, the same property in respect of which Banakhat was entered in 1987 was transferred in the name of the assessee by the same party/ seller. Hence, in light of the above facts, it would be difficult to conclude that it is a straightforward case wherein the Ld. assessing officer has made a 'mistake apparent from the record'. The Ld. Counsel for the assessee has brought various evidences in support of his contention that the assessee had secured effective right to have the asset transferred in his name since 1987. Both parties, the seller and the buyer of land (assessee) took necessary steps to effectuate the sale. The sale of said plot was registered in assessee's name on 08-12-2009. In our view, in view of the cases cited above, the issue involved requires an analysis of facts before coming to the conclusion whether the sale of land by the assessee qualifies as a short term or long term capital gains. This, in our view, is not an issue which can be a subject matter of section 154 of the Act. Therefore, in our view, the Ld. CIT(A) erred in law and in facts in upholding the order u/s 154 of the Act

passed by the Ld. AO. Now having decided on jurisdiction, we are not going into the merits of the case on each ground individually.

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

Order pronounced in the open court on 08-04-2022

Sd/-	**Sd/-**
(WASEEM AHMED)	**(SIDDHARTHA NAUTIYAL)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad : Dated 08/04/2022

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद