

**IN THE INCOME TAX APPELLATE TRIBUNAL 'A' BENCH, MUMBAI
BEFORE SHRI G.S. PANNU, AM AND SHRI RAVISH SOOD, JM**

आयकर अपील सं./ I.T.A. No. 6261/Mum/2013
(निर्धारण वर्ष / Assessment Year: 2003-04)

Smt. Amina Ismil Rangari Building No. 2, Room No. 10, Kidwai Nagar, Wadala, Mumbai-400019	बनाम/ Vs.	ITO Ward 17(2)4, Piramal Chambers, Parel Mumbai-400012
स्थायीलेखासं./जीआइआरसं./	PAN/GIR No.	AAAPR9083C
(अपीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से/ Appellant by	:	Dr. Danial, A.R
प्रत्यर्थी की ओर से/ Respondent by	:	Shri V. Justin, D.R.

सुनवाई की तारीख/ Date of Hearing	:	27/06/2017
घोषणा की तारीख / Date of Pronouncement	:	15/09/2017

आदेश / ORDER

PER RAVISH SOOD, JUDICIAL MEMBER:

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-29, Mumbai, dated 23.09.2013, which in itself arises from the order passed by the A.O u/s. 251 r.w.s 143(3) of the Income-tax act, 1961 (for short 'Act') giving effect to an earlier order passed by the CIT(A), dated 25.05.2012. The assessee assailing

the order of the CIT(A) had raised before us the following grounds of appeal :-

“On the facts and in the circumstances of the case, The Learned Commissioner of Income Tax (A) 29. Mumbai-

1. Rejecting claim of relief U/s 54F

Erred in confirming the action of A.O. in rejecting claim of relief U/s 54F of the I.T. Act 1961 while giving effect of CIT(A's) order dated 25/05/2012 on the ground that assessee had not filed the return of income within 30 days from the date of issue of notice U/s 148 of the I.T. Act 1961.

2. Levy of Interest U/s 234B, 234C

Erred in confirming the levy of interest U/s 234B and 234C which is not in accordance with the provisions of law.

The Appellant craves to add, alter, delete or modify any of the above grounds of appeal and request to consider each of the above grounds without prejudice to one another.

2. Briefly stated, the facts of the case are that the assessee had in response to a notice issued under Sec. 148 filed her 'return of income' for A.Y. 2003-04, declaring taxable income of Rs.7,04,169/- after claiming exemption under section 54F amounting to Rs. 20,00,000/- against the 'Long-term capital gains' arising from sale of shares. The case of the assessee was re-opened and a notice under Sec. 148 was issued and served upon him. The assessment in this case was completed under section 143 (3) r.w.s. 147 on 15.12.2010 at an income of Rs. 27,69,870/- and it was held by the A.O that the share transaction entered into by the assessee resulting in long term capital gains were not genuine. Since the long-term capital gains were not treated to be genuine, the AO also rejected the claim of the assessee for exemption under section 54F amounting to Rs. 20,00,000/-.

3. The assessee being aggrieved with the assessment framed by the A.O carried the matter in appeal before the CIT(A). The CIT(A) vide order dated 19.08.2011 held the transactions of sale/purchase of the

shares of the assessee as genuine transactions and deleted the addition made by the A.O amounting to Rs. 27,33,277/. The claim of the assessee regarding the long term capital gains was accepted by the CIT(A). The A.O while giving effect to the above directions of the CIT(A) though deleted the additions on account of long term capital gains made in the original assessment order, but however, being of the view that the CIT(A) while disposing of the appeal had directed to allow the claim u/s 54F, as per law, therefore declined to summarily accept the claim of exemption made by the assessee u/s 54F. Thus, the A.O on the basis of the observations of the CIT(A) deliberated upon the entitlement of the assessee towards claim of exemption raised u/s. 54F. The A.O observed that as the assessee had not filed her original 'return of income' for AY: 2003-04 stating that she did not have any taxable income, therefore, on the basis of information gathered by the A.O, her case was reopened u/s. 147 of the 'Act'. It was observed by the A.O that though the notice u/s 148 was issued and served on the assessee on 30.03.2010, therein calling upon her to file the 'return of income' for AY: 2003-04 within 30 days from the above date of service of the notice, however, the same was filed only as on 10.08.2010, i.e beyond the stipulated time period. The A.O observed that as the assessee had failed to file the 'return of income' in compliance to notice u/s. 148 within the stipulated time period of 30 days, therefore, the same was not a valid 'return of income', and thus the claim of exemption u/s 54F raised therein could not be admitted. The A.O on the basis of his aforesaid observations thus declined the claim of the assessee for deduction u/s 54F and computed his total income at Rs. 27,57,870/-.

4. The assessee being aggrieved with the order of the A.O had carried the matter in appeal before the CIT(A). The CIT(A) observed

that his predecessor while disposing of the appeal of the assessee, vide his order dated 19.08.2011, had not discussed the issue as regards the allowability of claim of exemption u/s 54F. It was further observed by the CIT(A) that his predecessor had as a matter of fact simply directed the A.O to allow the exemption u/s 54F, as per law. Thus in the backdrop of his aforesaid observations, the CIT(A) concluded that the A.O while giving effect to the appellate order and the directions of his predecessor, had thus in the spirit of the 'directions' given in the appellate order, rightly dealt with the claim of the assessee towards exemption u/s 54F. The CIT(A) while approving the aforesaid examination by the A.O of the allowability of exemption u/s 54F while giving effect to the order of his predecessor, therein observed that the CIT(A) had nowhere stated that the claim of exemption u/s 54F was to be allowed as claimed by the assessee, but rather, had directed that the same was to be allowed ,as per law. The CIT(A) thus deliberating on the fine distinction between the wording 'to be allowed' and 'to be allowed as per law', thus held that the issue of allowability of the claim of exemption had not reached finality pursuant to the directions of the CIT(A), therefore, the A.O was well within his jurisdiction to examine the allowability of the claim of the assessee towards exemption under Sec. 54F. The CIT(A) on the basis of his aforesaid observations concluded that the rejection of claim of exemption u/s. 54F by the A.O ,was in order.

5. The assessee being aggrieved with the upholding by the CIT(A) of the rejection of her claim towards exemption u/s 54F, had thus carried the matter in appeal before us. The ld. Authorized Representative (for short A.R) for the assessee submitted that as the assessee had duly satisfied all the requisite conditions contemplated in Sec. 54F and was duly eligible for claim of exemption under the said

statutory provision, therefore, the lower authorities had erred in not allowing the same. Per contra, the ld. D.R. relied on the orders of the lower authorities.

6. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find that our indulgence is sought for adjudicating as to whether the claim of exemption raised by an assessee u/s 54F in a belated 'return of income' filed in compliance to a notice issued u/s 148 is allowable, or not. We have given a thoughtful consideration to the issue which had been raised before us, and are of the considered view that before adjudicating the same it would be relevant to refer to the aforesaid statutory provision, viz. Section 54F, which reads as under:-

“Capital gain on transfer of certain capital assets not to be charged in case of investment in residential house.

54F. (1) [Subject to the provisions of sub-section (4), where, in the case of an assessee being an individual or a Hindu undivided family], the capital gain arises from the transfer of any long-term capital asset, not being a residential house (hereafter in this section referred to as the original asset), and the assessee has, within a period of one year before or ⁸⁶[two years] after the date on which the transfer took place purchased, or has within a period of three years after that date "[constructed, one residential house in India] (hereinafter in this section -referred to as the new asset), the capital gain shall be dealt with in accordance with the following provisions of this section, that is to say:-

- (a) if the cost of the new asset is not less than the net consideration respect of the original asset, the whole of such capital gain shall not be charged under section 45;*
- (b) if the cost of the new asset is less than the net consideration in respect of the original asset, so much of the capital gain as bears to the whole of the capital gain the same proportion as the cost of the new asset bears to the net consideration, shall not be charged under section 45:*

[Provided that nothing contained in this sub-section shall apply where:-

(a) The assessee:-

- (i) Owns more than one residential house, other than the new asset, on the date of transfer of the original asset: or*

- (ii) Purchases any residential house, other than the new asset, within a period of one year after the date of transfer of the original asset; or
 - (iii) Constructs any residential house, other than the new asset, within a period of three years after the date of transfer of the original asset; and
- (b) The income from such residential house, other than the one residential house owned on the date of transfer of the original asset, is chargeable under the head "Income from house property"]

Explanation- For the purposes of this section—

"net consideration", in relation to the transfer of a capital asset, means the full value of the consideration received or accruing as a result of the transfer of the capital asset as reduced by any expenditure incurred wholly and exclusively in connection with such transfer.

(2) Whether the assessee purchases, within the period of [two years] after the date of the transfer of the original asset, or constructs, within the period of three years after such date, any residential house, the income from which is chargeable under the head "Income from house property", other than the new asset, the amount of capital gain arising from the transfer of the original asset not charged under section 45 on the basis of the cost of such new asset as provided in clause (a), or as the case may be, clause (b), of sub-section (1), shall be deemed to be income chargeable under the head "Capital gains" relating to long term capital assets of the previous year in which such residential house is purchased or constructed.

(3) Where the new asset is transferred within a period of three years from the date of its purchase or, as the case may be, its construction, the amount of capital gain arising from the transfer of the original asset not charged under section 45 on the basis of the cost of such new asset as provided in clause (a) or, as the case may be, clause (b), of sub-section (1) shall be deemed to be income chargeable under the head "Capital gains" relating to long-term capital assets of the previous year in which such new asset is transferred.]

[(4) The amount of the net consideration which is not appropriated by the assessee towards the purchase of the new asset made within one year before the date on which the transfer of the original asset took place, or which is not utilised by him for the purchase or construction of the new asset before the date of furnishing the return of income under section 139 shall be deposited by him before furnishing such return [such deposit being made in any case not later than the due date applicable in the case of the assessee for furnishing the return of income under sub-section (1) of section 139] in an account in any such bank or institution as may be specified in, and utilised in accordance with, any scheme which the Central Government may, by notification in the Official Gazette, frame in this behalf and such return shall be accompanied by proof of such deposit: and, for the purposes of sub-section (1), the amount, if any, already utilised by the assessee for the purchase or construction of the new asset together with the amount so deposited shall be deemed to be the cost of the new asset:

Provided that if the amount deposited under this sub-section is not utilised wholly or partly for the purchase or construction of the new asset within the period specified in sub-section (1), then,—

(1) the amount by which—

(a) the amount of capital gain arising from the transfer of the original asset not charged under section 45 on the basis of the cost of the new asset as provided in clause (a) or, as the case may be, clause (b) of sub-section (1), exceeds

(b) the amount that would not have been so charged had the amount actually utilised by the assessee for the purchase or construction of the new asset within the period specified in sub-section (1) been the cost of the new asset, shall be charged under section 45 as income of the previous year in which the period of three years from the date of the transfer of the original asset expires; and

(ii) the assessee shall be entitled to withdraw the unutilised amount in accordance with the scheme aforesaid.

Explanation.--[Omitted by the Finance Act, 1992, w.e.f. 1-4-1993.]

7. We find from the facts available on record that the assessee had not voluntarily filed the 'return of income' u/s. 139 for the year under consideration. That it was only when a notice u/s. 148 was issued and served on the assessee on 30.03.2010, calling upon her to file the 'return of income' within a period of 30 days from the date of service of the said notice, that the same was filed on 10.08.2010, which having been filed beyond the stipulated time period thus involved a delay. The assessee in her aforesaid 'return of income' had raised a claim for exemption u/s 54F of Rs.20,00,000/-. We find that the A.O while giving effect to the order passed by the CIT(A) deliberated on the entitlement of the assessee towards claim of exemption u/s 54F and concluded that as the assessee had failed to file the 'return of income' within the stipulated time period of 30 days from the date of service notice u/s 148, therefore, the same was not a valid return of income. We find that the A.O on the basis of his aforesaid observations thus being of the view that the claim for exemption u/s 54F raised by the assessee on the basis of the invalid return of income could not be allowed, thus, declined to allow the same.

8. We shall first advert to the observation of the A.O that as the 'return of income' filed by the assessee pursuant to notice issued u/s 148 was filed beyond the specified time period of 30 days from the date of service of notice, therefore, the same would be rendered as invalid, and resultantly the claim of exemption raised by the assessee u/s 54F in the said *non est* 'return of income' could not be allowed. We are unable to persuade ourselves to accept the aforesaid observation of the lower authorities. We are of the considered view that though a statutory obligation is cast upon the assessee to comply with the notice issued u/s 148 and file the 'return of income' in compliance thereto within the stipulated time period of 30 days, however, in case the same is filed by the assessee beyond the stipulated time period, then merely for the reason that some delay is involved in filing of the said 'return of income' would not render the same as invalid and *non est*. We are of the considered view that a 'return of income' filed by an assessee beyond the specified time period contemplated in the notice issued u/s 148, would though lead to characterizing the same as a 'return of income' filed beyond the stipulated time period, but however, the same would not cease to be a 'return of income' filed pursuant to the notice issued u/s 148, though involving some delay. We find that our aforesaid view is supported from the very fact that as per section 234A(3), where the 'return of income' in compliance to a notice u/s 148 is filed beyond the stipulated time period, then interest under the said statutory provision is imposed on the assessee till the date of furnishing of the same. We may herein observe that Clause (a) of Section 234A(3) clearly contemplates that a 'return of income' filed after the expiry of the stipulated time period shall still continue to be a 'return of income' filed by the assessee pursuant to the notice u/s 148. We find that our aforesaid view also stands fortified from the very fact that after the assessee had filed the 'return of income'

pursuant to the notice u/s 148 on 10.08.2010, the same was acted upon by the A.O and a Notice u/s 143(2) was issued to the assessee, followed by culmination of the same into an assessment u/s. 143(3) r.w.s 147 of the 'Act'. We are of the considered view that now when issuance of a notice u/s 143(2) presupposes the availability of a 'return of income' of the assessee on record, therefore, now when in the present case the A.O acted upon the 'return of income' filed by the assessee, and issued a notice u/s 143(2), which thereafter had culminated into an assessment u/s 147 r.w.s 143(3), therefore, it would not be permissible on the part of the revenue to turn around and claim that no valid 'return of income' was filed by the assessee.

9. We now in the backdrop of our aforesaid observations that the 'return of income' filed by the assessee after the expiry of the time period specified in the notice u/s 148 continues to be a 'return of income' filed u/s 148, though involving some delay, would now deliberate upon the validity of the claim of the assessee raised u/s 54F. We have perused the statutory provision contemplated u/s 54F and are of the considered view that the same does not cast any statutory obligation on the part of assessee to file his return of income within the stipulated time period contemplated u/s 139 or 148 of the 'Act', as a precondition for entitling him to claim exemption under the said statutory provision. We are of the considered view that the reference to the term 'due date' for furnishing of return of income u/s. 139 as contemplated in section 54F(4) is in context of the time limit within which the amount which had not been appropriated by the assessee towards making of investment in the purchase and/or construction of the new residential house is permitted to be deposited in the 'Capital Gains Account Scheme, 1988', which thereafter is to be withdrawn and utilized as per the terms contemplated in the said

statutory provision. We are of the considered view that Section 54F, neither provides as a pre-condition the requirement of filing of the 'return of income' by the assessee within the stipulated time period, nor places any embargo as regards claim of such exemption in a case the 'return of income' filed by the assessee involves some delay. We thus in the backdrop of our aforesaid observations are of the considered view that now when the assessee had raised the claim u/s 54F in the 'return of income' filed by her in compliance to notice u/s 148, therefore, it was obligatory on the part of the A.O to have deliberated on the entitlement of the assessee towards claim of exemption u/s 54F, on merits. We do not find ourselves to be in agreement with the observations of the A.O that the claim towards exemption u/s 54F raised by the assessee in her 'return of income' was liable to be scrapped solely for the reason that the filing of such 'return of income' involved some delay. We thus in light of our aforesaid observations set aside the order of the CIT(A), who we find had concurred with the view taken by the A.O that the assessee was not entitled towards claim of exemption u/s 54F. We however not being oblivious of the fact that due to dismissal of the claim of exemption in *limine* by the A.O, there had been no occasion for the lower authorities to have deliberated upon the satisfaction of the requisite conditions contemplated u/s 54F by the assessee, therefore, in all fairness restore the matter to the file of A.O for making the necessary verifications. We may however observe that as the assessee had during the course of the hearing of the appeal submitted complete details as regards his entitlement towards claim of exemption u/s 54F, which we find had been reproduced by the CIT(A) in his order dated. 29.03.2013, therefore, the A.O is directed to verify the genuineness and veracity of the claim of the assessee in the backdrop of the said facts and figures provided by the assessee. That in case the facts and

figures provided by the assessee are found to be in order, then claim of exemption u/s 54F, as raised by the assessee shall be allowed. Needless to say, the A.O shall during the course of the set aside proceedings afford an opportunity of being heard to the assessee to substantiate his aforesaid claim. The **Ground of appeal no. 1** raised by the assessee is allowed for statistical purposes.

10. That as the **Ground of appeal no.2** raised by the assessee, therein assailing the levy of interest u/s 234B, 234C is consequential, therefore, the same is also restored to the file of the A.O for giving necessary effect.

11. The appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 15.09.2017

Sd/-

(G.S.PANNU)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक 15.09.2017

Ps. Rohit Kumar

Sd/-

(RAVISH SOOD)
JUDICIAL MEMBER

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

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

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

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

आयकर अपीलीय अधिकरण, मुंबई / **ITAT,**
Mumbai