IN THE INCOME TAX APPELLATE TRIBUNAL,
BENCH 'B', BANGALORE

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND
SHRI JASON P BOAZ, ACCOUNTANT MEMBER

ITA No.858/Bang/2016
(Asst. Year – 2012-13)

The Asst. Commissioner of Income-tax,
Circle-1(2)(1),
Bengaluru. . Appellant

Vs.

Shri Dilip Ranjrekar,
No.6B, Nitesh Mayfair,
31, Kasturba Road Cross,
Bengaluru. . Respondent
PAN No. – AANPR4015M.

CO No.28/Bang/2017
(Asst. Year – 2012-13)

Shri Dilip Ranjrekar,
No.6B, Nitesh Mayfair,
31, Kasturba Road Cross,
Bengaluru. . Appellant

Vs.

The Asst. Commissioner of Income-tax,
Circle-1(2)(1),
Bangalore. . Respondent

Revenue by : Smt. Padmameenakshi, JCIT
Assessee by : Shri H.N Khincha, C.A

Date of Hearing : 26-09-2017
Date of Pronouncement : 10-11-2017

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O R D E R

PER SHRI JASON P BOAZ, ACCOUNTANT MEMBER

This appeal by Revenue is directed against the order of the CIT(A)-1, Bangalore dated 28/1/2016 for asst. year 2012-13. The assessee has also filed cross objections in this regard.

2. Briefly stated, the facts of the case are as under:-

3. The assessee, a consultant, filed the return of income for asst. year 2012-13 on 29/9/2012 declaring income of Rs.1,18,03,300/-. The case was taken up for scrutiny and the assessment completed u/s 143(3) of the Income-tax Act, 1961 (in short 'the Act') vide order dated 19/2/2015, wherein the assessee's income was determined at Rs.5,16,93,547/- in view of the following additions/disallowances:-

(i) Long Term Capital Gain (LTCG) on sale of property at Pune on account of denial of exemption u/s 54 of the Act and other variations in computation of capital gains	3,16,74,073/-
(ii) P.F accumulated Balance	- 37,93,588/-
(iii) Interest thereon	- 44,07,195/-
(iv) Annuity from LIC	- 15,391/-

2.2 Aggrieved by the order of assessment dated 19/2/2015 for asst. year 2012-13, the assessee preferred an appeal before the CIT(A) - 1, Bangalore. The ld CIT(A) disposed the assessee's appeal vide order dated 28/1/2016 allowing partial relief. In this

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order, inter alia, the ld CIT(A) deleted the addition made by the Assessing Officer ('AO') on account of denial of exemption u/s 54 of the Act, but has not rendered any finding on the variations made by the AO to the computation of LTCG. In respect of the addition on account of withdrawal from PF amount, the ld CIT(A) has deleted the entire addition of Rs. 82,00,783/-without rendering any finding in respect of the interest received on PF balance.

3. Aggrieved by the order of the CIT(A)-1, Bangalore dated 28/1/2016 for asst. year 2012-13, Revenue has preferred this appeal raising the following grounds:-

> *"1. The order of the Learned CIT (Appeals), in so far as it is prejudicial to the interest of revenue, is opposed to law and the facts and circumstances of the case.*
>
> *2. The CIT(Appeals) erred in giving relief to the assessee by holding that the entire amount due in an EPF account whenever drawn is not to be included in the income of the assessee, without considering that the benefit u/s.10(12) of the Income Tax Act shall be limited to the employees only and the further income generated from the investment of terminal benefits beyond the employees retirement are not intended to be exempt unless specifically stated in the Act.*
>
> *3. The CIT(Appeals) erred in directing the Assessing Officer to allow exemption u/s.10(12) of*

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the Act on the accumulated PF withdrawn after a period of nine years, without appreciating that the assessee had not made any claim of exemption u/s,10(12), in the return of income. Also, the CIT(A) erred in placing reliance on sub-rule 3 of Rule 5 to Schedule - IV of Recognised Provident Fund, without appreciating that they are the rules applicable to the Fund and Trust to be followed so as to get the recognition as Recognised Provident Funds.

4. The CIT(Appeals) erred in deleting the addition made under the head 'income from other sources, of the interest received on accumulated balance of PF, without considering clause (f) of Rule 2 in Part-A of Schedule IV, wherein it is clarified that the accumulated balance due to an employee will be only till the date of his cessation to be an employee of the employer, maintaining the fund and as no interest income has been offered by the assessee in any of the assessment years from 2003-04 to 2012-13, the interest portion on the maturity amount withdrawn by the assessee becomes income of the assessee, to be taxed under the head 'income from other sources'.

5. The CIT(Appeals) erred in holding the assessee to be eligible for exemption u/s.54 by considering

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the issues to be beyond the control of the assessee, without appreciating that the assessee was not able to meet the conditions prescribed u/s.54 and was clearly not able to complete the construction within the period of 3 years from the date of sale of original property.

6. The CIT(Appeals) erred in giving relief to the assessee inasmuch as holding the assessee to be eligible for exemption u/s.54 only by adjudicating the issue of non-completion of project within the prescribed time limit and without adjudicating on the several other issues considered by the Assessing Officer for concluding the assessee to be ineligible for the benefit of exemption u/s.54.

7. For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the CIT(A) be reversed and that of the Assessing Officer restored.

8. The appellant craves leave to add, to alter, to amend or delete any of the grounds that may be urged at the time of hearing of appeal."

4. The assessee has also filed cross objections ('CO') which are as under:

"1. The order passed by the Commissioner of Income tax (Appeals) is bad in law to the extent that the

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ground raised on re-computation of the long term capital gain by reducing the cost of acquisition by the assessing officer has not been dealt at all by the Commissioner of Income tax (Appeals). The Commissioner of Income tax (Appeals) may be directed to consider this ground being appealed before him.

2. The order passed by the Commissioner of Income tax (Appeals) is bad in law to the extent that there is no finding on the ground taken for not giving full credit of TDS by the assessing officer. On proper appreciation of facts of the case and the evidence available, the appellant is eligible for TDS credit as claimed in the return of income same is to be allowed without any variation.

3. The learned Commissioner of Income tax (Appeals) has erred in not giving the specific finding while granting relief with respect to addition made by the assessing officer on account of Interest accrued on accumulated balance of Provident Fund."

Revenue's appeal and the assessee's C.O. are disposed hereunder. In the course of hearing, the ld AR filed a paper book

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(pgs 1 to 207) and case law compilation (pgs 208 to 289) which have been perused and considered.

5. **Grounds No: 1, 7 and 8 – Revenue's appeal**

5.1 The grounds 1,7 and 8 of Revenue's appeal (Supra), being general in nature, no adjudication is called for thereon.

6. **Ground Nos. 2 to 4 – Revenue's appeal) Accumulated Cross Objections No: 3 – Assessee's C.O) Balance in) Provident Fund**

6.1 In grounds 2 to 4 (Supra), Revenue contends that the ld CIT(A) erred in granting relief to the assessee with respect to the withdrawal of the accumulated balance in the PF account as the benefit u/s 10(12) of the Act; which is available to employees only and that too only upto the date of his cessation to be employee of the employer as per clause (f) of Rule 2 in part A of schedule IV. The assessee in the case on hand had ceased to be an employee of Wipro Ltd., in the April, 2002 itself and the accumulated PF amount was withdrawn after a period of 9 years i.e., on 11/4/2011. The assessee had also not made any claim for exemption u/s 10(12) of the Act in the return of income filed for the year under consideration. It was also contended that the ld CIT(A), had erred in granting relief to the assessee by relying on the sub-rule 3 of Rule 5 to Schedule-IV of Recognized Provident Fund, without appreciating that they are rules applicable to and to be followed by the Fund and Trust in order to get recognition as Recognized Provident Funds. It was further contended that the ld CIT(A) erred in deleting the addition made under head 'income from other

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sources' of the interest received on accumulated balance of PF, without considering clause (f) of Rule 2 in Part-A of Schedule-IV, wherein it is clarified that the accumulated balance due to an employee will be only upto the date of cessation of employment. In the case of the assessee, employment with Wipro Ltd., ceased in the financial year 2002-03. The interest portion on the maturity amount withdrawn after retirement which becomes taxable in the hands of the assessee under the head 'income from other sources' has not been declared and offered to tax by the assessee in the asst. years 2003-04 to 2012-13. The ld DR for Revenue was heard in support of the grounds raised and submitted that since the assessee did not make the claims for exemption u/s 10(12) of the Act in the return of income, the same is not allowable in terms of the decision of the Hon'ble Apex Court in the case of Goetze India Ltd., (284 ITR 383) (SC).

6.2 Per contra, the ld AR reiterated the submissions put forth before the ld CIT(A) (placed at pg. 69 to 76 of paper book) which are extracted hereunder:-

> *3.1 The appellant was an employee of Wipro Ltd.,*
>
> *3.2 The appellant retired from this company on April 1, 2002 after serving the company approximately for a period of 26 years (from 15th May 1976 to 31st March 2002).*
>
> *3.3 In the course of employment the appellant was a member of Company's Provident Fund that was an exempted fund under the appropriate provisions of the*

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Act. Contributions out of salary were being made by the appellant as an employee and also by the employer to the Employee Provident Fund ('EPF') Account of the employee. The amount of contributions accumulated in the EPF account together with interest as on date of retirement was Rs.37,93,588/-.

3.4 The appellant did not immediately withdraw the accumulated balance in EPF account claimable by him on the date of retirement. The appellant had withdrawn the sum of Rs. 82,00,783/- from EPF account on 11.04.2011.

3.6 The amount so withdrawn was credited to capital account of the appellant and no income was offered to tax by the appellant on this credit in the capital account.

3.7 In the course of assessment proceedings the appellant was asked about the credit in capital account of Rs. 82,00,783/-.

3.8 The appellant submitted in course of assessment proceedings that he served as an employee of Wipro Ltd. till March,2002 and that amount was withdrawn from EPF account on 11.04.2011. The appellant further submitted that the amount so withdrawn was exempt u/s.1O (12) of the Act.

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3.9 The appellant submitted that the Wipro EPF was a recognized Provident Fund. The appellant took support of Rule 4 and Rule 5 of Part A of Schedule 4 to Income-tax Act, to buttress his point.

3.10 The Assessing Officer however, added the amount of Rs.37,93,588/- to the income on the ground that the claim for exemption u/s. 10(12) is a new claim and since the claim was not made in the return of income, the same cannot be now done in the course of assessment proceedings.

3.11 The Assessing Officer has at Page 16 prepared a chart showing calculation of interest accumulated every year and has worked it out from the date of retirement till the date of withdrawal. The accumulated interest so calculated was Rs.44,07,195/- . The Assessing officer further went ahead to say that the provisions of Section 10(12) of the Act would not apply to this interest, since reading 10(12) along with Rule 2(F) in Part A of the 4th Schedule, the exemption is available only upto the date on which the person ceases to be an employee of the employer maintaining the fund.

3.12 Therefore, overriding the objections of the appellant, the addition is made.

3.13 The relevant provisions of law are as under:-

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Sub-section 12 of Section 10,

"The accumulated balance due and becoming payable to an employee participating in a Recognized Provident Fund to the extent provided in Rule 8 of Part A of the 4th Schedule."

3.14 Rue 8 of Part A of the 4th Schedule reads as under:-

"The accumulated balance due and becoming payable to an employee participating in a Recognized Provident Fund shall be excluded from the computation of his total income -

(i) If he has rendered continuous service with his employer for a period of 5 years or more

Or

(ii) If, though he has not rendered such continuous service, the service has been terminated for reason of the employee's ill-health or by the contraction or discontinuance of the employer's business or other cause beyond the control of the employee.

3.15 Dissecting section 10(12) of the Act, one would get the following.

a) The exemption is for the accumulated balance due and becoming payable

b) To an employee

c) Who is participating in a RECOGNISED PROVIDENT FUND

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d) To the extent provided in Rule 8 of Part A of the 4th Schedule

3.16 In 4th schedule Part A the words "employee" and words "accumulated balance" are defined as under:

(b) Employee means an employee participating in a Provident Fund, but does not include a 'personal or domestic servant",

(f) "Accumulated balance due to an employee means the balance to his credit, or such - portion thereof as may be claimable by him under the regulations of the fund, on the day he ceases to be an employee of the employer maintaining the fund"

3.17 The words 'extent provided in Rule 8' would mean the period of service referred to in Rule 8. This is supported by Circular No. 138 dated 17.06.1974 from which the relevant extract is as under:

"Under rule 8 of Part A of the Fourth Schedule, the amount of the accumulated balance due and becoming payable to an employee on the termination of his employment is excluded from the computation of his taxable income if the employee has rendered continuous service with his employer for a period of 5 years or more, or if the service of the employee are

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terminated by reason of his ill health or by the contraction or discontinuance of the employer's business or any other cause beyond the control of the employee. If the accumulated balance due to an employee participating in a recognized provident fund is paid to him otherwise than in the circumstances referred to above, as for instance, in cases where the employee voluntarily resigns from his post before the completion of 5 years' service with the employer, the amount paid to the employee is brought within the ambit of taxation. In such cases, the employee is required to pay, in addition to the normal tax payable by him, an amount equal to the difference between the aggregate tax which would have been payable by him if certain tax concessions allowed to employees participating in recognized provident funds had not been allowed to the employee in the years in which he made contributions to the fund and the aggregate tax actually paid by him for these years. Since the accumulated balance due to an employee becomes payable on the day he ceases to be an employee of the employer maintaining the fund, the effect of this provision is that the tax relief allowed to an employee is withdrawn in cases where the amount of the accumulated balance due to him is transferred from the recognized provident fund maintained by the

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former employer to a recognized provident fund maintained by the new employer. In view of the position that an employee does not receive any immediate benefit by the mere transfer of the amounts to his credit from one account to another and remains in virtually the same position as he would have been, had former employer, the withdrawal of the tax relief in such cases results in hardship to the employees. With a view to avoiding this hardship, the Finance Act, 1974 has made a specific provision in the aforesaid rule 8 to secure that exemption from income-tax is not withdrawn in such cases. Further, it has also been provided that in cases where the accumulated balance due and becoming payable to an employee includes any amount transferred from any other recognized provident fund maintained by his former employer, then, in computing the period of continuous service of 5 years for the purposes of the aforesaid provision, the continuous service rendered by the employee with such former employer will also be taken into account."

3.18 In this connection, it is also relevant to refer to sub Rule 3 of Rule 5 of Schedule 4. This Rule, which reads as under provides for continuation of the

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maintenance of the fund, even after the employee ceases to be an employee.

(3) Notwithstanding anything contained in clause (e) or clause (g) of rule 4,

(a) At the request made in writing by the employee who ceases to be an employee of the employer maintaining the fund, the trustees of the fund may consent to retain the whole or any part of the accumulated balance due to the employee to be drawn by him at any time on demand;

(b) Where the accumulated balance due to an employee who has ceased to be an employee is retained in the fund in accordance with the preceding clause, the fund may consist also of interest in respect of such accumulated balance.

3.19 From the reading of the above clause, it is very clear that the above is a Non-obstante clause which overrides Rule 4(e) and 4(g).

3.20 Rule 4(e) defines the composition of the fund which is further accelerated by a reading of Rule 5 (3) a & b to include even the interest accumulated after the person ceases to be an employee.

Clause 4(g) provides that the accumulated balance due to an employee shall be payable on the day he ceases to be an employee. The clause is also overridden by Sub Rule (3) of Rule 5.

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3.21 Reading all the above together it is very clear that the entire amount due in an EPF account whenever drawn is not to be included in the income of the appellant.

3.22 The appellant is entitled for exemption for the reason that he had participated in the fund - There is a provision of continuation of the fund even after he ceases to bean employee - and the total accumulated balance as on date of withdrawal is exempt from tax.

3.23 In a negative way also, it can be proved that the amount so to withdrawn is not taxable.

3.24 Rule 10 of the Part A of 4th Schedule enjoins on the Trustees of the Recognised Provident Fund to deduct tax at source if the amount being withdrawn is taxable in pursuance of Rule 8 of the Part A of the 4th Schedule. in this case, no tax is deducted at source, meaning dwreby that the amount withdrawn is not taxable under Income-tax Act.

3.25 A mere non-mentioning of exempt income in the return of income cannot be construed as new claim and therefore the decision of the APEX court in Goetze India P Ltd is not applicable to the case at hand.

3.26 In any case, the appellant further wishes to submit as follows

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a) Under Section 4 of the Act, tax is to be levied on the total income of the previous year.

b) Total income is defined in Section 2(45) as the income referred in Section 5 computed in manner laid down in the Act.

c) Article 265 of the constitution of India reads as under:

"No tax shall be levied or collected except by authority of law".

d) Assuming (without admitting) there was an oversight of not mentioning this as Tax- Exempt Income in the relevant year; it is a well-established principle of law that nobody can take advantage of legal mistake committed by anybody. The taxability of a receipt under the Income tax Act, 1961 depends on / governed by the provisions of the said Act and not on the view which the parties may take as to their rights and liabilities. It is open for an assessee to avail the remedy and point out the mistake, if he is not really liable to tax, even though he might have, by his conduct, acquiesced to the taxability. There can be no estoppel against statute. [CIT v. Bharat General Reinsurance Co. Ltd [1971] 81 ITR 303 (Delhi), Asit Kumar Ghose v. Commissioner of Agricultural Income-tax (1952) 22 ITR 177 (Cal), Impsat P. Ltd. v. ITO [2005] 276 ITR (AT) 136 ITAT (Del)]

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e) In ***Kedarnath Jute Mfg. Co. Ltd. v. CIT 11971] 082 ITR 363 (SC)****, it was held as under:*

We are wholly unable to appreciate the suggestion that if an assessee under some misapprehension or mistake fails to make an entry in the books of account and although, under the law, a deduction must be allowed by the Income-tax Officer, the assessee will lose the right of claiming or will be debarred from being allowed that deduction. Whether the asessee is entitled to a particular deduction or not will depend on the provision of Law relating thereto and not on the view which the assessee might take of his rights nor can the existence or absence of entries in the books of account be decisive or conclusive in the matter.

f) ***Sail DSP YR Employees Association 1998 v. Union of India [20031 262 ITR 638 (Cal) - SLP dismissed on 27.02.2004 1266 ITR (St.) 109]****, it was held as under:*

What is not otherwise taxable cannot become taxable because of admission of the assessee. Nor can there be any waiver of the right otherwise admissible to the assessee in law. The chargeability is not dependent on the admission of or waiver, by the assessee. Chargeability is dependent on the charging section, which needs to be strictly construed.

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g) In ***Commissioner of Income-tax v. D.K.B. and Co. (2000) 243 ITR 0618 (Ker)*** *it was held as under:*

It is the settled position in law that there cannot be estoppel against a statute. There is no provision in the statute which permits a compromise assessment. The above position was indicated by the apex court in Union of India v. Banwari Lal Agarwal [1999] 238 ITR 461.

h) In Commissioner of Income-tax v. Dharmadeepti [1999] 236 ITR 397 (Ker), it was held as under:

That the assessee consistently claimed exemption under section 11 notwithstanding section 13(1) (bb) having been inserted in the Act. Therefore, when the assessee gave up a particular ground, the Tribunal was justified in considering the ground on the merits on the basis that there was no estoppel against law.

i) In ***Deputy Commissioner of Income-tax v. Quark Systems Pvt. Ltd. [2010] 4 ITR (Trib.) 606 ITAT [Chandigarh] SB,*** *it was held as under:*

The taxpayer is not estopped from pointing out a mistake in the assessment though such mistake is the result of evidence adduced by the taxpayer.

When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side

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cannot claim to have a vested right in injustice being done due to some mistakes on its part.

Proceedings before the tax authorities are not adversarial proceedings and the assessee should not be placed at under advantage because of his inadvertent and bona fide mistakes. 3.27 From the above, it is very clear that the entire amount withdrawn from PF account is not liable for taxation and the addition made on both the counts is to be deleted in entirety."

6.3.1 We have heard the rival contentions and perused and carefully considered the material on record: The facts of the case as emanate from a perusal of the records in that the assessee, was an employee of Wipro Ltd., and retired from the company on 1/4/2002. As on the date of retirement the accumulated provident fund balance of contributions plus interest was 37,93,588/-. The assessee did not withdraw the same immediately, after retirement, but withdrew the accumulated balance of Rs. 82,00,783/- from the EPF account on 11/4/2011, which comprised of Rs. 37,93,588/- the balance on the date of retirement plus interest of Rs. 44,07,195/- on the accumulated balance from 1/4/2002 (the date of assessee's retirement) upto 11/4/2011; the date of withdrawal. These details not disclosed by the assessee but were ascertained by the Assessing Officer in the course of assessment proceedings when he required

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the assessee to explain the credit of Rs. 82,00,783/- to his capital account. At this juncture, the assessee claimed that the aforesaid amount so withdrawn was exempt u/s 10(12) of the Act. The AO was of the view that since the claim for exemption u/s 10(12) of the Act was not made by the assessee in the return of income, the assessee's claim cannot be considered in assessment proceedings in view of the decision of Goetze (India) Ltd., (284 ITR 323)(SC).

6.3.2 A perusal of the provision of section 10(12) of the Act and the definition of 'Accumulated Balance' in Part A of 4th Schedule clearly indicates that the exemption u/s 10(12) of the Act is available only to a person who being an employee withdraws the accumulated fund from the PF account as on the date of retirement or termination of employment. In these factual and legal circumstances, as laid out above, we are of the considered opinion that the withdrawal to the extent of the accumulated balance (viz., contributions plus interest) upto the retirement of the assessee's i.e., 1/4/2002 of Rs.37,93,888/- is eligible for exemption u/s 10(12) of the Act . In this view of the matter, to this extent, the impugned order of the ld CIT(A) is upheld. The ld DR had placed reliance on the decision of the Hon'ble Apex in the case of Goetze (India) Ltd., (supra) for denial of the assessee's claim, since it was not put forth before the AO in the return of income filed. We are not inclined to accept this argument put forth by the ld DR for Revenue. It has been held in the decisions of various Hon'ble Courts that the decision of the Hon'ble Apex Court in Goetze (India) Ltd., (Supra) is in respect of the claims before the AO and

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does not place fetters on the appellate authorities to entertain fresh claims put forth by the assessee which are part of the record and/or are a material for the purpose of assessing the correct tax liability in accordance with law. In coming to this view, we, inter alia, draw support from the decision of the Hon'ble Apex Court in the case of NTPC Ltd., (229 ITR 383). We are therefore of the view that it was incumbent on the ld CIT(A) to examine the assessee's claim which was admittedly put forward before the AO in the course of assessment proceedings.

6.3.3 However in respect of the accrued interest of Rs. 44,07,195/- from 1/4/2002 to 11/4/2011 on the accumulated balance of Rs.37,93,588/- as on 1/4/2002, the same has accrued to the assessee after he retired from Wipro Ltd., and it cannot be said that such accrual of the interest was qua an employee. The exemption u/s 10(12) of the Act is limited to the accumulated balance due and payable to an employee upto the date of retirement/end of employment. In this view of the matter, we are of the considered opinion that the accumulated interest of Rs.44,07,195/- post retirement of the assessee on 1/4/2002 is not eligible for exemption u/s 10(12) of the Act. We therefore hold that the AO was right in holding that the said interest was exigible to tax in the assessee's hands. However, since the assessee is following mercantile system of accounting and to bring to tax the correct income in the hands relevant period of accrual, we direct the AO to bring this amount of accrued interest of Rs.44,07,195/- on P.F balance for the period 1/4/2002 to 11/4/2011 to tax in the assessee's hands in the

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respective asst. years in which the interest accrued, as per the working in the table in page 15 of the order of assessment, which is extracted hereunder:-

F.Y	P.F.A/c cumulative balance at the F.Y.starting	Total Interest taxable	Rate of Interest on total balance.
2002-03	37,93,588/-	3,60,391/-	9.5%
2003-04	41,53,978/-	3,94,628/-	9.5%
2004-05	45,48,606/-	4,32,118/-	9.5%
2005-06	49,80,724/-	4,23,361/-	8.5%
2006-07	54,04,086/-	4,59,347/-	8.5%
2007-08	58,63,433/-	4,98,392/-	8.5%
2008-09	63,61,825/-	5,40,755/-	8.5%
2009-10	69,02,580/-	5,86,720/-	8.5%
2010-11	74,89,300/-	7,11,484/-	9.5%
2011-12	82,00,783/-		

Consequently, grounds 2 to 4 of Revenue's appeal and C.O No.3 are disposed off as indicated above.

7. **Ground Nos.5 & 6 of Assessee's appeal**) Computation of
Cross-objection No.1) LTCG and
) Exemption u/s 54
) of the Act

7.1 In these grounds (Supra), the Revenue assails the order of the ld CIT(A) in allowing the assessee exemption u/s 54 of the Act without appreciating that the assessee was not able to complete the construction within three years from sale of original property, and holding that this was only due to issues beyond the control of the assessee.

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7.2.1 The facts of the matter are, that in the year under consideration, the assessee had sold a property in Pune i.e on 3/11/2011, for a consideration of Rs.4,50,90,000/-. In respect of this sale, the assessee computed the capital gains thereon at Rs.2,91,94,197/-. The entire LTCG of Rs.2,91,94,197/- was claimed by the assessee as exempt u/s 54 of the Act, stating that the investment in acquisition of the new property was upto Rs.3,00,00,000/-. While computing the LTCG, the assessee considered the original cost of acquisition of the property sold at Rs.94,14,000/- which was indexed to Rs.1,53,95,813/-. The AO, however, considered the original cost of the property sold at Rs.78,97,637/- which was indexed to Rs.1,29,15,927/-.

7.2.2 The AO also denied the assessee's claim for exemption u/s 54 of the Act mainly on the ground that the construction of the new house property was not completed within a period of three years from the date of sale of the Pune property. The AO was also of the view that since the Pune property was sold on 3/11/2011 and that the assessee had commenced investing in new property on 15/10/2010 itself; which was more than one year prior to the date of sale of the said property; the assessee was not entitled for exemption u/s 54 of the Act for construction of the new house.

7.2.3 On appeal, the ld CIT(A) allowed the assessee's claim for exemption u/s 54 of the Act on the ground that exemption sections are to be construed liberally and the assessee having done whatever was legally required of him was entitled to exemption u/s 54 of the Act.

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7.3 The ld DR for Revenue was heard in support of the grounds raised (Supra). According to the ld DR since the construction of the new house has not been completed within the eligible period of 3 years from the date of sale of the old property, the assessee has failed to comply with the provisions of law and hence is not eligible for exemption u/s 54 of the Act. The ld DR further contended that since the construction of the new house commenced more than one year prior to the date of sale of the old property, the assessee is not eligible for exemption.

7.4.1 The sum and substance of the arguments put forth by the ld AR for the assessee, briefly, are that :-

(i)The assessee, after sale of original asset at Pune on 3/11/2011, had entered into a MOU with Chalet Hotels (P) Ltd., for construction/purchase of an apartment No: B-1101 on the 11th floor of a project called Vinarea, Koramangala, Bangalore for a total consideration of Rs. 3,24,52,841/- which the builder was to complete and give possession by June, 2013.

(ii) The assessee had invested Rs. 2,26,82,097/- towards the aforesaid flat.

(iii) Since the 'Vinarea' project was one of high rise buildings, necessary NOC was obtained from HAL on 28/10/2011 (copy placed at page 122 of paper book) and accordingly the builder had constructed 17 storey's of the building by Oct, 2012.

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(iv) Thereafter, vide letter dated 16/8/2013, HAL unilaterally and without notice cancelled the NOC (copy of letter at pg 123-124 of the Paper Book).

(v) The Hon'ble High Court of Karnataka vide order dated 23/10/2013 (a copy placed at pg 125 to 129 of paper book) prohibited the builder from any further construction, pending decision on the NOC.

(vi) The Builder, while filing an appeal against the withdrawal of NOC by HAL also offered to conduct a fresh, independent survey. A single Judge Bench of the Hon'ble High Court passed an order dated 9/9/2014 permitting such an independent survey (copy placed at pgs 130 to 190 of paper book).

(vii) On appeal by HAL against the aforesaid order of the single Judge bench of the Hon'ble High Court, a division Bench of the Hon'ble Karnataka High Court vide order dated 3/9/2015 (copy placed at pg. 151 to 207 of paper book) upheld the order of the single Judge dated 9/9/2014.

7.4.2 It was the contention of the ld AR that in view of the aforesaid peculiar and abnormal situation and events which were beyond the control of the assessee, the assessee could not take the permission of the apartment by 3/11/2014, i.e., the date on which the three year period would expire from the date of the sale of the original asset on 3/11/2011. It was submitted that the assessee has done whatever was possible from his side and therefore the asessee should not be denied the benefit of exemption u/s 54 of the Act for

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no fault on his part. In support of the above contentions, the ld AR of the assessee has inter alia, cited/placed reliance on the following judicial pronouncements:-

(i) ITO v Bina Gupta (ITA No: 4074/Delhi/2012) wherein the view, that the assessee cannot be penalized and denied the benefit u/s 54/54F of the Act for the default by the builder which is beyond the control of the assessee, was upheld.

(ii) CIT v R.L. Sood (2000) 245 ITR 727 (Del);

(iii) CIT v B.S. Shantakumari (2015) 60 Taxman.com 74 (Karnataka):

(iv) CIT v Sambandam Udaykumar (2012) 345 ITR 389 (Karnataka):

(v) CIT v Sardarmal Kothari (2008) 302 ITR 288 (Mad).

The ld AR for the assesee contends, that in view of the ratio of the above judicial pronouncements, despite the non completion of the construction of the new property by the builder, the assessee would be entitled to the benefit of exemption u/s 54 of the Act.

7.4.3 With respect to the exemption claimed u/s 54F of the Act on account of construction of the new house, the ld AR submitted that what was material was not the dates of payment but that the event of construction should be completed after the date of sale of the original amount. In support of the proposition, the ld AR placed reliance, inter alia, on the following judicial pronouncements:-

(i) CIT v J.R. Subramanya Bhat – 28 Taxman 578 (Mys);

(ii) CIT v Pradeep Kumar (153 Taxman 138) (Madras);

(iii) CIT v H.K. Kapoor (234 ITR 753)(All).

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7.5.1 We have heard the rival contentions and perused and carefully considered the material on record. It is apparent from the facts of the case as mentioned (along with copies of corroborative documentary evidence) and discussed above from para 7.1 to 4.4.3 of this order (Supra) that the non completion of the construction the flat by the builder within the stipulated period is beyond the control of the assessee. In our considered opinion, in view of the decision of the Hon'ble Jurisdictional High Court in the case of Smt. B.S. Shantakumari (Supra) and Sambandam Udaykumar (Supra) the assessee cannot be denied exemption u/s 54 of the Act to the extent of investment in the new property, even though the construction of the new asset is not completed within the eligible period of 3 years for the date of sale/transfer of the original asset. With respect to the amount invested in construction of the new property before the date of transfer of the original asset, it is well settled law that the amount invested within one year before the date of transfer of the original asset is to be allowed exemption u/s 54 of the Act. From the details of investments for purchase of the new asset as submitted by the assessee, it is stated that the assessee has only invested an amount of Rs. 2,26,82,097/- towards construction of the property. The AO is therefore directed to restrict the exemption allowable to the assessee to the actual amount spent on construction after due verification. We hold and direct

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accordingly. Consequently, Revenue's ground Nos. 5 and 6 and the assessee's C.O. ground No. 1 are disposed off as indicated above.

8. **Cross Objection – No:2 Short Credit of TDS**

8.1 In this ground of cross objection (Supra), the assessee contends that the ld CIT(A) has not disposed off the ground raised for directing the AO to grant the assessee full credit for TDS. It was submitted that the assessee had claimed TDS credit of Rs.25,67,776/- in the return of income and the assessee's grievance is that it has been allowed TDS credit of only Rs.25,09,137/- by the AO. We, therefore, restore this issue to the file of the AO with direction for examination and verification of the assessee's claim and to grant the assessee the TDS credit entitled to as per law. Consequently, C.O. ground No.2 is allowed for statistical purposes.

9. In the Result, both Revenue's appeal and the asseessee's Cross-objection for asst year 2012-13 are partly allowed.

Order pronounced in the open court on 10th **November, 2017.**

Sd/-	**Sd/-**
(SUNIL KUMAR YADAV)	**(JASON P BOAZ)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Bangalore
Dated : 10/11/2017
Vms
Copy to :1.The Assessee
2.The Revenue
3.The CIT concerned.
4.The CIT(A) concerned.
5.DR
6.GF

By order

Sr. Private Secretary, ITAT, Bangalore

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