

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES 'A' JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 1358/JP/2019
निर्धारण वर्ष / Assessment Year : 2011-12

Manohar Lal Choudhary 5/338, Malviya Nagar, Jaipur	बनाम Vs.	Dy. CIT, Circle-06, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No. ACWPC1043R		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Sh. Naresh Gupta (Adv.)
राजस्व की ओर से / Revenue by : Smt. Monisha Choudhary (JCIT)

सुनवाई की तारीख / Date of Hearing : 24/06/2021
उद्घोषणा की तारीख / Date of Pronouncement: 12/07/2021

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Id. CIT(A), Ajmer dated 17.10.2019 wherein the assessee has raised the following grounds of appeal:

"1. That the CIT (A) has grossly erred in sustaining the denial of the exemption u/s 54 of the Act of 1961 of Rs. 12 lacs invested in purchase of new residential flat at Bharooch in State of Gujarat vide registered sale deed dated 04-01-2011.

1.1. Because the Revenue authorities have committed illegality in assuming that the property is not chargeable to tax under the head 'Income from House Property' and ignoring the uncontroverted affidavit of the staff of the assessee proving that the basement and

the room (kotari) were being used for the residence of the staff for last so many years.

1.2. Alternatively, because the Revenue authorities have grossly erred in not allowing the benefit of exemption u/ s. 54 at least qua the half of the property being apparently constructed and used for residence purposes.

2. That the CIT (A) has grossly erred in allowing deduction only of Rs. 2,00,000/- as against Rs. 5,24,602/- (i.e. $1,91,100 \times 711/259$) claimed by the assessee on account of construction cost incurred in construction of three shops, basement, one room (Kotari) as well as boundary wall all along 4 sides of the Plot.

3. That under the facts and in totality of the circumstances of the case the assessee is entitled to benefit of exemption u/s. 54 of the Act so claimed on the actual sale consideration of Rs. 35 Lacs received to the appellant instead of Rs. 43,08,360/- as assumed by the AO as per DLC Rates u/s. 50C of the Act."

2. Briefly stated, the facts of the case are that the assessment in the case of assessee was completed u/s 143(3) read with section 147 of the Act. The AO considered deemed sale consideration as per stamp duty value u/s 50C at Rs. 43,08,360/-, disallowed claim of cost of construction (after indexation) amounting to Rs. 5,24,602/- and disallowed claim of deduction u/s 54 amounting to Rs. 12,00,000/-while computing capital gains on sale of immovable property and assessed total income at Rs 44,79,732/- as against returned income of Rs 19,46,770/-.

3. Being aggrieved, the assessee carried the matter in appeal before the Id. CIT(A) who has confirmed the denial of deduction u/s 54 of the Act. However, the cost of construction has been partly allowed at Rs. 2,00,000/-. Against the said findings of the Id CIT(A), the assessee is in appeal before us.

4. During the course of hearing, the Id. AR taken us through the findings of the Assessing Officer and submitted that the reasoning adopted by the Assessing Officer for denial of deduction was that the assessee has not shown any income from house property which has been sold and in respect of which the deduction u/s 54 has been claimed by the assessee. Referring to the provisions of section 54 of the Act, the Id AR submitted that it provides that "capital gains arising from the transfer of a long term capital asset being buildings or lands appurtenant thereto and being a residential house". It was accordingly submitted that there is no requirement under law that there has to be actual usage of the house for residential purposes and consequent income offered from such house property to qualify for claim of deduction u/s 54 and in absence thereof, nothing more can be read or implied while interpreting the provisions of section 54 of the Act.

5. Regarding the other finding of the Assessing Officer that the nature of the property is that of shops as mentioned in the sale deed itself and the basement was constructed under the shops and therefore is a part of the shopping complex, it was submitted that from the perusal of the sale deed, it may be noted that the property being sold consisted of 3 shops, basement, boundary wall and one out-house. It was submitted that the construction was done on a residential plot of land which has not been converted for commercial purposes. It was further submitted that the

basement and the room therein was used for residential purposes by a staff member of a partnership firm where the assessee is a partner and an affidavit of such staff member has been filed which has not been considered and properly appreciated by either of the lower authorities. Without prejudice, it was submitted that where the property is partly treated as commercial to the extent of shop area and partly as residential, the claim u/s 54 should be proportionately allowed to the assessee.

6. Regarding claim of cost of construction, our reference was drawn to the submissions made before the Id. CIT(A) which were reiterated and the same read as under:-

".....The AO has accepted the existence of the Construction of the Basement, Kotari & Shops in front of the Plot which is about 910 Sq Ft as per the Map being the forming part of the sale deed [Page No 21 to 26 & Specially page 26] but has taken the cost thereof at Zero Rupees on the pretext that the cost is unverifiable in absence of the Supporting Vouchers for Construction.

The Construction took place in the year 1992 and the cost was duly depicted in the Balance sheets of the assessee filed in your good office (ITD OFFICE) as annexure to the Income Tax Return annexures for the year ending 31.3.2000 [Page No 93 to 96], 31.3.2002 (Audited u/s 44AB) [Page 97 to 103], & 31.3.2003 (Audited u/s 44AB) etc [Page no 104 to 107]

No queries whatsoever were raised by the. Income tax Officials on the Tax Audit Report and Balance Sheet & Profit Loss account filed therewith for these years

Thus Accepting the Construction but taking cost thereof at Zero Rupee is a very harsh decision of the learned Assessing officer for a detrimental interest of the assessee. There cannot be a magic of construction without a cost thereof.

Disbelief on the papers filed with your good office before a long time of selling an assets indicates that conduct of the assessee's in filing the papers with you are not adequate and no authenticity of the papers filed is verified.

In fact moreover No manipulations should be apprehended for disclosure of the construction cost in the year 2000 for a property to be sold at a far future date.

Let us recall the CBDT Circular No. 14 (XL-35) dated 11/04/1955 wherein the AOs are instructed to take cognizance of bonafide claim of the assessee's and not to act against the assessee

But in our case, it appears that the Learned AO has acted totally against the principle of natural justice to create unfair demand.

In view of the above you are requested to kindly accept the cost of construction of 910 Sq Ft as claimed by the assessee."

7. Per contra, the Id. DR submitted that property sold by the assessee was not a property which was used for residential purposes as it apparent from the description in the sale deed which talks about 3 shops and the basement therein. It was further submitted that there is nothing on record in terms of any portion of the house used for residential purposes and in any case, the assessee has not shown any income from house property from the said property and therefore, the basic conditions of eligibility

under Section 54 of the Act has not satisfied in the instant case and therefore, the deduction has been rightly disallowed by the Assessing Officer and has rightly been confirmed by the Id. CIT(A).

8. Regarding cost of construction, it was submitted that in spite of any evidence on record, the Id. CIT(A) has been more than reasonable in allowing cost of construction of Rs. 2 lacs and therefore, no further relief should be granted to the assessee.

9. We have heard the rival contentions and perused the material available on record. The first issue is regarding claim of deduction under Section 54 of the Act which provides as under:

"54. Profit on sale of property used for residence.—(1) Subject to the provisions of sub-section (2), where, in the case of an assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of a long-term capital asset, being buildings or lands appurtenant thereto, and being a residential house, the income of which is chargeable under the head "Income from house property" (hereafter in this section referred to as the original asset), and the assessee has within a period of one year before or two years after the date on which the transfer took place purchased, or has within a period of three years after that date constructed, a residential house, then, instead of the capital gain being charged to income-tax as income of the previous year in which the transfer took place, it, shall be dealt with in accordance with the following provisions of this section, that is to say,—

(i)

(ii)....."

10. A reading of the aforesaid provision makes it clear that the property being sold, referred to as original asset, is described as buildings or lands appurtenant thereto and being a residential house. The emphasis is on the nature of the property being a residential house which may consist of building or land appurtenant thereto and secondly, the income of such residential house is chargeable under the head "income from house property."

11. As held by the Courts from time to time, the term 'residential house' has not been given any statutory definition and, thus, has to be assigned meaning as understood in common parlance. As per dictionary meaning, it means abode, a dwelling place or a building for human habitation. A building, in order to be habitable by a human being, is ordinarily required to have minimum facilities of washroom, kitchen, electricity, sewerage, etc.

12. In the instant case, we find that the assessee has sold an immovable property situated at plot no. C-219, Siddharth Nagar, Jaipur consisting of shops, basement, a room (kotari) surrounded by a boundary wall. The same is evident from the perusal of the sale deed duly executed by the assessee as well as from the photographs annexed with the sale deed. Therefore, as far as shops are concerned, even where they are built on a residential plot of land (land use not being changed in local municipality records), the nature of property for tax purposes cannot by any stretch of imagination be treated as property used for residential houses and are thus commercial in nature. Further, regarding the claim of basement and a kotari being used by one of the staff members for residential purposes, there is nothing on record to demonstrate the existence of the basic facilities of a residential house in terms of

washroom, kitchen, electricity and sewerage connection and therefore, an affidavit so filed without any corroborative evidence on record which demonstrate the physical attributes of a residential/dwelling unit cannot come to the aid and assistance of the assessee and thus, the alternate contention so raised that atleast a part of the property being used for residential purposes cannot be accepted and is hereby dismissed. Therefore, we find that the instant case, the property which was sold was clearly not a residential house and thus, the basic condition for claiming exemption u/s 54 has not been satisfied in the instant case.

13. Regarding other contention raised by the Id AR that there is no requirement under law that there has to be actual usage of the house for residential purposes and consequent income offered from such house property to qualify for claim of deduction u/s 54 and in absence thereof, nothing more can be read or implied while interpreting the provisions of section 54 of the Act. In this regard, if we look at the legislative history of section 54, it is noted that prior to amendment by the Finance Act, 1982, there was a condition of residence by the assessee or his parent in the property which was transferred, as also residence by the assessee in the new property purchased or constructed by him. However, realizing certain practical difficulties, the legislature by way of amendment brought in through the Finance Act, 1982 removed such condition of residence by the assessee or his parent in the property which was transferred, as also residence by the assessee in the new property purchased or constructed by him as can be gathered from contents of the CBDT Circular No. 346, dated 30-6-1982. And the provisions of sub-section (1) were consequently amended to read, as contained in the current provisions, where it talks about transfer of a residential house, the income of which is chargeable under the head "Income from house property".

14. If we look at the provisions of section 22 and 23 of the Act relevant for the purposes of computation of income chargeable under the head "Income from house property", it talks about the determination of annual value of the property which is actually let out or expected to be let out. Further, in the context of house or a part of the house which is in occupation of the owner of the property for his own residence, the annual value of such property has been stated to be taken as Nil. Therefore, whether the property is actually let out or not, barring exceptions, the annual value of the property has to be determined and the income to be offered to tax under the head "Income from house property". There could be actual usage of the house for residential purposes either in terms of let out or being self-occupied and there could be potential usage of house for residential house, thus bringing in complete flexibility for the purposes of section 54 of the Act. The basic nature, attributes and character of the property being a residential house however need to be satisfied to qualify for claim of deduction u/s 54 which, as we have noted above, has not been satisfied in the instant case and thus, the claim of deduction has been rightly denied by the AO and confirmed by the Id CIT(A) and we are thus not inclined to interfere with the said findings. The ground no. 1 is thus dismissed.

15. Regarding claim of cost of construction, it has been submitted that the construction was carried out in year 1992 and the cost of construction has been duly disclosed in the audited financial statements of the relevant year so furnished by the assessee before the revenue authorities. Where the audited accounts have been furnished by the assessee, the same are thus part of the records and the cost of construction can be verified therefrom. The matter is accordingly set-aside to the file of the AO to verify the same and where found in order, allow the same to the assessee

after due verification and examination. In the result, the ground of appeal is allowed for statistical purposes.

16. No arguments have been advanced in respect of ground no. 3 which is in any case is consequential to ground no.1 and the same is also dismissed.

In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open Court on 12/07/2021.

Sd/-
(संदीप गोसाई)
(Sandeep Gosain)
न्यायिक सदस्य / Judicial Member

Sd/-
(विक्रम सिंह यादव)
(Vikram Singh Yadav)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 12/07/2021

*Ganesh Kr.

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

1. अपीलार्थी / The Appellant- Sh. Manohar Lal Choudhary, Jaipur
2. प्रत्यर्थी / The Respondent- Dy. CIT, Circle-06, Jaipur
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 1358/JP/2019}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar