

आयकर अपीलिय अधकरण, अहमदाबाद ँयायपीठ
**IN THE INCOME TAX APPELLATE TRIBUNAL,
" SMC" BENCH, AHMEDABAD**

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर ँ ँ ँ स. /ITA

No.631/AHD/2019

िनधा ँरण वष ँ /Asstt. Year:2014-15

Rasilaben Yogeshbhai Patel, 19, Jitendrapark Society, Narayan Nagar Road, Paldi, Ahmedabad-380007. PAN: AEHPP4960P	Vs.	I.T.O., Ward-5(3)(2), Ahmedabad.
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(Applicant)		(Respondent)
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Assessee by :	Shri Parin Shah, A.R
Revenue by :	Shri Atul Pandey, Sr. D.R

सुनवाई क ँ तारीख /Date of Hearing : 26 /09/2022
घोषणा क ँ तारीख /Date of Pronouncement: 07/10 /2022

आदश/ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Commissioner of Income Tax (Appeals)-5, Ahmedabad, dated 26/02/2019 arising in the matter of assessment order passed under s. 143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2014-15.

2. The assessee has raised following grounds of appeal:

1. *Ld.CIT(A) erred in law and on facts in confirming addition of Rs.29,27,396/- on account of reworking of calculation of cost of acquisition for sold property as well as for property for which exemption u/s.54 of the Act has been claimed. Ld.CIT(A) ought to have considered the submission of the appellant and delete the disallowance. It be so held now.*
2. *Ld.CIT(A) ought to have allowed cost of fixed furniture of Rs.17,50,000/- and documentation charges of Rs.1,90,000/- as cost of improvement as same is allowable expenses. It be so held now.*
3. *Ld.CIT(A) ought to have allowed all cost incurred by appellant for purchase of new property while determining exemption u/s.54 of the Act as section prescribes purchase or construction of new assets and appellant purchased independent bungalows and incurred construction and other expenses which is considered as purchase of assets as mentioned in the section. Ld.CIT(A) ought to have considered the submission of the appellant and ought to have allow the claim of the appellant. It be so held now.*
4. *The order passed by AO and confirmed by CIT(A) is illegal and bad in law and required to quashed.*
5. *Charging of Interest u/s.234B is unjustifiable.*
6. *Initiation of penalty proceedings u/s.271(1)(c) is unjustifiable.*

3. The interconnected issue raised by the assessee is that the learned CIT-A erred in confirming the addition of Rs. 29,27,396/- on account of re-computation of capital gain.

4. The assessee is an individual and engaged in the business of job work and commission and also deriving income from capital gain and other sources. The assessee during the year sold "Municipal Tenant" for the property bearing final plot No. 2,4,5 & 6 situated at Sharda Sahakari Gruh Mandal Ltd. for Rs. 1.9 crore in which assessee's share was 50% only. The assessee worked out the long term capital gain of Rs. 35,14,071/- and same was claimed as exempted on account of purchase of new property for Rs. 36,96,525/-(being 50%).

5. The AO found that the cost of acquisition for sold out property claimed by the assessee include cost of purchase of furniture for Rs. 17.5 lakh (100%) in addition to cost of construction. Similarly cost of acquisition for new property purchased includes cost of construction of Rs. 17 lakh and other misc. expenses of

Rs. 8,93,050/- only. As per the AO the cost of purchase of furniture cannot be made part of cost of acquisition of sold out property. Similarly, cost of construction for new property cannot be included in the amount of exemption under section 54 of the Act as the same is incurred for purchase of the new property. Likewise certain misc. expenses incurred for purchase of new property was not supported by documentary evidences. Thus the AO, re-worked the value of capital gain and exemption under section 54 of the Act and made addition of Rs. 29,27,396/- in the following manner:

Sr.No.	Description	Amount Rs.	Remarks
1	Residential Unit	48,00,000/-	As per deed, it is constructed. Page No.12 is photo copy of property,. It complete Unit.
2	Stamp Duty	2,35,500/-	
3	Registration Charges	48,500/-	
4	Brokerage	48,000/-	1 % is prevailing rate for each party.
5	Society Transfer fee	50,000/-	To be charged maximum by society.
	Total	51,82,000/-	
	50%	51,82,000/-	

Working of "Long Term Capital Gain":-

(B) Cost of acquisition:-

Sr.No	Submission	Items	Rs.	Indexation Cost
1	04/12/2016	Land of cost etc.	20,52,493/-	41,62,605/-
2	..do..	Cost of const.	19,42,800/-	38,00,603/-
			Total	79,63,208/-
			50%	39,81,604/-

Sr.No.	Description	Amount Rs.	Remarks
1.	Sales consideration 50%	Rs.95,00,000/-	
	Less:		
2.	Cost of acquisition 50%	Rs.39,81,604/-	[as per (B) above]
3.	Long Term Capital Gain	Rs.55,18,396/-	
	Less:		
3	Exemption against new property	Rs.25,91,000/-	[as per (A) above]
	Long Term Capital Gain to be taxed	Rs.29,27,396/-	

Considering the above chart, "Long Term Capital Gain" requires to be charges for Rs.29,27,396/-. "Long Term Capital Gain" considered for Rs.29,27,396/- and added to the total income.

6. Aggrieved, assessee preferred an appeal before the learned CIT-A, who confirmed the addition made by the AO by observing as under:

3.4 I have carefully considered the assessment order, ground of appeal, submission made by the appellant and material available on record. It is seen that the appellant sold one property jointly held, having 50% share, for Rs.1,90,00,000/- and got Rs.95 lakhs. It is seen that after considering all documents and material available on record, the A O calculated 50% share of the appellant at Rs.39,81,604/- in the property allowing cost of acquisition of sold out property after considering land cost and cost of construction at Rs.79,63,208/-and calculated long term capital gain in the hand of the appellant at Rs.55,18,396/-.

3.5. The AO further considered the investment made by the appellant for the purchase of new property and after allowing the stamp duty, registration charge and brokerage and society transfer calculated the exemption u/s.54 of Rs.51,82,000/- having 50% share of the appellant of Rs.25,53,000/- and thus determined the long term capital gain at Rs.29,27,396/-

3.6. The AO allowed the investment in the purchase of new property for calculating the exemption u/s 54 of the Act and further construction in newly purchased property was not allowed as both were not admissible. The AO noted that as per the provisions of section 54 exemption is allowed either purchaser of the new property or construction of the property.

3.7. The appellant in written submission dated 22.02.2108 submitted that the brokerage paid at the time of purchase is 14 years old and no proof is available. Regarding disallowance of fixed furniture as capital expenses the appellant merely submitted that the furniture was wooden furniture including cupboard and almera, therefore the same should be allowed. Regarding transfer fee no evidence was submitted and for other incidental expenses submitted that expenses were made by cheque only therefore the same should be allowed. The contention of the appellant is vague and general and in absence of any evidence and supporting bills and vouchers, the same cannot be considered genuine as the AO has examine the issue and given the detailed finding. With respect to furniture and fixture the appellant could not produce any bills and details to show that the furniture was permanently fixed in the property and was not removable and the same was not removed at the time of the sale of the property, therefore the furniture cannot be taken as cost of improvement and the AO is justified in not considering the same.

3.8. In view of the above discussion the long term capital gain worked out by the AO after allowing exemption u/s.54 is found justified and the addition made by the A.O. is confirmed.

7. Being aggrieved by the order of the learned CIT-A, the assessee is in appeal before us.

8. The learned AR before us filed a paper book running from pages 1 to 91 and compilation of additional evidences. The learned AR before us contended that the

identical capital gain was shown and exemption was claimed in the case of co-owner namely Shri Yogesh N Patel which has been accepted by the Revenue. Therefore, the claim of the appellant assessee should also be accepted in to-to. As such the appellant assessee cannot be treated indifferently.

9. On the other hand the learned DR before us submitted that in case of co-owner namely Shri Shri Yogesh N Patel, no scrutiny assessment was taken. The return of Shri Yogesh N Patel was accepted under section 143(1) of the Act, hence the assessee cannot take the plea for treating him indifferently. In the present case, the assessee was given full opportunity before making addition. The Id. DR vehemently supported the order of the authorities below.

10. We have heard the rival contentions of both the parties and perused the materials available on record. The AO, reworked value of capital gain and exemption claimed under section 54 of the Act by disallowing certain items from the cost of acquisition. We note that property was sold and new property was purchased jointly by the assessee with Shri Yogesh N Patel being 50% shareholder and 50% of sale consideration was received by him/ Yogesh N Patel. The assessee has placed on record copy of application dated 22-12-2011 along with the copy of return of income with computation of total income of his co-owner who declared similar capital gain and claimed similar exemption. The return of the co-owner has been accepted by revenue under section 143(1) of the Act. Therefore, in our considered view when, the long term capital gain and exemption claimed by the co-owner has been accepted, then the assessee cannot be treated indifferently. In this regard we find support and guidance from the order of coordinate bench of this tribunal in case of *M. Ambalal Desai v. ITO* [IT Appeal No. 1870 (AHD.) of 2015, dated 7-1-2021 wherein it was held as under:

"7. We have considered the submission of both the parties and gone through the orders of Lower Authorities carefully. We have also deliberated on various case laws relied by the AR of the assessee. Before us, the AR of the assessee vehemently submitted that in assessee's co-owner case, the revenue has accepted similar Long Term Capital Gain in the scrutiny assessment. Copy of the assessment order in respect of two co-owners is placed on

record. We have noted that no counter to the submission of the assessee, was made by DR that similar Long Term Capital Gain was accepted in case of co-owner.

8. The Hon'ble Madras High Court in *ICT v. Kumararani Meenakshi Achi (supra)* held that during the same assessment year same quantity of wealth in possession of co-sharer is subjected to a lower rate of taxation, it would be highly improper to burden a similarly situated co-sharer with a higher rate of tax. If such an action on the part of the assessing authorities is sanctioned it would militate against the principle of equality of laws enshrined in Article 14 of the Constitution. By following the same principle, the Co-ordinate Bench of this Tribunal in *Chetanbhai Prahladbhai Gami v. ITO* in ITA No. 2082/AHD/2013 dated 19-7-2019, the Tribunal granted relief to the assessee holding that while making the assessment of the same property the similar treatment should be granted.

9. We have noted that in assessee's co-owner's case with respect to the property against the sale of which the assessee claimed Long Term Capital Gain, the AO in assessee's co-owner case in *Prabhodhchandra Ambelal Desai* allowed the similar Long Term Capital Gain by passing the following order :

"3. On perusal of records and details submitted by the assessee it was found that the assessee was co-owner having share of 6.25% in the property sold for Rs. 2,00,00,001/- on 19-1-2009 situated at Survey No. 86, Lunsikui, Navsari. Value of property as per stamp duty valuation was determined at Rs. 4,09,01,000/-. The assessee has not declared capital gain as he has not filed Return of Income for AY 2009-10 . The said property was inherited by the assessee. The assessee has submitted valuation report of the property from Govt. Approved Valuer who has arrived value of property at Rs. 66,61,020 as on 1-4-1981. The value of the assessee's share comes to Rs. 4,16,314. Indexed cost as per section 48 of the Act is worked out at Rs. 24,22,947/-. As per stamp duty authority the assessee's share being 6.25% of sale value in the property comes to Rs. 25,56,310/-. Thus capital gain comes to Rs. 1,33,363/-, which was taxable in the hands of the assessee. The capital gain of Rs. 1,33,363 has now been shown by the assessee in the Return of Income filed in response to notice u/s 148 of the Act. However, the assessee has not declared suo moto Long Term Capital Gain as he has not filed return of Income. The assessee has consciously not filed return of income to avoid payment of tax. Therefore, Penalty proceedings u/s. 271(1)(c) of the Act are initiated on this issue for concealment of income."

10. We have noted that identical worded assessment order was passed in other co-owner case i.e. *Smt. Prabhaven Harshadrai Desai*, relevant part of the assessment order is extracted below;:

"3. On perusal of records and details submitted by the assessee it was found that the assessee was co-owner having share of 6.25% in the property sold for Rs. 2,00,00,001/- on 19-1-2009 situated at Survey No. 86, Lunsikui, Navsari. Value of property as per stamp duty valuation was determined at Rs. 4,09,01,000/-. The assessee has not declared capital gain as he has not filed Return of Income for AY 2009-10. The said property was inherited by the assessee. The assessee has submitted valuation report of the property from Govt. Approved Valuer who has arrived value of property at Rs. 66,61,020 as on 1-4-1981. The value of the assessee's share comes to Rs. 4,16,314. Indexed cost as per section 48 of the Act is worked out at Rs. 24,22,947/-. As per stamp duty authority the assessee's share being 6.25% of sale value in the property comes to Rs. 25,56,310/-. Thus capital gain comes to Rs. 1,33,363/-, which was taxable in the hands of the assessee. The capital gain of Rs. 1,33,363 has now been shown by the assessee in the Return of Income filed in response to notice u/s 148 of the Act. However, the assessee has not declared suo moto Long Term Capital Gain as he has not filed return of Income. The assessee has consciously not filed return of income to avoid payment of tax. Therefore, Penalty proceedings u/s. 271(1)(c) of the Act are initiated on this issue for concealment of income."

11. In view of the above aforesaid factual and legal discussion and respectfully following the decision of Madras High Court in Kumararani Meenakshi Achi (supra) and decision of Co-ordinate Bench in Prabhodhchandra Ambelal Desai (supra), the revenue cannot treat the assessee in different way, therefore, the addition to the Long Term Capital Gain added by the AO, confirmed by Id. CIT(A) is deleted. In the result the grounds of appeal raised by the assessee are allowed."

10.1 In view of the above elaborated factual and legal discussion, and respectfully following the finding of coordinate bench of this tribunal in aforesaid case. We accept the contention of Id. AR for the assessee that once, the similar LTCG offered and exemption claimed by the co-owner has been accepted by the Revenue, then the assessee is also entitled for similar relief. We find convincing force in the submissions of the learned AR for the assessee. Hence, the appeal of the assessee is allowed. So far as the objection of learned DR that in the case of co-owner, no scrutiny assessment was initiated, is concern, we find that this fact was brought by assessee at the earliest possible action. The Revenue has not taken any action for reopening the case of co-owner and thereby accepted the capital gain and exemption on same transaction, therefore, in our view, the assessee cannot be treated indifferently for similar transaction. Thus, the objection raised by the learned DR for the revenue is not acceptable to us. Hence, the ground of appeal of the assessee is hereby allowed.

11. In the result, the appeal of the assessee is hereby allowed.

Order pronounced in the Court on 07/10/2022 at Ahmedabad.

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

Ahmedabad; Dated 07/10/2022
Manish

(True Copy)