2018 (5) TMI 1026 - ITAT DELHI

Dr. Anoop Kumar Gupta Versus ACIT, CIRCLE 37 (1) , New Delhi

ITA No. 3648/DEL/2014

Dated: - 16 May 2018

Addition on account of cash surrendered at the time of survey - Held that:- We are of the view that assessee is a medical practitioner and it receives fees from the patients. It is normal that the patient is accompanied by his/her relatives, thus, the difference in name per se cannot be a ground to reject assessee's explanation. Further, assessee has filed reconciliation regarding the difference in the amount. Another reason which appears to us is logical that the dispute was of non-inclusion of an amount of 17,98,122/-. This amount having been included in the cash book by the assessee, post survey in the books of account and thus form part of the income declared in the return. The same amount cannot be added again and hence addition of the same amount on the above reasoning is not justified. - Decided in favour of assessee

Addition on account of the difference in stock at the time of the survey - Held that:- this issue has arisen as the survey team did not appreciate the fact that stock in the trail balance as per the tally software represents the opening stock of the year and does not represent the stock of the day. The survey team on the basis of this, worked out the difference of 3,99,951/- and on being confronted the assessee being a doctor and not aware of the facts accepted the same and agreed to offer as income at the time of the survey. But later on, on examination, he could point out the error. Thus, this amount cannot be added as income of the assessee. It is a settled law, an amount offered or surrendered under a mistaken belief cannot be a ground for making addition - Decided in favour of assessee

Addition on account of business promotion expenses - denial by receiver of payment of any receipt - cross-examination denied - Held that:- The basis for drawing adverse inference against the assessee is the statement of Mr. Hardeep Bisht. Since, cross-examination of Mr. Hardeep Bisht has not been given to the assessee, the said statement cannot be used against the assessee. Cross-examination is an important aspect of appreciation of evidence. Mere denial by a person in the statement may not be sufficient to lead to the conclusion that the transaction is not genuine. Such person need to be confronted with the other evidences such as signature, etc. to find out the truth. In the absence of cross-examination, the statement recorded at the back of the assessee cannot be relied upon. Thus remit this issue back to the AO with a direction that he will allow cross-examination of Mr. Hardeep Bisht before relying upon the same for rejecting the claim of the assessee. - Decided in favour of assessee for statistical purpose.

Addition on account of electricity expenses disallowed invoking explanation below Section 37(1) on the ground that such expenses are penal in nature - Held that:- This payment has been made by the assessee to the municipality for use of the electricity for commercial purposes. The assessee is carrying on its profession in a residential property. However, since the property is being used for profession, the corporation consider the use as commercial and hence levy commercial charges. Accordingly, in our view such charges cannot be

considered to be a penalty so as to fall in the Explanation to Section 37(1) of the Act. Hence, the addition in dispute is deleted - Decided in favour of assessee

Addition on account of Sundry Creditors - Held that:- Addition to the extent of 5,07,741/- in respect of the difference in the opening balance cannot be sustained in the year under consideration. CIT(A) was justified in directing the AO to examine the opening balance and delete the addition of 5,07,741/- on account of the difference in the opening balance. Accordingly, we uphold the order of the CIT(A).

Denial of exemption u/s 54 - long term capital gain in respect of the residential property sold - use of the property as relevant criteria to consider the eligibility of the benefit - Held that:- The property sold by the assessee during the year was first floor and barsati floor. The said property was a residential property as is evident from the lease deed as well as other documents confirming to the fact that the first floor and barsati floor was constructed as residential and the other facts analysed herein above. There is no evidence that the said property has been reconstructed as commercial property. In fact it is not the case of the AO. Accordingly, we hold that the property sold by the assessee during the year was residential property and hence assessee is entitled for exemption under section 54 of the Act.

We are also in agreement with the alternative contention of the learned AR that the use of the property is not the relevant criteria to consider the eligibility of the benefit of section 54 of the Act. There is no such condition that the property should be occupied as a residence for claiming the exemption. As against this it may be relevant to mention that section 54B providing for exemption in respect of agriculture land specifically provides that such agriculture land was being used for agricultural purposes. In the absence of any such specific condition in Section 54, no such condition can be read. - Decided in favour of assessee.

Judgment / Order

SHRI H.S. SIDHU, JUDICIAL MEMBER AND SHRI L.P. SAHU, ACCOUNTANT MEMBER

For The Assessee : Sh. Ved Jain, & Sh Ashish Goel, CAs

For The Revenue : Sh. Ravi Kant Gupta, Sr. DR.

ORDER

PER H.S. SIDHU, JM

The Assessee has filed the Appeal against the Order dated 04.3.2014 of the Ld. CIT(A)-XXVIII, New Delhi pertaining to assessment year 2009-10 on the following grounds:-

1. "On the facts and circumstances of the case, the order passed by the learned Commissioner of Income Tax (Appeals) [CIT(A)] is bad, both in the eye of law and on facts.

2(i) On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the addition of 17,98,122/- made by AO on account of cash surrendered at the time of survey.

(ii) That the above addition has been confirmed despite the assessee bringing on record all evidences "to show that the cash so found during the course of survey has been duly recorded and the surrendered cash as income in the return filed by the assessee and as such separate addition made by the AO is unjustified.

3(i) On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the addition of an amount of 3,99,951/- made by AO on account of stock surrendered at the time of survey.

(ii) That the above addition has been confirmed despite the assessee bringing on record evidences to show that the assessee has duly recorded and included the surrendered stock in the income returned by him.

4(i) On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the disallowance of an amount of 24,24,650/- made by AO on account of business promotion expenses.

(ii) That the above-said disallowance has been confirmed despite the assessee bringing all material and evidences to prove the same.

(iii) That the addition has been confirmed relying upon the statement recorded at the back of the assessee and without allowing cross examination.

5 (i) On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the disallowance of an amount of 5, 14,867/- made by AO on account of electricity expenses.

(ii) That the disallowance was made by misinterpreting the facts of the case, as the amount involved does not bear the character of penalty charges.

6(i) On the facts and circumstances of the case, the Id. CIT(A) has erred both on facts and in law in setting aside the issue of an addition of an amount of 5,07,741/- on account of sundry creditors to the AO to examine.

7(i) On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the disallowance of an amount of 70,OO,OOO/- made by AO on account of exemption claimed by the assessee under Section 54 of the Act.

(ii)That the above disallowance has been confirmed despite the fact that the assessee fulfills all the conditions for being eligible to get exemption under Section 54 of the Act.

(iii) On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the action of AO in holding that the property sold was not residential property at the time of sale.

(iv) On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in ignoring the evidences submitted by the assessee in support of its contention that the property sold being the first floor was residential property and as such eligible for exemption under Section 54 of the Act.

(v) On the facts and circumstances of the case, the addition has been confirmed despite the AO having. used the material collected at the back of the assessee and without confronting the same and in gross violation of the provision of Section 142(3) of the Act.

8. The appellant craves leave to add, amend or alter any of the grounds of appeal."

2. The brief facts of the case are that assessee filed return of income on 30.09.2009 declaring a total income of 2,24,88,480/-. The case of the assessee was picked up for scrutiny through CASS. Accordingly, a notice u/s. 143(2) of the I.T. Act, 1961 was issued on 16.9.2010. Detailed questionnaire alongwith notice u/s. 142(1)

of the Act was issued on 16.9.2011. In compliance thereto, the A.R. of the assessee attended the proceedings from time to time and filed details/information/documents, etc. as required. Books of accounts were also produced and the same were examine on test check basis. The assessee is a Medical Practitioner and has derived Professional income from his proprietorship firm M/s Delhi IVF & Fertility Clinic Research Centre. Apart from this, assessee is also deriving income from house property, capital gain and income from other sources. A survey was conducted on 11.2.2009 at the premises of the assessee u/s. 133A of the Act whereby the assessee agreed to surrender following sum for the AY 2009-10.

S. NO.	Details	Amount
1.	Sundry Creditors	55,19,650/-
2.	Sundry Creditors Ferring Pharmaceuticals	23,24,216/-
3.	Unaccounted Cash	17,98,122/-
4.	Unexplained Medicine in Stock	3,99,951/-

2.1 During the course of the assessment, the AO raised the issue of inclusion of the above amounts in the return filed by the assessee. The AO was satisfied with the explanation of the assessee with regard to the inclusion of amount of 55,19,650/- and 23,24,216/- in the return of income. However, the AO was not satisfied with the explanation of the assessee with regard to the other two amounts i.e., 17,98,122/- on account of cash and 3,99,951/-. Accordingly, he added these amounts in the income declared by the assessee. The AO further made disallowance on account of the business promotion expenses of 24,24,650/- incurred by the assessee during the year and also 1,86,667/- on account of the travelling expenses and 5,41,867/- on account of electricity expenses. Further, the assessee during the year has sold a residential property against which it has claimed exemption under Section 54F of Act. The AO denied the benefit of the exemption on the ground that the property sold is not a residential property and assessed the income of the assessee at 3,53,20,840/ u/s. 143(3) of the Act vide order dated 30.12.2011. Aggrieved with the assessment order, the assessee filed appeal before the Ld. CIT(A), who vide his impugned order dated 04.3.2014 gave a partial relief in respect of the disallowance of the travelling expenses. The Ld. CIT(A) also gave a partial relief regarding addition on account of difference in one of the creditor that is Inter Medics. Aggrieved by the impugned order passed by the Ld. CIT(A), the assessee is in appeal before the Tribunal.

3. As regards, Ground No. 1 and 8 are concerned, the same are general in nature and hence need no adjudication.

4. As regards Ground No. 2 is concerned, which is relating to addition of 17,98,122/- made by the AO on account of the cash sales not accounted for, for the period from 1st February, 2009 to 7th February, 2009. We note that as per the AO, the assessee has offered this amount at the time of the survey but has not included the same in the return. The assessee in its reply dated 16th February, 2011 has stated that this cash has been included in the return of income as it has recorded the same in the books of accounts after the survey and as such the income on this account stands accounted for. It was submitted by the ld. AR of the assessee that at the time of the survey, the assessee was shown the cash book from tally for the period from 1st April, 2008 to 7th February, 2009. The assessee was asked a question that no receipts have been reported in the cash book from 1st February, 2009 to 7th February, 2009. The assessee has in response thereto agreed to

include this amount in the income. The assessee after the survey accordingly included this amount in the receipts and as such there was no reason for the AO to make further addition on this account. It was further submitted that it will tantamount to double addition. As regard the finding of the Ld. CIT(A) on this issue, it was submitted that during the appellate proceeding, the assessee has submitted a complete reconciliation which has been quoted on page 10 & 11 of the impugned order. The cash in hand as on 1st February, 2009 as per the seized cash book was 23,72,810.65/- and after reconciliation the cash in hand as on 11th February, 2009 comes to 17,98,122.65/-. This was exact cash found at the time of the survey. It was further submitted that the issue at the time of the survey as is evident in the statement recorded was not writing of the cash book from 1st February to 7th February, 2009. The assessee post survey has written the cash book an accounted for the entire amount. As regards the comparison carried out by the CIT(A), it was submitted that the CIT(A) has failed to appreciate the facts in the right perspective. The assessee is carrying on the profession as medical practitioner and receipts are received from the patients and the difference in the name is sometimes because of the relatives accompanying the patients. Our attention was drawn to the Table 2 at page 12 and 13 where the Ld. CIT(A) has just picked up certain figures to make out a case ignoring the fact that even as per her tabulation, this tabulation does not pertain to the period in dispute as can be seen that the dates quoted include dates from 19th January, 2009 to 31st January, 2009 for which there were no dispute.

4.1 On the contrary, ld. DR relied upon the orders of the authorities below. It was submitted that the assessee has offered this amount at the time of the survey and during assessment proceedings, has failed to substantiate its explanation that the amounts has been considered and included in the income returned by it.

5. We have heard both the parties and perused the records, especially the impugned order. The issue here is addition of 17,98,122/- offered by the assessee at the time of the survey on account of the fact that receipts for the period from 1st February, 2009 to 7th February, 2009 were not found recorded. The assessee's explanation is that these receipts have been included in the books of account post survey and as such this amount form part of the income returned by it. During the course of the assessment the AO rejected the explanation of the assessee. In the appellate proceedings the Ld. CIT(A) called for a remand report whereby the assessee submitted a detailed reconciliation. That reconciliation has been rejected by the Ld. CIT(A) on the ground that the name and the amount do not match. Now the issue is whether the Ld. CIT(A) was justified in upholding the addition when the assessee has filed the detailed reconciliation. In this regard, we note that the main issue was non-recording of the receipts of the period from 1st February to 7th February, 2009. From the facts on record, it is evident that assessee has included such receipts post survey and form part of the income returned by it. The contention of the Ld. CIT(A) is difference in the name and some of the amounts. We are of the view that assessee is a medical practitioner and it receives fees from the patients. It is normal that the patient is accompanied by his/her relatives, thus, the difference in name per se cannot be a ground to reject assessee's explanation. Further, assessee has filed reconciliation regarding the difference in the amount. Another reason which appears to us is logical that the dispute was of non-inclusion of an amount of 17,98,122/-. This amount having been included in the cash book by the assessee, post survey in the books of account and thus form part of the income declared in the return. The same amount cannot be added again and hence addition of the same amount on the above reasoning is not justified. Accordingly delete the addition by allowing the Ground No. 2.

6. As regards Ground No. 3 is concerned, which is relating to addition of 3,99,951/- on account of the difference in stock at the time of the survey. In this regard, the ld. AR of the assessee submitted that there is no dispute as regards the value of the stock as in the date of survey of 7,40,551/-. The issue is limited to the figure of the stock as per the books of accounts taken at 3,40,600/-. It was further submitted that figure as per trial balance taken at the time of the survey does not represent the stock as on the date of the survey.

The stock in the tally shown in the trial balance is the opening stock and that is why this confusion has arisen. It was further submitted by the ld. AR that addition is otherwise untenable in view of the fact that the closing stock of 4,84,500/- as on 31st March, 2009 will itself set off the above difference even if it is assumed that there was a difference. It was contended that the Ld. AO has accepted the closing stock and has not rejected the books of accounts.

6.1 On the contrary, Ld. DR relied upon the orders of the authorities below.

7. We have heard both the parties and perused the records, especially the impugned order. We note that this issue has arisen as the survey team did not appreciate the fact that stock in the trail balance as per the tally software represents the opening stock of the year and does not represent the stock of the day. The survey team on the basis of this, worked out the difference of 3,99,951/- and on being confronted the assessee being a doctor and not aware of the facts accepted the same and agreed to offer as income at the time of the survey. But later on, on examination, he could point out the error. Thus, this amount cannot be added as income of the assessee. It is a settled law, an amount offered or surrendered under a mistaken belief cannot be a ground for making addition. Accordingly, we delete the addition in dispute and allowed the Ground No. 3.

8. Ground No. 4 is relating to addition of 24,24,650/- on account of business promotion. During the course of the assessment proceeding, the AO noted that assessee has incurred an expenditure of 24,24,650/- on account of business promotion expenses. This payment has been made to M/s Dhara Prakashan Pvt. Ltd. The assessee submitted the details of the expenses along with the supporting vouchers. The AO in order to verify the expenditure, issued summon to Mr. Hardeep Bisht, Director of Dhara Prakashan Pvt. Ltd. and recorded his statement. In the statement, Mr. Hardeep Bisht denied having issued these invoices to the assessee. The AO on the basis of the denial by Mr. Hardeep Bisht disallowed the above expenditure. During the course of the proceeding before the Ld. CIT(A), the assessee contended that the statement of Mr. Hardeep Bisht was recorded at the back of the assessee on 21st December, 2011 and without providing a copy of the same, the assessee was asked to submit reply within a day i.e. on 22nd December, 2011. The AO has incorrectly recorded that nobody appeared on 22nd December and no reply has been filed. This was factually incorrect as the AO himself has recorded a statement of the assessee on 27nd December, 2011 as is evident from the assessment order itself. Further, the AO has referred to the letter dated 26th December, 2011 submitted by the assessee. The assessee accordingly requested the Ld. CIT(A) that the matter be remanded to the AO for giving a copy of the statement recorded of Mr. Hardeep Bisht and also allowing cross examination. The Ld. CIT(A) considering the above explanation of the assessee and the facts, called for the remand report from the AO. The Ld. CIT(A) also held a joint hearing with the AO and AR of the assessee whereby it was decided to allow cross examination of Mr. Hardeep Bisht. The AO did not allow the cross examination and shifted the onus on assessee of producing Mr. Hardeep Bisht. Despite, no cross examination being allowed the Ld. CIT(A) confirmed the action of AO ignoring the specific issue raised by the assessee and quoted by the Ld. CIT(A) in para 7.2 of its order. On the basis of the above, it was contended that the order passed by the AO and the Ld. CIT(A) is in violation of the settled law that no adverse view can be taken against the assessee in respect of the statement recorded at the back of the assessee unless an opportunity of cross examination is allowed to the assessee. Further, the Ld. AR submitted that the AO has failed to ask any further question from Mr. Hardeep Bisht at the time when the statement was recorded. A simple denial as is evident from the statement quoted in the assessment order has been taken as gospel truth. It was submitted that assessee is an IVF Clinic where patients comes from far off rural places and the sale promotion through painting on walls etc. is the most effective way. The assessee has incurred the expenditure and has produced the necessary evidences.

8.1 On the contrary, Ld. DR relied upon the orders of the authorities below. It was submitted by the Ld. DR that Mr. Hardeep Bisht have denied the bills being issued by him, the AO was justified in drawing adverse inference and it is not sacrosanct always to allow cross-examination.

9. We have heard both the parties and perused the records, especially the impugned order. We note that during the year, an expenditure of 24,24,650/- has been incurred by the assessee on account of sale promotion. The assessee in support thereof has submitted the details along with the invoices. The AO has doubted the same and recorded the statement of Mr. Hardeep Bisht. It is an admitted fact that this statement was recorded at the back of the assessee. Though, the assessee was asked to submit reply in response to the statement recorded but the time given during the assessment proceeding was only of 1 day. In the appellate proceeding, the Ld. CIT(A) referred the matter to the AO for remand. In the remand proceedings also, no cross-examination was allowed to the assessee. The Ld. CIT(A) still has drawn adverse inference against the assessee. However, as per the above facts, it is evident that the basis for drawing adverse inference against the assessee is the statement of Mr. Hardeep Bisht. Since, cross-examination of Mr. Hardeep Bisht has not been given to the assessee, the said statement cannot be used against the assessee. Crossexamination is an important aspect of appreciation of evidence. Mere denial by a person in the statement may not be sufficient to lead to the conclusion that the transaction is not genuine. Such person need to be confronted with the other evidences such as signature, etc. to find out the truth. In the absence of cross-examination, the statement recorded at the back of the assessee cannot be relied upon. If we ignore the statement of Mr. Hardeep Bisht, apparently there is no other adverse evidence so as to reject the claim of the assessee. However, considering the totality of the above said facts, we feel it appropriate to remit this issue back to the AO with a direction that he will allow cross-examination of Mr. Hardeep Bisht before relying upon the same for rejecting the claim of the assessee. Needless to say that assessee should be given adequate opportunity of being heard by the AO. Therefore, the ground No. 4 is allowed for statistical purpose.

10. As regards Ground No. 5 which is relating to addition of 5,14,867/- on account of electricity expenses disallowed by the AO by invoking explanation below Section 37(1) on the ground that such expenses are penal in nature. It was submitted by the Ld. AR of the Assessee that this amount has been paid to the New Delhi Municipal Corporation on account of the commercial use of the premises. The electricity charges for commercial use are different than the charges for domestic use. The NDMC accordingly has levied charges on account of the commercial use. It was submitted that charges nowhere has been termed as penalty. The Ld. AR placed reliance on the decision of the ITAT Bench of the Hyderabad in the case of Dy. Commissioner of Income Tax vs. FOSAN & Co. 40 ITD 306.

11. On the contrary, the Ld. DR relied upon the orders of the authorities below. It was submitted that these charges are not allowable in view of the Explanation to Section 37(1) of the Act.

12. We have heard both the parties and perused the records, especially the impugned order and the Paper Book. We note that this payment has been made by the assessee to the municipality for use of the electricity for commercial purposes. The assessee is carrying on its profession in a residential property. However, since the property is being used for profession, the corporation consider the use as commercial and hence levy commercial charges. Accordingly, in our view such charges cannot be considered to be a penalty so as to fall in the Explanation to Section 37(1) of the Act. Hence, the addition in dispute is deleted and ground no. 5 is allowed.

13. As regards Ground No. 6 which is relating to addition of 5,07,741/- on account of Sundry Creditors is concerned, we note that Ld. CIT(A) has set aside for verification. The AO has made the above addition on the ground that outstanding balance as per assessee in respect of M/s Inter Medics was 6,00,322/- whereas as per the reply received from the said party, the balance was only 92,581/-. During the appellate proceeding,

the Ld. CIT(A) called for a report from the AO and it transpired that the difference during the year as per the copy of account is only of 2,800/- only. The rest of the difference is in the opening balance. Since opening balance difference cannot be added in the year under consideration, the Ld. CIT(A) directed the AO to verify the same and to allow proportionate relief. The assessee is aggrieved by the order of the Ld. CIT(A) on this issue. After examination of the facts and the contention of the rival parties, we are of the opinion that addition to the extent of 5,07,741/- in respect of the difference in the opening balance cannot be sustained in the year under consideration. Accordingly, the Ld. CIT(A) was justified in directing the AO to examine the opening balance and delete the addition of 5,07,741/- on account of the difference in the opening balance. Accordingly, we uphold the order of the CIT(A).

14. As regards Ground No. 7 which is relating to denial of exemption in respect of the long term capital gain of 70,00,000/- in respect of the residential property sold by the assessee during the year is concerned, we note that the assessee during the year has sold first floor of the property in Sundar Nagar for a total consideration of 1,50,00,000/-. After deducting the indexed cost of the residential property of 39,35,655/-, there was a net capital gain of 1,10,65,345/- out of which assessee invested a sum of 70,00,000/- in the capital gains scheme and offered balance amount of 40,64,345/- towards tax. The AO however was of the view that the property sold is not a residential property and hence assessee is not eligible for claiming benefit of investment made by it in the capital gains scheme of 70,00,000/- and accordingly, he added the same while computing total income of the assessee. The AO also got a physical verification done whereby the Inspector obtained some of the photographs from the outside of the property. The ld. CIT(A) has confirmed the findings of the AO. It was contended by the Ld. AR that the finding recorded by the AO and upheld by the Ld. CIT(A) are factually incorrect. It was submitted that AO has not appreciated the facts in the right perspective. The assessee during the year has sold only first floor which is a residential property. The assessee has not sold the ground floor which is a shop during the year. The assessee during the year has sold First Floor of the property which was residential property. In this regard, it was submitted that in Sundar Nagar Market, the ground floor is commercial for shops and first floor is residential. This has been the policy not only for Sundar Nagar Market but also for other areas particularly in the NDMC areas like Khan Market and Sarojini Nagar market. In support thereof our attention was invited to the agreement for lease dated 22nd February, 1951 entered into between the President of India and the then Lessee Smt. Vidyavati placed at PB. Pg. 306 – 311. It was submitted that in clause II at PB. Pg. 307 of the said agreement to lease it is clearly stated that the building for use as shop at ground floor and first floor as residence. Further attention was invited to clause XIII at PB. Pg. 309 whereby it has been stated that the land should be used only for the purposes expressly stated in clause II hereof and there is a restriction on use for any other purposes. It was submitted that Perpetual Lease Deed also has the same clauses. The property was constructed accordingly by the then lessee comprising of a shop on the ground floor and the residential portion on the first floor and the Barsati floor as is evident from the document placed at PB Pg. 302. After the death of Smt. Vidavati the legal heir Mr. Ashok Kumar Gupta sold the property to the assessee in terms of sale deed dated 20th December 1993 to the assessee. In this agreement, in clause 7 at PB Pg. 336, it has been clearly stated that the ground floor of the property is under tenancy of Mr. JaganNath Hem Chand and the first floor and the terrace floor are in the possession of tenant Sh. Subhash Jain. The assessee did not made any changes to the property after the purchase. The assessee in the year 2005sold the ground floor of the said property to Mr. Arun Sankhawal being shop vide agreement dated 5th September, 2005. The assessee continued to be owner of the residential property being first floor and the Barsati floor. During the year under consideration the assessee has sold this first floor and the barsati floor which was the residential property and hence assessee is eligible for exemption claimed by it. The AO has denied the benefit by ignoring the above facts which are on record and without appreciating that in market area there is commercial area on the ground floor and the first floor and barsati floor are residential floor. The assessee has clarified these facts vide letter dated 27th

December 2011 which has been totally ignored. The inspector's report relied upon by the AO has failed to take into consideration these aspects. The photograph which is forming part of the assessment order apparently is of the ground floor where JaganNath Hem Chand was the tenant since 1993. Further, this property was sold on 5th June, 2008 and the inspector visit is on 23rd December, 2011 i.e. after a period of more than 3 years. Further, the electricity bills in the name of the assessee is continuing as the buyer would not have applied for substitution of name. The name in the electricity bill does not change automatically, it is the buyer who has to get the name changed. It was further submitted that though the Inspector has taken a few photographs which are part of the assessment order but these photographs nowhere confirms that the gas agency was running on the first floor as can be seen from the photographs. It was also pointed out that the inspector has not made any enquiry from the occupant of the first floor during his visit, nor he has made any enquiry with any neighbors. It was further submitted that the mandate of Section 54 is that the property should be residential and there is no condition that such property should have been occupied for the purpose of residence at the time of sale so as to claim the benefit. For claiming the exemption the property should be a residential property. From the facts on record it is clear that the First floor and the barsati floor have been constructed as residential property and has continued be so as there is no alteration/ modification. The property was constructed by Mrs. VidyaWati and has continued to be so. It is also not the case of the AO that the assessee has reconstructed this property so as to convert the residential property into a commercial property. It was further contended that it is not also the case of the AO that this property was being used by the assessee for commercial purposes before its sale by him. The subsequent change in usage of property by the buyer without prejudice to the above facts, in any case will not disentitle the assessee being the seller for its claim. The Ld. AR placed reliance on the following Judgments:

1. Mahavir Prasad Gupta Vs Joint Commissioner of Incometax [2006] 5 SOT 353 (DELHI)

2. ShyamlalTandonv. Income-tax Officer, Ward -7(4), Hyderabad*[2014] 43 taxmann.com 155 (Hyderabad - Trib.)

3. Income-tax Officer, Ward 24(2) (2) Versus Ms. SandhyaSaxena [2006] 7 SOT 527 (MUM.)

14.1 The Ld. AR of the assessee also placed reliance on the following judgment in support of its contention that residential house constructed on a land, the exemption will still be available.

1. Income-tax Officer, Ward- 1 (2), Jaipur v.Smt. Saroj Devi Agarwal [2017] 87 taxmann.com 23 (Jaipur - Trib.)

14.2 On the contrary, ld. DR relied upon the orders of the authorities below. It was submitted that the AO has examined the matter thoroughly and has recorded a finding of fact. The same be upheld.

15. We have considered the rival submissions and perused the order passed by the authorities below and the Paper Book. The issue here is of exemption on account of long term capital gain having been invested in capital gains scheme. There is no dispute about these facts and also the figures. The only dispute is whether the property sold is a residential property or not. The AO has stated in the assessment order that the property sold is not residential. In this regard, he has made reference to the documents and also to the Inspectors' report. However, on going through the various documents placed in the Paper Book, we note that the finding recorded by the AO is factually incorrect. The AO on page 11 and in para 7.5 of the assessment order has made a reference to the purchase deed of F.Y. 1993- 94 to assert that this purchase deed nowhere states that the property is residential. In this regard, we have examined the entire set of documents including the Agreement for Lease executed between the President of India and Mrs. VidyaWati from whom Mr. Ashok Kumar Gupta, the legal heir, the assessee has purchased the property in the year 1993-94. In the lease deed, it has been clearly stated that the ground floor is shop and the first floor and the barsati floor is residence. We have also examined the document being General Power of Attorney dated 4th June, 2008 whereby it is

clearly stated that Smt. VidyaWati after possession of the plot of land, constructed a building on the same comprising of a shop on the ground floor and the residential portion on the first floor and the barsati floor. We have also perused the purchase deed of 1993-94 placed at PB. Pg. 332 -337 dated 17th December, 1993 which has been made the basis by the AO to make allegation. On going through the same we not that in para 7, it is clearly stated that ground floor of the said property is under the tenancy of M/s JaganNath Hem Chand and the first floor and the Barsati floor are in possession of Mr. Subhash Jain as tenants. Thus, these are two distinct portion. The ground floor was with the firm as a commercial property allowed as per the lease deed and the first floor was with an individual as a tenant and hence cannot be assumed as a commercial property. In our view, the AO has gone wrong in drawing adverse inference on the basis of these documents. In fact, these documents supports the case of the assessee. Further these facts also negates the contention of the AO whereby he has relied upon the photograph taken by the inspector at the time of the visit placed at page 12 of the assessment order where the firm name M/s JaganNath Hem Chand is appearing. As the above referred purchase deed dated 17th December, 1993 clearly shows that it was the ground floor which was on rent with M/s JaganNath Hem Chand and the first floor was with another tenant namely Mr. Subhash Jain. Thus, this photograph also do not support the case of the AO. It is a matter of record that assessee has sold the ground floor way back in the year 2005 and during the year under consideration he has sold the first floor and the barsati floor only which were the residential property.The adverse inference being drawn on the basis of the Inspector's report by the AO accordingly is also not justified and more so, when this report is of 23rd December, 2011 i.e. more than 3 years after the sale made by the assessee. The Ld. AR has rightly contended that subsequent change in the end use even if it is there, cannot disentitle the seller from claiming the exemption in the absence of any evidence that the seller has been using the property before sale for any commercial purposes. Thus we are of the view that the authorities below have failed to appreciate the facts in the right perspective. The property sold by the assessee during the year was first floor and barsati floor. The said property was a residential property as is evident from the lease deed as well as other documents confirming to the fact that the first floor and barsati floor was constructed as residential and the other facts analysed herein above. There is no evidence that the said property has been reconstructed as commercial property. In fact it is not the case of the AO. Accordingly, we hold that the property sold by the assessee during the year was residential property and hence assessee is entitled for exemption under section 54 of the Act. We are also in agreement with the alternative contention of the learned AR that the use of the property is not the relevant criteria to consider the eligibility of the benefit of section 54 of the Act. There is no such condition that the property should be occupied as a residence for claiming the exemption. As against this it may be relevant to mention that section 54B providing for exemption in respect of agriculture land specifically provides that such agriculture land was being used for agricultural purposes. In the absence of any such specific condition in Section 54, no such condition can be read. Our this interpretation get further supported by the judgment in the case of Mahavir Prasad Gupta Vs Joint Commissioner of Income-tax [2006] 5 SOT 353 (DELHI) wherein the Hon'ble Court has held as under:

> *"8. We have considered the rival submissions carefully and in our view having regard to the circumstances of the instant case, the assessee is eligible for claim of exemption under section 54F of the Act. To the extent it is necessary for our purpose, we note that section 54F envisages exemption of long-term capital gain, if the net consideration thereof is appropriated towards the construction of a new residential house. The new property, in the instant case, has been let out for commercial use, and thus revenue seeks to deny the exemption under section 54F. In our view, the use of the property is not the relevant criterion to consider the eligibility of section 54F benefit. A bare reading of the provisions of section 54F reflect that what is required is investment in a new residential house. Therefore, the question that arises in the instant case is as to whether the new property constructed by the assessee is a residential house or not. Mere non-residential use would not render a property ineligible for section*

54F benefit, if it otherwise is a residential house. On this aspect, we do not find any positive finding by the lower authorities and neither is there any relevant material before us to arrive at a finding. Thus, for this limited purpose, the issue is restored to the file of the Assessing Officer. If the assessee is found to have constructed a residential house, whatever may be the use it has been put to, the assessee can be said to have fulfilled the conditions envisaged under section 54F."

Further, in the case of Shyamlal Tandon v. Income-tax Officer, Ward -7(4), Hyderabad*[2014] 43 taxmann.com 155 (Hyderabad - Trib.) the Hon'ble Court has held as under:

"We have considered the rival submissions and perused the orders of the Revenue authorities. It is evident from the impugned orders of the lower authorities and other material on record that intention of the parties when the development agreement was entered into was to construct a residential property. Municipal permission has also been obtained only for construction of a residential complex. Ultimately, the assessee has received possession of such residential property. It may be true that the said property was put to use subsequently for commercial use. Merely because of change in the use of such property for non-residential purposes, it cannot be said that what was acquired by the assessee was not a residential property, but a commercial one. Subsequent change in the user of the property does not disentitle the assessee to relief under S.54F of the Act, as held by Hyderabad Bench B of this Tribunal in the case of Shri M.V. Subramanyeswara Reddy (HUF)(supra),"

Further, in the case of Income-tax Officer, Ward 24(2) (2) Versus Ms. SandhyaSaxena [2006] 7 SOT 527 (MUM.) where the court has held as under:

"3. After going through the rival contentions and after perusing the material on record, we are not inclined to interfere with the well reasoned finding of the CIT(A), who has held that house property, i.e., B-I and B-II, though purchased by two separate agreements on the same day, is one house property despite the fact that a part of this house property was used by the assessee for running a beauty parlour for some time. The said beauty parlour had already been closed prior to sale. Even if part of the said property had been used for commercial purpose for some time, but it does not change the character of the house property in view of the reasoning that no depreciation had been claimed thereon in the past and the society's secretary had certified the same as being a residential house property all along. Both these units jointed together by a common entrance and inter-linked stair-case, the house property had to be considered as one only. The said property was acquired on 24-10-1986 and sold on 24-2-1994 - both dates had been verified from the records of the Housing Society and the same was accepted by the Assessing Officer. Accordingly, the CIT(A) has rightly directed the Assessing Officer to allow such indexation of the cost of the original asset sold and to allow deduction under section 54(1) of the Income-tax Act, 1961, with regard to the Long Term Capital Gain reinvested in purchase of the new asset being residential house property."

15.1 Keeping in view of the facts and circumstances of the case and respectfully following the precedents, as aforesaid, the AO is directed to allow the deduction as claimed by the assessee under section 54 of the Act.

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

Order pronounced on 16-05-2018.

Citations: in 2018 (5) TMI 1026 - ITAT DELHI

1. The Income Tax Officer, Ward-1 (2) , Jaipur Versus Smt. Saroj Devi Agarwal And Vice-Versa - 2017 (11) TMI 667 - ITAT JAIPUR
2. Shri Shyamlal Tandon Versus Income Tax Officer, Ward 7(4), Hyderabad - 2014 (4) TMI 867 - ITAT HYDERABAD
3. Dy. Commissioner of Income-tax Versus Shri MV. Subramanyeswara Reddy(HUF), Hyderabad And Others - 2014 (4) TMI 71 - ITAT HYDERABAD
4. Mahavir Prasad Gupta. Versus Joint Commissioner Of Income-tax. - 2005 (10) TMI 231 - ITAT DELHI-G
5. Income-tax Officer, Ward 24(2) (2) Versus Ms. Sandhya Saxena - 2005 (7) TMI 583 - ITAT MUMBAI
6. Deputy Commissioner Of Income-Tax. Versus Fosan And Company. - 1991 (10) TMI 97 - ITAT HYDERABAD