



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION (L) NO.1601 OF 2022

Gagan Omprakash Navani)
Residing at 12, 1st Floor,)
Devi Bhawan, 38, Napean Sea Road,)
Mumbai – 400 006)
PA No.AAJPN8047R)Petitioner

V/s.

Income Tax Officer)
International Tax Ward – 3(3)(1),)
1631, 16th Floor, Air India Building,)
Nariman Point, Mumbai – 400 021)Respondents

Ms. Akshita Bhandari a/w. Mr. Nishit Gandhi for petitioner.

Mr. P.A. Narayanan for respondent.

**CORAM : K.R. SHRIRAM &
N.R. BORKAR, JJ.
DATED : 15th MARCH 2022**

ORAL JUDGMENT : (PER K.R. SHRIRAM, J.)

1 Petitioner is an individual assessed to tax. For the Assessment Year 2016-2017 petitioner, on 10th April 2017, filed a return of income declaring an income of Rs.2,57,34,990/-. In the return of income, petitioner has offered income under the heads “income from house property”, “income from capital gains” and “income from other sources” after claiming an exemption under Section 54 of the Income Tax Act, 1961 (the Act) amounting to Rs.51,57,29,543/-. The return was selected for scrutiny assessment under CASS. The reason for selection of the said return for scrutiny assessment was to examine the claim of exemption from long term capital gains. Petitioner received a notice dated 1st September 2018 under

Section 142(1) of the Act seeking statement of capital gains and exemption claimed alongwith evidences supporting the claim of exemption. Petitioner replied and uploaded on 10th September 2018 their forwarding letter, ITR statements and accounts, sale agreements and details regarding one Rishi Gagan Trust. Physical copies were submitted on 11th September 2018. Thereafter, on 27th November 2018, petitioner once again submitted various documents including capital gain and loss computation statement and also explained how petitioner was entitled to the allowance under Section 54 of the Act. Once again various documents were submitted. On or about 5th December 2018, respondent once again issued a notice under Section 142(1) of the Act calling upon petitioner for list of immovable properties owned by petitioner. This was provided on 7th December 2018.

2 Thereafter, an assessment order dated 15th December 2018 under Section 143(3) of the Act was passed accepting the return of income of petitioner at Rs.2,57,34,490/-. In the assessment order, the Assessing Officer has stated “*the issue has been identified for complete scrutiny under CASS for examination are whether the assessee has claimed the benefit of substantial deduction/exemption u/s. 11(1A), other than Section 11(1A), 54, 54B, 54D, 54EC, 54EE, 54F, 54G, 54GA, 54GB, 115F etc*”. It is also mentioned in the assessment order that during the year under consideration the assessee has earned income under the head income from house property, income from capital gains and income from other sources and in response to

the notices issued, the assessee has furnished relevant details online. The details are verified and placed on record.

3 Thereafter, petitioner received a notice dated 11th March 2021 for Assessment Year 2016-2017 under Section 148 of the Act stating that Revenue has reasons to believe that petitioner's income chargeable to tax for Assessment Year 2016-2017 has escaped assessment within the meaning of Section 147 of the Act. Petitioner was provided the reasons for reopening by a communication dated 29th June 2021. As it appears from the reasons for reopening, petitioner had sold a residential property at Gulistan, Napeansea Road and purchased a residential property being "Villa Orb" for a consideration of Rs.56,18,30,000/-. Against the long term capital gains of Rs.53,25,95,542/-, petitioner claimed deduction under Section 54 of the Act. But from the documents relating to the acquisition of new property being "Villa Orb", it related to six residential flats on the 9th Floor admeasuring 7,500 sq. ft. According to the Assessing Officer, since the residential property at 9th Floor, Villa Orb consisted of six residential flats and under Section 54 of the Act, if the assessee purchases more than one residential house from the capital gain accrued from sale of original asset, the exemption under Section 54 of the Act is not allowable.

4 Since the reopening proposed is within four years after expiry of the relevant assessment year, what is required to be seen is whether there is any tangible material made out for reopening the assessment. Since the

assessment under Section 143(3) of the Act has been completed, the assessment cannot be permitted to be reopened if it is based on change of opinion.

5 As noted earlier, a specific query during the assessment proceedings was raised calling upon petitioner to provide statement of capital gains and exemptions claimed alongwith evidences supporting the claim of exemption by a notice dated 1st September 2018. Petitioner provided all the details including copy of the sale agreement by a letter dated 10th September 2018. Subsequently, petitioner provided further details by a letter dated 24th November 2018. Thereafter, respondent issued a fresh notice under Section 142(1) of the Act dated 5th December 2018 seeking further details on the immovable properties owned by petitioner. These details were also provided.

6 In the assessment order, accepting petitioner's explanations and return of income, it is mentioned specifically that benefit of deductions/exemption under Section 54 of the Act was one of the reason for scrutiny under CASS and petitioner was issued notices and petitioner also provided all details online. Therefore, all the material relied upon by the new Assessing Officer proposing the reopening were available with the Assessing Officer when the assessment order dated 15th December 2018 was passed.

7 Ms. Bhandari also relied upon various judgments of this Court to submit that the reason to believe that income chargeable to tax had

escaped assessment within four years from the end of the relevant assessment year has to arise not on account of mere change of opinion but on the basis of some tangible material. Ms. Bhandari submitted - can respondent take recourse to the provision of Section 147 of the Act for his own failure to apply his mind to the material which was relevant and was available on record and this Court in *Asian Paints Limited V/s. Deputy Commissioner of Income Tax*¹ has answered in negative. Ms. Bhandari, relying upon *Purity Techtexile Private Limited V/s. The Assistant Commissioner of Income Tax*², also submitted that the statement contained in the reasons, on the basis of which the assessment is sought to be reopened, is belied by the record which shows that the Revenue was in possession of the material produced by the assessee during the course of the assessment proceedings and, therefore, the Assessing Officer had no additional material at all to form a belief that income had escaped assessment.

8 Mr. Narayanan argued that there is no specific discussion in the assessment order about the deduction claimed under Section 54 of the Act and the query raised and answers given. We cannot accept Mr. Narayanan's objections because this Court has, time and again, held that once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of

1. (2009) 308 ITR 195 (Bombay)

2. (2010) 325 ITR 459

consideration of the Assessing Officer while completing the assessment. It is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised [*Aroni Commercials Ltd. V/s. Deputy Commissioner of Income Tax 2 (1)*³].

9 There can be no doubt in the facts of the present case that the issue of deduction under Section 54 of the Act was a subject matter of consideration by the Assessing Officer during the assessment proceedings leading to passing of the assessment order dated 15th December 2018. It would, therefore, follow that the reopening of the assessment by impugned notice dated 11th March 2021 is merely on the basis of change of opinion of the Assessing Officer from that held earlier during the course of assessment proceedings. This change of opinion does not constitute justification and/or reason to believe that income chargeable to tax has escaped assessment.

10 A point came to light as pointed out by Mr. Narayanan that in the reasons for reopening, there is reference to six residential flats being purchased to claim capital gains. Whereas, there is no such discussion earlier. In our view, this also does not help the Revenue because the same documents, on which this officer has relied upon, were subject matter of consideration during the assessment proceedings.

11 First of all, no reply to this petition has also been filed though the petition was served long ago and even Vakalatnama has been filed on or

3. (2014) 44 taxmann.com 304 (Bombay)

about 11th February 2022. Moreover, in an undated objections to reopening, petitioner has expressly provided that the flat, when purchased by the assessee in auction under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act), was one flat comprising of an area of approximately 7500 sq. ft. alongwith four car parking spaces. Petitioner has also provided all evidences to justify that when petitioner purchased the flat, it was one residential unit/flat comprising of around 7500 sq. ft. having common kitchen and common areas. Documentary evidence to that effect was also provided. These facts have not been denied or disputed by the Assessing Officer in the order dated 8th December 2021 which is also impugned in the petition alongwith notice issued under Section 148 of the Act.

12 In the objections, petitioner has also relied upon certain judgments where it says that “*Section 54/54F only requires the assessee to acquire a residential house and so long as the assessee acquires a building, which may be constructed, for the sake of convenience, in such a manner as to consist of several units which can, if the need arises, be conveniently and independently used as an independent residence, the requirement of the Section should be taken to have been satisfied*”. Even during the course of submissions today, Mr. Narayanan did not disagree with the proposition submitted by petitioner.

13 In the circumstances, petition is allowed in terms of prayer clause – (a), which reads as under :

(a) That this Hon'ble Court may be pleased to issue under Article 226 of the Constitution of India an appropriate direction, order or a writ, including a writ in the nature of Certiorari, calling for the records of the case and, after satisfying itself as to the legality thereof, quash and set aside the Notice u/s 148 dated 11.03.2021, Ex. "I" herein and the order disposing objections dated 08.12.2021, Ex. "M" herein passed by the respondent.

14 Petition accordingly disposed.

(N.R. BORKAR, J.)

(K.R. SHRIRAM, J.)