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

WRIT PETITION NO. 1644 OF 2022

Hemant Dinkar Kandlur
(PAN: ADIPK8605J), having address at 11/9, Saraswat colony, Santacruz (West), Mumbai 400 054.

...Petitioner

Versus

1. Commissioner of Income Tax (International Taxation) – 3, 16th floor, 1601, AIR India Building Nariman Point, Mumbai 400 021.

2. Union of India, Through the Secretary, Ministry of Finance, Government of India, North Block, New Delhi 100 001.

...Respondents

Mr. Devendra Jain with Radha Halbe and Namita Chandra, for the Petitioner.
Mr. Akhileshwar Sharma, the Respondent No.1-Revenue.

CORAM K. R. SHRIRAM &
DR. N. K. GOKHALE, JJ.
DATED: 12th September, 2023

JUDGMENT:- (Per Dr. N. K. Gokhale, J.)

1. **Rule**. Rule made returnable forthwith. Affidavit-in-reply is filed by the Respondent No.1. Rejoinder thereto is on record. Heard by consent of parties.

2. Petitioner assails the order dated 18th March 2019 passed by Respondent No.1, Commissioner of Income Tax (International

Taxation)-3 whereby his Petition under Section 264 of the Income Tax Act, 1961 ("**the Act**") was rejected. The issue that arises is: "whether, in the facts and circumstances of the case, the benefits of Section 54(F) of the Act are available to Petitioner having transferred his residential house in India and purchased another house property in the United States of America, in view of the Amendment in Sections 54 and 54(F) of the Act by the Finance (No.2) Act of 2014?

3. Petitioner is a Non-Resident Indian working in the USA. Petitioner filed return of income for Assessment Year ("**AY**") 2014-15 declaring NIL taxable income, under the assumption that being NRI his income was not taxable in India. It was processed by the Centralized Processing Centre ("**CPC**") under Section 143(1) of the Act on 30th June 2016. The tax payable on his income was Rs. 1,61,855/- and the tax deducted at source ("**TDS**") on his salary and interest was Rs. 2,34,220/-. Thus, according to Petitioner, he was entitled to a refund of Rs. 72,370/-. It is also the case of Petitioner that he had sold a residential flat in India for Rs. 54,12,760/- and purchased another residential flat in the USA for a consideration more than the amount of Long Term Capital Gain ("**LTCG**") within the time limit prescribed by Section 54 of the Act. Again, under a mistaken presumption, he deposited an amount higher than the amount of LTCG into a Capital Gain Account Scheme("**CGAS**").

4. Petitioner applied, under Section 197 read with Section 195 of the Act, for a receipt of sale proceeds without deduction of tax at source and was granted the same by the Income Tax Officer concerned. Upon learning the correct provisions of law, he filed a rectification application accompanied by a correct return of income with the CPC, Bangalore. He then filed an application seeking a revision of the intimation under Section 143(1) of the Act dated 30th June 2016. He brought to the notice of Respondent No.1 the position as mentioned above and sought issuance of a certificate to the bank for release of an amount of Rs. 75,00,000/- which was deposited in the CGAS. Respondent No.1 considered his application but rejected his claim on the ground that Petitioner was not eligible for deduction under Section 54 of the Act as the investment was made in a house property situated outside India. Respondent No.1 relied upon an amendment in Section 54(1) of the Act by the Finance (No.2) Act, 2014 which inserted the words '**in India**' in the said provision. It is this rejection order which is assailed in the present Petition.

5. At the very outset, Mr. Devendra Jain learned Counsel appearing for Petitioner fairly concedes that the Commissioner, though rightly assumed jurisdiction over Petitioner's Revision Application, however, failed to consider the position of law settled by

various binding precedents. He also relied upon the provision of Section 54(1) of the Act as it existed prior to the amendment by the Finance (No.2) Act, 2014 to canvass that the only condition to be fulfilled to claim deduction under Section 54 of the Act at the relevant assessment year, was that a new residential house be purchased within the prescribed time *dehors* any condition as to the location of such house. The amendment to insert the words 'in India' was with effect from 1st April 2015 and was to apply prospectively in relation to subsequent assessment years. He further relies upon the settled principle of interpretation that requires the courts to adopt an interpretation favouring the assessee in cases where the taxing provision is ambiguous or capable of more than one meaning. He thus submits that even assuming that the language of the Amendment Act was ambiguous or capable of more meanings, the interpretation to be adopted has to be in favour of the assessee.

Petitioner relied upon the following decisions to support his case:-

(a) ***Ashok Keshav Lal Tejuja v. Assistant Commissioner of Income Tax, Circle 18(1)(12);***[1]

(b) ***Leena Jugalkishore Shah v Assistant Commissioner of Income Tax;***[2]

1 (2018) 91 taxmann.com 29 (Mumbai – Tribunal).
2 (2016) 392 ITR 19 (Guj).

(c) *The Commissioner of Income Tax-International Taxation- 2 v Anurag Pandit;*[3]

6. Mr. Sharma learned counsel appearing for Respondent No.1 submitted that the due date for filing of the original return of income under Section 139(1) of the Act was 31st July 2014 and the due date for filing belated return under Section 139(4) of the Act was 31st March 2016 which is beyond the due date and hence, Petitioner was ineligible to revise his return under Section 139(5) of the Act. Thus, Mr. Sharma says that the revised return filed by Petitioner is non-est. Secondly, the cost of the new asset as declared by Petitioner has also been doubted by Respondent No.1. According to Respondent No.1, it is impossible that the cost of the new asset will be the same as capital gains and hence it is presumed that Petitioner has withheld the purchase consideration of a new house. Mr. Sharma also submitted that the application of Section 54 of the Act in case of non-resident Indian can only be made when the new asset is purchased or constructed '**in India**'. It is contended that this aspect is of great significance because if the new asset is transferred after three years, the two conditions are not applicable for both resident as well as non-resident and thus, the test for applicability of the provisions of Section 54(1) of the Act in a given case is actually dependent upon

3 ITA 1169 of 2018 dated 14th May 2019 (Delhi High Court).

whether it can be applied when the new asset is transferred within three years. This test fails in the case of a non-resident if he constructs or purchases a new residential house outside India and transfers the same within three years from the purchase or construction. In response to contention of Petitioner regarding the amendment to the Finance (No.2) Act, 2014 having prospective effect, it is argued by Respondent that the insertion i.e., the amendment was only clarificatory in nature and as such, has retrospective effect. To buttress this argument, Mr. Sharma contends that in Section 5(2) of the Act the words **'in India'** were already in operation in the scheme of the Act. Thus, on the basis of the aforesaid arguments, Respondent has justified the rejection of Petitioner's Revision Petition.

7. We have heard the learned counsel for the parties and perused the impugned order. It is an admitted position that Petitioner has sold his house property in India and invested the sale proceeds in a residential house in USA, out of the capital gain on the sale of the property in India, within the specified period. Petitioner has thus satisfied the conditions stipulated in Section 54(F) of the Act as it stood and was applicable to the relevant Assessment Year. The language of Section 54(F) of the Act before its Amendment was that the assessee should invest capital gain in a residential house. It did

not mention any boundary. It is only after the amendment to Section 54(F) of the Act, which amendment came into effect from 1st April 2015, that the condition that the assessee should invest the sale proceeds arising out of a sale of capital asset in a residential situated "in India" within the stipulated period was imposed. Thus, a plain reading of the pre-amended Section 54(F) of the Act, leaves no room for doubt that the assessee need not restrict his investment only in India. The only condition was that sale proceeds should be invested in a residential property within the stipulated period of time.

8. Reliance upon Section 5(2) of the Act to suggest that the amendment to Section 54(F) of the Act was merely clarificatory in nature does not aid Respondents. Undoubtedly, any legislation or instrument having the force of law which is clarificatory or explanatory in nature and purport and which seeks to clear doubts or correct an obvious omission in the statute, would generally be retrospective in operation. Hence, it is necessary to identify the nature of amendment, to ascertain whether it is clarificatory in nature or a substantive amendment. It is settled position of law that if a statute is curative or merely clarificatory of the previous law, a retrospective operation thereof is permitted. In order for an amendment to be considered as clarificatory of the previous provision, the pre-amended law ought to have been vague or

ambiguous. It is only when it would be impossible to reasonably interpret a provision unless an amendment is read into it, that the amendment is considered to be a clarification or declaration of the previous law and therefore applied retrospectively. Moreover, an explanation/clarification does not expand or alter the scope of the original provision.

9. It may also be noted that the amendment stated that the amended provision would come into force with effect from 1st April 2015 and therefore, would apply to future periods only and not prior to the date of amendment. It is well settled position of law that an amendment can be considered to be declaratory and clarificatory only if the statute itself expressly and unequivocally states that it is declaratory and clarificatory provision. If there is no such clear statement, the amendment is not merely a clarification, but a substantive amendment, which shall apply prospectively. In the matter of ***Virtual Soft Systems Limited v. CIT***[4]***,*** the Apex Court has gone further and held that '*even if the statute does contain such a statement, the Court will not regard itself as being bound by the statement, but will proceed to analyse the nature of the amendment and then conclude whether it is in reality clarificatory provision or is intended to change the law and apply to future periods.*'

4 (2007) 289 ITR 83 (SC)

10. In the context of the above-mentioned position of settled law, we have examined the interplay of Section 5(2) and Section 54(F) of the Act, prior and post-amendment. As reproduced above, Section 5(2) of the Act starts with the words, 'subject to the provisions of this Act…….'. Thus, even if the words 'in India' appearing in Section 5(2) are read into the unamended Section 54(F) of the Act, yet, the said provisions would always operate subject to the other provisions of the Act including Section 54(F) of the Act. Furthermore, the unamended Section 54(F) of the Act was not at all ambiguous. It expressly and specifically excluded the words 'in India'. The amended provision also does not refer to Section 5(2) of the Act to even remotely suggest it to be a mere clarification. The statute also does not contain any statement that the amendment is merely declaratory or clarificatory or "for removal of doubts". In this perspective the amendment in Section 54(F) can be said to be neither clarificatory nor merely explanatory giving it retrospective operation. We agree with the contention of Mr. Jain that the amendment is prospective in nature and cannot be applied to the transaction prior to 1st April 2015 as it would tantamount to imposing an additional condition retrospectively to an earlier transaction, which was neither the intention nor the object of the amendment. *Leena Jugalkishore Shah (supra)* and *Anurag Pandit (supra)* support the contention of

Petitioner.

11. We find that the language of Section 54(F) of the Act prior to the amendment is neither ambiguous nor vague. The intention of the legislature to insert the words '**in India**' with effect from 1st April 2015 is not uncertain or confusing and hence the applicability of the amendment cannot but be prospective.

12. It is also clear that Petitioner has not filed the revised returns under Section 139(5) of the Act but he has admitted to an inadvertent error in declaring total income as Nil vide a rectification application. Admittedly, he is entitled to a refund of Rs.72,370/- for excess amount of tax deduction at source. The sale deed placed on record also discloses the exact amount of consideration. It is undisputed that Petitioner has deposited Rs.75,00,000/- in the CGAS. In the circumstances, it is clear that rejection of the revision petition on the grounds mentioned therein cannot be sustained.

13. In view of the foregoing, the Petition deserves to be allowed. The order dated 18th March 2019 passed by Respondent No.1 is quashed and set aside. Rule is made absolute in terms of prayer clause (a). Respondent No.1 is directed to accept the rectified return of income filed by Petitioner and on or before 31st December 2023 decide the same in accordance with law.

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14. There will be no order as to costs.

(DR. N. K. GOKHALE, J.) (K. R. SHRIRAM, J.)

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