

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 17328 of 2021****FOR APPROVAL AND SIGNATURE:****HONOURABLE MS. JUSTICE SONIA GOKANI****and****HONOURABLE MS. JUSTICE NISHA M. THAKORE**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

RASHESH SHIRISH SANJANWALA**Versus****ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE 4(1)(4)****Appearance:****LD.SR.ADV.MR.SOPARKAR ASSISTED BY MR B S SOPARKAR(6851) for the Petitioner(s) No. 1****DS AFF.NOT FILED (N)(11) for the Respondent(s) No. 1****NOTICE NOT RECD BACK(3) for the Respondent(s) No. 1****CORAM: HONOURABLE MS. JUSTICE SONIA GOKANI****and****HONOURABLE MS. JUSTICE NISHA M. THAKORE****Date : 01/12/2021****ORAL JUDGMENT****(PER : HONOURABLE MS. JUSTICE SONIA GOKANI)**

1. This Court at the time of issuance of notice for final disposal passed the following order on 23.11.2021:

“1. Petitioner challenges the order dated 28.10.2021 passed by the respondent rejecting the request of issuance of no objection certificate to the petitioner, who has already paid the advance tax to the tune of Rs.1.25 crores, which is more than the amount of Capital Gain tax that may be required to pay.

2. The petitioner, being one fourth owner of the parcel of the land sold in December, 2018, has gained Rs.4.75 crores from the sale of the land. For claiming exemption under section 54F of the Income Tax Act, 1961 (“the Act” for short), the amount has been deposited with the Bank of India in terms of Capital Gains Scheme Accounts, 1988. The disclosure of the said sale of parcel of land in the return of income of AY 2019-20 reveals that the claim of deduction under section 54F at Rs.4.65 crores in Nil while computing the taxable Capital Gain.

3. Prayer sought for are as follows:

“7. The Petitioner, therefore, prays that this Hon’ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or a writ of certiorari or a writ in the nature of

certiorari or any other appropriate writ, direction or order and be pleased to:

(a) quash and set aside the impugned order at Annexure-'A' to this Petition and direct the Respondent to issue 'No Objection Certificate' to the petitioner;

(b) pending the admission, hearing and final disposal of this petition, to stay implementation and operation of the order at Annexure-'A' to this petition and stay recovery of tax for A.Y.2018-19 and further be pleased to direct the Respondent to issue 'No Objection Certificate' to the Petitioner;

(c) any other and further relief deemed just and proper be granted in the interest of justice;

(d) to provide for the cost of this petition."

4. We have heard Mr. B.S. Soparkar, learned advocate for the petitioner. He also has drawn our attention to the indemnity bond, the petitioner has furnished in favour of the Assistant Commissioner of Income Tax on 23.10.2021. He has further urged that the tax which the petitioner is required to pay on a regular basis is not more than Rs.58 lakhs and the payment of the said amount towards Capital Gain Tax should not be doubted and there is nothing under the law to preclude the Assessing Officer to allow the

remaining amount, which has remained with the Department, as the petitioner is no longer going to claim the benefit under the provisions of Capital Gain Scheme Accounts. He has relied on the decision of the Karnataka High Court rendered in the case of Padma Swaminathan vs. Income Tax Officer, Non-Corporate Ward-15(4), Chennai, [2017] 88 taxmann.com 596(Madras).

5. Notice for final disposal returnable on 30.11.2021.

6. Over and above the regular mode, direct service by way of Speed Post is also permitted.”

2. On the returnable date, learned senior standing counsel, Ms.Maithili Mehta appeared for the department and she resisted this petition.

3. We have taken up the matter for final hearing at the stage of admission and have heard the learned senior advocate, Mr.Soparkar assisted by the learned advocate, Mr.Bandish Soparkar for the

petitioner and learned senior standing counsel, Ms.Maithili Mehta. We had requested learned senior advocate, Mr.Bhatt to assist the cause and he has also in support of the submissions made by the learned senior standing counsel, Ms.Maithili Mehta has argued before this Court.

4. Brief facts leading to the present petition are as follow:

4.1 The petitioner is an individual and a citizen of this country. He is also practicing advocate before this Court, who has been on a regular basis filing the return and paying the income tax. His return upto the Financial Year 2019-2020 have been assessed in terms of Section

143(1) of the Income Tax Act, 1961 ('the Act' hereinafter). According to the petitioner, there has been no default so far on his part.

4.2 On 24.12.2018 he along with three other co-owners of a land parcel sold the land for the total consideration of Rs.19 Crore and he being 1/4th owner of the same gained Rs.4.75 Crore.

4.3 Desirous of investing the gain into a residential home in terms of Section 54 F of the Act, he claimed exemption under Section 54 F of the Act by depositing the amount of Rs.4.67 Crore with the Bank of India in terms of Capital Gains Accounts Scheme, 1988.

4.4 The petitioner filed the return of income for the Assessment Year 2019-2020 on 23.09.2019 disclosing the sale of land parcel and computed the taxable Capital Gain as Nil after the claim of deduction under Section 54 F of the Act.

4.5 The interest upon the amount deposited with the Bank of India had been received by the petitioner. According to him, he was waiting for the opportunity to invest in the residential home. However he could find the viable opportunity after a long time and the maximum time allowable under Section 54 F since is three years from the date of transfer to construct the residential house, his time is expiring on 23.12.2021. It is averred that since he is not in a position to carry out the desired

objective, he seeks to withdraw the money deposited with the Bank to utilize the same for the purchase of land. As a No Objection Certificate of the respondent was a must as per the say of the Bank, the petitioner chose to pay the Capital Gain by way of an advance tax of Rs.1.25 Crore on 15.09.2021. He also sought No Objection Certificate from the respondent vide letter dated 20.09.2021. The amount of Rs.1.25 Crore as averred by the petitioner is more than the amount which is actually due and payable as the Capital Gain Tax. The petitioner has also paid the additional advance tax on 15.09.2021 over and above the said amount of Rs.1.25 Crore which concerns his professional income and income from other sources.

4.6 The respondent sought the details from the petitioner on 21.10.2021 in relation to his sale deed executed for consideration of Rs.4.75 Crore, Bank Statement reflecting the said amount, copy of Capital Gain Scheme Account and Indemnity Bond for offering the income in Assessment Year 2022-2023.

4.7 On 22.10.2021 the request was made to the respondent for issuance of the No Objection Certificate to enable the petitioner to withdraw the money from the Bank of India account.

4.8 On 28.10.2021 the rejection had come for issuance of No Objection Certificate only on the ground that the same cannot be done until the return of

income is filed for Assessment Year 2022-2023.

4.9 The petitioner is, therefore, before this Court with the aforementioned prayers at para 7.

5. We have extensively heard the learned senior advocate, Mr.Soparkar assisted by the learned advocate, Mr.Bandish Soparkar, who has argued along the line of the memo of the petition and also has urged that the ordinarily income offered by the petitioner and the tax paid by him with respect to his professional income is nearly Rs.55 to 57 Lakh every year. The tax liability of the petitioner on Capital Gain is calculated and it can not exceed the amount of Rs.1.25 Crore. The said sum being due and payable as the Capital Gain Tax, there

could be no earthly reason for the respondent not to issue the No Objection Certificate for the Bank to allow him withdrawal of the remaining amount.

5.1 According to learned senior advocate, Mr.Soparkar, the petitioner since is unable to now purchase the residential home for which the amount had been parked for three years, he is seeking to withdraw the money deposited with the Bank of India for utilisation of the said fund for the purchase of other land. It is further urged that necessary undertaking is being offered by the petitioner when he offered the Capital Gains on such transfer in the return of income to be filed for the Assessment Year 2022-2023 in terms of Section 54 F of the Act. He has undertaken

to supply the physical copy of the return of income for the Assessment Year 2022-2023 to the Jurisdictional Assessing Officer no sooner than he e-files the return of income under the provision of Section 139 of the Act. He has also further undertaken not to claim the set off of any business/professional loss against the said Capital Gain that he may offer in the Assessment Year 2022-2023.

5.2 Learned counsel has relied on the following two decisions to substantiate his submissions:

(I) *Professor P.N.Shetty vs. Office of Income-tax Officer*, reported in (2019) 112 taxman.com 218 (Karnataka).

(II) *Padma Swaminathan vs. Income Tax Officer, Non-Corporate Ward-15(4), Chennai*, reported in (2017) 88 taxman.com 596 (Madras).

6. From the Capital Gain Account Scheme the learned senior standing counsel, Ms.Maithili Mehta has urged that the offering of sum of Rs.1.25 Crore may not suffice as there may be a possibility at the time of filing of the return for the Assessment Year 2022-2023 for him to claim the set off against the loss. Moreover, he can always wait as provided in the communication rejecting his request for No Objection Certificate till he completes the filing of return of income under Section 139 of the Act for the Assessment Year 2022-2023. She has also emphasised that the

said amount for three years had been parked with an intent to purchase the residential house which has not been done so far. Therefore, the authority concerned was right in denying the No Objection Certificate considering the possibility of certain loopholes and the possibility of enhanced liability of tax.

6.1 However, in response to the additional affidavit which has been filed today, she has fairly submitted that this is in compliance on furnishing of the hard copy of the return and in the event of not claiming any kind of loss in the return, as submitted by the petitioner before this Court.

6.2 She has further argued that the provision of Section 54 F (4) of the Act

specifically provides that the amount deposited under this sub-section if is not utilised wholly or partly for the purchase or construction of the new asset within the specified time period then the said amount is to be charged under Section 45 of the Act as the income of the previous year in which the period of three years from the date of the transfer of the original asset expires. According to her, this being the charging provision, the tax paid may not be sufficient as the final calculation shall be done only at the stage of the assessment after once the return is filed for the Assessment Year 2022-2023.

7. At the outset, provision of Section 54 F of the Act will require to be reproduced at this stage:

“54 F:

(1) Subject to the provisions of sub-section (4), where, in the case of an assessee being an individual or a Hindu undivided family], the capital gain arises from the transfer of any long-term capital asset, not being a residential house (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, one residential house in India] (hereafter in this section referred to as the new asset), the capital gain shall be dealt with in accordance with the following provisions of this section, that is to say,

(a) if the cost of the new asset is not less than the net consideration in respect of the original asset, the whole of such capital gain shall not be charged under section 45;

(b) if the cost of the new asset is less than the net consideration in respect of the original asset, so much of the capital gain as bears to the whole of the capital gain the same proportion as the cost of the new asset bears to the net consideration, shall not be charged under section 45:

”[Provided that nothing contained in this sub-section

shall apply where-

(a)the assessee,-

(i) owns more than one residential house, other than the new asset, on the date of transfer of the original asset; or

(ii) purchases any residential house, other than the new asset, within a period of one year after the date of transfer of the original asset; or

(iii) constructs any residential house, other than the new asset, within a period of three years after the date of transfer of the original asset; and

(b) the income from such residential house, other than the one residential house owned on the date of transfer of the original asset, is chargeable under the head "Income from house property".]

Explanation. For the purposes of this section-

*[***]*

*[***] "net consideration", in relation to the transfer of a capital asset, means the full value of the consideration received or accruing as a result of the transfer of the capital asset as reduced by any expenditure incurred wholly and exclusively in connection with such transfer.*

(2) Where the assessee purchases, within the period of "[two years] after the date of the transfer of the original asset, or constructs, within the period of three years after such date, any residential house, the income from which is chargeable under the head "Income from house property", other than the new asset, the amount of capital gain arising from the transfer of the original asset not charged under section 45 on the basis of the cost of such new asset as provided in clause (a), or, as the case may be, clause (b), of sub-section (1), shall be deemed to be income chargeable under the head "Capital gains" relating to long-term capital assets of the previous year in which such residential house is purchased or constructed.

(3) Where the new asset is transferred within a period of three years from the date of its purchase or, as the case may be, its construction, the amount of capital gain arising from the transfer of the original asset not charged under section 45 on the basis of the cost of such new asset as provided in clause (a) or, as the case may be, clause (b), of sub-section (1) shall be deemed to be income chargeable under the head "Capital gains" relating to long-term capital assets of the previous year in which such new asset is transferred.]

(4) The amount of the net consideration which is not appropriated by the assessee towards the purchase of the

new asset made within one year before the date on which the transfer of the original asset took place, or which is not utilised by him for the purchase or construction of the new asset before the date of furnishing the return of income under section 139, shall be deposited by him before furnishing such return (such deposit being made in any case not later than the due date applicable in the case of the assessee for furnishing the return of income under sub-section (1) of section 139] in an account in any such bank or institution as may be specified in, and utilised in accordance with, any scheme which the Central Government may, by notification in the Official Gazette, frame in this behalf and such return shall be accompanied by proof such of deposit; and, for the purposes of sub-section (1), the amount, if any, already utilised by the proof of such deposit: assessee for the purchase or construction of the new asset together with the amount so deposited shall be deemed to be the cost of the new asset:

Provided that if the amount deposited under this sub-section is not utilised wholly or partly for the purchase or construction of the new asset within the period specified in sub-section (1), then,

(i) the amount by which

(a) the amount of capital gain arising from the transfer

of the original asset not charged under section 45 on the basis of the cost of the new asset as provided in clause (a) or, as the case may be, clause (b) of sub-section (1), exceeds

(b) the amount that would not have been so charged had the amount actually utilised by the assessee for the purchase or construction of the new asset within the period specified in sub-section (1) been the cost of the new asset,

shall be charged under section 45 as income of the previous year in which the period of three years from the date of the transfer of the original asset expires; and

(ii) the assessee shall be entitled to withdraw the unutilised amount in accordance with the scheme aforesaid.”

7.1 This provision clearly provides for the Capital Gain on transfer of certain capital assets which are not to be charged in case of the investment made in residential house. In case of an assessee being an individual, if the Capital Gain arises from the transfer of any long term

capital asset, not being a residential house and if the assessee has within a period of one year before or 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, the Capital Gain shall be dealt with as provided in the said provision. Sub-section (4) of Section 54 F of the Act provides that the amount of the net consideration which is not appropriated by the assessee towards the purchase of the new asset made within one year before the date on which the transfer of the original asset took place, or the same is not utilized for the purchase or construction of the new asset before the date of furnishing the return of income under Section 139 of the Act, the same is required to be deposited before

furnishing such return in an account in any such Bank or institution as may be specified in, and utilized in accordance with any scheme which the Central Government may by notification in the Official gazette frame in this behalf and such return shall be accompanied by proof of such deposit and for the purpose of Sub-section (1) of Section 139 of the Act, the amount, if any, already utilized by the assessee for the purchase or construction of the new asset together with the amount so deposited shall be deemed to be cost of the new asset.

7.2 The proviso, of course, provides that if the amount deposited is not utilized wholly or partly for the purchase or construction of the new asset within the

period specified in Sub-section (1) of Section 139 of the Act and the amount of Capital Gain that arises from the transfer of the original asset not charged under Section 45 of the Act on the basis of the cost of the new asset as provided exceeds the amount that would not have been so charged had the amount been actually utilized by the assessee for the purchase or construction of new asset, then it shall be charged under Section 45 of the Act as income of the previous year in which the period of three years from the date of transfer of the original asset expires.

7.2 Apt would be to refer to Section 45 of the Act at this stage:

“45. Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in Section 54, 54B...54D, 54E, 54EA,

54EB, 54F, 54G and 54H be chargeable to income-tax under the head “Capital gains”, and shall be deemed to be the income of the previous year in which the transfer took place.”

7.3 Thus, any profit or gains arising from transfer of capital asset effected in the previous year shall be chargeable, as provided under the provisions of Sections 54, 54B which includes Section 54F to income tax under the head Capital Gains and shall be deemed to be the income of the previous year in which the transfer took place.

8. The High Court of Karnataka in case of ***Professor P.N.Shetty (supra)*** was dealing with a case where assessee had sold the immovable property and deposited the Capital Gain of Rs.1.15 Crore in Capital Gain Account Scheme, 1988 and claimed

exemption under Section 54 F of the Act. He purchased a property premise for price of Rs.21.32 Lakh before the expiry of three years from the date of transfer of original capital assets. Since only a part of the amount deposited in Capital Gains Account Scheme was utilized for construction or purchase of a new asset within specified time of three years, the question was whether the income tax was chargeable on remaining unutilized amount in previous year in which the period of three years had expired. The Court answered it in affirmation by holding that if only a part of the amount deposited in Capital Gains Account Scheme is utilized for the construction or purchase of new asset within the specified time period, the income tax is chargeable on unutilised

amount. The appellant before the Karnataka High Court was held entitled for withdrawal of the amount deposited under Sub-section (4) of Section 54F of the Act, subject to deduction of the tax applicable.

9. In case of *Padma Swaminathan (supra)* the question of profit on sale of the property used for residential house where revenue refused to give No Objection Certificate to petitioner enabling her to withdraw amount deposited by way of fixed deposit under Capital Gain Account. The Capital Gain Accounts were in eight different account numbers and the petitioner had raised a request for issuing the 'No Objection Certificate', so far as the five accounts were concerned, by retaining three accounts which, according

to the petitioner, would cover the total demand of tax. When this was denied by the authority, the Court had intervened and directed the revenue to issue the No Objection Certificate in respect of the remaining five accounts. While so doing the Court held that since the tax liability under dispute would cover the total amount in deposit, in respect of the three account numbers when the petitioner had come forward with a request only in respect of other five accounts and was willing to go before the respondent for considering the matter afresh in respect of those three accounts, the revenue was directed to issue No Objection Certificate for the remaining five accounts.

10. Reverting to the facts on hands,

the parcel of land situated at District Ahmedabad in Ghatlodiya Taluka had been sold by the petitioner and other co-owners by way of a registered sale deed executed on 24.12.2018. The petitioner along with the other co-owners had received the consideration of Rs.19 Crore and being the 1/4th owner of the property, he gained Rs.4.75 Crore from the sale of this land. With an intent to invest it into the residential house, he had deposited the amount with the Bank of India in terms of Capital Gains Account Scheme, which provides the modalities of the deposits to be made, the types of deposits, the application for opening account, the issuance of duplicate pass book or receipt, transfer and conversion of the account, the interest to be paid on such amount and also

provides for the withdrawal from the account. It provides that a depositor having an account may at any time after making the initial subscription, may apply in Form C nearer as possible together with the pass book to the deposit office for withdrawal of the amount from the balance to his credit subject to the other provisions of this scheme. It also provides for utilisation of the amount of withdrawal, nomination and the closure of the account.

10.1 Apt would be to reproduce para 13(1) of the Capital Gains Account Schemes which provides thus:

Closure of the account.

“13(1). If a depositor (other than an eligible company as referred to in section 54GB) desires to close his account, an

application shall be made with the approval of the Assessing Officer who has jurisdiction over the depositor to the deposit office in Form G or as near thereto as possible, and the deposit office shall pay the amount of balance including interest accrued, to the credit in the account of the depositor by means of crediting such amount to any bank account of the depositor.”

10.2 It provides clearly that if a depositor other than the eligible company when desires to close its account an application needs to be made with the approval of the Assessing Officer having jurisdiction over the depositor to the deposit office. The deposit office shall pay the amount of balance including interest accrued, to the credit in the account of the depositor by means of crediting such amount to any Bank account of the depositor.

11. Here is a case where it is not on

account of the depositor having fulfilled the requirement of Section 54 F of the Act is choosing to close the account, but he has instead shown his inability to purchase any residential house and therefore, on payment of tax he has sought to close the account and permit the withdrawal of the remaining amount for the same to be utilised as may be legally permissible. However, for so doing he would be requiring not only the payment of the tax as provided under Section 54 F of the Act in the proviso clearly while reading the said provision and Section 45 of the Act.

12. With no mechanism or modality provided for the withdrawal of the amount which at one point of time had been contemplated for the purchase of the

residential premises from the amount of Capital Gains under the said scheme, the request had been made to the respondent for issuance of the No Objection Certificate to which for the apprehension ventilated before this Court, it has chosen not to issue the same.

13. We see no reason for the authority concerned not to allow this. More particularly, on the entire amount the advance tax of Rs.1.25 crore is already paid. It is given to understand that ordinarily the tax which is being offered from the professional income is over the period of time being regularly paid and at no stage the petitioner has defaulted. The said amount of Rs.1.25 Crore is not to be adjusted against any possible loss which is

quite unlikely and the same has been stated by way of an affidavit. It has been undertaken further that while filing of the return, physical copy shall be also given to the Assessing Officer having the jurisdiction. With all possible loopholes having been plugged cementing the same with the affidavit tendered before this Court additionally pursuant to the submissions made by the learned senior standing counsel, Ms.Maithili Mehta, the action of the Assistant Commissioner, Income Tax dated 20.10.2021 whereby he denied to issue the No Objection Certificate for the balance withdrawal of the deposit deserves and warrants interference.

14. From the robust facts which have been set out coupled with the circumstances which exist in the instant case and being

convinced with the credibility of the petitioner as the assessee of income tax department over the years, the Court is of the opinion that this petition deserves to be permitted.

15. We accordingly allow the present petition and direct the respondent authority concerned that from the part of the amount deposited in the Capital Gain Account Scheme, the amount which remains shall be permitted to be withdrawn.

15.1 Let No Objection Certificate in respect of Account No.200116810000015 be issued within a period of one week from the date of receipt of a copy of this order.

16. The petitioner, over and above the

additional affidavit dated 01.12.2021
tendered before this Court, shall file an
undertaking before the concerned Assessing
Officer along the same line.

17. Over and above the regular mode of
service, direct service is permitted
through speed post as well as e-mode.

Sd/-
(SONIA GOKANI, J)

Sd/-
(NISHA M. THAKORE, J)

M.M.MIRZA

THE HIGH COURT
OF GUJARAT

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