Assessee cannot claim exemption of LTCG based on unregistered Banakhat agreement

The ITAT, Ahmedabad in ***Shri Navghanbhai Laxman Rabari v. ITO [ITA No.1864/AHD/2019 dated January 18, 2023]*** has held that, the transfer of property only takes place when either the possession of the property is transferred or sale deed is executed and the documents like unregistered 'Banakhat' or power of attorney are not the substitute of sale deed. Further, held that, the sale of land within 36 months from the date of purchase will lead to a Short Term Capital Gain ("**STCG**"), and therefore exemption under Section 54F of the Income Tax Act, 1961 ("**the IT Act**") will not be available.

Facts:

Shri Navghanbhai Laxman Rabari ("**the Appellant**") is engaged in the business of selling milk. The Appellant had sold a piece of land along with ten other co-owners on May 24, 2012 for a consideration of INR 4,80,00,000/-, making the Appellant's share of consideration INR 43,63,636/- and the Appellant had claimed indexed cost of acquisition amounting to INR 3,39,722/- and the balance Long Term Capital Gain ("**LTCG**") was claimed as deduction under Section 54F of the IT Act thereby the LTCG resulted to be NIL.

The Revenue Department, ("**the Respondent**") on verification, found out that the particular piece of land was purchased on September 14, 2009 and since the Appellant had held it for less than 36 months, it would be treated as a STCG and thus, deduction under Section 54F of the IT Act cannot be claimed.

The Appellant had filed a 'Banakhat' to justify that the possession of land was already transferred, and hence should be treated as a long term capital gain. However, the Respondent disregarded the claim of the Appellant and observed that the 'Banakhat' was unregistered and there was no mention of the same even in the sale deed and thus it was not a valid document. Further, there was no mention of a 'Banakhat' before, and hence, was a frivolous and after

thought attempt by the Appellant to misguide the authority. The Respondent disregarded the contention of the Appellant and passed an Assessment Order adding the sum of INR 41,11,645/- to the total income.

The Appellant had preferred an appeal, however, the Appellate Authority upheld the decision of the Respondent on the same grounds vide order dated September 3, 2019 ("**the Impugned Order**").

Being aggrieved, this appeal has been filed.

Issue:

Whether the sale of land within 36 months is to be treated as LTCG?

Held:

The ITAT, Ahmedabad in ***ITA No.1864/AHD/2019*** held as under:

- Opined that, the Appellate Tribunal is an appointed machinery under the IT Act responsible for deciding questions of fact and the tribunal must provide the parties with an opportunity to hearing, emphasizing the quasi-judicial function of the Tribunal, but, if a party does not avail the opportunity of hearing provided, the Appellate Tribunal will still be obliged to decide.
- Stated that, the right to be heard in a suit is one of the tenets of principles of natural justice but due to the continuous absence and negligence of the Appellant must be heard ex-parte as per the provisions of Rule 24 of the Income Tax (Appellate Tribunal) Rules, 1963, ("**the ITAT Rules**")
- Observed that, the assessment order and the Impugned Order were speaking orders and had incorporated lot of evidences to substantiate the decision against the Appellant. Further, there was no mention of 'Banakhat' in the sale deed.

- Held that, the transfer of property only takes place when either the possession of the property is transferred or sale deed is executed and the documents like unregistered 'Banakhat', power of attorney are not the substitute of sale deed. Further, the sale of the land within 36 months will lead to a STCG to the Appellant, and therefore exemption under Section 54F of the IT Act will not be available.

Relevant Provisions:

Section 54A of the IT Act:

"Capital gain on transfer of certain capital assets not to be charged in case of investment in residential house. –

(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

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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 of such deposit ; and, for the purposes of sub-section (1), the amount, if any, already utilised by the 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."

Rule 24 of the ITAT Rules:

"Hearing of appeal ex parte for default by the appellant –

Where, on the day fixed for hearing or on any other date to which the hearing may be adjourned, the appellant does not appear in person or through an authorised representative when the appeal is called on for hearing, the Tribunal may dispose of the appeal on merits after hearing the respondent.

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Provided that where an appeal has been disposed of as provided above and the appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance, when the appeal was called on for hearing, the Tribunal shall make an order setting aside the ex parte order and restoring the appeal."

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