

CIT(A) couldn't enhance assessment by changing head of income without giving SCN to assessee

Summary – The Pune ITAT in a recent case of Naresh Sunderlal Chug, (the Assessee) held that Order of Commissioner (Appeals) could not be sustained where he was not only changing head of income but was also enhancing assessment without giving any show-cause notice of enhancement to assessee

Facts

- The assessee had purchased development rights of, plot of land. Since the same could not be developed by the assessee, the said rights were transferred by way of deed which was executed by land owner in the name of buyer, with the assessee as consenting party. The assessee had declared gain arising on the said transfer as long-term capital gain. Further, the assessee had made investment in new asset and had claimed deduction under section 54F.
- The Assessing Officer accepted the computation of income of long term capital gain but denied the deduction claimed under section 54F on grounds that the new asset was not purchased through registered documents and even till date of assessment order, the sale deed was not executed and balance consideration was still payable.
- On appeal, the assessee submitted additional evidences of payment of balance consideration and sale deed being registered in the later year. The Commissioner (Appeals) remanded the issue to the Assessing Officer to submit remand report and after receiving remand report of Assessing Officer, held that income on sale of development rights was to be treated as business income. However, the Commissioner (Appeals) held that the assessee was entitled to claim deduction under section 54F in case profit on sale of development right in the land was held to be taxable long-term capital gain.
- On appeal to the Tribunal:

Held

- The issue of assessability of capital gain was completed before the Assessing Officer who accepted the stand of assessee that the said gain was to be assessed as income from capital gains. There was no dispute about the assessability of gains as income from long-term capital gain. The only dispute was whether against such gains, the assessee could claim deduction under section 54F on account of investment in new asset. In this regard, action of the Commissioner (Appeals) in holding that the said income on sale of development rights was to be treated as adventure in the nature of trade/business income, was not correct as per provisions of the Act. The powers of Commissioner (Appeals) are coterminous with the power of Assessing Officer. In other words, the Commissioner (Appeals) has wide power while deciding the appeal. However, as per clause (2) of section 251, it is provided that the Commissioner (Appeals) shall not enhance an assessment or a penalty or reduce the amount of refund, unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction. The *Explanation* talks about the power of the

Commissioner (Appeals) in deciding the appeal and stresses that he may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the Commissioner (Appeals) by the appellant. In view of the said provisions, the Commissioner (Appeals) has power to decide any matter arising out of the proceedings but the said power has to be exercised after giving reasonable opportunity to the assessee to show cause against such enhancement or reduction. In the instant case, the Commissioner (Appeals) has not only changed the head of income but also enhanced the assessment, since income which is assessed in the hands of assessee as per direction of Commissioner (Appeals) had worked out at Rs. 49,41,225/- as against income assessed by the Assessing Officer under the head long term capital gain at Rs. 48,75,610. The second aspect is rate of tax. In case income is assessed under the head long-term capital gain, the rate of tax is lower than the rate applied when the income is being assessed as business income. In view thereof in not giving an opportunity or any show-cause notice of enhancement as required under section 251(2), the order of Commissioner (Appeals) suffers from infirmity and the same cannot be sustained.

- The Commissioner (Appeals) has decided the issue of entitlement of claim under section 54F and held the assessee to be eligible for said claim. The revenue is not in appeal against the order of the Commissioner (Appeals). Accordingly, the Assessing Officer is directed to allow claim of assessee under section 54F.