आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ,सी,मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "C", MUMBAI

श्री जोगिन्दर सिंह, न्यायिक सदस्य **एवं**

श्री अश्वनी तनेजा, लेखा सदस्य**,** के समक्ष

Before Shri Joginder Singh, Judicial Member, and
Shri Ashwani Taneja, Accountant Member

ITA NO.1209/Mum/2014
Assessment Year- 1998-99

ACIT, CC-25, Room No.404, Aayakar Bhavan, M.K.Road, Mumbai-400020	बनाम/ Vs.	M/s Parle Bottling Pvt. Ltd. Western Express Highway, Chakala, Andheri (East), Mumbai-4000099
(राजस्व /Revenue)		(निर्धारिती /Assessee)
		PAN. No.AAACP8417H

राजस्व **की ओर से** / Revenue by	Shri Arvind Kumar-DR
निर्धारिती **की ओर से /** Assessee by	Shri Firoze Ahdhyarajina

सुनवाई की तारीख / **Date of Hearing :**	**18/11/2015**
आदेश की तारीख /**Date of Order:**	**23/11/2015**

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

The Revenue is aggrieved by the impugned order dated 02/12/2013 of the ld. First Appellate Authority, Mumbai. The only ground raised in this appeal pertains to deleting the

penalty when the quantum addition was deleted in the case of the assessee on the basis of which penalty was imposed.

2. At the time of hearing, the ld. DR, contended that appeal u/s 260A of the Act has been filed by the Department before the Hon'ble High Court against deleting the quantum addition by the Tribunal. The ld. counsel for the assessee defended the conclusion arrived at in the impugned order and submitted the copy of the order as per which the quantum addition was deleted (ITA No.877/Mum/2003). This factual matrix was not controverted by the ld. DR.

2.1. We have considered the rival submissions and perused the material available on record. Since, quantum addition has been deleted by the Tribunal and no contrary decision was brought to our notice by either side and more specifically the Revenue, we find merit in the argument of the assessee. Even otherwise, our view find support from the decision of the Tribunal in the case of Smt. Neela P. Doshi (ITA No.6859/Mum/2013) order dated 21/10/2015, which is reproduced hereunder for ready reference and analysis:-

> "*The assessee is aggrieved by the impugned order dated 07/10/2013 of the ld. First Appellate Authority, Mumbai, confirming penalty of Rs.3,36,912/-, imposed u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter the Act).*
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> *2. At the time of hearing, the ld. counsel for the assessee, Shri Mahesh O. Rajoura, contended that quantum addition has been deleted by the Tribunal vide order dated*

31/07/2015 (ITA No.3513/Mum/2012), in the case of assessee itself, therefore, it was pleaded that penalty does not survive. This factual matrix was not controverted by the ld. DR, Shri Vijay Kumar Soni.

2.1. We have considered the rival submissions and perused the material available on record. In view of the above, we are reproducing hereunder the relevant portion of the aforesaid order dated 31/07/2015, on quantum addition, for ready reference:-

"ITA No.3513/M/2012

2. The assessee in this appeal has challenged the action of the Ld. CIT(A) in confirming the additions made by the Assessing Officer (hereinafter referred to as the AO) as unexplained investments in relation to jewellery found during the course of search action.

3. The facts in brief are that a search action u/s 132 of the I.T. Act was carried out in the case of Acme Group Companies and related persons. The assessee was also covered in the said search action. The assessee is a partner in various firms engaged in business of builder and developer. During the course of the search operation, total jewellery valued at Rs.17330641/- was found from the premises of the assessee, out of which jewellery valued at Rs.36,93,026/- was seized. During the course of the assessment proceedings, the AO asked the assessee to show cause why jewellery to the extent which has not been reflected in the return of income should not be treated as unexplained and added to the income of the assessee.

4. The assessee explained the source of the jewellery and made his submissions vide letter dated 4.10.2010 and further vide letter dated 8.11.2010. He further submitted that looking to the status of family and the customs and the practice of the community to which the family belonged, the jewellery found should be treated as duly explained. The AO however did not agree with the explanation offered by the assessee. He observed that out of the total jewellery found, the jewellery valuing Rs.21,58,524/- had remained unexplained. He accordingly added the said amount into the income of the assessee u/s 69A of the Act. Aggrieved by the addition made by the AO, the assessee preferred appeal before the Ld. CIT(A).

5. The assessee submitted before the Ld. CIT(A) that the jewellery found during the search action belonged to the members of the Doshi family, including the assessee, the names of whom are mentioned as under:

"i) Mr. Pravin H Doshi (Spouse of Appellant)

ii) Mrs. Neela Pravin Doshi (Self-Appellant)

iii) Mr. Munish P Doshi (Son of Appellant)

iv) Mrs. Alka Munish Doshi (Daughter in law)

v) Master Manav Munish Doshi (Grand Son of Appellant)

vi) Mr. Rajesh P Doshi (Son of Appellant)

vii) Mrs. Priti Rajesh Doshi (Daughter in law)

viii) Pravin H Doshi (HUF)

ix) Mrs. Ranjan Ben R Doshi. (widow of late Shri Ratilal Doshi) (Aunty of spouse)"

The assessee also furnished the following evidences to explain the source of acquisition of the jewellery in question:

a) Jewellary valuation Report dt.1.11.1995 of Suresh C Kapoor, Government Approved Value (during search action in 1995)

b) Jewellary valuation Report dt.23.4.2004 as on 3 1.3.2004 of Shrenik R Shah (Jewellary Report obtained for Wealth Tax Purpose)

b) Jewellary Valuation Report dt.3.4.2000 as on 31.3.2000 in case of Priti Rajesh Doshi (Maiden name Priti Vinod Ambani)

c) Bills for purchase of Jewellary & making charges along with bank statement/ pass book reflecting payment made along with few ledger account of parties.

The assessee also filed the ledger of the jewellery account reflecting the jewellery purchased for the relevant period. The assessee further submitted that considering the financial status of the family of the assessee, the jewellery found during course of search action could not be regarded as unexplained. The assessee further explained that some of the jewellery was received as gift from relatives on social and religious occasions like marriage, birthday anniversary etc. It was also explained that some of the jewellery was remade out of the old jewellery. The assessee further submitted that the total weight of jewellery found matched with the jewellery accounted by the Doshi family. The assessee further submitted that in case of some jewellery, the description did not match either due to absence of full description of the jewellery made by the Departmental Valuer during search action or due to the remaking of the jewellery from the old jewellery items. It was

submitted that even in respect of Diamond Jewellery, the overall carat weight of diamonds approximately matched with that was already accounted by assessee's family members. It was therefore submitted that the additions under section 69A were not warranted in this case.

6. The Ld. CIT(A), after considering the submissions of the assessee observed that it was correct that the overall weight of the gold jewellery declared by the assessee and his family in the books of accounts was in excess of gold jewellery found during the course of search action, however, the department had to match each and every item found with the items declared in the valuation reports of the Approved Valuers as furnished by the assessee and that the onus was on the assessee to prove the source of acquisition of each and every item of jewellery. He therefore called upon the assessee to prepare an item vise chart showing which of the items could be said to be matching and another chart in respect of items which did not match with the description of items made in the valuation report furnished by the assessee. The assessee made charts No. I & II in the above manner in relation to gold items, the contents of which have also been reproduced in the impugned order.

7. The Ld. CIT(A), after tallying and making comparative analysis of the items disclosed by the assessee in the approved valuer's report with that of the report made during search action, observed that most of the items mentioned in chart No.I mathed with the description given in the valuation report of the approved valuer, except items No.24 & 25 being gold ginni and gold coin respectively, which the assessee claimed to have been received as gift. The Ld. CIT(A), therefore directed the AO to delete the addition in respect of the remaining items mentioned in chart No. I,

except the above stated two items amounting to Rs.82,392/- and Rs.75,823/- respectively. In relation to chart No.II, the Ld. CIT(A) observed that the items mentioned in chart No.II did not exactly match with the description made in the approved valuers' reports. He, therefore, confirmed the additions in respect of items of gold jewellery mentioned in chart No.II.

The Ld. CIT(A) also directed the assessee to prepare similar charts in respect of diamond jewellery. The assessee submitted the said charts accordingly. The Ld. CIT(A), after tallying the each of the items with that of valuation report of the approved valuer, found that though number of pieces of diamonds in respect of diamond jewellery were matching in almost all the items; however, there was difference in the estimate of carat weight. He therefore held that the description did not exactly match in respect of diamond jewellery. He, accordingly, confirmed the addition made by the AO in respect of diamond jewellery. Aggrieved by the order of the Ld. CIT(A), the assessee has come in appeal before us.

9. The Ld. A.R. of the assessee has brought our attention to the details and description of the items as reproduced by the Ld. CIT(A) in the impugned order. Inviting our attention to the page 12 of the impugned order in relation to item No.29 of locker No.571, the description has been mentioned as 'Tanmanya Pendant with chain'. The number of pieces of diamond in the said pendant has been mentioned as 59. The assessee has stated that it matched with item at serial no. 9 of the valuer's report wherein the description has been mentioned as 'Double String Black Beads Mangalsutra with Pendant' wherein the total number of diamonds is also mentioned as 59. However, the carat weight mentioned by the Departmental Valuer is 0.88, whereas, in the assessee's valuation

report, it has been mentioned as 118. However, the gold gross weight mentioned by the Departmental Valuer is 21.850 whereas in the valuation report produced by the assessee it has been mentioned as 20.3. Similarly, in respect of item No.19 i.e. 'Bangles with Rodium' the gold gross weight also matched and the pieces of diamonds mentioned also matched. However, the estsimation of carat value by the government valuer is at 1.68 whereas as mentioned in the valuation report of the assessee is at 2.75. Similarly, in respect of item No.21 'Eartopes' gold gross weight also matches and number of pieces of diamond also matches. However, there is a small difference in carat weight of diamonds. The Ld. A.R. of the assessee has invited our attention in respect of other items also where the gross gold weight of the items matches with that of the description mentioned in the valuation reports submitted by the assessee and even number of pieces of diamonds in the jewellery also matched. However, there was difference in estimation of carat weight.

10. We find that it is not a case where the items mentioned in the valuation reports submitted by the assessee did not match at all with that of the items of jewellery which were found during the search action. Not only the description of the jewellery sets, bangles, pendant, eartopes etc. matched with the valuation report but also the number of diamonds embedded in the jewellery. So far as the estimation of carat weight is concerned, it is an admitted fact that the weight was not measured by extracting the diamonds out of the jewellery, but was just estimated by the Departmental Valuer. Under such circumstances, the minor difference in carat weight value, especially when the same was not exactly weighed by the Departmental Valuer could not be the sole criteria to hold that the description of jewellery did not match. The Ld. A.R. of the assessee

has further invited our attention to page No1 of the paper book which is the summary of the gold jewellery. He has explained that the total gold jewellery shown by the assessee and his family members in the books was of 9919.790 gms. whereas the jewellery found and valued by the Departmental Valuer was of 9145.380 gms. which was less than the jewellery already declared by the family members of the assessee in the books of account. Similarly, in respect of diamond jewellery, the assessee family has already declared 222.80 carats of diamond, whereas, the Departmental Valuer had estimated only 203.29 carat of the diamonds which was less than the total diamond weight/carats declared by the assessee. Even the number of diamonds embedded in the each item of the jewellery matched with that of the valuation report.

11. The Ld. A.R. has further invited our attention to the decision of the Jodhpur Bench of the Tribunal in the case of "DCIT vs. Arjun Dass Kalwani" 101 ITD 337 wherein the Tribunal has held that simply because the assessee could not lead evidence for conversion or remaking of the jewellery, possession of which was otherwise accepted, it could not be said that holding of gold jewellery to that extent was unexplained, especially when evidence was available that the assessee had already been assessed at much more jewellery in earlier assessment year. Further, in the case of "Mrs. Vinita S. Jhunjhunwala vs. ACIT" in ITA No.8837/M/2010 for A.Y. 2008-09 decided on 20.01.2014, the co-ordinate Mumbai bench of the Tribunal has concluded that when quantity of jewellery disclosed by the assessee is same as the quantity of jewellery found during the course of search, no addition is warranted merely because the description is not matching. It is a vital fact that ladies get jewellery converted as per latest design and for which even the concerned man in the family is being not informed. In these

circumstances merely because of conversion of such jewellery, cannot be made basis for making addition, when the jewellery disclosed by the assessee either in his own hand or in the hands of their family members prior to the date of search is equal to or more than the jewellery found during the course of search. In the case of "Rakesh J. Parikh v. DCIT" in IT(SS)A No.136/M/2000 for Block period 01.04.1987 to 25.09.1997 decided vide order dated 26.02.2004, the coordinate bench of the Tribunal has observed that merely because the description of some of the ornaments in the Wealth-tax return did not tally with the ornaments found at the time of search, is no ground for rejecting the assessee's claim of remaking of the ornaments even if the assessee has not preserved the bill of remaking charges. In the case of "ACIT vs. Shri Kamalkishan H. Aggarwal" in ITA No.777/M/1998 and ITA No.5127/M/1995 & others decided vide common order dated 21.06.13, the Tribunal under somewhat similar circumstances has observed that normal presumption is that during the course of the search, the entire jewellery found at residence, in Bank lockers, other premises and also on person is duly inventorised. If the weight of the jewellery found at the time of search is more than the weight declared in Wealth Tax returns, the difference has to be taken to be unexplained jewellery unless the assessee is able to establish that fresh jewellery was purchased and sources thereof are explained. it is normal that some of the ornaments are dismantled and remade. it would be unreasonable to take a stand that all the ornaments found at the time of search must accurately compare in description and weight with the ornaments declared in the wealth tax return. The possibility that some of the items could have been remade cannot be ruled out. The important point is that the ornaments found should not be in excess in quantity as compared to the ornaments declared in the Wealth Tax returns.

Our attention has also been invited to the decision of the Hon'ble Allahabad High Court in the case of "Commissioner of Wealth Tax vs. B.M. Kanodia (HUF)" wherein the Hon'ble High Court in para 5 of the order has observed that where the government valuer adopted the weight of the diamond by estimating without separating the diamond from the metal, the reports of valuers could not be held to be accurate and exact and that the possibility in difference of weight could not be ruled out.

12. In the case in hand also, if the difference in weight is ignored the description of the items of the jewellery almost tallied with that of the items already declared by the assessee. Moreover the overall weight of jewellery already declared by the assessee in her books of accounts is more than that of the jewellery found during the course of search action. In view of the above stated facts and in the light of the proposition of law laid down vide judicial pronouncements on this issue as discussed above, it cannot be said in this case that the jewellery found during the search action was unexplained. The additions thus in this case are not warranted and the same are ordered to be deleted."

2.2. In view of the above, it can be said that the basis on which penalty was levied, remains no more in existence, therefore, the penalty cannot survive. Our view find supports from the decision of the Tribunal dated 30/09/2015 (ITA No.2253/Mum/2014) in the case of Ms. Vilma M. Pereira for ready reference:-

"The Revenue is aggrieved by the impugned order dated 10/01/2014 of the ld. First Appellate Authority, Mumbai, deleting penalty of Rs.18,75,314/-, imposed u/s 271(1)(c), even though the

quantum addition has been upheld by the ld. Commissioner of Income Tax (Appeals).

2. During hearing of this appeal, the ld. counsel for the assessee, at the outset, pointed out that the quantum addition on the basis of which penalty was imposed has been deleted by the Tribunal in order dated 27/02/2015. The assessee furnished the copy of the order. On the other hand, ld. DR, Shri B. Yadagiri, defended the imposition of penalty.

2.1. We have considered the rival submissions and perused the material available on record. In view of the above, we are reproducing hereunder the aforesaid order of the Tribunal (ITA No.8797 and 8798/Mum/2010) order dated 27/02/2015 for ready reference:-

"These two appeals have been filed by two assessees against the order of CIT(A), for the assessment year 2007-08, in the matter of order passed u/s.143(3) of the I.T.Act.

2. Common grievance in both the appeals relate to disallowance of claim of deduction u/s.54(1) in respect of residential flats acquired by the assessees in consideration of old house sold to the builder.

3. Rival contentions have been heard and record perused. Facts in brief are that the assessee Vilma Mary Pereira has sold immovable property situated at "Violet Valley" (with garage) at Junction of 26th and 30th Road at Bandra (W), Mumbai for a total consideration of Rs.3,05,00,000/- vide agreement dated 28.4.2006 to M/s. Aqua Marine Enterprises. The share of the assessee is 23% in the said property and the other assessee Mr. Peter Pereira was

having share of 77% in the said house. From the agreement, the A.O. observed that the assessee was to receive three more flats i.e. two flats having a carpet area of 1200 sq.ft. each and one flat having carpet area of 750 sq.ft. and three parking spaces (two stilt and one open) as part of additional consideration. However, the additional consideration was not shown as part of the total consideration received by the assessee in her computation of LTCG on transfer of the said property during the year. Further, the assessee had taken the FMV of the said property as on 1.4.1981 at Rs.35,00,000/- on the basis of valuation report dated 3.8.2006. In view of this, vide letter dated 21.8.2009, the A.O. asked the assessee to state as under :-

"1. Please provide the market value of tile additional flats and other amenities to be received by you from the builder as per the sale agreement dated 28.4.2006. Furnish copies of agreements entered by you in this respect. Please also explain why the market value of the said flats and amenities should not be added to your total consideration for sale of property during the year while computing the LTCG for the year on sale of property.

2. Please furnish purchase proof at" NHA bonds against which deduction uls.54EC has been claimed. Please furnish copies of relevant bank extracts with narration of each entry to support your claim.

3. Proof of payment of professional fees and allowability of the same as deduction from the LTCG shown.

4. Basis of division of share of the property sold during the year. Please furnish evidences to support your claim.

5. Please explain why the valuation made by you of the property sold as on 1.4.1981 should not be rejected?

4. In response, the A.R. of the appellant vide letter dated 23.10.2009 submitted as under :-

"The new flat and car parking is receivable in lieu of old residential place and old car parking place. Hence there is no additional amenities received from seller hence there should not be addition on account of market value of the said flat and amenities added to total consideration for sale of property during the year.

Valuation done by Odilio Fernandes on 31.7.2006 as on 1.4.1981 at Rs.35 lacs. Your honour may refer to departmental valuer for further verification. In case your honour is not satisfied without valuation report."

4. The aforesaid submission of the assessee was considered by the A.O. According to the A.O. the new flat and car parking are nothing but additional consideration. If the said new flat is receivable for old flat and old car parking place, how the assessee has claimed indexation on the value of the said properties as on 1.4.1981 against the consideration. If the new flat was to be given in lieu of the old area occupied by the assessee in the old structure, then the value of the said old structure should have been reduced from the value of the entire property as on 1.4.1981 while computing the LTCG on such sale. However, the assessee has taken the FMV of the entire property as on 1.4.1981 into consideration while computing the LTCG on the sale of such property.

5. The A.R. of the assessee vide his submission dated 12.11.2009 stated that if market value of the new flat is added to income of the assessee, then the investment in new residential property should be allowed u/s.54 at market value. The AO. analysed the contention of the assessee. According to the A.O., exemption u/s.54 is available only when the assessee has purchased a new flat one year before or two years after the date of transfer or has constructed a new residential' house within a period of three years from the date of transfer of the house property (original). The flats (alongwith car 'parking spaces) received by the assessee in the proposed building as 'additional consideration' agreed upon in the agreement dated 28.4.2006 was over and above her share in the monetary consideration. These flats (alongwith car parking spaces) form part of consideration received by the assessee towards transfer of the

property. This flat is neither purchased by the assessee nor constructed by her. The A.O. held that since the assessee has not fulfilled the conditions laid down in section 54, she is not eligible for exemption u/s.54 of the LT. Act. The A.O. has further elaborated this issue in para 10 of the assessment order wherein he has held that exemption u/s.54 of the I.T.Act is allowable only when the assessee makes an investment towards purchase or construction of a new house property within the stipulated period. Thus for availing exemption u/s.54, the assessee has to either purchase or construct a new house property.

6. In this regard, the A.O. further held that exemption u/s.54 in respect of capital gains arising on-sale of property used for residence is only available towards investment [by way of purchase or construction in a new house property within the time limit prescribed under the Act. In the case under consideration, the assessee is treating the flats and parking lots received by her as additional consideration as investment made u/s.54. These flats (alongwith car parking spaces) received by the assessee as part of 'consideration' cannot simultaneously be treated as investment. In order to avail the exemption u/s.54, the assessee should have made the investment in a new residence either by way of purchase or construction of the same. In the instant case, as per AO, the assessee has not fulfilled this condition which is the requirement of the Act. In view of the above, the A.O. held that the assessee is not eligible for exemption u/s.54 of the l.T.Act and accordingly denied the same to the assessee.

7. By the impugned order, the CIT(A) confirmed the disallowance against which the assessees are in further appeals before us.

8. We have considered rival contentions, carefully gone through the orders of the authorities below and found from the record that during the course of appellate proceedings the assessee has submitted as under :-

"1. During the year the assessee with her co owner i.e. her brother Mr.Peter Savio Pereira sold the ancestral residential property for consideration of Rs.3,05,00,00/- and 3 flats admeesurinq 3150 sq. ft. with one open and two stilt parking in kind.

2. In the assessment order. the A.O. has valued the consideration received in kind for Rs.3,32,70,540/- and additions were made in the assessment order under the head long term capital gains without considering the said amount as reinvestment is neither purchased nor constructed by the assessee.

3. As regards benefit of section 54, this section makes it clear that capital gain arising from the transfer of a house property is exempt from tax provided the following conditions are satisfied :-

(a) The house property is a residential house whose income is taxable under the head 'Income from house property' as transferred by an individual or an HUF.

(b) The house property (may be self occupied or let out) is a long term capital asset.

(c) The assessee has purchased a residential house within a period of one year before the transfer or within two years after the date of transfer or has constructed a residential house property within a period of three years after the date of transfer.

The appellant has fulfilled the precondition mentioned at point Nos.(a) & (b) above was not in doubt. This was also not in dispute that the assessee had purchased new residential property by way of construction. This was because it was clear from the agreement with developer that the developer would construct the residential building on the property alienated by the assessee to the developer and handover the residential house to the assessee in consideration of the sale of original residential property. This fact is clear and unambiguous. Therefore to say that the appellant has also complied the last condition of section 54 for acquisition of new residential property.

The A.O. has considered sale consideration received in cash and kindbut failed to allow the exemption u/s.54 for reinvestment of the

said consideration received in kind for acquiring of new residential house properly.

5. The A.O. has misinterpreted the definition of 'purchase' held by the Apex Court in the assessee of CIT vs. T.N. Aravinda Reddy. In this case, the definition of the term 'purchase' has been given as under:

"....... We find no reason to divorce the ordinary meaning of the word purchase as buying for a price or equivalent of price by payment in kind or adjustment towards an old debt or for other monetary consideration from the legal meaning of that word in section 54(1). If you sell your house and make a profit pay Caesar what is due to him. But if you buy or build another subject to the conditions of section 54(1), you are exempt. The purpose is plain the symmetry is simple, the language is plain. "

Thus the Hon. Supreme Court has defined the term 'purchase' as buying for a price / equivalent of price by payment in kind or adjustment towards an old debt or for other monetary consideration. The word 'purchase' in section 54 has to be given its common and wider meaning. It should include buying or adjustment towards old debt or for other monetary consideration.

6. In the present' case before your honour, the assessee has purchased/constructed the new residential property and paid the consideration equivalent of price by payment in kind. Therefore the assessee has purchased the residential property and is entitled for exemption u/s.54 of the I T.Act 1961."

9. It is clear from the above that residential house was given to the assessee in consideration of the sale of old house. The sale consideration was partly received in cash and partly in the form of new flats to be constructed on the plot of old house sold by assessee. The new flats agreed to be given to assessee amounts to investment by assessee in residential house. Therefore, the AO was not justified in adding back the additional consideration given in the form of allotment of three flats by declining claim of deduction u/s.54 of the I.T.Act.

10. In the present case before us, the assessee has purchased/constructed the new residential property and paid the

consideration equivalent of price by payment in kind. Therefore, the assessee is entitled for exemption u/s.54 of I.T.Act, 1961 in respect of these flats.

11. An issue was also raised by the AO with regard to sharing of 3 flats between the co-owners of the property and the exemption u/s.54 allowable in case of investment in one residential flat only. In this regard, we found that the details of allocation of area of new residential property between co-owners are as follows :-

Name	*Ratio*	*Area in Sq.Ft.*	*Description*
Mr. Peter S. Pereira	*77%*	*2400*	*Flat No.301 & 302 adjacent flats @ 1200 Sq.Ft. each on 3 rd floor and two Stilt car parking space*
Ms Vilma M. Pereira	*23%*	*750*	*Flat No.402 on 4th floor and one car parking space*

The aforesaid ratio of allocation between co-owners is already on record of the AO as well as in the valuation report. Furthermore, the co-owner will get the area according to their ratio in the new residential property. Since flat no.301 & 302 are situated in the same floor and adjacent to each other and will be treated as one single residential unit for the purpose of claiming exemption u/s.54. The same view has been taken by the Special Bench of the Mumbai Tribunal in the case of ITO Vs. Ms. Sushila M. Jhaveri, (2007) 292 ITR (AT) 1 (Mumbai). 12. The issue raised by the AO is also covered by the decision of Hon'ble Delhi High Court in the case of Gita Duggal 257 CTR 208, wherein the Hon'ble High Court held as under:-

"Sec. 54/54F uses the expression "a residential house". The expression used is not "a residential unit". This is a new concept introduced by the AO into the section. Sec. 54/54F 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. There is nothing in these sections which require the residential house to be constructed in a particular manner. The only requirement is that it should be for the residential use and not for commercial use. If there is nothing in the section which requires that the residential house should be built in a particular manner, it seems that the IT authorities cannot insist upon that requirement. A person may construct a house according to his plans and requirements. Most of the houses are constructed according to the needs and requirements and even compulsions. For instance, a person may construct a residential house in such a manner that he may use the ground floor for his own residence and let out the first floor having an independent entry so that his income is augmented. It is quite common to find such arrangements, particularly post-retirement. One may build a house consisting of four bedrooms (all in the same or different floors) in such a manner that an independent residential unit consisting of two or three bedrooms may be carved out with an independent entrance so that it can be let out. He may even arrange for his children and family to stay there, so that they are nearby, an arrangement which can be mutually supportive. He may construct his residence in such a manner that in case of a future need he may be able to dispose of a part thereof as an independent house. There may be several such considerations for a person while constructing a residential house. The physical structuring of the new residential house, whether it is lateral or vertical, should not come in the way of considering the building as a residential house. The fact that the 'residential house consists of several independent units cannot be permitted to act as an impediment to the allowance of the deduction under s.54/54F. It isneither expressly nor by necessary implication prohibited. Tribunal was therefore justified in allowing exemption under s.54 in respect of entire investment in construction of basement, ground floor, first floor, second floor and third floor."

13. In view of the above discussion, we do not find any merit in the action of the AO for decline of claim of deduction u/s.54 in respect of

residential flats allotted by builder in consideration of sale of old house.

14. In the result, appeals of both the assessees are allowed.

Order pronounced in the open court on this 27th Feb.2015."

2.2. We find that the Tribunal deliberated the issue with respect to declining the claim of deduction u/s 54 of the Act and by following the decision of the Special Bench in the case of ITO vs Ms. Sushila M. Jhaveri (2007) 292 ITR (AT) 1 (Mum.) and also the decision from Hon'ble Delhi High Court in Geeta Duggal 257 CTR 208 (Del.) decided the claimed deduction in favour of the assessee. We further note that the ld. Assessing Officer imposed penalty with respect to claimed deduction u/s 54 of the Act, therefore, when the basis no longer survive on the basis of which penalty was imposed, in our view, penalty u/s 271(1)(c) of the Act cannot survive.

2.3. There is no dispute that quantum addition has been deleted by the Tribunal, therefore, in our humble opinion, the ld. Commissioner of Income tax (Appeals) is justified in deleting the penalty. Our view further finds support from the decision and the ratio laid down in CIT vs S.P Viz Construction company 176 ITR 47 (Patna) and K.C. Builders vs ACIT 265 ITR 562 (Supreme Court). We are of the view where the penalty for concealment or furnishing inaccurate particulars was levied and after deleting the quantum addition, there remains no basis at all for levying the penalty. Ordinarily, penalty cannot stand in itself if the addition made in the assessment itself is set aside or cancelled by the superior authority/Court. The penalty cannot stand by itself because false result may be produced by the falsity of one or more of the

constituent items in the return. The word 'inaccurate particulars' would cover falsity in the final figure and also the constituent elements or items. They simply would mean inaccurate in some specific or definite respect whether in the constituent or subordinate items of income or the end result. Concealment or furnishing inaccurate particulars implies some deliberate act on the part of the assessee in withholding the true facts from the authorities. Since, the basis of levying penalty remains no more in existence, after deletion of quantum addition, therefore, from this angle, the stand of the ld. Commissioner of Income tax (Appeals) is justified.

Finally, the appeal of the Revenue is having no merit, therefore, dismissed."

2.3. There is no dispute that quantum addition has been deleted by the Tribunal, therefore, in our humble opinion, the ld. Commissioner of Income tax (Appeals) is not justified in confirming the penalty. Admittedly, the impugned order is dated 07/10/2013, whereas, the order of quantum addition of the Tribunal is dated 31/07/2015, meaning thereby, the order of the Tribunal was even not even existence. Our view further finds support from the decision and the ratio laid down in CIT vs S.P Viz Construction company 176 ITR 47 (Patna) and K.C. Builders vs ACIT 265 ITR 562 (Supreme Court). We are of the view where the penalty for concealment or furnishing inaccurate particulars was levied and after deleting the quantum addition, there remains no basis at all for levying the penalty. Ordinarily, penalty cannot stand in itself if the addition made in the assessment itself is set aside or cancelled by the superior authority/Court. The penalty cannot stand by itself because false result may be produced by the falsity of one or more of

the constituent items in the return. The word 'inaccurate particulars' would cover falsity in the final figure and also the constituent elements or items. They simply would mean inaccurate in some specific or definite respect whether in the constituent or subordinate items of income or the end result. Concealment or furnishing inaccurate particulars implies some deliberate act on the part of the assessee in withholding the true facts from the authorities. Since, the basis of levying penalty remains no more in existence, after deletion of quantum addition, therefore, from this angle, the stand of the ld. Commissioner of Income tax (Appeals) is not sustainable.

Finally, the appeal of the assessee is allowed."

2.2. In the aforesaid order, an elaborate discussion has been made by the Tribunal by taking recourse to various judicial pronouncements. In the present appeal also, there is no dispute that quantum addition has been deleted by the Tribunal, therefore, in our humble opinion, the ld. Commissioner of Income tax (Appeals) is justified in deleting the penalty. Our view further finds support from the decision and the ratio laid down in CIT vs S.P Viz Construction company 176 ITR 47 (Patna) and K.C. Builders vs ACIT 265 ITR 562 (Supreme Court). We are of the view that where the penalty for concealment or furnishing inaccurate particulars was levied and after deleting the quantum addition, there remains no basis at all for levying the penalty. Ordinarily, penalty cannot stand in itself if the addition made in the assessment itself is set aside or cancelled by the superior authority/Court. The penalty cannot stand by itself because

false result may be produced by the falsity of one or more of the constituent items in the return. The word 'inaccurate particulars' would cover falsity in the final figure and also the constituent elements or items. They simply would mean inaccurate in some specific or definite respect whether in the constituent or subordinate items of income or the end result. Concealment or furnishing inaccurate particulars implies some deliberate act on the part of the assessee in withholding the true facts from the authorities. Since, the basis of levying penalty remains no more in existence, after deletion of quantum addition, therefore, from this angle, the stand of the ld. Commissioner of Income tax (Appeals) is justified.

Finally, the appeal of the Revenue is dismissed.

This Order was pronounced in the open court in the presence of ld. representatives from both sides at the conclusion of the hearing on 18/11/2015.

Sd/- Sd/-
(Ashwani Taneja) (Joginder Singh)
लेखा सदस्य / ACCOUNTANT MEMBER **न्यायिक सदस्य** / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 23/11/2015

Sunil Sr. P.S./नि.स.

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai.**