

**IN THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai**

**Before Shri Jason P. Boaz, Accountant Member
and Shri Sandeep Gosain, Judicial Member**

ITA No. 4650/Mum/2013
(Assessment Year: 2009-10)

Income Tax Officer (IT)-1(1) Room No. 015, Scindia House Ballard Pier, Mumbai 400038	Vs.	Shri Farokh Jal Deboo 24-A, A Block, Usha Sadan Next to Colaba Post Office Colaba, Mumbai 400005 PAN - AACPD0275C
Appellant		Respondent

ITA No. 3478/Mum/2013
(Assessment Year: 2009-10)

Shri Farokh Jal Deboo 24-A, A Block, Usha Sadan Next to Colaba Post Office Colaba, Mumbai 400005 PAN - AACPD0275C	Vs.	Income Tax Officer (IT)-1(1) Room No. 015, Scindia House Ballard Pier, Mumbai 400038
Appellant		Respondent

Revenue by:	Shri Sumit Kumar
Assessee by:	Shri K.K. Ved

Date of Hearing:	02.02.2016
Date of Pronouncement:	05.02.2016

ORDER

Per Jason P. Boaz, A.M.

These are cross appeals by the Revenue and assessee directed against the order of the CIT(A)-10, Mumbai dated 26.03.2013 for A.Y. 2009-10.

2. The facts of the case, briefly, are as under: -

2.1 The assessee, a non-resident, filed his return for A.Y. 2009-10 on 30.07.2009 declaring total income of ₹63,62,578/-. The case was taken up for scrutiny. In the course of assessment proceedings, it was seen that in the year under consideration, the assessee sold Flat No. 21-22, A, Mehezin, Woodhouse Road, Colaba, Mumbai-400005 to Shri Naran J. Shah and others for a sale consideration of ₹2,30,00,000/- on 05.03.2009. The

assessee inherited the said property from his parents. Taking the cost of acquisition of this property as on 01.04.1981 at ₹6,75,000/- the assessee claimed indexation cost of acquisition w.e.f. 01.04.1981 and consequently computed the Long Term Capital Gains on sale thereof at ₹1,85,50,110/-. The assessee also claimed exemption under section 54 of the Income Tax Act, 1961 (in short 'the Act') in respect of investment of ₹1,22,53,878/- in the acquisition of new residential property situated at 151, Whispering Lane, Winona, Winona County, Minnesota 55987, USA and offered the remaining LTCG of ₹62,96,232/- to tax. The Assessing Officer (AO) did not agree with the assessee's computation of LTCG. In respect of the assessee's claim for computing the indexed cost of acquisition w.e.f. 01.04.1981, the AO was of the view that since the assessee inherited 50% share on his father's expiry on 11.11.1963, and 50% share on his mother's expiry on 18.10.2006, the indexed cost of acquisition was to be computed in two stages, i.e. financial year 1981-82 for 50% and financial year 2006-07 for 50% of the share of property. The AO also rejected the assessee's claim for being granted exemption under section 54 of the Act on the ground that the investment was in a property situated outside India. In that view of the matter, the AO proceeded to recompute the LTCG on sale of the aforesaid property at ₹2,01,35,891/- as under: -

Sale Consideration Market value u/s50C at ₹2,07,71,705/-		2,30,00,000
Less: Incidental Expenses		
1. Brokerage	2,53,690	
2. Professional Charges	1,65,450	
3. Transfer Fees	1,02,250	5,21,390
		2,24,78,610
Less: Cost of acquisition (As per valuation Report) ₹6,75,000/-		
Indexed cost of acquisition for ₹7,75,000/- For ½ share (F.Y. 1981-82)	$6,75,000 * 582/100$ $= 19,64,250$	
Indexed Cost of acquisition for ₹6,75,000/- For ½ share (F.Y. 2006-07)	$6,75,000 * 582/519$ $= 3,78,468$	23,42,718
Gross LTCG		2,01,35,891
Less Exemption U/s. 54	Investment amount in the new house property	-----
Taxable LTCG		2,01,35,891

In view of the re-computation of LTCG on sale of the said property, the assessee's income was determined at ₹2,01,35,891/- as per the order of the assessment passed under section 143(3) of the Act vide order dated 21.11.2011.

2.2 Aggrieved by the order of assessment for A.Y. 2009-10, the assessee preferred an appeal before the CIT(A)-10, Mumbai. The learned CIT(A) disposed off the appeal vide the impugned order dated 26.03.2013 allowing the assessee partial relief. In the impugned order, the learned CIT(A): (i) upheld the AO's action in denying the assessee's claim for exemption under section 54 of the Act, and (ii) following the decision of the Hon'ble Bombay High Court in the case of CIT vs. Manjula J. Shah (2013) 355 ITR 474 (Bom) directed the AO to allow indexation of the cost of acquisition w.e.f. 01.04.1981 in respect of the said property.

3. Both Revenue and the assessee are aggrieved by the impugned order of the learned CIT(A)-10, Mumbai dated 26.03.2013 for A.Y. 2009-10 in respect of the issues adjudicated against them. We proceed to dispose off the cross appeals hereunder.

Assessee's appeal for A.Y. 2009-10 in ITA No. 3478/Mum/2013

4. The ground raised by the assessee in this appeal are as under: -

“1:0 Re.: Non-granting of exemption available u/s. 54 of the Income-tax Act, 1961:

1:1 The Commissioner of Income-tax (Appeals) has erred in confirming the Assessing Officer's stand of not granting the Appellant a deduction u/s. 54 of the Income-tax Act, 1961.

1:2 The Appellant submits that considering the facts and circumstances of his case and the law prevailing on the subject the deduction available u/s. 54 of the Income-tax Act, 1961 ought to have been granted to him and the stand taken by the Assessing Officer in this regard is erroneous, incorrect, illegal and unwarranted to say the least and the Commissioner of Income-tax(Appeals) ought to have held as such.

1:3 The Appellant submits that the Assessing Officer be directed to grant the deduction available u/s. 54 of the Income-tax Act, 1961 to the Appellant and to re-compute his total income and tax thereon accordingly.

2:0 Re.: General:

2:1 The Appellant craves leave to add, alter, amend, substitute and/or otherwise modify in any manner whatsoever all or any of the foregoing grounds of appeal at or before the hearing of the appeal.”

4.1 The sole issue before us in the grounds raised in assessee's appeal (supra) is its contention that the learned CIT(A) had erred in not granting the assessee exemption of ₹1,22,53,878/- claimed under section 54 of the Act on the ground that the investment in the new residential house property was not situated in India. The learned A.R. for the assessee submitted that the issue in question, of exemption under section 54/54F of the Act, is covered in favour of the assessee by the following decisions of the Coordinate Bench of the Mumbai Tribunal and other Tribunals in the following cases: -

- i) Dr. Girish M. Shah (ITA No. 3582/Mum/2009)
- ii) Ms. Dhun Jehan Contractor (ITA No. 7058/Mum/2013)
- iii) Girdhar Mohanani (ITA No. 4591/Mum/203)
- iv) Mrs. Varsha Girdhar (ITA No. 4592/Mum/2013)
- v) Vinay Mishra [(2012) 20 ITR (T) 129 (Bangalore Tribunal)]

4.2 Per contra, the learned D.R. placed reliance on the decision of the authorities below as well as the decision of the ITAT, Ahmadabad Bench in the case of Smt. Leena J. Shah [(2006) 6 SOT 74 (Ahd)]

4.3.1 We have heard the rival contentions and perused and carefully considered the material on record, including the judicial pronouncements cited and placed reliance upon. We find that a similar issue has already been decided in the case of Ms. Dhun Jehan Contractor in ITA No. 7058/Mum/2013 dated 13.05.2015. In that case the Coordinate Bench, after considering the facts of that case at para 2 thereof, allowed the assessee's claim for exemption under section 54 of the Act on account of investment in the acquisition of a new property outside India. In doing so the Coordinate Bench followed the decision of another Coordinate Bench of this Tribunal in the case of Girdhar Mohanani and Smt. Varsha Girdhar in ITA Nos. 4591 & 4592/Mum/2013 dated 06.05.2015. In its order in the case of Ms. Dhun Jehan Contractor (supra) the Coordinate Bench at paras 6 & 7 thereof held as under: -

“6. Having considered the rival submissions as well as the relevant material on record, we find that a similar issue has already been decided by the coordinate bench of the Tribunal in the case of Mr. Girdhar Mohanani & Mrs. Varsha Girdhar in ITA Nos.4591 & 4592/Mum/2013 decided on 06.05.15 and the relevant finding in paras 4 to 9 is as under:

“4. We have considered rival contentions and found that during the year assessee has claimed exemption u/s.54. Out of the sale consideration of Rs.87,37,291/-, assessee has deposited Rs.50 lakhs in capital gains in scheme account. Subsequently deposit was withdrawn during the assessment year 2010- 2011 under consideration and was invested in a flat in Dubai. As per AO assessee was not entitled for claim of exemption u/s.54 in respect of investment made in house property outside India.

5. It was contended by ld. DR that CIT(A) has already considered the decision in the case of Dr. Girish M. Shah, Mrs.Prema P. Shah, Leena P. Shah, wherein it was ITA No.7058/M/2013 Ms. Dhun Jehan Contractor 4 held that exemption is permissible, even if investment in new residential house is made outside India.

6. On the other hand, ld. AR relied on the decision of Bangalore bench of the Tribunal in the case of Vinay Mishra, 141 ITD 301, wherein it was held that provisions of Section 54F does not suggest that new residential house acquired should be situated only in India. Accordingly exemption was granted in respect of residential house acquired outside India. It was observed that on a plain reading of provisions of Section 54F one does not find anything therein to suggest that the new residential house acquired should be situated in India. The words “in India” cannot be read into section 54F, when Parliament in its legislative wisdom has deliberately not used the words ‘in India’ in Section 54F, there was no reason to show that exemption will not be applicable in respect of house acquired outside India. Similarly, the Chennai Bench of the Tribunal in case of N.Ranganathan, 33 ITR(AT) 444 held that the profit on sale of property used for residential house (foreign house property) acquired outside India is eligible for exemption u/s.54. However, no contrary decision of Tribunal or Hon’ble High Court was brought to our notice suggesting that exemption will not be available in case residential house is acquired outside India.

7. The Finance (No.2) Bill, 2014 brought an amendment in Section 54, wherein sub-section (1), for the words “constructed, a residential house”, the words “constructed, one residential house in India” has to be substituted w.e.f. 1st day of April, 2015. Thus, it is clear from the amendment so brought for claiming exemption u/s.54, that new residential house should to be constructed in India only w.e.f. assessment year 2015-2016.. However, the assessment year under consideration is 2010-2011 i.e. much prior to the amendment so brought in Finance (No.2) Bill, 2014. There is no reason to decline exemption u/s.54 during the A.Y.2010-11 under consideration.

8. *The provisions contained in sub-section (1) of section 54 of the Income-tax Act, before its amendment by the Act, inter alia, provided that where capital gain arises from the transfer of a long-term capital asset, being buildings or lands appurtenant thereto, and being a residential house, and the assessee within a period of one year before or two years after the date of transfer, purchases, or within a period of three years after the date of transfer constructs, a residential house, then, the amount of capital gains to the extent invested in the new residential house is not chargeable to tax under section 45 of the Income-tax Act.*

9. *In view of the above, we hold that during the year under consideration, assessee was entitled for exemption u/s.54 even if investment was made in residential house situated outside India, provided that assessee has to comply with other conditions of Section 54. Since the AO has out-rightly declined exemption on this plea without examining the other conditions of Sec.54 so as to make assessee eligible, we accordingly restore the appeal to the file of the AO for verifying other conditions to be fulfilled for grant of exemption u/s.54 in both the appeals of the ITA No.7058/M/2013 Ms. Dhun Jehan Contractor 5 assesseees. The AO is also at a liberty to verify actual acquisition of house property outside India, in terms of transfer deeds so executed in favour of assessee. We direct accordingly.”*

7. *Accordingly, following the order of the co-ordinate bench of the Tribunal in the case of “Mr. Girdhar Mohanani & Mrs. Varsha Girdhar” (supra), we decide this issue in favour of the assessee and against the Revenue. AO is also at a liberty to verify fulfillment of other conditions of section 54 of Act.”*

4.3.2 Following the decision of the Coordinate Bench of this Tribunal in the case of Ms. Dhun Jehan Contractor in ITA No. 7058/Mum/2013 (supra), we hold that the assessee is entitled to be allowed exemption under section 54 of the Act in respect of the investment made in the purchase of the new residential property abroad in 151, Whispering Lane, Winona, Winona County, Minnwsota 55987, USA. The AO is accordingly directed. Consequently ground No. 1 (1.1 to 1.3) of the assessee’s appeal is allowed.

5. Ground No. 2 of assessee’s appeal being general in nature, no adjudication is called for thereon.

6. In the result, assessee’s appeal for A.Y. 2009-10 is allowed.

Revenues appeal for A.Y. 2009-10 in ITA No. 4650/Mum/2013

7. In this appeal, Revenue has raised the following grounds: -

“1. *On the facts and in the circumstances of the case and in law, whether the Ld. CIT(A) was justified in holding that the AO’s action*

of not allowing indexation benefit on part of the property received on inheritance cannot be upheld in view of the decision of Hon'ble Bombay High Court in the case of Manjula J. Shah, reported in 204 Taxman 691, even though the judgement relied on by the CIT(A) has not been accepted by the Department?

2. *On the facts and in the circumstances of the case and in law, whether the ld. CIT(A) was justified in holding that the AO's action of not allowing indexation benefit on part of the property received on inheritance cannot be upheld even though the 2nd proviso to section 48 of the I.T. Act, which deals with indexed cost of acquisition and as defined in clause (iii) to Explanation to sec. 48 provides that indexation is to be allowed to the assessee from the 1st year of acquisition in which the asset was held by him.*
3. *The appellant prays that the order of the Ld. CIT(A), Mumbai on the above ground(s) be set aside and the order of the Assessing Officer be restored.*
4. *The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."*

8. The grounds raised at S.Nos. 3 and 4 (supra) by Revenue being general in nature, no adjudication is called for thereon.

9. Grounds at S.Nos. 1 & 2: Dates to be adopted for Indexed Cost of Acquisition

9.1 In these grounds, the Revenue has assailed the decision of the learned CIT(A) in allowing the assessee's claim for indexation of the cost of acquisition w.e.f. 01.04.1981 by following the decision in the case of Manjula J. Shah (2013) 355 ITR 474 (Bom) since this decision has not been accepted by the Department. The learned D.R. was heard in this matter and he placed strong reliance on the AO's order on the issue.

9.2 Per contra, the learned A.R. for the assessee submitted that there was no error in the impugned order of the learned CIT(A) in allowing the assessee's claim for indexation of cost of acquisition of the assessee's flat w.e.f. 01.04.1981 in the light of the decision of the jurisdictional High Court in the case of Manjula J. Shah (355 ITR 474) (Bom) on this issue.

9.3 The facts of the matter as emanate from the record, on the issue of the assessee's claim for indexation of the cost of acquisition of the property at 21-22, A, Mehezin, Woodhouse Road, Colaba, Mumbai-400005 are as follows. This property was acquired by the assessee, 50% on the expiry of his father on 11.11.1963 and the remaining 50% on the expiry of his mother on

18.10.2006. In respect of the assessee's claim that the indexed cost of acquisition, on inheritance of 50% of the said property on expiry of his father on 11.11.1963 is to be computed from 01.04.1981, there is no dispute. The dispute before us is in respect of the date to be adopted for computing the indexed cost of acquisition of the remaining 50% of the said property inherited by the assessee on the expiry of his mother on 18.10.2006; whether it should be 01.04.1981 as contended by the assessee or from financial year 2006-07 as held by the AO. We find that in the decision of the jurisdictional High Court in the case of Manjula J. Shah (355 ITR 474), followed by the learned CIT(A) in the impugned order and relied upon by the assessee, it has been held that where a property is acquired under a will or by gift and the asset was acquired by the earlier owner prior to 01.04.1981, then the indexation in respect of the said property is to be given w.e.f. 01.04.1981. Respectfully following the decision of the Hon'ble Bombay High Court in the case of Manjula J. Shah (supra), we hold that while computing the LTCG on transfer of the said property acquired by the assessee in the case on hand by inheritance, the indexed cost of acquisition has to be computed with reference to the year in which the previous owner first held the asset (i.e. the assessee's late mother first held her 50% share in the said property by inheritance on the expiry of her husband on 11.11.1963) and not in the year in which the assessee became the owner of the asset, viz. in 2006. We, accordingly, hold and direct the AO to allow indexation of the cost of acquisition of the said property entirely w.e.f. 01.04.1981. Consequently, grounds 1 & 2 of Revenue's appeal are dismissed.

10. In the result, Revenue's appeal for A.Y. 2009-10 is dismissed.

11. To sum up, assessee's appeal for A.Y. 2009-10 is allowed and Revenue's cross appeal is dismissed.

Order pronounced in the open court on 5th February, 2016.

Sd/-
(Sandeep Gosain)
Judicial Member

Sd/-
(Jason P. Boaz)
Accountant Member

Mumbai, Dated: 5th February, 2016

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *CIT (A) - 10, Mumbai*
4. *Director of Income Tax (Int. Txn.)-1, Mumbai*
5. *The DR, "F" Bench, ITAT, Mumbai*

By Order

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Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.