आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, एच,मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL

MUMBAI BENCHES "H", 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.909/Mum/2014
Assessment Year: 2006-07

Smt. Basanti Jeevanlal Jain, 287, Dharamraj Gully, M.J. Market, Mumbai-400020	**बनाम**/ Vs.	The Income Tax Officer Ward-14(3)(2), Earnest House, Mumbai-400020
(निर्धारिती /Assessee)		(राजस्व /Revenue)
PAN. No.**AGDPJ5258A**		

निर्धारिती **की ओर से /** Assessee by	Shri Ajay R. Singh
राजस्व **की ओर से** / Revenue by	Shri B.D. Naik

सुनवाई की तारीख **/ Date of Hearing :**	**25/08/2016**
आदेश की तारीख /**Date of Order:**	**08/09/2016**

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

The assessee is aggrieved by the by the impugned order dated 12/12/2013 of the Ld. First Appellate Authority, Mumbai. The assessee has challenged proceedings of reopening u/s 147 of the Income Tax Act, 1961 (hereinafter the Act) and also not allowing the claimed deduction u/s 54 of the Act.

2. So far as, reopening u/s 147/148 of the Act is concerned, the ld. counsel for the assessee, Shri Ajay R. Singh, explained that necessary documents/material were duly made available before the Assessing Officer for claiming deduction u/s 54 of the Act and after considering the submissions of the assessee, the claimed deduction of Rs.50 lakh u/s 54 of the Act was allowed. Thereafter, notice u/s 148 was issued to the assessee, which was objected to be illegal and void. Still the assessee declared the same income, which was declared in the original return. The ld. counsel explained the factual matrix for making the investment in the flat with M/s Rohan Developers Ltd. and since due to very slow pace of construction by the developer, the amount was refunded back to the assessee and again invested with M/s S M Enterprises. Unfortunately, due to some legal hitches in the building, it was learnt that the developer is unable to complete the building, therefore, the amount was refunded back and again invested with M/s Omega

Investment & Properties Ltd. in the building "Tivoli Court". The cost of acquisition of the flat was Rs.72,33,750/- and thus the assessee purchased the flat. The disallowance of investment made u/s 54 of the Act has been challenged before us. The ld. counsel relied upon following judicial decisions:-

i. Allana Sons Ltd. vs ACIT (2015) 230 taxman 436(Bom.)

ii. Metro Auto Corporation vs Income Tax Officer (2006) 286 ITR 618 (Bom.)

iii. Vodafone Essar Gujarat Ltd. vs ACIT (37 DTR 259)

iv. CIT vs Flothern Engineers Pvt. Ltd. (2014) (225 taxman 223)(Mag.)(Mad.)

2.1. On the other hand, ld. DR, Shri B.D. Naik, defended the disallowance made by the Assessing Officer and confirmed by the CIT(A) by stating that the investment was not made by the assessee within the stipulated period.

2.2. We have considered the rival submissions and perused the material available on record. The facts, in brief, are that the assessee sold a property, jointly owned by him with two other family member, for a consideration of Rs.2,07,00,000/-. The share of the assessee, after claiming stamp duty of Rs.1,51,705/- comes to Rs.50,08,295/-. The assessee advanced Rs.50 lakh with M/s Rohan Developers Pvt. Ltd. by making the investment in a flat. The assessee

declared total income of Rs.2,70,730/- by making a long term capital gain claim of Rs.50 lakh as exempt u/s 54 of the Act. On 14/01/2008, the Assessing Officer issued notice u/s 142(1) of the Act raising a query on the claimed capital gain/claimed exemption. On 24/07/2008, the assessee submitted its working/reply for capital gains and furnished a copy of the sale agreement (pages 11 to 34 of the paper book). On 24/07/2008, the assessee invested the amount of Rs.50 lakh in a flat with M/s Rohan Developers Pvt. Ltd., against which exemption was claimed. Since, the developer was unable to complete the building in time, he refunded the amount and thus on 15/10/2007 to 13/02/2008, the amount was invested with M/s S. M. Enterprises. However, due to some dispute, this amount was refunded to the assessee. On 29/07/2008, assessment was completed u/s 143(3) of the Act, allowing the capital gain but no discussion was made in the assessment order. On 25/09/2009, notice u/s 148(pages 58 to 59 of the paper book) was issued to the assessee. Pursuant to notice u/s 148, on 22/10/2009, the assessee filed the same return along with the purchase agreement and details of claimed exemption and further explaining the factual matrix by narrating that the assessee has again invested the proceeds in another flat with M/s Omega Investment & Properties Ltd. on 26/03/2008 to 27/10/2009 and claimed the amount as exempt. The assessee duly submitted the copy of the bank statement from 01/04/2006 to 31/10/2009, cancelation of allotment

letter of M/s S. M. Enterprises dated 25/07/2008 and allotment letter of M/s Omega investment & Property ltd. dated 05/03/2008 (pages 35 to 55 of the paper book). The agreement was entered on 01/10/2009. The ld. Assessing Officer vide assessment order dated 23/12/2010 disallowed the claimed exemption of Rs.50 lakh u/s 54 of the Act. The assessee preferred appeal before the Ld. Commissioner of Income Tax (Appeal), who vide order dated 29/07/2011 allowed the claimed exemption of Rs.50 lakh. This order was accepted by the assessee as well as by the Department (pages 89 to 99 of the paper book). On 09/09/2011, show cause notice was issued to the assessee of second reopening (Assessing Officer page 3 to 5 and pages 100 to 102 of the paper book). Vide letter dated 07/10/2011, the assessee asked the reason of reopening (pages 103 to 108 of the paper book). The assessee filed reply before the Assessing Officer on 10/04/2012 (pages 116 to 121 of the paper book). Totality of facts, available on record, clearly indicates that during original assessment proceedings as well as on first reopening of assessment, the assessee duly furnished the complete details of capital gains, investment so made for the exemption, the Ld. Commissioner of Income Tax (Appeal) allowed the claim of the assessee made u/s 54 of the Act for an amount of Rs.50 lakh. Under these facts, we find that no new material was unearthed by the Assessing Officer while reopening the case for the second time. The first assessment order dated 29/07/2008, completed u/s 143(3)

of the Act actually merged with the appellate order, therefore, the reopening is bad in law, because, there was no failure on the part of the assessee to disclose material facts. The cases relied upon by the assessee (supra) supports our view.

2.3. So far as, second reopening is concerned, it is merely on the basis of change of opinion, more so when the assessment was completed u/s 143(3) and 143 r.w.s 147 of the Act after due application of mind. The ratio laid down in CIT vs Kelvinator India Ltd. 320 ITR 561 (SC), CIT vs Jet Speed Audio Pvt. Ltd. (2015) 372 ITR 762 (Bom.), Arthur Anderson & Co. vs ACIT (324 ITR 240)(Bom.), Titanor components Ltd. vs ACIT (243 CTR 520)(Bom.) supports our view. The material facts were duly made available by the assessee to the Assessing Officer. Even assuming that the ld. Assessing Officer failed to apply his mind, assessment cannot be reopened u/s 147 of the Act merely on the basis of change of opinion. The ratio laid down in Asian Paints Ltd. vs CIT (2009) (308 IR 195)(Bom.), CIT vs Central warehousing corporation (2015) 371 ITR 81 (Del.) and the ratio laid down in GKN Sinter Metals Ltd. vs ACIT (2015) 371 ITR 225 (Bom.), Techman Buildwell Pvt. Ltd. vs ACIT (2015) 370 ITR 771 (Del.) supports our view. Further, if there is a failure on the part of the Assessing Officer to examine the documents during the original assessment proceedings that cannot be the basis to reopen the assessment as it was not fault of the assessee. The ratio laid

down in IBS Software Services Pvt. Ltd. vs UOI (2015) 379 ITR 66, Unitech Holdings Ltd. (2016) 138 DTR (Del.) 272, Vodafone South Ltd. vs UOI (2014) 363 ITR 388 (Del.) supports our view. Thus, the reopening was not valid.

3. Now, we shall deal with the merits of the appeal. Before adverting further, we are reproducing hereunder section 54 of the Act for ready reference and analysis:-

> **" 54.** (1) Subject to the provisions of sub-section (2), where, in the case of an assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of a long-term capital asset, being buildings or lands appurtenant thereto, and being a residential house, the income of which is chargeable under the head "Income from house property" (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], then, instead of the capital gain being charged to income-tax as income of the previous year in which the transfer took place, it shall be dealt with in accordance with the following provisions of this section, that is to say,—
>
> (*i*) if the amount of the capital gain is greater than the cost of the residential house so purchased or constructed (hereafter in this section referred to as the new asset), the difference between the amount of the capital gain and the cost of the new asset shall be charged under section 45 as the income of the previous year; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be *nil*; or
>
> (*ii*) if the amount of the capital gain is equal to or less than the cost of the new asset, the capital gain shall not be charged under section 45; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be reduced by the amount of the capital gain.
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> (2) The amount of the capital gain 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 not so utilised shall be charged under section 45 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; and

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

Explanation.—[*Omitted by the Finance Act, 1992, w.e.f. 1-4-1993.*]"

In the aforesaid section, the legislature has provided a time frame within which the assessee has to invest the sale proceeds, subject to the provisions of sub-section (2), in a residential house. In the present case, the assessee sold the joint property for a consideration of Rs.2,07,00,000/- and his share comes to Rs.50,08,295/-. The assessee claimed exemption u/s 54 of the Act and thus advanced Rs.50 lakh for purchase of flats with M/s Rohan Developers Pvt. Ltd. This amount was duly declared in the return filed by the assessee by claiming exemption of Rs.50 lakh u/s 54 of the Act. However, this amount was refunded, due to dispute arose between the assessee and developer, and reinvested with M/s S.M. Enterprises on 15/10/2007 to 13/02/2008. Still dispute arose and the amount was defunded on 10/07/2008 to 11/09/2008 (paege-35 o the paper book). The assessee made investment in M/s Omega Investments and made first instalment of Rs.10 lakh on 26/03/2008 towards purchase of flats and remaining instalments

thereafter. The assessee vide letter dated 24/07/2008 duly furnished the details of investment made by the assessee. Now question arises whether the assessee made substantial payments towards cost of acquisition of the flat within the statutory allowable period. The stand of the Assessing Officer as well as the Ld. Commissioner of Income Tax (Appeal) is that substantial payment/investment was not made by the assessee within time. Considering the totality of facts and the circumstances available on record and explained before us, under the facts, it can be inferred that the assessee has established her bona fides by making the investment first with Rohan Developers, thereafter with M/s S. M. Enterprises (however, due to disputes, the invested amount was refunded to the assessee) and in the last with M/s Omega Investments. It is not the case that the assessee violated the provisions of the law, set idle rather made consistent efforts to invest the sale proceeds and finally got the house. It is not the case of the Revenue that no house was purchased by the assessee. The only allegation against the assessee is that substantial investments, out of sale proceeds, was not made by the assessee. The amount of Rs.10 lakh, in our view, is a substantial amount and thereafter the remaining instalments were made. It is made clear that so far as making investment of substantial amount is concerned, it depends upon the individual perception. For certain persons, it may be huge amount and for some persons, it may be a smaller amount. However,

keeping in view, the consistent efforts made by the assessee and since the sale proceeds were duly invested by the assessee, it can be concluded that substantial compliance was made by the assessee of the provisions of the law by making required investment for purchasing the residential house. Hon'ble Bombay High Court in CIT vs Mrs. Hilla J.B. Wadia (216 ITR 376)(Bom.) held that the assessee should have invested substantial amount within two years after the date of sale of the property. In the instant case, the assessee made complete investment with earlier two developer i.e. M/s Rohan developers and S.M. Enterprises, wherein, due to various reasons, the money was returned and thereafter the amount of Rs. 10 lakh was invested in the property with M/s Omega Investments and Properties Ltd. As per the provision of Act, the assessee was either to construct the house or to invest the sale proceeds within the stipulated period of 2/3 years from the date of transfer of asset. The Hon'ble Calcutta High Court in CIT vs Bharati C. Kothari (244 ITR 352)(Cal.) held as under:-

> " 1. On an application under Section 256(1) of the Income-tax Act, 1961, the following question set out at page 2 of the application, has been referred by the Tribunal for our opinion :
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> "Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was justified in holding that the assessee is entitled to exemption under Section 54(1) since the agreement of purchase was made within one year from the date of sale and since substantial parts of instalments were paid within two years from the date of sale and thereby treating the date of agreement as the date of purchase ?"
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> 2. The assessee had sold her flat at Rs. 1,40,000 on April 30, 1981. The asses-see thereupon entered into an agreement on April 29, 1982, for purchase of ownership flat from Akash Deep Corporation for a sum of Rs. 1,40,000. As per the agreement, she had to pay Rs. 10,000 on or before the execution of the agreement and the balance amount she has to pay as under :

Date of payment Amount (Rs.) 22-4-1982 10,000 25-3-1983 10,000 25-4-1983 10,000 4-6-1983 10,000 5-7-1983 10,000 27-7-1983 10,000 14-11-1983 50,000 21-1-1984 20,000 3-3-1984 10,000

3. The assessee claimed the benefit of exemption under Section 54(1) of the Income-tax Act, 1961. According to the Assessing Officer, the assessee is entitled to only the benefit to the extent of Rs. 30,000 which she has invested during two years from the date of sale.

4. In appeal before the Deputy Commissioner of Income-tax (Appeals), the Deputy Commissioner of Income-tax (Appeals) dismissed the appeal of the assessee.

5. In appeal before the Tribunal, the Tribunal has considered the decision of the Andhra Pradesh High Court in the case of CIT v. Mrs. Shahzada Begum , and also considered the decision of the apex court in the case of CIT v. J.H. Gotla and allowed the claim of the assessee. When the assessee has invested the entire amount within three years, she is entitled to exemption underSection 54(1) of the Act.

6. The facts are not in dispute that after sale of her flat on April 30, 1981, she entered into an agreement for purchase of an ownership flat on April 29, 1982, and the entire amount of the flat, that is, Rs. 1,40,000 has been paid within three years from the date of sale of her flat.

7. In Mrs. Shahzada Begum's case the Andhra Pradesh High Court has taken the view that the expression "purchased" would undoubtedly connote the domain and control of the property given into the assessee's hands. Therefore, registration is not necessary. If money is paid and possession has been taken within the stipulated period under Section 54(1), the assessee is entitled to benefit under Section 54(1).

8. The provisions of Section 54(1) of the Act provide that subject to the provisions of Sub-section (2), where capital gain arises from the transfer of a long-term capital asset, the income of which is chargeable under the head "Income from the house property" and the assessee has within a period of one year before or two years after the date on which a transfer took place purchased, or has within a period of three years after that date constructed a residential house, then, instead of capital gain being charged to income-tax as income of the previous year in which the transfer took place, it shall be dealt with in accordance with the provisions in the section.

9. The admitted facts are that the assessee has entered into an agreement within two years for purchase of a residential flat and the flat was under construction. The amount was paid in instalments, but all the instalments are paid within three years from the date of sale of her flat, i.e., on April 30, 1981. The provisions of Section 54(1) permit the assessee in case the assessee invests the sale proceeds in the construction of a house within three years, the assessee is exempted from the capital gain tax arising out of the sale of the earlier house. Here no doubt, the assessee has not constructed herself the house, but she purchased the flat which was being constructed and within three years, she paid the entire amount against that flat which was being constructed. Therefore, the question does arise, whether the sale proceeds which she has invested in the flat which was under construction amounts to an investment of the sale proceeds underSection 54(1)--whether it is necessary that she should herself construct a house, then only she is entitled for exemption under Section 54(1) of the Act.

10. If the assessee has invested that sale proceeds in a house, which is being constructed by the third party for her, that in our considered view, entitles the assessee for the benefit or the exemption under Section 54(1). If the benefit is not given to the assessee, though she has invested the sale proceeds in the house

which is being constructed for her, that view may not be in conformity with the object behind the provision. The purpose behind this exemption is that when the assessee sells her residential house and if she purchased any new house or acquired the new house from those sale proceeds, the assessee is exempted from the capital gain tax.

11. In J.H. Gotla's case , their Lordships at page 339 have observed as under :

"Where the plain literal interpretation of a statutory provision produces a manifestly unjust result which could never have been intended by the Legislature, the court might modify the language used by the Legislature so as to achieve the intention of the Legislature and produce a rational construction. The task of interpretation of a statutory provision is an attempt to discover the intention of the Legislature from the language used. It is necessary to remember that language is at best an imperfect instrument for the expression of human intention. It is well to remember the warning administered by Judge Learned Hand that one should not make a fortress out of the dictionary but remember that statutes always have some purpose or object to accomplish and sympathetic and imaginative discovery is the surest guide to their meaning."

12. Keeping in view the above observations of the apex court, where the plain literal expression of the statutory provisions produces manifestly unjust result, which could never have been intended by the Legislature, the court can modify the language to achieve the intention of the Legislature and produce a rational construction.

13. The purpose behind the exemption under Section 54(1) is that if any assessee sells his residential house and purchases a new house against those sale considerations that capital gains tax arising out of the sale of the earlier house should not be taxed. Whether the assessee himself constructs the house or he gets it constructed by a contractor or a third party that does not make any difference. The basic requirement for the purpose of relief under Section 54(1), is that the assessee should invest the sale proceeds in the construction of a residential house, which has been constructed for the assessee. Keeping in view the above observations and reasons given by the Tribunal, no case is made out for interference.

14. In the result, we answer the question in the affirmative, i.e., in favour of the assessee and against the Revenue.

15. The application is, thus, disposed of.

It is also noted that CBDT vide Circular No.471, dated 15/10/1986, dealing with the investment in flats, under self financing scheme of Delhi Development Authority states that when allotment letter is issue to the allottee under the scheme on payment of first instalments of the cost of construction, the allotment is final, unless it is cancelled. The allottee, thereupon gets title of the property on the issuance of allotment letter and the payment of instalments is only a follow of action and taking delivery of possession is

only a formality. Considering the intention of the legislature for this beneficial provision and the purpose behind u/s 54(1) is that if any assessee sells his/her residential house and purchases a new house against the sale consideration, the capital gain tax arising out of sale of earlier house property, it should not be taxed. The basic requirement for the purpose of relief u/s 54(1) is that assessee should invest the sale proceeds in the construction of the residential house. Keeping in view, the totality of facts and the foregoing discussion, the assessee has made substantial compliance of the provision by investing required amount, therefore, on merit also, the appeal has to be allowed.

Finally, the appeal of the assessee is allowed.

This order was pronounced in the open court in the presence of ld. representatives from both sides at the conclusion of hearing on 25/08/2016.

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

मुंबई Mumbai; दिनांक Dated : 08/09/2016

Shekhar, P.S/निजी सचिव

<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 (TDS), 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**