

आयकर अपीलीय अधिकरण "D" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER AND
SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 6169/Mum/2013

(निर्धारण वर्ष / Assessment Year : 2007-08)

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| Shri Dilip Manhar Parekh, National Plastic, National House, Opp Ansa A Bldg., Saki Vihar Road, Chandivali, Mumbai - 400 072. | बनाम/ v. | The Dy. Commissioner of Income Tax -21(3), Mumbai. |
| स्थायी लेखा सं./PAN : AFFP4206B | | |
| (अपीलार्थी / Appellant) | .. | (प्रत्यर्थी / Respondent) |

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| Assessee by | Dr. K. Shivaram |
| Revenue by : | Shri Kailash Gaikwad(D.R.) |
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सुनवाई की तारीख / **Date of Hearing** : 28-01-2016

घोषणा की तारीख / **Date of Pronouncement** : 15-04-2016

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee, being ITA No. 6169/Mum/2013, is directed against the order dated 30-08-2013 passed by learned Commissioner of Income Tax (Appeals)- 32, Mumbai (hereinafter called "the CIT(A)"), for the assessment year 2007-08, , the appellate proceedings before the CIT(A) arising from the assessment order dated 23-12-2010 passed by the learned assessing officer(hereinafter called "the AO") u/s 143(3) read with Section 147 of the Income Tax Act,1961(Hereinafter called "the Act").

2. The grounds raised by the assessee in the memo of appeal filed with the Tribunal read as under:-

“1. The learned CIT (A) erred in not following the judgment of the Hon'ble Bombay High Court delivered in the case of co-owner Mrs. Chhaya Parekh after the decision of Hon'ble ITAT in assessee own case, in respect of the same transaction wherein it was held that demolition of asset by assessee voluntarily would not amount to transfer under the Income-tax Act, 1961 and hence denial of exemption u/s.54F is bad in law.

2. The learned CIT (A) erred in concluding that the purchase of bungalow was symbolic and not real as the same was not occupied by assessee after purchase though the Appellant had filed all the relevant documents to show that the bungalow was in a habitable condition and also filed Affidavit explaining the reason for not occupying the bungalow and the reason for demolishing it for reconstruction and that for claiming exemption u/s.54F assessee can be owner of more than one residential house at the time of purchase of new residential house and denial of exemption u/s.54F is bad in law.

Section 54F(3)

3. Without prejudiced to the above, the learned CIT(A) failed to appreciate that the denial of exemption can be done only in the year of demolition of the asset in accordance with section 54F(3) and not in the year under consideration.”

3. The brief facts of the case are that the assessee filed return of income with Revenue on 26-10-2007 declaring total income of Rs.25,39,550/- , which return of income was revised on 22-07-2009 by the assessee by filing revised return of income whereby income returned was revised to Rs.25,49,475/- .

The notice u/s 148 of the Act was issued to the assessee on 03-11-2009 which was duly served on the assessee, after recording reasons for re-opening of the assessment proceedings u/s 147 of the Act. The assessee filed return of income for the assessment year 2007-08 in pursuance of notice u/s 148 of the Act, declaring the same income of Rs.25,49,475/- as was declared earlier vide revised return filed on 22-07-2009.

The A.O. during the course of re-assessment proceedings observed that during the accounting period relevant for the assessment year 2007-08, the Shop No. 6 and garage No. 6A standing in the name of M/s. Parekh Brothers in the building shown as Tirupati Shopping Complex, Bhulabhai Desai Road, Mumbai -400026 is sold vide agreement dated 01-09-2006 for a consideration of Rs. 5,40,00,000/-. It was observed by the AO from the purchase and sale agreements that the owner of these premises was M/s. Parekh Brothers, a co-ownership concern (co-owners being the assessee and Smt. Chhaya B. Parekh, the assessee's sister in-law) which purchased the said building on 28-08-1981 from M/s. Gowani Builders Pvt. Ltd. . However, the assessee has claimed exemption u/s. 54F of the Act from capital gains treating the half of the sale proceeds, and his own share being Rs. 2,70,00,000/- invested in Juhu Bungalow (new asset), purchased jointly with Smt. Chhaya B. Parekh, who also invested $\frac{1}{2}$ share being Rs. 2,70,00,000/- in the said Juhu Bungalow (new asset). There is no mention of M/s Parekh Brothers on the agreement drawn for purchase of the Juhu Bungalow. The A.O. observed that the assessee has intentionally treated the ownership of the shop and garage at Tirupati shopping complex of his own replacing the ownership of Association of Persons(AOP) i.e. M/s. Parekh Brothers. It has been evidently done to claim the exemption u/s. 54F of the Act which are available only to HUF and individual assesseees. Since no exemption u/s. 54F of the Act is available to Association of Persons(AOP), the assessee and his associate sister-in-law have made the case in individual capacity to avail the benefit not legally available to them . The A.O. observed that though the agreement made for new bungalow at Juhu has been purchased within one year but investments out of the sale proceeds of shop and garage is shown in individual capacity of both associates i.e. assessee and Smt. Chhaya Parekh, which actually belonged to M/s. Parekh Brothers, an Association of Persons(AOP). Since exemption u/s. 54F of the Act cannot be considered in

the hands of M/s. Parekh Brothers, the claim is made in case of individuals. The agreements and several documents mentioned earlier evidently certify that the properties (shop and garage) ownership never stood in name of individual capacity of the assessee and his sister-in-law Mrs, Chhaya B. Parekh. Hence the exemption u/s. 54F of the Act was denied to the assessee. The assessee submitted that he had fulfilled all the conditions for claiming exemption u/s 54F of the Act which was furnished before the AO as reproduced hereunder:-

“Note about fulfillment of conditions u/s 54F:

I, Mr. Dilip M. Parekh has satisfied the following conditions for being eligible u/s 54F.

1. The assessee must be an individual and I am an individual assessee.
2. The asset transferred in Shop NO. 06 and Garage NO. 06-A of Tirupati Apartment (herein after referred to as the Premises) and not any residential house.
3. The asset (the said Premises) transferred is a long term asset as the same was purchased on 25-08-2001 and was sold on 01-09-2006 (i.e. after a period of 36 months)
4. I have purchased a residential house i.e. Juhu bungalow (50% share) vide agreement dated 22-04-2006 within one year prior to the date of sale on 01-09-2006.
5. I have invested Rs. 346,54,320/- in the new asset (Juhu Bungalow) which is more than the Gross Consideration of Rs. 2,70,00,000/- received on sale of the said premises.
6. I do not own any other residential house on the date of transfer of the said Premises (i.e. 01-09-2006)
7. I have neither purchased nor constructed any other residential house after the date of transfer i.e. after 01-09-2006.
8. The income from the said premises was chargeable to Income tax under the head income from house property and the tax was paid accordingly.

I have satisfied all the above conditions of u/s. 54F, hence I am fully entitled to the deduction and accordingly my claim has to be accepted."

The A.O., however, rejected the contentions of the assessee and held that the assessee was not the owner of the shop and garage sold in Tirupati Apartment in individual capacity but the ownership right was with M/s. Parekh Brothers. The claim of the assessee in his individual capacity is erroneous. Further, during the course of assessment proceedings for the assessment year 2007-08 in the case of Mrs. Chhaya B. Parekh, the other co-owner of M/s. Parekh Brothers, the spot inquiries had also been conducted and it was ascertained and found that the Juhu Bungalow(new asset) has been demolished after purchase but within 2 years of the purchase while the requirement of the Act is that the new residential asset should not be transferred within 3 years and also the assessee has not constructed new bungalow till date. Thus, the AO rejected the claim of the assessee u/s 54F of the Act on the grounds that while the capital gains are assessable in the hands of the assessee and Mrs. Chhaya B Parekh as the association of person stood dissolved as the properties (shop and garage) at Tirupati Apartments was divided in the individual capacity after sale of the same and association of person(AOP) stood dissolved but the investment of sale consideration of the said premises of association of person does not qualify for exemption in individual hands of the assessee and Mrs. Chhaya B Parekh and also the new asset has been demolished and no construction has been done within 3 years and hence exemption claimed u/s 54F of the Act was denied by the AO , vide re-assessment orders dated 23.12.2010 passed by the AO u/s 143(3) r.w.s. 147 of the Act.

4. Aggrieved by the re-assessment orders dated 23.12.2010 passed by the AO u/s 143(3) r.w.s. 147 of the Act., the assessee preferred an appeal before the CIT(A) which was allowed by the CIT(A) in the first round of litigation vide

orders dated 04-07-2011 by holding that the Tribunal, Mumbai has in assessee's own case in earlier years has held that the said property was held on co-ownership basis and not as an AOP and the AO has assessed rental income in the hands of the assessee , there is no reason to change the settled position. The capital gains are held to be chargeable to tax in the hands of the assessee by the AO and hence the assessee will be entitled for deduction u/s.54F of the Act on acquisition of new asset in the individual name of the assessee. The CIT(A) also noted that in the case of other co-owner Mrs. Chhaya B Parekh, the CIT(A) has held that the income from capital gain shall be chargeable to tax in the hands of Mrs. Chhaya B Parekh and she will be entitled for deduction u/s. 54F of the Act. With respect to demolition of the new asset Juhu Bungalow within 2 years, the CIT(A) held that since in the year under consideration there was no such demolition, hence the assessee will be entitled for deduction u/s.54F of the Act and the AO shall be entitled to take up appropriate action for verifying whether there is any violation u/s. 54F(3) of the Act in the year of demolition of superstructure of the Juhu Bungalow(new asset).

The matter went to the Tribunal , Mumbai in the first round of litigation whereby the Revenue filed appeal against the orders of the CIT(A) dated 04-07-2011 and the assessee filed cross objections in ITA no. 6596/Mum/2011 and CO no. 37/Mum/2012 respectively , vide orders dated 30-01-2013 had set aside the issue's to the file of the CIT(A) for de-novo consideration of the matter both with respect to Revenue appeal and the CO filed by the assessee. During the course of appellate proceedings before the Tribunal, the assessee relied upon the order of the Tribunal, Mumbai in the case of Smt. Chhaya B. Parekh in ITA No. 4954/Mum/2010 dated 16.5.2012. The Tribunal vide its order in ITA No. 6596/Mum/2011 had observed that the judgment of Hon'ble Apex Court in the case of Vania Silk Mills (P) Ltd. , (1991)191 ITR 647(SC) was overruled by the Three Member Bench of Hon'ble Apex Court in the case

of Mrs. Grace Collis and Others, (2001)248 ITR 323(SC) , whereas in the case of the co-owner Mrs. Chhaya B. Parekh , the Tribunal had followed the decision in the case of Vania Silk Mills (P) Ltd. wherein it was held that the extinguishment of right on account of destruction or loss of asset does not amount to transfer.

The Tribunal subsequently considered the decisions in the case of Neelamalai Agro Industries Ltd. v. CIT , (2003)259 ITR 651 (Mad. HC) relied upon by the assessee and in the case of CIT v. Pradeep Kumar (2006)153 Taxman 138 [Mad. HC) relied upon by the Revenue and observed that the issue hinges around the meaning of expression "transfer" 'provided in section 2(47) of the Act. The Tribunal observed that expression "extinguishment of any right therein" was the subject matter of consideration by the Hon'ble Supreme Court in the case of Mrs. Grace Collis (supra) wherein their lordships were concerned with the expression "extinguishment" in the context of amalgamating company by the order of the Court. The Tribunal further after considering decision of Hon'ble Apex Court in the case of Vania Silk Mills Pvt. Ltd. (supra) as well as the later decision of Hon'ble Madras High Court in the case of Neelamalai Agro Industries Ltd. (supra) arrived at that "any extinguishment on account of act of the assessee would amount to transfer" and the only exception provided therein was the extinguishment on account of act of God such as destruction of the capital asset in a fire, complete loss in the case of sinking of a vessel of the assessee etc. The Tribunal observed that in the instant case, it was not in dispute that the demolition of the building took place at the behest of the assessee and it was not an act of God in which event, it had to be said that demolition of house would fall within the definition of "transfer". The Tribunal further observed that this aspect was not properly analysed by the Tribunal in the case of co-owner Mrs. Chhaya B. Parekh since the subsequent decision of Hon'ble Supreme Court in the case of Mrs. Grace Collis (Supra) was not brought to the notice of the co-ordinate

bench. As the CIT(A) had also no occasion to consider the same, the matter was set aside to the file of the CIT(A) with the direction to consider the matter in accordance with law in the light of the Tribunal's above observation.

In denovo- proceedings before the CIT(A), the assessee submitted that the issue is squarely covered by the judgment of Hon'ble jurisdictional Bombay High Court dated 24.1.2013 in ITA(L) no. 1583 of 2012 in the case of co-owner Smt. Chhaya B. Parekh wherein the Hon'ble Bombay High Court has held that demolition would not amount to transfer and hence the assessee was eligible to claim exemption u/s 54F of the Act (copy of the judgment placed in paper book page No. 177 to 180). It was submitted by the assessee that the demolition of the structure for renovation would not constitute a transfer as all rights, title and interest in the property continue to be with the assessee relying upon decision of Hon'ble Supreme Court in the case of Vania Silk Mills Private Limited (supra). It was submitted that extinguishment of any right in the capital asset arising out of extinguishment of asset does not amount to 'extinguishment of rights' . It was submitted that the assessee holds right to occupy, right to reconstruct, right to lease, right to renovate etc, even after demolition of Juhu bungalow(new asset). The assessee also submitted that the decision of Hon'ble Apex Court in the case of CIT v. Mrs Grace Collis (2001) 248 ITR 323(SC) was explained in the case of Neelamalai Agro Industries Ltd. v. CIT (2003) 259 ITR 651(Mad. HC). Thus, it was submitted that demolition of an asset does not amount to transfer as there is no transferee nor there is any consideration. The assessee submitted that the CIT(A) in the first round of litigation held that there was violation of section 54F(3) of the Act on demolition of the bungalow as assessee was not the owner of the residential house for a period of three years as the residential house was demolished. The assessee contended that the interpretation adopted by the CIT(A) in first round of litigation was not correct as the assessee has purchased the bungalow with right to lease hold property and

even after demolition , the said right was not transferred . The assessee submitted that the purchase of bungalow cannot be said to be symbolic as agreement clearly states that consideration was paid for purchase of bungalow and further the same was demolished in December, 2008 i.e. only four months before the completion of three years from the date of purchase. It was contended that the finding of the Tribunal that if the demolition was voluntary it will amount to transfer is contrary to the law laid down by the Hon'ble Bombay High Court in the case of the co-owner Mrs. Chhaya B Parekh , wherein it has been held that demolition will not amount to transfer. It was further submitted that the decision of the Hon'ble Bombay High Court in the case of the co-owner Mrs. Chhaya B Parekh was not available at the time of hearing before the Tribunal and the decision of the Hon'ble Bombay High Court which is a jurisdictional High Court is binding on the tax-authorities and hence it may be held that demolition will not amount to transfer. Without prejudice, it was submitted that there is no requirement to reconstruct the bungalow within 3 years as (a) there is no transfer in the first place (b) the entire net consideration from the sale of original asset is less than the purchase cost of right in land and bungalow thereon and (c) even otherwise there is no requirement to complete the construction within three years . The assessee placed reliance on the decision of Hon'ble Madras High Court in the case of CIT v. Sardarmal Kothari and Anr. (2008) 302 ITR 286 (Mad). The assessee submitted that no independent due diligence was done and the assessee and his family members visited the site and were satisfied that bungalow was capable of being used and occupied . The assessee submitted that no notice /document suggesting interior repairs, demolition was received at the time of /subsequent to purchase. The assessee submitted the copy of the survey report conducted by the local authority before grant of permission for redevelopment. The survey report clearly indicated that the bungalow was demolished in December 2008 and before that the same represented a house which establishes that the bungalow was demolished 2

years and 8 months after purchase by the assessee . The assessee referred to the decision of Hon'ble Madras High Court in the case of Neelamalai Agro Industries Ltd. (supra) wherein it was held that the decision in the case of Mrs. Grace Collis (supra) is not applicable to demolition of asset, hence there was no need for the Hon'ble Bombay High Court in the case of co-owner Smt. Chhya Parekh to consider the decision of Mrs. Grace Collis (supra). The assessee further submitted that the Tribunal has prima facie given a finding that voluntary demolition would amount to transfer. The assessee contended that the jurisdictional High Court decision in the case of Mrs Chhaya B Parekh is the only decision on the point of voluntary demolition which being decision of jurisdictional High Court is binding on the tax-authorities.

The CIT(A) after considering the submissions of the assessee rejected the claim of the assessee for deduction u/s. 54F of the Act and held that the said Juhu bungalow(new asset) after being acquired by the assessee was never occupied by the assessee and it was a 'symbolic purchase of residential property' and no deduction u/s 54F of the Act can be allowed as it is not a 'real purchase of residential house property'. Further, it was held that demolition of the bungalow took place at the behest of the assessee and it is not an act of god and hence demolition of the bungalow within three years amount to transfer in view of decision of Hon'ble Supreme Court in the case of Grace Collis (supra) and accordingly the assessee is not entitled for deduction u/s. 54F of the Act. The decision in the case of co-owner Smt. Chhaya B. Parekh by the Hon'ble High Court has been done without consideration of the later decision of the Hon'ble Apex Court in the case of Grace Collis and others (supra) wherein the decision in the case of Vania Silk Mills Pvt. Ltd. (supra) has been overruled by the three member bench of Hon'ble Apex Court in Grace Collis(supra). Accordingly in the humble view of the CIT(A) the decision of-Hon'ble Bombay High Court in the case of co-owner Smt. Chhaya B. Parekh would not have binding precedence in deciding the

case on hand. The CIT(A) held that since there was only 'symbolic purchase of property' and not 'real purchase of property', deduction u/s 54F of the Act shall not be allowable, the question of transfer on account of demolition would not arise and is academic especially in the year under consideration. Thus, provisions of section 54F(3) of the Act will be applicable only in the assessment year 2009-10 as the bungalow was demolished in December 2008. The CIT(A) partly allowed the appeal of the assessee as set out above vide orders dated 30-08-2013.

5. Aggrieved by the orders dated 30-8-2013 of the CIT(A), the assessee is in appeal before the Tribunal.

6. The ld. Counsel for the assessee submitted that the assessee has been denied the deduction u/s 54F of the Act. the assessee has duly purchased and made investment in the residential bungalow at Juhu(new asset) along with co-owner Smt. Chhaya B. Parekh. The said bungalow was demolished for the purposes of redevelopment. The Hon'ble Bombay High Court in the case of co-owner Smt. Chhaya B Parekh in Income Tax Appeal No. 1583 of 2012 vide judgment dated 24th January, 2013 had held that demolition of residential bungalow will not tantamount to transfer and hence the same will not be hit by provisions of section 54F(3) of the Act. Further, in the case of Mrs Chhaya B Parekh who was co-owner with the assessee of the properties (shop and garage) at Tirpuati Shopping complex on the sale of which capital gain's had arisen to both the assessee and Mrs Chhaya B Parekh , the revenue has not challenged the entitlement of Mrs Chhaya B Parekh to deduction u/s 54F of the Act on the purchase of Juhu bungalow property(new asset) , then on the principles of parity, the assessee should also be allowed to be entitled for deduction u/s.54F of the Act as the assessee had also made investment in the same residential bungalow at Juhu along with Ms. Chhaya B Parekh who also invested in the said Juhu Bungalow and

her claim of deduction u/s. 54F was allowed by the Revenue and it was not challenged before the Hon'ble Bombay High Court on the ground that investment in Juhu Bungalow tantamount to 'symbolic purchase of residential property' and not 'real purchase of the residential property'. The decision of the Hon'ble Bombay High Court was available before the CIT(A) at the time of adjudication of the appeal in the case of the assessee. The CIT(A) refused to consider and follow the said decision of Hon'ble Bombay High court in the case of Mrs. Chhaya B. Parekh on identical facts with respect to same transaction of sale of property (shop and garage) at Tirupati shopping complex, where-in the assessee was co-owner with said Mrs Chhaya B. Parekh as well with respect to purchase of Juhu Bungalow(new asset) which was also jointly purchased by the assessee along with the said Mrs. Chhaya B Parekh and thereafter the said bungalow was demolished after 2 years and 8 months after its acquisition by the assessee and said Mrs Chhaya B. Parekh who is sister-in-law of the assessee.

7. The ld. D.R. submitted that the destruction of asset was involuntary due to fire in the case of Vaniya Silk Mills Private Limited(supra) while in the case of the assessee it was a voluntary act of demolition of the bungalow. There was a transfer of asset hence it is an extinguishment of right of the assessee in the bungalow.The CIT(A) has given a finding that it was due to intervention of the assessee that the Juhu bungalow (new asset) was demolished prior to completion of three years from the date of acquisition which has violated provisions of Section 54F(3) of the Act. The ld. DR also tried to distinguish the case of the assessee with that of Mrs. Chhaya B Parekh which was adjudicated by Hon'ble Bombay High Court.

8. The ld. AR submitted in rejoinder that judgment of Hon'ble Bombay High Court in the case of Mrs. Chhaya B Parekh has not been followed by CIT(A) despite being brought to the notice of the CIT(A). The facts in the case of Mrs

Chhaya B Parekh and of the assessee are identical and hence the judgment of Hon'ble Bombay High Court in the case of Mrs Chhaya B Parekh need to be followed in the case of the assessee and relief need to be given to the assessee on the same lines.

9. We have considered the rival contention and also perused the material including the case laws cited by both the sides. We have observed that the assessee is co-owner of the premises being shop No.6 and garage no. 6A standing in the name of M/s Parekh Brothers in the building known as Tirupati Shopping Complex, Bhulabhai Desai Road, Mumbai-400026 which was acquired by the assessee along with his sister-in-law, Mrs Chhaya B. Parekh and was held to be owned on co-ownership basis by the Tribunal. The same has been sold and the assessee has acquired the residential Bungalow(new asset) at Juhu along with his sister-in-law Mrs. Chhaya B. Parekh. The CIT(A) denied the benefit to the assessee due to the fact that the bungalow which was purchased has been demolished within a period of three years hence the condition laid down in section 54F(3) of the Act have been violated. However, the Hon'ble Bombay High Court in the case of Mrs.Chhaya B. Parekh has refused to admit the question of law referred by the Revenue and dismissed the appeal of the Revenue by approving the decision of the Tribunal in the case of Mrs Chhaya B Parekh where-in it was held by Hon'ble Bombay High Court that demolition of bungalow will not tantamount to transfer. While dismissing the said appeal of the Revenue, Hon'ble Bombay High Court has clearly noted in the judgment that Revenue is not disputing the entitlement of Mrs Chhaya B Parekh u/s.54F of the Act on the purchase of Bungalow property(new asset). The facts in the case of the assessee are identical to the facts in the case of Mrs Chhaya B. Parekh as the transactions with respect to the sale and purchase of the impugned properties are same where both, the assessee and Mrs Chhaya B Parekh are co-owners. The judgment of Hon'ble Bombay High Court in the case of Mrs.

Chhaya B. Parekh as reported in 2013 TaxPub(DT) 1390 (Bom-HC) : (2013) 051 (I) ITCL 0292 whereby the Hon'ble Bombay High Court dismissed the appeal of the Revenue and approving the orders of the Tribunal dismissing the appeal of the Revenue in the case of Mrs Chhaya B Parekh is reproduced hereunder:

“In this appeal by the revenue, the following question of law has been proposed for our consideration.

Whether on the facts and circumstances of the case and in law, the Tribunal was correct in confirming the order of CIT(A) allowing the assessee's claim of exemption u/s 54F of the Act even though the Juhu Bungalow which the Assessee had purchased as co-owner had been demolished much before completing 3 years of purchase and no new bungalow was constructed thereby violating the condition u/s 54F(3) of the Act that the new property should not be transferred within a period of three years and also ignoring that the facts in the Supreme Court case of Vania Silk Mills P. Ltd. v. CIT (1991) 191 ITR 647 (SC) were clearly distinguishable from the facts of this case?

2. *The basic dispute between the parties is whether the respondent-assessee is entitled to benefit of section 54E of the Income Tax Act, 1961 (the Act) when the asset is demolished within a period of three years from its purchase.*

3. *The revenue does not dispute the entitlement of the respondent-assessee under section 54F of the Act on the purchase of the bungalow property. However, the grievance of the revenue is that as the respondent had demolished the bungalow within 3 years of its purchase, the same would amount to transfer and would be hit by section 54F(3) of the Act. Consequently, in the previous year relevant to the assessment year*

under consideration the capital gain tax would be payable on the amounts not charged due to the benefit availed of section 54F of the Act as held by the assessing officer in his order dated 30-10-2009.

4. *The Commissioner of Income Tax (Appeals) (the CIT (A) by his order dated 18-03-2010 followed the appeal of the respondent-assess. The CIT(A) held that the demolition of the structure would not constitute a transfer of the assets in terms of section 54(3) of the Act. Being aggrieved the revenue carried the matter in appeal to the Tribunal. By order dated 16-05-2012, the Tribunal dismissed the 'appeal of the revenue by placing reliance upon the decision of the Apex Court in the matter of Vania Silk Mills P. Ltd. v. CIT (1991) 191 ITR 647 (SC). In the above case, the Apex Court has held that when an asset is destroyed, there is no question of transfer taking place under the Act. The Apex court held that in terms of the Act that the words Extinguishment of any right in section 2(47) of the Act, does not include an extinguishment of right on account of destruction. It has to be an extinguishment of right on account of transfer. Thus, a destruction of assets when not on account of any transfer would not be hit by section 54F (3) of the Act.*

5. *Counsel for the revenue seeks to distinguish the decision of the Apex Court in Vania Silk Mills P. Ltd. (Supra) that the destruction in that case took place because of fire and hence it was involuntary This distinction is of no consequence. In our view of the decision of the Apex Court in Vania Silk Mills (Supra) would squarely apply to the facts of the present case.*

6. *In view of the above, we see no reason to entertain the proposed question of law. Accordingly, the appeal is dismissed with no order as to costs.”*

The facts in the case of the assessee is identical to the facts in the case of Mrs. Chhaya B. Parekh and hence the assessee cannot be denied the entitlement to deduction u/s. 54F of the Act on the purchase of same Juhu bungalow property(new asset) on pretext that the same was 'symbolic purchase of residential property' and not the 'real purchase of residential property' on the allegation that the same was never occupied after its acquisition by the assessee and the said co-owner Mrs Chhaya B. Parekh till demolition of the said bungalow after 2 years 8 months of its acquisition. The CIT(A) is bound to follow the decision of the Hon'ble Bombay High Court in the case of the assessee's sister-in-law Mrs Chhaya B Parekh as the facts are identical in the case of the assessee to that of the assessee's sister-in-law Mrs Chhaya B. Parekh case, whereby Hon'ble Bombay High Court has refused to admit the question of law referred by the Revenue and instead approved the orders of the Tribunal dismissing the Revenue appeal in the case of Mrs. Chhaya B Parekh. When the Mumbai-Tribunal set aside the issues to the file of the CIT(A) in assessee's own case in first round of litigation vide its orders dated 30-01-2013 in ITA No. 6596/Mum/2011 and CO no. 37/Mum/2012 , it did not had the benefit of judgment of Hon'ble Bombay High Court in the case of Mrs Chhaya B Parekh which judgment in ITA(L) No.1583 of 2012 was pronounced on 24-01-2013 , while hearing by the Mumbai-Tribunal in the afore-stated appeal and CO stood concluded on 11-01-2013 i.e. prior to the pronouncement of judgment of the Hon'ble Bombay High Court in the case of Mrs Chhaya B. Parekh(supra). The CIT(A) while rendering its order on 30-08-2013 clearly had the benefit of afore-stated judgment of Hon'ble Bombay High Court pronounced on 24-01-2013 in the case of Mrs Chhaya B. Parekh and the CIT(A) fell into an error by making an attempt to distinguish the judgment of Hon'ble Bombay High Court by holding that judgment of Hon'ble Apex Court in the case of Grace Collins(supra) was not brought to the notice of Hon'ble Bombay High Court while judgment of Vania Silk Mills Limited(supra) was brought to the notice of Hon'ble Bombay High Court, which judgment of

Vania Silk Mills stood overruled by Hon'ble Supreme Court by three member bench of Hon'ble Supreme Court in the case of Grace Collis(supra). The judgment of Hon'ble Supreme Court in Grace Collis has been considered and distinguished by Hon'ble Madras High Court in the case of Neelamalai Agro Industries Limited(supra) whereby it has held by the Hon'ble Madras High Court *that the law laid down in Vania Silk Mills (P.) Ltd.'s case (supra), that extinguishment of rights in a capital asset as a necessary consequence of destruction of the asset does not amount to transfer, has not been overruled by the Apex Court in the case of Mrs. Grace Collis (supra), as under :*

“6. That the building was completely destroyed in the fire is undisputed. The capital asset thus was not in existence when the assessee received the compensation. The asset was not available for being owned, used or enjoyed by anyone.

7. ‘Capital asset’ is defined in section 2(14) of the Act. It is defined as meaning property of any kind held by an assessee whether or not connected with his business or profession. The definition of ‘transfer’ in section 2(47) of the Act as it stood at the commencement of the year 1976-77 read thus :

"transfer", in relation to a capital asset, includes,—

(i) the sale, exchange or relinquishment of the asset; or

(ii) the extinguishment of any rights therein; or

(iii) the compulsory acquisition thereof under any law.

The modes of transfer mentioned in this definition are : sale, exchange, compulsory acquisition, relinquishment of the asset, and extinguishment of any rights in the capital asset. The definition is an inclusive definition,

and modes of transfer other than those referred to in the definition are also capable of being included in this definition. All the modes mentioned in the definition appear to have one thing in common viz., that the capital asset would continue to exist after the transfer by anyone of those modes.

8. *'Capital gains' is dealt with in Chapter IV of the Act in sections 45 to 55A. Section 45 of the Act refers to profits or gains arising from the transfer of a capital asset. The section which brings the capital gains to charge of tax is section 45. What is to be taxed is the profit or the gain arising from the 'transfer of a capital asset'. This also implies the continued availability of the asset even after the transfer. The extent of the gain is to be ascertained with reference to the cost of acquisition of the asset. The continued availability of the asset even after the transfer, though not stated in so many words, is clearly implicit in the definition of 'transfer', as also in the charging section.*

9. *When a thing is destroyed by fire or when a ship sinks into the sea, the capital asset is no longer available for being owned, used or enjoyed by anyone including the assessee. With the destruction of the asset, the rights of the assessee in that asset also would be destroyed. The destruction of such rights in an asset consequent upon the assets ceasing to exist is a situation which is not contemplated either in the definition of 'transfer', or in the charging section.*

10. *The Supreme Court in the case of Vania Silk Mills (P.) Ltd. v. CIT [1991] 191 ITR 647¹ dealt with a case where the assessee's machineries had been destroyed in a fire and for which it had received*

the amount payable by the insurer who had insured those machineries against the risk of fire. The Court in that case held thus:

"When an asset is destroyed there is no question of transferring it to others. The destruction or loss of the asset, no doubt, brings about the destruction of the right of the owner or possessor of the asset, in it. But it is not on account of transfer. It is on account of the disappearance of the asset. The extinguishment of right in the asset on account of extinguishment of the asset itself is not a transfer of the right but its destruction. By no stretch of imagination can the destruction of the right on account of the destruction of the asset be equated with the extinguishment of right on account of its transfer."

Thus, the Court held that the destruction of the asset which, as a consequence brings about the extinguishment of rights in that asset, cannot be equated with the extinguishment of rights of the assessee on the transfer of the asset.

11. *This Court in the case of Smt. Agnes Corera v. CIT [2001] 249 ITR 317² dealt with a case where the boat owned by the assessee and which had been insured against loss, sank in the sea. The Court held that the amount received by the assessee from the insurer who had insured the boat against such loss was not taxable by treating part of the amount received from the insurer as capital gain. While doing so, the Court relied upon the observation of the Apex Court in the case of Vania Silk Mills (P.) Ltd. (supra) that,*

"whatever the mode by which the transfer was brought about, the existence of the asset during the process of transfer was a precondition. Unless the asset existed in fact, there could not be a transfer of it."

12. *Learned counsel for the revenue, however, contended that the law declared by the Apex Court in the case of Vania Silk Mills (P.) Ltd. (supra) is no longer good law, and that that decision has been both expressly and implidely been overruled by a three-Judge Bench in the case of CIT v. Mrs. Grace Collis [2001] 248 ITR 323¹. In the case of Mrs. Grace Collis (supra), the Court was concerned with the question as to whether there is a transfer of the shares when the amalgamation of the Company whose shares are held by the assessee is ordered by the Court with another Company. The Court held that the rights of the assessee in the capital asset, viz., the shares in the amalgamating Company stood extinguished upon the amalgamation of the amalgamating Company with the amalgamated Company and that,*

"There was, therefore, a transfer of the shares in the amalgamating Company within the meaning of Section 2(47). It was, therefore, a transaction to which section 47(vii) applied and, consequently, the cost to the assesseees of the acquisition of the shares of the amalgamated company had to be determined in accordance with the provisions of section 49(2), that is to say, the cost was deemed to be the cost of acquisition by the assesseees on their shares in the amalgamating company."

13. *On the amalgamation of one company with another, the assets and liabilities of the amalgamating company are taken over by the amalgamated company. Those assets and liabilities do not cease to exist when*

amalgamation takes place. They continue to exist. The ownership of those assets stand transferred to the amalgamated company.

14. *The rights of the shareholder in the shares held by him or her in the amalgamating company which had owned the assets, are replaced by the rights given to such shareholders in the shares of the amalgamated company which takes over the assets and liabilities of the amalgamating company. Shares in the amalgamated company are allotted to the shareholder of the amalgamating company, as the consideration for the transfer of the assets of the amalgamating company, the ratio being determined with reference to the value of the respective shares which is dependent upon the value of the assets and prospects of the company. Despite the extinguishment of the rights in the shares of the amalgamating company on its dissolution, the assets which gave value to those shares prior to amalgamation continue to exist, now under the ownership of the amalgamated company, and may provide added value to the shares of that company.*

15. *The extinguishment of rights in the capital asset referred to in the definition of 'transfer' in section 2(47) of the Act, therefore, would clearly apply to a case where the rights in the shares in the amalgamating company are extinguished on amalgamation to be replaced by shares in the amalgamated company, which after amalgamation is the owner of the assets transferred to it as a consequence of the amalgamation, and which will thereafter have the ownership, use and benefit of those assets.*

16. *The case of amalgamation of companies and the extinguishment of rights of the shareholder in the amalgamating company is no way*

comparable to the destruction of the assets which as a consequence brings about the extinguishment of the rights of the assessee-owner in such assets.

17. *In the case of Mrs. Grace Collis (supra), at page 330 of the Reports, the Court noticed the submission made by counsel for the Revenue thus:*

"Learned counsel for the Revenue submitted that having held that the payment in settlement of the insurance claim was not in consideration of the transfer to the insurer of the damaged machinery and that, therefore, there was no transfer within the meaning of section 45, it was unnecessary for this Court in Vania Silk Mills (P.) Ltd.'s case [1991] 191 ITR 647 to go on to consider the definition in section 2(47) and the meaning to be attached to the expression 'extinguishment of any rights therein'. In his submission, the decision in Vania Silk Mills (P.) Ltd.'s case [1991] 191 ITR 647 was to this extent orbiter dicta".

It is only to the extent of that orbiter dicta, that the decision rendered in the case of Mrs. Grace Collis (supra) can be said to be at variance with the decision rendered in the case of Vania Silk Mills (P.) Ltd. (supra). In the case of Mrs. Grace Collis (supra), the Court considered the terms 'extinguishment of any rights therein' and the definition of 'transfer' in section 2(47) of the Act. The Court did not approve limiting the effect of the words 'extinguishment of any rights therein' in the definition of 'transfer' in section 2(47) of the Income-tax Act, to extinguishment on account of transfer. The Court held,

"As we read it, therefore, the expression does include the extinguishment of rights in a capital asset independent of and otherwise than on account of transfer."

18. *In the case of Mrs. Grace Collis (supra), the Court did not have occasion to go into the question as to whether the destruction of a capital asset which as a consequence brings about the extinguishment of the rights of the assessee-owner in such asset, would amount to transfer. The Court did not hold that Vania Silk Mills (P.) Ltd.'s case (supra) was wrongly decided, or that the definition of 'transfer' in section 2(47), particularly, the use of the words 'extinguishment of any rights therein' would cover cases of destruction of the capital asset. Cases such as the destruction of the capital asset in a fire, or its complete loss as in the case of sinking of a vessel in the sea, cannot be regarded as having been brought within the fold of definition of 'transfer' in section 2(47), by reason of what has been said and laid down in the case of Mrs. Grace Collis (supra).*

19. *It is well-settled that the words and expression used in a judgment are not to be read as statutory provisions. Situations which did not arise for consideration and were, in fact, not considered are not to be regarded as having been considered. It is significant that the argument advanced for the Revenue before the Court in the case of Mrs. Grace Collis (supra) was not that the case of Vania Silk Mills (P.) Ltd. (supra) was wrongly decided. On the other hand, the argument before the Court was that though that decision on facts was correct, certain observations which were not necessary for the case and which the Revenue considered to be erroneous had been made, and were required to be overruled.*

20. The law laid down in Vania Silk Mills (P.) Ltd.'s case (supra), that extinguishment of rights in a capital asset as a necessary consequence of destruction of the asset does not amount to transfer, has not been overruled by the Apex Court in the case of Mrs. Grace Collis (supra).

21. Our answer to the question referred is, therefore, in the negative, in favour of the assessee, and against the revenue."

Judicial discipline and rule of law demand and requires that lower judicial authorities should and must follow the decisions/judgment of higher judicial authorities on identical facts. Thus, the CIT(A) was bound by law to follow the jurisdictional High Court judgment in the case of Mrs Chhaya B. Parekh(supra) . In our considered view that this instant case is squarely covered by the decision of Hon'ble Bombay High Court in the case of Mrs Chhaya B. Parekh(supra) and hence the assessee is entitled for his claim of deduction u/s 54 F of the Act as claimed in the return of income filed with the Revenue. We order accordingly.

10. In the result, the appeal filed by the assessee in ITA NO. 6169/Mum/2013 for the assessment year 2007-08 is allowed.

Order pronounced in the open court on 15th April, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 15-04-2016. को की गई ।

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 15-04-2016

I

व.नि.स./ R.K., Ex. Sr. PS

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

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

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

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