

आयकर अपीलीय अधिकरण “जी” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “G” BENCH, MUMBAI
BEFORE SHRI SANJAY ARORA, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं./I.T.A. No. 6093/Mum/2014

(निर्धारण वर्ष / Assessment Year: 2008-09)

Yogesh Sunderlal Shah, F/107, Shreepal Industrial Estate, New Oshivara Bridge, S. V. Road, Jogeshwari (W), Mumbai-400 102	बनाम/ Vs.	Dy. CIT-24(1), C/13, Pratyakshkar Bhavan, BKC, Bandra (E), Mumbai-400 051
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAKPS 2779 L		
(अपीलार्थी / Appellant)	:	(प्रत्यर्थी / Respondent)
अपीलार्थी की ओर से / Appellant by	:	Shri K. Gopal, Adv.
प्रत्यर्थी की ओर से/Respondent by	:	Shri Airiju Jaikaran
सुनवाई की तारीख / Date of Hearing	:	22.6.2016
घोषणा की तारीख / Date of Pronouncement	:	30.6.2016

आदेश / ORDER

Per Sanjay Arora, A. M.:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-34, Mumbai ('CIT(A)' for short) dated 06.8.2014, confirming the levy of penalty u/s. 271(1)(c) of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2008-09 vide order dated 29.4.2013.

2. The issue in the instant appeal is the sustainability or otherwise in law of the penalty u/s. 271(1)(c) of the Act, i.e., in the given facts and circumstances of the case.

The facts are admitted and undisputed. The assessee-individual sold his residential premises during the year, and acquired another on transferrable tenancy (for, as stated, 999 years) basis, claiming exemption u/s. 54 of the Act on the capital gains arising on the said sale in respect of the new residential flat. This was denied by the Revenue, whose case stands upheld by the Tribunal per its decision dated 21.9.2012 (in ITA No. 1876/Mum/2012/copy on record). The tribunal decided the issue against the assessee holding that the word 'purchase' as occurring in section 54, howsoever wide, has its limits implicit therein, i.e., would not extent to include a case where a person holds tenancy rights, even if for an extended period, and which is otherwise liable to be considered as a capital asset (refer: *CIT vs. Khimline Pumps Ltd.* [2002] 258 ITR 459 (Bom); *Cadell Wearing Mill Co. Ltd. vs. UOI* [2001] 249 ITR 265 (Bom)). Further, that the extended meaning of the word 'owner' would not include a deemed owner, so that reference by the assessee to the provisions of section 27(iiiB) and section 269UA(f) was, in its view, of no moment. Reliance stands placed by it on the decisions in the case of *CIT vs. T. N. Aravinda Reddy* [1979] 120 ITR 46 (SC); *CIT vs. Gopaldas H. Hansrajani* [1999] 239 ITR 523 (Bom); and *Hameed Jaffery vs. CIT* [1997] 227 ITR 724 (Bom), each explaining the scope of the word 'purchase' and, further, only in the context of section 54 itself. The well-settled principle of interpretation of statutes, i.e., that where two views are possible, the Court shall be inclined to favour one which is more beneficial to the subject (assessee), was also found by it as inapplicable in-as-much as there was no ambiguity in the language of the provision, employing the word 'purchase' and 'construction' *qua* the new capital asset, so that the benefit of exemption was only where the same was acquired by either of the two specified modes. Further, the said principle is even otherwise not applicable in case of an exemption provision, which is to be strictly construed, advertent to the decision by the Apex Court in *Nova Pan India Ltd.* (reported at 3 SCR 549). The penalty being levied and confirmed on the same basis, the assessee is in second appeal.

3. We have heard the parties, and perused the material on record.

In our view, the assessee stands to succeed. That a plausible view shall save penalty is trite law, and for which case law is legion, to some of which we may refer to, as follows: *Mak Data (P.) Ltd. vs. CIT* [2013] 358 ITR 593 (SC); *Union of India v. Dharmendra Textile Processors* [2008] 306 ITR 277 (SC); *K.P. Madhusudhanan vs. CIT* [2001] 251 ITR 99 (SC); *B.A. Balasubramaniam and Bros v. CIT* [1999] 236 ITR 977 (SC); *Addl. CIT vs. Jeevan Lal Shah* [1994] 205 ITR 244 (SC); *CIT vs. Nathulal Agarwala & Sons* [1985] 153 ITR 292 (Pat)(FB).

What the assessee has acquired (at a cost of Rs.185 lacs, also incurring the obligation for a peppercorn rent of Rs.500/- per month), is an interest in a residential flat, which can itself be termed as an immovable property, with the acquisition thus further qualifying as a transfer u/s. 2(47) of the Act. The Apex Court has clarified per its decisions in the case of *CIT vs. Podar Cement (P) Ltd.* [1997] 226 ITR 0625 (SC); *R. B. Jodha Mal Kuthilal vs. CIT* [1971] 82 ITR 570 (SC); as well as the Hon'ble jurisdictional High Court in *CIT vs. Dr. Laxmichand Narpal Nagda* [1995] 211 ITR 804 (Bom), that an owner is a person who exercises the rights of an owner in his own right, and the legal title to the property was not necessary. The question that therefore arises for consideration, and as rightly pointed by the tribunal, is if s. 54 contemplates 'ownership' by other than the specified modes (of 'purchase' and 'construction'), or could include other modes, as by transfer of perpetual interest therein, as well. Considered thus, the assessee's claim may perhaps even not qualify to be regarded as 'wrong' *per se*, but only a different, albeit plausible, view. We have, further, in arriving at our foregoing decision, holding non-exigibility to penalty in the present case, also referred to and considered the decisions relied upon by the tribunal in the quantum proceedings (refer para 2). None of them pertain to a case of perpetual tenancy, which obtains in the instant case. Though, surely, the assessee ought to have per its return of income (PB pgs. 2-3) clarified this aspect, stating clearly of the

'purchase' being on transferable tenancy basis, the fact of the matter is that he has taken a considered, possible view of the matter, establishing his *bona fides*. Why, the tribunal has itself in *Archana Parasrampuria v. ITO* [2015] 68 SOT 550 (Mum)(copy on record) upheld the claim for exemption u/s. 54 on a claim made on acquisition of residential property on transferable tenancy basis. Further, the fact that the appeal against the order by the tribunal in the instant case stands admitted by the Hon'ble Court (PB pgs. 61-62) is also relevant. Even though the same may not by itself be conclusive of the matter, as explained in *CIT vs. Dharmshi B. Shah* [2014] 366 ITR 140 (Guj) and *CIT vs. Splender Construction* [2013] 352 ITR 588 (Del), the assessee in the present case has in our view, as afore-stated, established to have an arguable case.

4. In the result, the assessee's appeal is allowed.

Order pronounced in the open court on June 30, 2016

Sd/-

(Amarjit Singh)

न्यायिक सदस्य / Judicial Member

Sd/-

(Sanjay Arora)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 30.06.2016

व.नि.स./Roshani, 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)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai