

**IN THE INCOME TAX APPELLATE TRIBUNAL "F" BENCH, MUMBAI
BEFORE SHRI RAJENDRA, AM AND SHRI RAVISH SOOD, JM**

ITA Nos. 3788/Mum/2016

(निर्धारण वर्ष / Assessment Years:2011-12)

Dy. Commissioner of Income Tax-5(2)(2), Room No. 571, 5 th Floor, Aayakar Bhawan, M.K. Road, Mumbai-400 020	बनाम/ Vs.	Shri Dawood Abdulhussain Gandhi, 102, Lohar Chawl, Mumbai 400002.
स्थायी लेखा सं./जीआइआर सं./PAN No.		AABPG4337K
(अपीलार्थी /Revenue)	:	(प्रत्यर्थी / Assessee)

अपीलार्थी की ओर से / Revenue by	:	Ms. Pooja Swaroop, D.R
प्रत्यर्थी की ओर से / Assessee by	:	Shri Nitesh Joshi, A.R

सुनवाई की तारीख / Date of Hearing	:	19.01.2018
घोषणा की तारीख / Date of Pronouncement	:	31.01.2018

आदेश / O R D E R

PER RAVISH SOOD, JUDICIAL MEMBER:

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-10, Mumbai, dated 17.02.2016, which in itself arises from the order passed by the A.O under Sec.143(3) of the Income tax Act, 1961 (for short 'Act'), dated 04.03.2014. The revenue assailing the order passed by the CIT(A) had raised before us the following grounds of appeal:-

- “1(a). On the facts and in the circumstances of the case, the Ld. CIT(A) erred in directing the AO to allow the exemption claimed by the assessee under section 54F without appreciating the fact that the assessee was already the beneficial owner and co-owner of two properties on the date of transfer of the original asset i.e. tenancy rights in ‘Sylverton Building’.
- 1(b). On the facts and in the circumstances of the case, the Ld. CIT(A) failed to appreciate that the proviso to section 54F(1) stipulates that the provisions of section 54F(1) shall not apply where the assessee owns more than one residential house, other than the new asset, on the date of transfer of the original asset.
- 1(c). On the facts and in the circumstances of the case, the Ld. CIT(A) erred in holding that the Tara Manzil & Noor Manzil properties owned by the assessee cannot be considered as residential properties in the true sense of the term within the meaning of section 54F of the Income Tax Act, 1916.

The appellant prays that the order of the Ld. CIT(A) be set aside and the order of the AO be restored.

The appellant craves leave to amend or alter any ground or add any other grounds which may be necessary.

2. Briefly stated, the facts of the case are that the assessee had e-filed his return of income for A.Y. 2011-12 on 29.03.2013 declaring total income of Rs. 5,96,947/-. The return of income filed by the assessee was processed as such under Sec. 143(1) of the Act. The case of the assessee was thereafter taken up for scrutiny assessment under Sec. 143(2).

3. The A.O during the course of the assessment proceedings noticed that the assessee had received an amount of Rs. 1,00,00,000/- on surrender of tenancy rights in respect of a flat at Sylverton Building, Wodehouse Road, Colaba, Mumbai. The assessee along with his wife Mrs. Nilofer Gandhi had made an investment of Rs. 1,84,91,350/- in a residential house with Oberoi Construction Pvt. Ltd., viz. Oberoi Splendour, Building No.1, ‘C’ Wing, Mumbai. That as the investment made by the assessee towards the purchase of the new residential house was in excess of the amount received on surrender

of the aforesaid tenancy rights, therefore, the capital gain arising there from was claimed by him as exempt under Sec. 54F of the Act. The A.O being of the view that as the assessee at the time of purchase of the new residential property, i.e. flat from Oberoi Constructions, owned more than one house property, therefore, he stood disentitled for claim of deduction under Sec. 54F of the Act. The assessee in order to dispel the doubts raised by the A.O as regards the entitlement of the assessee towards deduction under Sec. 54F, supported his claim primarily on three grounds, viz. (i) that both the properties, i.e. Tara Manzil and Noor Manzil were commercial properties; (ii) that as the share of ownership of the assessee in the respective properties, i.e. Tara Manzil and Noor Manzil was 25% and 20%, therefore, the assessee was not the absolute owner of the said properties; and (iii) that as both the properties, i.e. Tara Manzil and Noor Manzil were tenanted properties, wherein the tenants with whom the quasi-ownership rights in the respective properties stood vested were protected under the provisions of Maharashtra Rent Control Act, 1999, therefore, the said respective properties could by no means be used by the assessee for the purpose of his own residence. However, the submissions of the assessee did not find favour with the A.O who disallowed the claim of deduction raised by the assessee under Sec. 54F and brought the LTCG of Rs. 1,00,00,000/- arising on the surrender of the tenancy rights to tax in the hands of the assessee.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The CIT(A) after deliberating on the contentions of the assessee, viz. (i) the properties under consideration, i.e. Tara Manzil and Noor Manzil were commercial properties and not residential properties; (ii) that as the properties were tenanted and the assessee did not have any occupancy rights in the said properties but only

limited legal ownership and rent collection rights; and (iii) that even if the respective properties were to be taken as residential properties, as the assessee had only a share in the properties, i.e. 25 % in Tara Manzil and 20% in Noor Manzil, therefore, he was not the absolute owner of the same, did find favour with the same and held that the assessee was duly entitled for claim of deduction under Sec. 54F as raised by him in his return of income.

5. The revenue being aggrieved with the order the CIT(A) had carried the matter in appeal before us. The Learned Authorized Representative (for short 'A.R') for the assessee Mr. Nitesh Joshi took us through the relevant observations of the lower authorities. The Ld. A.R. submitted that the claim of deduction raised by the assessee under Sec. 54F was well in order and had wrongly been dislodged by the A.O. It was submitted by Mr. Joshi that as both of the properties owned by the assessee i.e. Tara Manzil and Noor Manzil were commercial properties, therefore, the *proviso* of Sec. 54F(1) which contemplates ownership of more than one residential house, was thus not applicable to the case of the assessee. It was further submitted by Mr. Joshi that as the assessee was holding only fractional ownership in the aforementioned properties, i.e. Tara Manzil and Noor Manzil, therefore, the same could not be construed as an ownership of more than one residential house as contemplated in the *proviso* of Sec. 54F(1). The Ld. A.R in order to drive home his aforesaid contention relied on the order passed by a coordinate bench of the Tribunal in the case **The Income Tax Officer Vs. Shri Rasiklal N. Satra (2006) 98 ITD 335 (Mum)**. The Ld. A.R. also placed reliance on the judgment of the **Hon'ble High Court of Madras** in the case of **Dr. P.K. Vasanthi Rangarajan Vs. CIT (2012) 209 Taxman 628 (Mad)**. Per Contra the

Ld. Departmental Representative (for short 'D.R') relied on the order of the A.O.

6. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find that our indulgence in the present appeal is sought for adjudicating as to whether the claim of exemption raised by the assessee under Sec. 54F of the Act is in order, or not. We find that the assessee who had received an amount of Rs. 1,00,00,000/- on surrender of his tenancy rights in respect of a flat at Sylverton Building, Wodehouse Road, Colaba, Mumbai, had claimed the same as exempt under Sec. 54F by making an investment in a residential house with Oberoi Construction Pvt. Ltd., viz. Oberoi Splendour, Building No.1, 'C' Wing, Mumbai. The A.O while framing the assessment held a conviction that as the assessee on the date of purchasing the new residential property, viz. Oberoi Splendour, owned two house properties, i.e. Tara Manzil and Noor Manzil, therefore, the assessee as per *proviso* of Sec. 54F(1) was disqualified for claiming the deduction under the said statutory provision. We have deliberated at length on the observations of the CIT(A) and find that he had observed that the two house properties, i.e. Tara Manzil and Noor Manzil which were owned by the assessee before purchase of the new property from Oberoi Constructions, were commercial properties and not residential properties. We find that nothing has been placed on record, nor averred before us by the Ld. D.R. which could persuade us to conclude that the aforesaid observations of the CIT(A) are either perverse or militated against the actual factual position. We find that the disqualification contemplated in the *proviso* of Sec. 54F(1) comes into play only where the assessee on the date of transfer of the original asset owns more than one residential house, other than the new asset.

We are of the considered view that as observed by us hereinabove the properties under consideration, i.e. Tara Manzil and Noor Manzil which were owned by the assessee on the date of surrender of the tenancy rights were commercial properties and not a residential house, therefore, the *proviso* of Sec. 54F(1) would not be applicable to the case of the assessee.

7. We have further deliberated on the claim of the assessee that as he was not the absolute owner of the aforesaid properties, i.e. Tara Manzil and Noor Manzil, but was only a co-owner having fractional ownership in the said respective properties, therefore, the precondition of being the owner of more than one residential house, other than the new asset, on the date of transfer of the original asset was not satisfied. We find substantial force in the contention of the Ld. A.R and are of the considered view that as the assessee on the date of making of an investment in a residential house with Oberoi Construction Pvt. Ltd., viz. Oberoi Splendour, Building No.1, 'C' Wing, Mumbai, was vested with only a fractional ownership in the aforementioned properties, i.e. 25% in Tara Manzil and 20% in Noor Manzil, therefore, it can safely be concluded that the assessee was not the owner of more than one residential house on the aforesaid relevant date. We may herein observe that the term owns more than one residential house used in the *proviso* of Sec. 54F(1) has to be strictly construed and accorded its literal meaning, which thus would not bring within its sweep a partial and fractional ownership of a property. We are of the considered view that if the legislature in all its wisdom would had sought to even bring a partial or fractional ownership of a residential house also within the gamut of the disqualification contemplated under the aforesaid statutory provision, viz. Sec. 54F(1), then, it would had specifically provided for the same. However, as the

partial or fractional ownership of a residential house does not find a place in the set of circumstances where an assessee is precluded from claiming deduction under Sec. 54F, therefore, going by the rule of strict literal interpretation, such a disqualification cannot be read by us in the said statutory provision. We find that a similar view had been taken by a coordinate bench of the Tribunal in the case of **The Income Tax Officer Vs. Shri Rasiklal N. Satra (2006) 98 ITD 335 (Mum)**, wherein the Tribunal while deliberating on the entitlement of the assessee towards claim of deduction under Sec. 54F had distinguished a joint ownership as against an absolute ownership of a residential property, by observing as under :

"7. The only question remains as to whether assessee can be said to be the owner of that residential house. The legislature has used the word "a" before the words "residential house". In our opinion, it must mean a complete residential house and would not include shared interest in a residential house. Where the property is owned by more than one person, it cannot be said that any one of them is the owner of the property. In such case, no individual person on his own can sell the entire property. No doubt, he can sell his share of interest in the property but as far as the property is considered, it would continue to be owned by co-owners. Joint ownership is different from absolute ownership. In the case of residential unit, none of the co-owners can claim that he is the owner of residential house. Ownership of a residential house, in our opinion, means ownership to the exclusion of all others. Therefore, where a house is jointly owned by two or more persons, none of them can be said to be the owner of that house. This view of ours is fortified by the judgment of the Hon'ble Supreme Court in the case of Seth Banarsi Dass Gupta vs. CIT (1987) 64 CTR (SC) 142 : (1987) 166 ITR 783 (SC), wherein, it was held that a fractional ownership was not sufficient for claiming even fractional depreciation under s. 32 of the Act. Because of this judgment, the legislature had to amend the provisions of s. 32 w.e.f. 1st April, 1997 by using the expression "owned wholly or partly". So, the word "own" would not include a case where a residential house is partly owned by one person or partly owned by other person(s). After the judgment of Supreme Court in the case of Seth Banarsi Dass Gupta (supra), the legislature could also amend the provisions of s. 54F so as to include part ownership. Since the legislature has not amended the provisions of s. 54F, it has to be held that the word "own" in s. 54F would include only the case where a residential house is fully and wholly owned by assessee and consequently would not include a residential house owned by more than one person. In the present case, admittedly the house at Sion, Mumbai, was purchased jointly by assessee and his wife. It is nobody's case that wife is benami of assessee. Therefore, the said house was jointly owned by assessee and his spouse. In view of the discussions made above, it has to be held that assessee was not the owner of

a residential house on the date of transfer of original asset. Consequently, the exemption under s. 54F could not be denied to assessee. The order of the learned CIT(A) is, therefore, upheld.”

8. We have given a thoughtful consideration to the facts of the case and are of the considered view that the case of the assessee before us does not fall within the sweep of the disqualification contemplated in the *proviso* of Sec. 54F(1) for two reasons, viz. (i) the properties, i.e. Tara Manzil and Noor Manzil were not residential properties but commercial properties; and (ii) that the assessee was not the absolute owner of the aforesaid properties, but rather, was only a fractional owner of the same. We thus are of the considered view that for the aforesaid reasons, it can safely be concluded that the observations of the CIT(A) do not suffer from any infirmity. We thus in the backdrop of our aforesaid observations and finding ourselves as being in agreement with the view taken by the coordinate bench of the Tribunal in the case of Shri Rasiklal N. Satra (*supra*), therefore, uphold the order of the CIT(A).

9. The appeal filed by the revenue is dismissed.

Order pronounced in the open court 31.01.2018

Sd/-
(RAJENDRA)
ACCOUNTANT MEMBER
मुंबई Mumbai; दिनांक 31.01.2018
Ps. Rohit Kumar

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

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
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

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

**आयकर अपीलीय अधिकरण, मुंबई / ITAT,
Mumbai**