

**आयकर अपीलीय अधिकरण “एक-सदस्य मामला” न्यायपीठ मुंबई में।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL “SMC” BENCH, MUMBAI**

श्री शमीम याहया, लेखा सदस्य के समक्ष ।  
**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 848/Mum/2017  
(निर्धारण वर्ष / Assessment Year: 2012-13)

Harish Gopal Amin Shop No. 1, Archana Smruti, Mahakali Caves Road, Andheri(E), Mumbai-400 093	<b>बनाम/ Vs.</b>	ITO-9(2)(4), Room No. 623, 6 <sup>th</sup> Floor, Aayakar Bhavan, M. K. Road, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AABPA 4925 B		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)
अपीलार्थी की ओर से / Appellant by	:	Ms. Diukle Hariya
प्रत्यर्थी की ओर से/Respondent by	:	Ms. N. Hemalatha
सुनवाई की तारीख / Date of Hearing	:	15.11.2017
घोषणा की तारीख / Date of Pronouncement	:	05.02.2018

**आदेश / ORDER**

Per Shamim Yahya, A. M.:

This appeal by the assessee is directed against the order of the Commissioner of Income Tax (Appeals) dated 24.11.2016 and pertains to the assessment year 2012-13.

2. The grounds of appeal read as under:

- 1) On facts and circumstances of the case and in law the learned CIT (A) erred in confirming determination of long term capital gains of Rs.24,50,017/-.
- 2) On facts and circumstances of the case and in law the learned CIT (A) erred in confirming determination of long term capital gain in A. Y. 2012-2013 & not in A. Y. 2013-2014 year in which transaction was completed.
- 3) On facts and circumstances of the case and in law the learned CIT (A) erred in not allowing deduction of Rs.11,51,900/- u/s. 54 of the I. T. Act, 1961.
- 4) On facts and circumstances of the case and in law the learned CIT (A) erred in confirming adopting market value of Rs.89,41,096/- u/s. 50C of the I. T. Act, 1961 and not considering sale value of Rs.65,00,000/-.
- 5) On facts and circumstances of the case and in law the learned CIT (A) erred in not considering fact that title of the flat was not marketable on account of not receipt of occupation certificate from BMC.

3. Brief facts of the case are as under:

The assessee company had sold a residential property located at Whispering Woods Building, Powai Vihar Complex, Powai, Mumbai to Mr. Devappa M. Shetty for a consideration of Rs.65,00,000/- on 02.03.2012. The said flat was purchased on 09.06.2008 from Mr. Ramneek Arora for a total value including stamp duty, transfer charges etc. for an amount of Rs.48,12,450/-. According to the Assessing Officer, the aforesaid property was valued at Rs.89,41,096/- by the stamp value authorities. Assessee had not offered any capital gains tax on the transaction therefore, the Assessing Officer issued a show cause asking the assessee as to why capital gain should not be taxed as per following computation:-

Sale consideration	Rs.89,41,096/-
Cost of acquisition - Rs.48,12,450/-	
Indexed cost of acquisition - $48,12,450 * 785/582 =$	Rs.64,91,019/-
Total Long Term Capital Gain	Rs.24,50,017/-

4. After considering the submission of the assessee, Assessing Officer rejected the submissions made with following observations : -

(a) The assessee has neither reported capital gain nor claimed exemption u/s.54(1) of I.T. Act, in his return of income. The assessee has not even bothered to file a revised return with respect to the LTCG earned from sale of residential premises. The fact that assessee has a/so earned Long Term Capital Gain came to the notice of the department only during scrutiny proceedings.

(b) The assessee has not fulfilled the first requirement of depositing the capital gain amount in the prescribed capital gain deposit account before filing his return of income i.e.31. 07,201 2 (in instant case) when the amount was not utilized for acquiring a new residential property. For the sake of clarity, provision of sec. 54 of I. T. Act is reproduced as under:

[1] "Where, in the case of an assessee being an individual or an HUF, the capital gain arises from the transfer of long-term capital asset, being buildings or land 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 year after the date on which the transfer took place purchased] or has within a period of three years after that date [constructed, a residential house] then, instead of the capital gain being charged to income tax as income of the previous year in which the transfer 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 u/s,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 u/s.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.

[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 utilized by him for the purchase or construction of the new asset before the date of furnishing the return of income u/s. 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 u/s.139(1) in an account in any such bank or institution as may be specified in, and utilized 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 purpose of sub section (1), the amount, if any, already utilized 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."

(c) The assessee has claimed that premium charges paid to BMC for additional 0.33 FSI in August 2013 in the name of Shri Harish G. Amin & others should be treated as construction and claim u/s.54 should be awarded to him, is simply an afterthought. Moreover the charges paid by Shri Harish G. Amin and others for premium of additional FSI to BMC is neither in form of purchase of new residential property nor it is construction of new house. Hence, the basic requirement for claim of exemption is not fulfilled by the assessee.

(d) The assessee vide submission dated 19.3.2015 has submitted the proposed addition/alteration plan approved by BMC to the existing building on plot bearing CTS no. 13/11 and 13/12 of village Mulgaon, situated at Mahakali caves road, Andheri (East). The above referred proposed addition/alteration plan is related to Ramaya Jeevan Co-operative Housing Society. This proposal was approved on 09.05.2013. The assessee has paid for FSI on August 2013. The proposed addition or alteration to the society is not purchase of new residential property or construction of new property.

(e) The grant of fungible compensatory FSI by payment of premium charges to BMC is not construction of property approving claim for LTCG u/s.54(1) of the I. T. Act. Moreover, as on today the construction work related to use of permissible FSI has not been completed yet.

(f) The asset was transferred on 02.03.2012 and no new property has been acquired between 01.03.2011 to date of sale.

4.6 The assessee has neither offered any LTCG nor claimed any exemption/ deduction in the return of income. The fact of LTCG was not disclosed before assessment proceedings and was noticed during assessment proceedings only when the ITS details were called for. And the alleged wrong claim of 54(1) has been submitted by assessee only after show cause notice issued for addition of LTCG. The assessee has not offered the LTCG derived by way of sale of property and deprived revenue of its legitimate rights. In view of the facts enumerated above, the Long term capital gain earned by assessee to the tune of Rs.24,50,017/- and not offered for taxation is hereby added to the total income of the assessee. Penalty proceedings u/s.271(1)(c) is hereby initiated for furnishing inaccurate particulars of income and concealment of income."

5. Upon the assessee's appeal, the Id. Commissioner of Income Tax (Appeals)

held as under:

6.1.3 'During appellate proceedings, a written submission was filed which finds place in para 5 of this order. The only effective argument taken by the appellant was that the occupancy certificate from the Municipal Corporation was not issued and the value adopted by the Assessing Officer was higher but assessee did not make any submission regarding non-applicability of provision of section 50C. In respect of the value disputed by the appellant, the Ld. AR did not file any valuation report or any argument regarding non-applicability of provision of section 50C. The value taken by the Registering Authority is based on circle rates which are decided after considering the cost of the land taken and subsequent construction cost etc. in particular areas. Appellant had not produced any material which can prove that value taken by the registering authority is on the higher side, therefore, the contention of the appellant cannot be accepted. Hence, appeal of the assessee on these grounds is dismissed and addition of Rs.24,50,017/- made by the AO is confirmed.

6. Against the above order, the assessee is in appeal before the ITAT.

7. I have heard the counsels and perused the records. On careful consideration, I note that the Assessing Officer has made the addition u/s. 50C on account of the difference between the value as per the agreement for sale paid for by the assessee and the value determined by the Stamp valuation authority. Upon the assessee's appeal,

the Id. Commissioner of Income Tax (Appeals) has noted that the assessee has not made any submission regarding the non applicability of the provision of section 50C. He further noted that in respect of the valuation disputed by the assessee, the assessee did not filed any valuation report or any agreement regarding the non applicability of section 50C of the Act. The Id. Commissioner of Income Tax (Appeals) concluded that the assessee's contention cannot be accepted as the assessee has not produced any material which can prove that the value adopted by the registered authority is on higher side. Hence, the Id. Commissioner of Income Tax (Appeals) has confirmed the addition.

8. In this regard, I note that the assessee has duly raised the objection in the grounds of appeal before the Id. Commissioner of Income Tax (Appeals) and has disputed the value adopted by the stamp value authority. In such circumstances, it was incumbent upon the Id. Commissioner of Income Tax (Appeals) to refer the matter to the departmental valuation cell for obtaining the valuation of the property. Furthermore, despite the ground raised for the claim u/s. 54F, the Id. Commissioner of Income Tax (Appeals) has not adjudicated the same. Hence, in my considered opinion, the issues raised in this appeal needs to be remitted to the file of the Id. Commissioner of Income Tax (Appeals). The Id. Commissioner of Income Tax (Appeals) is accordingly directed to consider the issue afresh and pass the speaking

order in accordance with our observations. Needless not add, the assessee should be granted adequate opportunity of being heard.

9. In the result, this appeal by the assessee stands allowed for statistical purpose.

*Order pronounced in the open court on 05.02.2018*

Sd/-

(Shamim Yahya)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated :05.02.2018

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**