

आयकर अपीलीय अधिकरण “डी” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAM LAL NEGI, JM

आयकर अपील सं./I.T.A. No. 3392/Mum/2016

(निर्धारण वर्ष / Assessment Year: 2011-12)

Kapil Rajkumar Jain 601, Paramount, H. N. Estate, G.B. Road, Patlipada, Thane (W)-400 607	बनाम/ Vs.	ITO, Ward 1(3), Thane
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AFIPJ 4486 N		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Kapil R. Jain
प्रत्यर्थी की ओर से/Respondent by	:	Shri Ram Tiwari

सुनवाई की तारीख / Date of Hearing	:	02.01.2018
घोषणा की तारीख / Date of Pronouncement	:	13.03.2018

आदेश / ORDER

Per Shamim Yahya, A. M.:

This appeal by the assessee is directed against order of the Id. Commissioner of Income Tax (Appeals) dated 08.03.2016 and pertains to assessment year 2011-12.

2. The grounds of appeal read as under:

1 On the facts and in the circumstances of the case and in law the Learned Income-tax Officer Ward 1(3) Thane (hereinafter referred to as Learned A.O.) has erred in not considering deposit of Rs 50 lacs Dated 16/12/2010 with Andhra Bank (the Notified Bank) as deposit [against Long Term Capital Gain

and further erred by treating this amount of Rs 50 lacs as LT Capital gain of assessment year 2011-12.

Clarification-

- Long term Capital gain was estimated at Rs 100 lacs. Appellant was under the notion that there is an Annual ceiling of Rs 50 lacs for deposit under capital Gain Scheme. Hence Appellant deposited Rs 50 Lacs with SBI under capital Gain Scheme and further Rs 50 lacs deposited with Andhra Bank under normal scheme. Deposits with both these banks continued for over 3 years and all the deposit receipts were produced before learned A.O. for consideration.

2- On the facts and in the circumstances of the case and in law, the Learned A.O. has erred in not considering Interest of Rs.6,57,402 paid on Housing loan as Capital Cost for flat no 1002 in Ixora Building, for the period from 31/01/2005 till 31/03/2007 as per details given below. It may please be noted that interest amount of Housing loan " paid during this period of 3 years was nowhere claimed from any other source of income including income from House Property in the relevant I. T. Returns filed by appellant.

Asstt Yr.	Hsg loan Intt	Indexed cost
2005-06	51,670 x 711/480 =	76,536
2006-07	3,06,387 x 711/497 =	4,38,312
2007-08	2,99,345 x 711/519 =	4,10,085
Total	6,57,402	9,24,933

The Learned A.O. has further erred in declining to deduct indexed cost of Rs 9,24,933 on Interest factor from L.T.Cap Gain for which assessee relied upon the latest ITAT Chennai judgment dt 31/10/2012 in the case of Assistant CIT Business Circle-IV V/S Shri C Ramabrahamam. Gist of this Judgment is Attached as annexure-A. for immediate reference.

5. All the above grounds are without prejudice to each other.
3. From the grounds of appeal above it is clear that that effectively the assessee is making two effective issues which are as under:
 1. Issue of deposit of Rs.50 lakh with Andhra bank to be treated as qualifying for deposit under capital gains scheme.
 2. Treatment of interest under housing loan as cost of improvement and application of cost inflation index thereupon.

4. Brief facts of the case are as under:

The assessee had sold a flat on 25.11.2010 for an amount of Rs.2,57,00,000/- and had computed long term capital gain as under:

	Amount(Rs.)	Amount(Rs.)
Sale Prize of flat		2,57,00,000/-
Cost of Flat	67,32,850/-	
Stamp Duty	3,19,310/-	
Registration	31,660/-	
Cost of improvement in account of Membership fee, Society Charges and Podium/ open parking	6,03,650/-	
Expenses incurred on Air Conditioning, furnishing, Remodeling and Flooring	29,70,530/-	
Total	1,06,57,000/-	
Index cost of flat-10657000x711/480		1,57,85,681
Long Term Capital Gain-		99,14,319

The assessee deposited Rs.50,00,000/- in SBI in Capital Gain account scheme and Rs.50,00,000/- in Andhra Bank, which was not a capital gain account scheme and claimed entire capital gain account as exempt. The Assessing Officer found that the assessee has claimed interest (along with indexation) paid on housing loan, as deduction u/s 48 while computing capital gains. This deduction was claimed on the basis of judgment of ITAT Chennai in the case of *ACIT v/s C. Ramabrahman* (A.Y. 2007-08) Dated 31/10/2012. The Assessing Officer held that interest on housing loan cannot be considered as cost of improvement. He held that cost of improvement means that capital expenditure incurred on renovation, addition or alternation to the property. Further any expenditure which is deductible in computing income under the head Income from house property would not be taken as cost improvement. The

Assessing Officer held that interest on housing loan paid to ICICI Bank cannot form part of improvement to the Capital asset. Relying upon the decision in the case of *Smt. S. Valliammai v/s CIT* (1981)127 ITR 713, the Assessing Officer disallowed the interest along with indexation and computed the Long Term Capital Gains as under:

F.Y.	Cost of Improvement/Cost of Flat as per assessee(Rs.)	Indexed cost of improvement/Cost of flat in F.Y. 2010-11 as per assessee (Index Rate 11)(Rs.)	Cost of improvement/Cost of Flat allowable Rs.)	Cost Inflation Index	Allowable Indexed cost of Improvement/Cost of Flat in F.Y. 2010-11 (index Rate 11)(Rs.)
2004-05	Flat cost-6732850 Interest on HBL-51 670	10049570	6732850	480	9973034
2005-06	Addl. Charges paid to builder-10630* Extra work by Cheque-50000* Loan Interest to ICICI Bank-306387	525112		497	00
2006-07	Parking Charges Paid-75000 Podium parking Hiranandani-175000 Loan Interest to ICICI Bank-299345	752571	75000 <u>175000</u>	519	102745 239740
2007-08	Infrastructure deposit-74550 Society Charges-30000 Maintenance Charges-149100 Loan Interest to ICICI Bank-291738 Stamp Duty-319300 Registration fee-31600	1156553	74550 30000 <u>149100</u> 319300 31600	551	96198 38711 192395 00 412019 40776
2008-9	Loan Interest to ICICI Bank-283521 /furniture cost paid to wood Plaza-679500	1176474	<u>679500</u>	582	00 830110
2009-10	Loan Interest to ICICI Bank-274644 Air conditioning cost + Labour-195387	528784	195387	632	00 219810
2010-11	Loan Interest to ICICI Bank-188772	188772	—	711	00
Total		14377836			12145538

(Highlighted amounts not allowed by AO)

Sale Prize of flat	2,57,00,000/-
Indexed cost of fiat including stamp duty and registration and indexed cost of improvement as tabulated above in para 6	1,21,45,538/-
Long Term Capital Gain	1,35,54,462/-

From the table above it is seen that the Assessing Officer computed Capital Gains at Rs.1,35,54,462/- whereas the assessee had computed the same at Rs.99,14,319/-, thus making an addition of Rs. 36,40,143/-.

5. Further, the Assessing Officer allowed the claim of the appellant for the amount of Rs. 50,00,000/- deposited in SBI in Capital Gain account scheme. However the AO disallowed deduction of Rs.50,00,000 deposited in Andhra Bank, which was not a capital gain account scheme which is the second Ground of appeal.

6. Against the above order, the assessee appealed before the Id. Commissioner of Income Tax (Appeals).

7. As regards the issue of claim of interest with indexation as deduction in computing capital gains, the Id. Commissioner of Income Tax (Appeals) elaborately considered the submissions. The Id. Commissioner of Income Tax (Appeals) observed as under:

6.1. During the course of appellant proceedings the appellant was asked whether the interest on housing loan was claimed as deduction u/s 24(b). Vide submission dated 29/02/2016, the appellant submitted copies of the returns and gave a working showing that in the first three years, the interest was capitalized and in subsequent years, the interest was claimed as deduction while Computing Income from House Property. The table submitted by the appellant is reproduced below.

A.Y	HSP Loan Interest paid to ICICI Bank	Returned Income	HSP Loan Interest claimed in IT Return	Balance of Loan Interest available for Capital cost	Cost of inflation index	Indexed cost of Balance of Interest of column 5
1	2	3	4	5	6	7
2005-06	51670	774741	00	51670	480	76536

2006-07	306387	1014659	00	306387	497	438312
2007-08	299345	376080	00	299345	519	410085
2008-09	291738	105570	150000(SOP)*	141738	551	182896
2009-10	283521	149280	150000(SOP)	133521	582	163116
2010-11	274644	163587	274644 (Rental inc.)	00	632	00
2011-12	188772	172990	188772 (Rental Incl.)	00	711	00
Total	1696077		73416	932661		1,27,0945
(B) Indexed cost of Extra work of Rs.60680						86807
C) Total Indexed cost						13,57,752

*SOP(Self occupied Property)

6.2. From the workings, it is seen that the appellant admitted that the interest claimed as deduction u/s 24(b) was not allowable as deduction. However it was requested that the interest paid in 1st 3 years, which was not claimed as deduction and in next 2 years amount which was more than the allowable deduction of Rs.1,50,000 should be indexed and amount of Rs.13,57,752 should be allowed as deduction while computing capital gains. The revised capital gains was submitted as under:

Sale Prize of flat		2,57,00,000
Indexed cost of flat including stamp duty and registration and indexed cost of improvement as tabulated above in para 6	12145538	
Additional Indexed cost of interest allowable	1357752	1,35,03,290
Long Term Capital Gain		1,21,96,710

The revised capital gain was now recomputed at Rs.1,21,96,710 instead of Rs.99,14,319 originally. It was further stated that the deposit value (of money in SBI capital gain scheme and Andhra Bank) with interest amounted to Rs.1,22,06,157 so capital gain is not taxable in year under consideration. However as the assessee could not purchase property in stipulated period of 3 years, hence capital Gain of 1,21,96,700 will be taxable in A.Y. 2014-15.

6.3. I have gone through the submission of the appellant and the assessment order. The A.O is of the view that as the expenditure is incurred after the asset is acquired, therefore it cannot be a part of cost of acquisition. Secondly interest paid on housing loan cannot be a part of cost of improvement as it is not a capital expenditure. Thirdly as the assessee has claimed the interest u/s 24(b) while computing Income from house property, the same cannot be allowed while computing Capital Gains as it amount to double deduction.

8. Thereafter, the Id. Commissioner of Income Tax (Appeals) elaborately considered the provisions of law and the case laws on the subject. The Id. Commissioner of Income Tax (Appeals) concluded as under:

6.6 The judgments discussed above lay down following principles:

a). In view of judgements of Honble SC, in case of RM, Arunachalam's case [1997] 227 ITR 222 and V. S. M. R. Jaga-dishchandran's case [1997] 227 ITR 240 as the appellant had created the mortgage and paid the interest, therefore as per law laid down by SC the appellant is not entitled to claim deduction of interest while computing capital gains.

b). The interest paid to bank and claimed as deduction u/s 24 does not form part of cost of acquisition or cost of Improvement as held by Smt. S. Valliammai v. CIT [1981] 127 ITR 713, which is further followed in Mrs. Umayal Ramanathan by ITAT Chennai and Karnataka High Court in the case of CIT v Maithreyi Pai (1985) 152 ITR 247 (Kar)

c. In view of Joginder Singh Chawla, Appellant Vs Asst. Commissioner of Income Tax -19(3), Mumbai. I.T.A No.349/Mum/2010, the interest which was not claimed as deduction u/s 24(b) and was capitalised is neither cost of acquisition nor cost of improvement.

d. Further Hon'ble SC in Escorts Ltd & Another v Union of India (1993) 199 ITR 43 (SC) held that in the absence of clear statutory indication to the contrary, the statute should not be read so as to permit assessee two deductions. In view of above, the ground of appellant to allow interest on housing loan for computation of capital gain is dismissed. When the interest is not allowable, the question of indexation does not arise. The addition made by the AO is confirmed.

9. As regards the disallowance of Rs.50 lacs not deposited in capital gains scheme, the Id. Commissioner of Income Tax (Appeals) held as under:

8.3. I have carefully examined the submissions of the appellant and the assessment order. As discussed in para 6 above, the AO has computed capital gains of Rs. 1,35,54,462, which is recomputed at Rs. 1,34,67,564 in para 7 above. For claiming exemption, the appellant is required to Purchase or construct a house within 2/3 years from the date of transfer of house. If the amount is not utilised for purchase/ construction of the new property till the due date of submission of the return of income, then it should be deposited in

"Capital Gain Deposit Account" as per provisions of section 54(2) reproduced below.

[(2) The amount of the (i) capital gain which is not appropriated by the assessee the purchase of the new asset made within one year before the date on transfer of the original asset took place, or which is not utilised by him for the purchase or construction of the new asset (ii). before the date of furnishing the return of income under sect/on 139, (Hi), 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-sect/on (1) of section 139] (iv).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.

On going through the facts of the case, it is seen that the appellant did not purchase new asset till date of filing of the return. He has deposited only Rs. 50 lacs in Capital Gain Account with SBI for which he is entitled to deduction under section 54 during the year. As the amount deposited with Andhra Bank was not with Capital Gains Account Scheme, the AO has rightly denied exemption on this account. The plea of appellant to allow deduction for normal fixed deposit with Andhra Bank is not acceptable and rejected.

10. Against the above order, the assessee is in appeal before us.
11. We have heard the learned departmental representative and that assessee in person. We have also perused the records. The assessee has made the following written submission:

RELIEF NO -1

Total deduction of Fixed deposits of Rs 100 Lacs kept with SBI (50 lacs) and Andhra bank (50 lacs) be considered from deduction of L.T. Capital Gain as against 50 Lacs allowed by A.O. for the SBI Deposit kept under capital gain scheme.

Our Clarification-

-While submitting return of income Long term Capital gain was estimated at Rs.100 lacs. Appellant was under the notion that there is an Annual ceiling of Rs.50 lacs for deposit under capital Gain Scheme. Hence Appellant deposited Rs.50 Lacs with SBI under capital Gain Scheme and further Rs.50 lacs deposited with Andhra Bank under normal scheme. Deposits with both these banks continued for over 3 years and all the deposit receipts were produced before learned A.O. for consideration

-It was specifically mentioned in Annexure-'C to the IT Return dated 29th July 2011 that..." As investment in new flat is to be done within TWO years from the date of sale, capital gain amount is kept in Deposit accounts with State Bank of India and Andhra Bank Hiranandani Estate Branches as per Income-tax rules."

-As Maximum Investment is capped at Rs 50 Lacs under Section 54 EC for Capital Gain Bonds , assessee presumed that this limit is applicable for deposits under Capital Gain Accounts Scheme 1988 also. Accordingly assessee deposited Rs 50 lacs with State Bank of India in Fixed deposits under Capital Gain Scheme and further deposited Rs 50 lacs as normal Fixed deposit with Andhra Bank as both these banks are Notified Banks to accept such deposits of LT Cap. Gain.

It was assessee's intention to invest minimum Rs 1,00,00,000 (one crore) in new asset within the stipulated period of TWO Years as there was strong market prediction that the realty prices are going to crash by 30 to 35%. Undersigned could not invest the amount in new flat within 2 years as the prices of the flats in Thane particularly in Hiranandani Estate / Hiranandani Meadows continued with increasing trend even till date.

Deposits with both the Banks were renewed and continued beyond 2 years as per the deposit receipts/ Bank certificates produced before the Learned Assessing officer during the course of proceedings. Maturity value of deposits

with these banks increased from Rs 1,00,00,000 to Rs 1,22,06,157 by June/ Oct 2013 as under-

State Bank of India- 2 receipts maturity amt in Oct 2013	62,30,698	Ann-A
Andhra Bank - 3 receipts maturity amt in Jun 2013	<u>59,75,459</u>	Ann-B
Total	1,22,06,157	

-Assessing officer in his order dated 24/03/2014 computed net taxable LT capital gain at Rs 85,54,462 after allowing deduction of Rs 50 lacs only as against our claim of Rs 100 lacs as original deposits of Rs 100 lacs continued for over 3 years and calculated LT Taxable gain as under-

A.Y.2011-12	1,35,54,462	Less-	(50,00,000)	=	85,54,462.
A.Y.2014-15.....					<u>50,00,000</u> 1,35,54,462

Relief sought as under-

A.Y.2011-12	1,35,54,462	Less-	(1,00,00,000)	=	35,54,462
A.Y.2014-15	Balance taxable LT Cap gain				<u>85,54,462</u> 1,35,54,462

RELIEF NO-2.

-Indexed cost of Rs 9,24,933 being Interest on housing loan till 31/03/2007 Be considered as capital cost as this was not claimed in any other head of income during A.Y 2005-06 to 2007-08

Our Clarification-

- The Learned A.O. has erred in not considering Interest of Rs 6,57,402 paid on Housing loan as Capital Cost for flat no 1002 in Ixora Building, for the period from 31/01/2005 till 31/03/2007 as per details given below. It may please be noted that interest amount of Housing loan " paid during this period of 3 years was no-where claimed from any other source of income including income from House Property in the relevant I.T. Returns filed by appellant.

Asstt Yr.	Hsg loan Intt		Indexed cost
2005-06	51,670 x 711/480	=	76,536
2006-07	3,06,387 x 711/497	=	4,38,312
2007-08	2,99,345 x 711/519	=	4,10,085
Total	6,57,402		9,24,933

Detailed working of I.T. Returns submitted from A.Y.2005-06 to 2011-12 is attached for your immediate reference asAnn- C

The Learned A.O. has further erred in declining to deduct indexed cost of Rs.9,24,933 on Interest factor from L.T.Cap Gain for which assessee relied upon the latest ITAT Chennai judgment dt 31/10/2012 in the case of Assistant CIT Business Circle-IV V/S Shri C Ramabrahamam. Gist of this Judgment is Attached as.....Ann-D

12. Upon careful consideration, we note that the assessee has not invested either in flat or construction of accommodation or desposed the sum of Rs.50 lacs in the designated capital gain account, instead it has deposited the same in Andhra Bank not qualifying for capital gain. The assessee pleads that it was due to mistaken understanding and adverse market situation in real estate as reasonable cause for not making the investment as required by the Act qualifying for exemption from capital gain. We find that it is trite law that the assessee can get relief only within the four corners of law. The assessee having not complied with the provisions of law by making the requisite investment in residential accommodation or investment in designated capital gain account cannot claim relief from capital gain to the extent of Rs.50 lacs deposited in Andhra Bank account which is not qualifying for capital gain exemption. Hence, in our considered opinion, the order of Id. Commissioner of Income Tax (Appeals) is reasonable one and does not need any inference on our part.

13. The assessee has made a further claim of seeking the interest on housing loan as cost of improvement and it also claims benefit of indexation thereon. In this regard, we note that the assessee has also claimed some part of the interest as deduction from

interest from house property. The provision for treatment of interest on borrowed capital is provided in section 24(b) of the I. T. Act which reads as under:

Deductions from income from house property.

24. Income chargeable under the head "Income from house property" shall be computed after making the following deductions, namely:—

- (b) where the property has been acquired, constructed, repaired, renewed or reconstructed with borrowed capital, the amount of any interest payable on such capital:

Provided that in respect of property referred to in sub-section (2) of section 23, the amount of deduction shall not exceed thirty thousand rupees :

Provided further that where the property referred to in the first proviso is acquired or constructed with capital borrowed on or after the 1st day of April, 1999 and such acquisition or construction is completed within *five* years from the end of the financial year in which capital was borrowed], the amount of deduction under this clause shall not exceed two lakh rupees.

Explanation.—Where the property has been acquired or constructed with borrowed capital, the interest, if any, payable on such capital borrowed for the period prior to the previous year in which the property has been acquired or constructed, as reduced by any part thereof allowed as deduction under any other provision of this Act, shall be deducted under this clause in equal instalments for the said previous year and for each of the four immediately succeeding previous years:

Provided also that no deduction shall be made under the second proviso unless the assessee furnishes a certificate, from the person to whom any interest is payable on the capital borrowed, specifying the amount of interest payable by the assessee for the purpose of such acquisition or construction of the property, or, conversion of the whole or any part of the capital borrowed which remains to be repaid as a new loan.

Explanation.—For the purposes of this proviso, the expression "new loan" means the whole or any part of a loan taken by the assessee subsequent to the capital borrowed, for the purpose of repayment of such capital.

14. From the above reading of law, it is apparent that the interest on housing loan has not been mandated to be allowed as deduction otherwise than the prescription of law prescribed as above. Furthermore, we find that the Id. Commissioner of Income Tax (Appeals) in his appellate order has referred to certain decisions of Hon'ble Apex Court and Hon'ble High Courts which are on this issue and are against the proposition being canvassed by the assessee. It is trite law that the decision from the higher judicial forums take precedence over the decisions of the tribunal. Accordingly, in our considered opinion, the Id. Commissioner of Income Tax (Appeals) has properly appreciated the issue in light of the relevant law and appropriate case laws from higher forums. Accordingly, we do not find any infirmity in the order of the Id. Commissioner of Income Tax (Appeals).

15. In the result, this appeal by the assessee stands dismissed.

Order pronounced in the open court on 13.03.2018

Sd/-
(Ram Lal Negi)

न्यायिक सदस्य / Judicial Member

मुंबई Mumbai; दिनांक Dated : 13.03.2018

व.नि.स./Roshani, Sr. PS

Sd/-
(Shamim Yahya)

लेखा सदस्य / Accountant 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 - 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**