

आयकर अपीलीय अधिकरण "C" न्यायपीठ मुंबई में।

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

**BEFORE SHRI C.N PRASAD, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.7195/Mum/2016

(निर्धारण वर्ष / Assessment Year : 2012-13)

Percy M Batliwalla 131/B. Twin Towers, Prabhadevi, Mumbai 400025	बनाम/ v.	ACIT-21(2), Room No. 115, 2 nd floor, Piramal Chambers, Parel, Mumbai 400012
स्थायी लेखा सं./ PAN : AACPB4924C		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	None	
Revenue by :	Shri M.C Omi Ningshen (DR)	

सुनवाई की तारीख / **Date of Hearing** : 23.04.2018

घोषणा की तारीख / **Date of Pronouncement** : 23 .04.2018

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee, being ITA No. 7195/Mum/2016 , is directed against appellate order dated 10.10.2016 passed by learned Commissioner of Income Tax (Appeals)-33, Mumbai (hereinafter called "the CIT(A)"), for assessment year 2012-13, appellate proceedings had arisen before learned CIT(A) from assessment order passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income-tax Act, 1961 (hereinafter called "the Act") for AY 2012-13.

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

"The appellant submits the following grounds:

1. *On the facts and circumstances of the case and in law, the learned CIT(A) erred in not granting the exemption u/s. 54F.*

2. *On the facts and circumstances of the case and in law, the learned CIT(A) ought to have appreciated that the appellant should not be deprived of the exemption merely because it was claimed under wrong Section by him.*

3. *Without prejudice to the above, on the facts and circumstances of the case and in law, the appellant prays that he may be granted the exemption u/s. 54F by admitting it as a fresh claim made in this regard.*

The Appellant craves leave to add, alter, amend, vary and / or withdraw any or all the above grounds of appeal."

4. The brief facts are that the assessee had sold two residential properties viz. Flat No. 1701 & 1702 at Ashok Towers which was jointly owned by him with Ms. Priya Taorion on 30.05.2011, for total consideration of Rs. 6,26,00,000/- in which the assessee share was of Rs. 4,19,73,300/- (being 67.05% of total transaction) but the assessee did not offered the said capital gain for taxation . The assessee had claimed benefit of exemption u/s. 54 of the Act. The AO while making assessment u/s 143(3) treated the gain arising from the sales of these two residential flats as short term capital gains on the grounds that the assessee booked residential flats with the builder wherein the assessee only acquired interest in the said flat which get extinguished when he got the possession of flat . The AO observed that the assessee got title in the flats when he got possession of the said residential flat. Thus the period of holding as per the AO is to be computed from the date of getting possession of the flats till the date when the flat were sold which was a period below 36 month and hence gains were treated as short term capital gains by the AO. Since the AO treated the said gains as short term capital gains , the benefit of indexation as also deduction claimed u/s 54 was denied to the assessee.

5. The assessee filed first appeal with learned CIT-A who granted the benefit of period of holding of the flats for the purposes of computing capital gains from the date of allotment of the flat by the builder in favour of the

assessee till the flats were sold by the assessee keeping in view CBDT circular no. 672 dated 16-12-1993 and also relying upon decision of Hon'ble Courts as discussed in the appellate order passed by learned CIT(A). However, since section 54 required that the residential property which is transferred should have been used for the residential purposes of the assessee and also income should have been offered for taxation under the head 'income of house property' and since these conditions were not met by the assessee, the exemption u/s. 54 was not allowed by learned CIT(A). The assessee pleaded before learned CIT-A that in alternative exemption u/s 54F be allowed to him to which Ld. CIT-A declined to grant as assessee never claimed such deduction in the return of income filed with the revenue.

6. Aggrieved by the appellate order passed by learned CIT(A), the assessee has come in an appeal before the tribunal. None appeared on behalf of the assessee when the appeal was called for hearing before the tribunal. Notices sent to the assessee returned un-served which are placed in filed. The Ld. DR on the other submitted that Ld. CIT-A has rightly disallowed the claim of exemption u/s. 54F. However the learned DR fairly agreed that the grounds urged by the assessee are legal grounds and Ld. CIT-A being appellate authority should have admitted the same and adjudicated on merits in accordance with law in view of several decisions of Hon'ble Courts.

7. We have heard Ld. DR and perused the material on record . We have observed that the assessee has earned income under the head capital gains with respect to the gain arising from the sale of two residential flats which were held by learned CIT(A) to be long term capital gains on sale of residential flats. The learned CIT(A) denied benefit of claim of exemption u/s 54 as the said flats were not used by the assessee for his residential purposes nor the income from said house property were earlier offered by the assessee under the head 'Income from House Property'. Now, the controversy remaining between the two rival parties which is subject matter of present appeal before us is with respect to the raising of the fresh ground before learned CIT-A by the assessee for the first time with respect to the claim of exemption u/s. 54F which was not claimed by the assessee in the return of income filed with the revenue , wherein learned CIT(A) refused to admit said ground of appeal as the assessee never raised this claim of exemption in

return of income filed with Revenue .We are of the considered view that the learned CIT-A being appellate authority should have admitted this additional grounds regarding claim of exemption by the assessee u/s. 54F and thereafter learned CIT(A) should have adjudicated the same on merits in accordance with law. Reliance is placed on the decision of Hon'ble Supreme Court in the case of Jute Corporation of India v. CIT (1991) 187 ITR 688 (SC) and Hon'ble Bombay High Court in the case of Ahmadabad Electricity Company Ltd. v CIT (1993) 199 ITR 351(Bom.) We , under these circumstances , are of considered view that this ground of claim of exemption u/s 54F raised by the assessee for the first time before learned CIT(A) need to be admitted and we direct admission of this ground raised by the assessee . Now the matter need to be set aside and restored to the file of learned CIT(A) for adjudication of this ground which is directed to be admitted by us w.r.t. claim of exemption u/s 54F , on merits in accordance with law. Needless to say that proper and adequate opportunity of being heard be allowed to the assessee by learned CIT(A) in set aside proceedings in accordance with principles of natural justice in accordance with law. The learned CIT(A) shall admit evidences and explanations submitted by the assessee in its defence and adjudicate the same on merits in accordance with law. The appeal of the assessee is allowed for statistical purposes. We order accordingly.

8. In the result appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 23.04.2018

आदेश की घोषणा खुले न्यायालय में दिनांक: 23.04.2018 को की गई ।

Sd/-

(C.N PRASAD)
JUDICIAL MEMBER

Sd/-

(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Mumbai, dated: 23.04.2018

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai

4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

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BY ORDER

**DY/ASSTT. REGISTRAR
ITAT, MUMBAI**