

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "B", MUMBAI**

**BEFORE SHRI JOGINDER SINGH, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA No.1055/M/2015
Assessment Year: 2008-09**

Late Mrs. Mungla C. Khatanhar, Dolly Bansilal Madhian legal heir of (Late Mrs. Mungla C. Khatanhar) C/o. Kishor J. Devani & Co., Chartered Accountants, 22 Mahavir Darshan, Opp. Bhandari Street Post Office, Masjid Bunder -(West), Mumbai - 400 003 PAN: AIWPK8750F	Vs.	Income Tax Officer 19(2)(4), Piramal Chamber, 3 rd Floor, Lalbaug, Mumbai - 400 012
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Kishor J. Devani, A.R.
Revenue by : Shri Suman Kumar, D.R.

Date of Hearing : 16.07.2018
Date of Pronouncement : 12.09.2018

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against the order dated 05.12.2014 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2008-09.

2. The grounds raised by the assessee are as under:

"1. CIT Appeals has erred in disallowing the claim of Rs. 1,53,00,000/-out of the sales proceeds expenses (a) paid for Brokerage of Rs.3,00,000/- (b) paid to Younger daughter for surrender of occupational right Rs. 1,50,00,000/-.

2. CIT Appeals having admitted the additional grounds of appeals officer rejected the admissibility of the claim of the appellant for this reason, but also on merits that the appellant's claim is not falling within the provisions of sec. 54E of the Act hence, it cannot be allowed and CIT appeals did not consider the amount of "Capital Gain Account Scheme" FDR reinvestment amount with oriental Bank of Commerce (Versova Branch) amounted to Rs.1,05,00,000/- (Rs. one crore five Lakhs) dated 11/7/2008 effective 1/7/2008 as it was not produced which needs to be also considered and granted as deductions for eligibility u/s. 54E of the Income Tax Act, 1961.

3. The appellant craves leave to add, alter, amend, modify, substitute, delete and or rescind all or any of the GROUND OF APPEAL on or before the final hearing if necessity so arises."

3. The issue raised in first ground of appeal is against the confirmation of disallowance of Rs.1,53,00,000/- out of sale proceed expenses by Ld. CIT(A) as made by the AO towards brokerage expenses of Rs.3,00,000/- and payment to younger daughter for surrender of occupational right Rs.1,50,00,000/-. The only grievance of the assessee is against the disallowance of Rs.1,50,00,000/- payment made to daughter whereas Rs.3,00,000/- has been allowed by the CIT(A).

4. The facts in brief are that the assessee sold a flat for a consideration of Rs.3,22,00,000/- against which the indexed cost of acquisition after indexation was claimed at Rs.68,05,952/- and expenditure in connection with transfer of was claimed at Rs.1,53,00,000/- thereby computing a capital gain of Rs.1,00,94,048/- which was claimed as exempt under section 54 of the Act. The AO observed during the course of assessment proceedings that assessee has paid Rs.1,50,00,000/- to her younger daughter for vacating the property sold much after the date of sale and claimed the same as expenditure relating to transfer of property u/s 48(i) of the Act. The said payment was made for surrendering the

occupational rights in the said flat which was being occupied by younger daughter of the assessee in terms of memorandum of family arrangement dated 25.07.2008 and which as per the assessee was incurred wholly and exclusively in connection with the transfer of the said property and has to be allowed under section 48(i) of the Act. According to the AO, the property was sold on 14.12.2007 whereas the memorandum of family arrangement was dated 25.07.2008 and therefore this was as an afterthought to claim the expenditure. According to the AO the whole exercise was undertaken to circumvent the tax liability of the assessee. The AO also rejected the contention of the assessee that there was a family dispute and there was a police complaint against the husband of the daughter who was staying with the assessee and hence the payment has been made for vacation of occupation of the flat by the younger daughter. According to the AO the said police complaint was dated 02.11.2004 and was filed by the assessee against the son-in-law and not against the daughter-in-law.

5. However, this is undisputed fact that the daughter was staying with the assessee due to love and affection and not in the capacity as a tenant and landlord. The assessee also proved during the course of assessment proceedings by filing necessary evidences that assessee's daughter Mrs. Dolly Bansilal Madhian and her family was staying with the assessee and this was never disputed. According to the AO even as per the society's letter the assessee held the share right, title and interest in the flat and the daughter has no legal right in the said flat and finally the AO rejected the contention of the assessee that there was an

encumbrance in favour of the daughter in the said flat and finally rejected the claim of expenses of Rs.1,50,00,000/-.

6. In the appellate proceedings, the Ld. CIT(A) affirmed the order of AO after considering the contentions and submissions of the assessee by holding that the family agreement was an afterthought and same was executed in July 2008 whereas the flat was sold in December,2007. It was also held by the Ld. CIT(A) that capital gains in the hands of assessee arose on the date of signing of agreement for transfer of the property and receipt of final amount of consideration of Rs.3.22 crores was also happened in the month of December 2007 and thus no expenses could be allowed as deduction under section 48(i) of the Act post date the agreement of transfer.

7. The Ld. A.R. vehemently submitted before us that the order of Ld. CIT(A) is wrong on facts and in law. The Ld. A.R. also submitted that Rs.1.5 crores was paid to the daughter of the assessee for vacating the occupational right as she was staying in the said premises since last 15 years along with her family. The Ld. A.R. submitted that she was not vacating the flat even after the date of the sale of the said property. Finally the compensation of Rs.1.5 crore has to be paid to ensure the peaceful handing of the possession of the property to the buyer and the same was claimed as expenses incurred in connection with the transfer of the capital assets while computing the capital gain. The Ld. Counsel also submitted that there was a family dispute between the members and the husband of the assessee's daughter Mrs. Dolly Bansilal Madhian was harassing the family continuously which is evident by the police complaint

filed against him. A copy of which is filed in the paper book. The Ld. A.R. submitted that the daughter occupying the flat was not vacating the flat even after the date of sale as she was not knowing that property has been transferred vide agreement dated 14.12.2007 for a consideration of Rs.3.22 crores which was registered on 05.01.2008. The said sale was affected by the assessee without the knowledge of her daughter who was residing at the same flat. The Ld. Counsel submitted that the sale of flat was made by the assessee in connivance with the elder daughter of the assessee without taking into confidence the younger daughter. The Ld. Counsel stated that due to said dispute within the family, the assessee was unable to handover the flat to the buyer. The family dispute was further aggravated by the act of the assessee jointly with her elder daughter buying a new house on 25.9.2008. A copy of which is also placed in the paper book at page No.68 to 88 and therefore younger daughter has ever reason to believe that she will not get anything from her mother. Therefore, she did not vacate the flat sold by the mother and continued to stay in the said flat even after the sale of property. The Ld. A.R. further referred to the family arrangement dated 25.07.2008 a copy of which is placed at page nos.89 to 100 and submitted that same was entered into primarily to end the dispute and handover the possession to the buyer who was continuously after the assessee. The Ld. Counsel argued that the possession was ultimately handed over on 10.10.2008 to the buyer which was confirmed by the buyer by a letter even dated a copy of which is placed at page No.162 to 163 in the paper book. The Ld. A.R. finally submitted that in view of the said facts that the daughter was staying with the

assessee and she was taking care of her parents for the last 15 years which is evident by the copy of ration card, passport and has the possessory rights. So deduction of Rs.1,50,00,000/- was rightly claimed as expenses incurred in connection with the sale of property and should be allowed.

8. The Ld. D.R., on the other hand, heavily relied on the order of authorities below and submitted that the whole exercise was undertaken by the assessee to circumvent the tax liability which was lawfully due from the assessee while reiterating the facts which have been mentioned by the authorities below in their respective orders. The Ld. D.R. submitted that the sale of the property has taken place on 14.12.2007 whereas the memorandum of family settlement was executed on 25.07.2008 and stating payment of Rs.1,50,00,000/- to the assessee's daughter Mrs. Dolly Bansilal Madhian who was admittedly staying with her mother and father for the last 15 years. The Ld. D.R. submitted that it is highly hypothetical and hard to believe that mother has sold the property without the knowledge of the daughter who was staying with her father for the last 15 years and the daughter was paid Rs.1,50,00,000/- approximately 8 months after the date of sale to vacate and ultimately surrender the occupation of the property in favour of the buyer. The Ld. D.R. also, while referring to the possession letter issued by the buyer dated 10.10.2008, submitted that all these papers can not be relied at this stage in favour of the assessee. Finally, the Ld. D.R. submitted that the Ld. CIT(A) has passed a very speaking and well reasoned order upholding the order of AO which should be affirmed by dismissing the appeal of the assessee.

9. We have heard the rival submissions of both the parties and perused the material on record including the impugned order. The undisputed facts are that the assessee sold the flat on 14.12.2007 for a consideration of Rs.3,22,00,000/-. The assessee paid a sum of Rs.1,50,00,000/- to her daughter Mrs. Dolly Bansilal Madhian who was staying with her family in the said flat for the last 15 years under a family settlement which was executed on 25.07.2008 in order to handover the peaceful possession to the buyer which could happen only after the assessee's daughter got Rs.1,50,00,000/- under the said family settlement and thus the possession was handed over to the buyer on 10.10.2008 as corroborated by the confirmation issued by the buyer of even date. Now the issue before us is whether the assessee is entitled to the deduction of Rs.1,50,00,000/- incurred wholly and exclusively in connection with the transfer of the said property under section 48(i) or is an arrangement to circumvent the tax liability. We find from the records before us that the daughter of the assessee was staying with her family for the last 15 years and she continued to stay in the said flat even after the sale as is corroborated by the evidences placed on record. The facts are also confirmed by the confirmation letter issued by the buyer who got the possession on 10.10.2008. There was a family dispute which is also established by way of police complaint, a copy of which is also placed on record. We, therefore, considering all the facts in totality hold that Rs.1,50,00,000/- was incurred in connection with the transfer of the property though after the date of sale but primarily in order to handover the peaceful possession of the said property which is confirmed by the possession letter issued by the buyer.

Accordingly, we set aside the order of Ld. CIT(A) and direct the AO to allow the deduction of Rs.1,50,00,000/-.

10. The second issue raised by the assessee is against the order of Ld. CIT(A) rejecting the claim of the assessee as regards the deduction of Rs.1,05,00,000/- under section 54 of the Act.

11. The facts in brief are that the assessee has deposited Rs.1,05,00,000/- in the capital gain account scheme on 01.07.2008 i.e. before the filing the return of income which was filed on 01.12.2008. However, assessee did not claim the deduction under section 54 in respect of the said deposit while computing the capital gain. The said FDR was converted into 4 FDRs on 17.11.2008 converting the same from non cumulative to cumulative. Firstly, because of the conversion, the assessee was entitled to beneficiary terms and conditions as regards interest and secondly when the FDR was non cumulative the interest was credited to the saving bank account of the assessee and the elder daughter was claiming the share in such interest income. The Ld. CIT(A) admitted the additional ground filed by the assessee and remanded the issue to the AO and a remand report was sought. However, the Ld. CIT(A) did not allow the claim on two grounds that investment was made in the capital gain account scheme within six months from the date of transfer u/s 54 E and the investment was prematurely withdrawn by putting the FDR into 4 FDRs and thus rejected the additional ground.

12. The Ld. A.R. vehemently submitted before us that the assessee deposited the amount of Rs.1,05,00,000/- into the

capital gain account scheme on 1.07.2008 in accordance with the provision of section 54(2) of the Act before the due date of filing the return. The return was filed on 01.12.2008 whereas the due date was 31.07.2008. The Ld. A.R. of the assessee submitted that all the conditions as laid down under section 54 for claiming the deduction were fully satisfied and thus the order of Ld. CIT(A) in not granting deduction of Rs.1,05,00,000/- is fallacious and wrong. On the second issue the FDR was converted into 4 FDRs from non cumulative to cumulative is not a premature of withdrawal from capital gain account scheme which was further corroborated by the bank certificate as filed at page No.161 certifying that the deposit is as per capital gain account scheme. The Ld. A.R. finally prayed before the Bench that in view of the said facts the claim of the assessee under section 54 of the Act should be allowed by reversing the order of Ld. CIT(A).

13. The Ld. D.R., on the other hand, relied on the order of Ld. CIT(A) and submitted that the assessee has not fulfilled the necessary conditions as contemplated under section 54 of the Act and thus the claim was rightly rejected.

14. Having heard the rival submissions and perusing the material on record, we find that the assessee has invested a sum of Rs.1,05,00,000/- after the date of sale but before the due date of filing the return which is undisputed. As per the provision of section 54 of the Act the assessee has to deposit the money into capital gain account scheme before the due date of filing the return and it does not talk of the six months period from the date of sale and therefore we find merit in the contention of the

assessee. Further, as regards the premature encashment of FDRs into 4 FDRs which is confirmed by the bank certificate as filed at page No.161 that the deposit is as per capital gain account scheme and mere conversion of FDR from non cumulative to cumulative in our opinion is not an encashment of FDR and thus is not at all a violation of capital gain account scheme as contemplated in the said section. Accordingly, we are of the view that assessee is entitled to deduction under section 54 of the Act to the tune of Rs.1,05,00,000/-. The issue is decided in favour of the assessee.

15. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 12.09.2018.

Sd/-
(Joginder Singh)
JUDICIAL MEMBER

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai, Dated:12.09.2018.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.