THE INCOME TAX APPELLATE TRIBUNAL
"A" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Sandeep Gosain (JM)

I.T.A. No. 6098/Mum/2014 (Assessment Year 2011-12)

ACIT 14(1) 2nd Floor, Earnest House, Nariman Point Mumbai-400 021.	Vs.	Ms. Arpita S. Bajla 273-283, Kalpatru Horizon, S.K. Ahire Marg, Worli Mumbai-400 018. PAN : AEMPB8649E
(Appellant)		(Respondent)

Assessee by	Shri Hariom Tulsiyani
Department by	Shri Ashim Kumar Modi
Date of Hearing	28.2.2019
Date of Pronouncement	13.5.2019

ORDER

Per Shamim Yahya (AM) :

This appeal by the Revenue is against the order of learned CIT(A) dated 30.7.2014 and pertain to A.Y. 2011-12.

2. Grounds of appeal read as under :-

1. On the facts and in the circumstances, the CIT(A) has erred in deleting addition of Rs.24,64,155/- on account of 1/3rd share in orchid flat by holding that the said property was shown in the balance sheet of Shri Sachin Bajla and the entire sale consideration was received by him only, as the CIT(A) failed to appreciate that :-

i) Shri Sachin Bajla failed to substantiate by way of submitting the relevant bank account statements that entire cost was borne only by him.

ii) The registered sale agreement dt.1.3 2011 expressly mentioned that all the joint owners hold 33% equal share in the property.

iii) The sale registered agreement dt.8.5.1998 clearly established that the payments were made vide three bank accounts.

2. On the facts and in the circumstances, the CIT(A) has erred in deleting addition of Rs.88.000/- being 1/3rd of rental income from

Orchid flat of Rs.2,64.000/- as he failed to appreciate that the registered sale agreement dt. 1.3.2011 expressly mentioned that all the joint owners-hold 33% equal share in the property.

3. On the facts and in the circumstances, the CIT(A) has erred in deleting addition of Rs.77.28.000/- being deemed rental income from Kalpatru Horizone by holding that the two flats converted into a duplex were a single residential unit in nature, as he failed to appreciate the facts that:-

i) Till A.Y. 2009-10, rental income was being offered by the assessee from Kalpatru Horizone flats.

ii) Since the conversion of two residential flats into one residential duplex was not within legal parameters, the assessee was not entitled to avail benefits of a single residential unit consisting of two separate residential flats.

4. For the mentioned reason and any other reasons that may be urged at the time of hearing, it is requested that the order of CIT(A) be quashed and that of the A.O. be restored.

3. Apropos ground No. (1)

Brief facts of the case are as under :-

The AO observed that during the year, the assessee had transferred an immovable property called Orchid flat, which was jointly held by her with Mr. Sachin Bajla and Mr. Sumit Bajla. The assessee was asked to furnish details of transaction and working of capital gain arisen on said transaction. In reply, the assessee submitted that total proceeds from sale of said flat was offered to LTCG being Rs. 73,92,4657- by Mr. Sachin Bajla in A.Y. 201 1-12; and the funds had actually invested in purchase as well the proceedings in sale of said property had been received in his return of income. The AO made enquiry from Mr. Sachin Bajla u/s 133(6) asking him to submit the sale agreements registered on acquisition and disposal of said flat, along with bank account statements reflecting that the payments were made only by him, and proceedings were received only by him, and also his computation of income and acknowledgment of returns. In response, Mr. Sachin Bajla submitted all other documents, but could not furnish bank statements to show that entire cost of acquisition was borne only by him. The AO noted from the agreement

registered on 08.05.1998 (at the time of purchase of said flat) that the payments were from three separate bank accounts. Also in sale agreement registered on 01.03.2011 (at the time of sale of said flat), it was clearly mentioned that *"Hereinafter referred together as the transferors and they equally hold the 33.33% each in below mentioned property.... "* In view of the above, the AO found it evident that the property was purchased by all three joint owners and payment for the same was also made by all three joint owners. Further no independent evidence was submitted by Mr. Sachin Bajla nor the assessee which could prove that Mr. Sachin Bajla was principal joint owner of the property and entire cost of acquisition was borne only by him. On being show caused, the assessee submitted various arguments such that it was a customary practice in Hindu families to add second and third name for safety; to determine ownership what is more relevant is who paid the total consideration; cost of the flat was shown in balance sheet of Mr. Sachin Bajla, house rent income from said flat was fully offered to tax by Mr. Sachin Cajla; the sale consideration was fully received by Mr. Sachin Bajla; similar submissions made in case of Mr. Sumit Bajla was accepted in assessment passed u/s 143(3) etc. The AO observed that it was expressly mentioned that all the joint owners hold 33% equal share in the property conveyed; and that in the purchase agreement dated 08.05.1998 it had been expressly mentioned that cost of consideration was received from all the three parties, that too from different bank accounts, etc. The AO noted that the findings in assessment order u/s. 143(3) r.w.s. 263 for A.Y 2009-10 of assessee also indicated that the assessee in collusion with her family run Private Limited Company tried to defraud the revenue by issuing cheques and acknowledge receipt of capital gain proceeds for claiming benefit u/s 54F of the Act. The AO further noted that the whole of capital gain arisen on sale of said property was transferred voluntarily by two joint owners Shri Sumit Bajla & Smt. Arpita Baila to Shri Sachin Baila. However this would fall in the purview of application of income. In view of above, the AO assessed $1/3^{r}$ LTCG on sale of said flat, i.e. Rs. 24,64,155/- in hands of the assessee.

4. Against the above order assessee pleaded before learned CIT(A). Learned CIT(A) deleted the addition by holding as under :-

> *"On perusal of facts of the case and submissions of appellant, I find that the appellant has relied upon various case laws to prove that merely the inclusion of family member's name in property agreements for name sake does not change the ownership status of the property, in case the assessee paid the entire consideration. As to the contention of the Assessing Officer that assessee held 33.33% share in the Orchid Flat does not seem appealing enough to me because of the two fold reasons. Firstly, the entire cost of consideration for acquisition of the Orchid flat has been duly paid by Mr. Sachin Bajla and is duly reflected in his balance Sheet year after year. Secondly, as per the information called by the AO u/s. 133(6) of the act, the entire sale consideration of the said flat was received only by Mr. Sachin Bajla and his bank account statements substantiate the same. Moreover, Mr. Sachin Bajla has voluntarily offered the complete capital gains on the sale of the said flat to tax in his return of income and was accepted by the department in assessment u/s 143(3). The stand of the AO that the name of the assessee appeared in the sale agreement of the flat gets defeated by the rulings relied of the various authorities by the AR of the assessee. In CIT vs. Ravinder Kumar Arora [2012] 343 ITR 38 Hon'ble Delhi High Court following the principles of constructive ownership as laid down by the Apex Court in CITv. Podar Cement (P) Ltd. [1997] 226 ITR 625 and held that mere mentioning of name of a close family member in the agreement does not make them the owner of the property. Given the facts before me and following the rule of constructive ownership, I hold that the assessee is entitled to the benefit of section 54F."*

5. Against the above order, Revenue is in appeal before us.

6. Learned Departmental Representative relied upon the order of the Assessing Officer.

7. Per contra, learned Counsel of the assessee submitted that in the first ground of appeal for this AY, the department has objected to the deletion of the addition of Rs. 24,64,155/- being the assessee's share in the capital gains on account of sale of l/3rd share in the flat in Orchid building by holding that the said property belonged to Shri Sachin Bajla, the husband of the assessee wholly and exclusively. That the facts of the case are that a flat in Orchid Building which was owned by Shri Sachin Bajla who is the husband of the assessee was sold in the year relevant to the AY in question. That a long term

capital gain of Rs. 73,92,4657- arose on this transaction. That this amount was claimed as exempt under section 54 of the Act. That the Assessing Officer while making the assessment in this case called for the details from Mr. Sachin Bajla like; the purchase and sale agreements. In the sale agreement which was registered on 01.03.2011, a clause read *"hereinafter referred together as transferors and they equally hold 33.33 % each in the below mentioned property"* was mentioned. From this, the Assessing Officer concluded that the assessee was 1/3rd owner of the property which was sold by her husband Mr. Sachin Bajla. That following points were made in support of the contention that the property actually belonged to Mr. Sachin Bajla exclusively.

i) The names of the assessee and Sumit Bajla were put in the purchase and sale agreement as per the customary practice in Hindu families and for the convenience of succession of the property;

ii) The entire payment for the purchase of the property was made by Shri Sachin Bajla;

iii) The entire sale proceeds was received by Shri Sachin Bajla;

iv) The ownership of the property by Sachin Bajla was accepted in the scrutiny assessment made in the case of Sumit Bajla;

v) The sale of the property was reflected in the Computation of Income of Shri Sachin Bajla;

vi) The entire sale proceeds was reflected in his bank account;

vii) The rental income from the said part was offered by Shri Sachin Bajla in his return and it was accepted as such;

8. Learned counsel further submitted that but these evidences did not satisfy the Assessing Officer. That the point of the department is that Sachin Bajla did not submit the relevant bank account from where the payment for purchase of property was made. That the sale agreement expressly indicated that the three different bank accounts. That learned CIT(A) examined the points of the AO and die submissions made on behalf of the assessee. That he has correctly observed that the entire purchase price for the flat has been paid

by Shri Sachin Bajla and it is duly reflected in his balance sheet year after year (Copy of the Balance Sheet is enclosed at pages 8 of the paper book). That similarly the entire sale price has also been received by him. That the capital gains arising on the sale of the flat has also been offered by him in his return of income and this has been accepted by the department after an assessment u/s 143(3). That therefore the mere fact that the assessee's name appears in the sale agreement is of little consequence. That in this connection reliance is placed on the case of *Ravinder Kumar Arora 342 ITR 38 (Del)* which has been passed following the Supreme Court judgment in the case of *CIT vs. Podar Cement (P) Ltd: 226 ITR 625 (SC).* It has been held in these cases that mere mentioning of name of close family members does not make them the owner of the property. That considering the principle of constructive ownership, the case has to be allowed in favour of the assessee and against the department.

9. We have carefully considered the submission and perused the record. Upon careful consideration.

10. Upon careful consideration we note that the Assessing Officer in this case has added 1/3rd of the capital gain from the sale of an immovable property being flat which was jointly held by the assessee alongwith two persons namely Mr. Sachin Bajla and Mr. Sumit Bajla. Mr. Sachin Bajal is the husband of the assessee. The assessee’s claim is that her name was added customarily in the purchase agreement. That the entire amount was paid by Mr. Sachin Bojla. That he has already shown the same in his balance sheet. The entire sale proceeds has been offered by him and received in his bank account. In these circumstances, it is the claim of the assessee that the Revenue has also accepted these facts in the assessment u/s. 143(3) of the Act in the case of another person Shri Sumit Bojla whose name is also there in the purchase agreement just like the assessee. The assessee has pleaded that the customary inclusion of assessee’s name in the purchase agreement cannot be determinative of the substance of the transaction. And in this regard the assessee has also placed reliance upon the decision of Hon'ble Delhi High

Court in the case of CIT Vs. Ravinder Kumar Arora (342 ITR 38), wherein Hon'ble High Court held that mere mentioning of the name of the close family member in the agreement doesn't make them owner of the property. We find that these facts have been appreciated by learned CIT(A). we find that the aforesaid fact duly indicate the cogency of the assessee's claim. The substance of the transaction is that the property was purchased by the husband of the assessee. He has shown the same in his balance sheet. The sale proceeds was received in his bank account and offered as his income. Revenue has also accepted these facts in the case of assessment of another co-owner of the property whose name was also mentioned in the purchase agreement just like the assessee.

11. In these circumstances in our considered opinion there is no infirmity in the order of learned CIT(A). accordingly, uphold the same.

12. Apropos ground No. (2)

Brief facts on this issue are as under :-

Rental Income from Orchid Flat: The assessee was asked to show cause as to why the 1/3r of deemed rental income in respect of her 1/3rd ownership of Orchid flat should not be added to her total income. In response, the assessee replied that she is not the owner of said property and the full rental income of the same was offered and assessed to tax in the hands of Mr. Sachin Bajla, hence the question of any deemed income being assessed in the hands of the assessee did not arise. The assessee further submitted that all parties mentioned in the agreement of sale of said flat were paying taxes at the maximum marginal rate and there was no loss of revenue in respect of tax on rental income of said flat. The AO did not accept the said explanation of assessee stating that it had been established that the assessee owned 33% share in the said flat; and that full rental income offered to tax by Mr. Sachin Bajla does not absolve the assessee from paying taxes which was required to be paid by the assessee as per law. In view of the above, 1/3rd of rent received

of Rs.2,64,000/- i.e. Rs.88,000/- was added to the total receipt of the assessee as rental receipt in respect of said flat.

13. Upon assessee's appeal learned CIT(A) deleted the addition holding as under :-

> *"b) Rental Income from Orchid Flat. As it has been held at ground 1 that the Orchid flat is owned by Mr. Sachin Bajla arid the income is also offered to tax by him no further addition can be made on this account to the income of the assessee".*

14. Against the above order Revenue is in appeal before us.

15. We have heard both the counsel and perused the records. Learned Departmental Representative relied upon the order of the Assessing Officer.

16. Per contra, learned Counsel of the assessee submitted as under :-

In Ground No. 2, the department has objected to the deletion of addition of Rs. 88,000/- being 1/3rd of the rental income from the Orchid flat. That this ground is covered by the earlier ground wherein the submissions have been made to demonstrate that the Orchid property belonged to Sachin Bajla. That in the computation of income of Sachin Bajla, it may be seen that the entire rental income is offered by Sachin Bajla himself. (Copy of Computation of Income for AY 2011-12 is enclosed at pages 6-7 of the paper book). That therefore the question of charging income from house property in the hands of the assessee does not arise.

17. Upon carefully consideration we find that we have already upheld that order of learned CIT(A) in ground No. 1. This issue is consequential. Hence, we uphold the order of learned CIT(A).

18. Apropos ground No. (3)

Brief facts on this issue are as under :

Rental Income from Kalpataru Horizon: It was observed that the assessee owned two residential property bearing flat no. 273 & 273 at Kalpataru

Horizon. During the course of proceedings u/s 143(3) r.w.s. 263 for A.Y. 2009-10, it was observed that the said properties were acquired through two different sale agreements; and that loans were sanctioned for two different residential properties; and that as per the approved plan for construction of both flats were separate house properties; and further till Sep. 2010 a portion of flat no. 283 was given on lease to M/s Param Aviation for a monthly rent of Rs. 1,00, 0007- The assessee was show caused to explain as to why one of the above flat should not be treated as deemed let out. It was pointed out to assessee that she received rent of Rs 1,00,0007- per month for leasing out 150 sq.ft. of flat no. 283, and the fair rental value of flat no. 273 or 283 was required to be added as deemed rental income from house property. In response, the assessee submitted that these two flats are in the nature of duplex flat one above the other having only one entrance, one kitchen and used by one family only, and thus these two flats are joined together and are contiguous to each other and are used as one house and, therefore, constitute a single house, even though two separate sale agreement were registered. Moreover she had let out to M/s Param Aviation only a portion consisting of study room. Just because M/s. Param Aviation used the same for communication purposes and not for commercial purposes, it did not constitute that the two flats are not joint. The portion let out to M/s Param Aviation was Self Occupied property only and after termination of said lease agreement, the said portion of study room was used by assessee for self purpose. There is no separate sale agreement for the study room. Therefore, the assessee submitted that the question of deemed rental income from said property does not arise in any way. The assessee stated that the proprietor of Param Aviation was Shri Sachin Bajla, the husband of assessee. The explanations of assessee were not accepted by AO. He noted that the two flats were bought by assessee as two separate independent residential houses vide separate registered sale agreements, and nowhere in the said agreements, it was written or even indicated that it was a duplex and not separate flats with separate amenities like separate entrance, separate kitchen etc. Plan was

approved by competent authority to construct the said flats as separate residential house properties and not as a duplex. The commencement/ completion certificates were subject to construction as per approved plan. Any alteration, even if done by builder also was not possible without consent of assessee being legal owner of these flats. The AO further noted it to be admitted by assessee that no approval was sanctioned by competent authority for alteration in the flats to convert the same into single duplex residential house property. In view of the above, the AO noted that legally the assessee purchased two independent and separate residential house properties, and alteration to make these two independent residential house properties in one residential house property was made after the assessee became the legal owner of these flats and was made without obtaining necessary approval, hence such alteration is illegal and even today these flats are two separate independent residential house properties. As the assessee is eligible to claim one residential house property as self occupied property, hence rental income from one of these two flats, calculated at Rs.77,28,000/- (based on per sq. ft. fair rent derived from leased space to M/s Param Aviation) was deemed rental receipt in hands of the assessee.

19. Upon assessee's appeal learned CIT(A) deleted the addition by holding as under :-

> *c) Rental Income from Kalpataru Horizon. The AO's case is that appellant was holding two flats (no. 273 & 283) in Kalpataru Horizon, which were acquired by separate registered agreements and moreover they were not joined by sanction of the municipal authority. 1 find that to address the concern of the Ld. AO the appellant has bought sufficient documents on record to show that the said flats 273 & 283 at Kalpataru Horizon are a single residential unit in nature of a duplex flat. The layout plan of the said flat and letter of the builder are sufficient proof that the said flats are joined together and are a single residential unit. On perusal of the order of the Jurisdiction High Court in CIT v. Raman Kumar Suri [2013] 255 CTR 107 and the Special Bench of the Hon'ble Mumbai ITAT in ITO-19(3)-4, Mumbai v Ms. Sushila M. Jhaveri [2007] 292 ITR (AT) 1/[2007] 14 SOT 394 (Mum.) (SB) held that entering into two separate agreements is no ground to hold them as two separate residential houses and disallowing the benefit of section 54F. I find that*

the view of the assessee is further supported by decision of the Hon'ble Karnataka High Court in CIT vs. Ananda Basappa reported in [2009] 309 ITR 329. The second allegation of the AO that there is no approved sanction of any municipality for the joining of the said flats gets defeated by the latest ruling of the Chennai ITAT in B. Sivasubramaniam v ITO [2014] 45 taxmann.com 74 wherein it was held that "The provision of section 54F mandate the construction of a residential house, within the period specified, however, there is no condition that the building plan of the residential house constructed should be approved by the Municipal Corporation or any other competent authority. If any person constructs a house without approval of building plan, he will be raising construction at his own risk and cost. As far as for availing exemption under section 54F, approval of building plan is not necessary. The approved building plan, certificate of occupation etc. are sought to substantiate the claim of new construction. In the present case, the fact that the assessee has raised new construction is evident from the interim order issued by the Municipal Corporation. [Para 6]". Therefore, I hold that the flats at Kalpataru Horizon are a single residential unit for the dwelling of the assessee and her family. As the said property is a self occupied property no deemed rental can be assumed on the same. Therefore, the additions made by the AO are deleted."

20. Against the above order Revenue is in appeal before us.

21. We have heard both the counsel and perused the records. Learned

22. Departmental Representative relied upon the order of Assessing Officer.

23. Per contra, learned Counsel of the assessee submitted that the assessee was the owner of a duplex flat consisting of two residential flats i.e. flat nos. 273 and 283 in the building known as Kalpataru Horizon. That the flats were acquired by two different sale agreements. That as per the approved plan, these were shown as two different flats. That a small portion of the flat no. 283 was given to M/s Param Aviation on lease for a monthly rent of Rs. 1 Lakh. That a point was raised as to why this property should not be treated as let out property and why the fair market value of the flat be not added to the assessee's income. That it was explained by the assessee that the two flats were in the nature of a duplex flat. That it had one entrance and one kitchen and it was used by one family. That the two flats were contiguous and joint and it constituted a single house even though it was registered under two

separate agreements. That a small portion of around 150 sq. ft. was let out to M/s. Param Aviation which was a family concern. That it was used for address purposes and to receive communication but basically it was the self occupied property of the assessee where her family used to live. That the proprietor of the firm was the husband of the assessee himself. But this was not accepted by the AO since there was no approval from the competent authority for joining of the two flats. Therefore, the AO took the view that one of the two flats could be allowed as self occupied property of the assessee and in respect of the other flat the annual letting value should be assessed to tax. Since rent was of Rs. 1 Lakh which was charged for an area of 150 sq. ft., for the whole flat, the reasonable rent was calculated at Rs. 77,28,0007- and and the same was considered as the annual letting out value and after allowing the permissible deductions an amount of Rs. 35,03,600/- was added to the total income of the assessee.

24. Learned Counsel further stated that the CIT(A) has very validly held that the AO should have perused the plan of the flats as given by the builder and which was submitted to him. The said plan clearly indicated that the two flats were single residential unit which had common entrance and kitchen. That if AO still had some doubts about it, he could have made an inspection for the same. That but nothing of this sort was done and instead of doing any inspection the claim of the assessee was rejected and an imaginary addition was made. That in this regard we would like to submit that in the assessee's own case for AY 2009-10, the same Bench of the Hon'ble IT AT has held the two units are to be treated as one residential unit as they are connected and used as one residential house and the fact that they were joined without the approval of the competent authority is of no consequence. The relevant para is as under:

> *"These two flats were acquired by two separate registered agreements but, the point of the department is that these flats were joined without the sanction from the competent authority. Therefore, the assessee is not entitled to take the benefit that it was one residential house and accordingly she cannot claim*

> *benefit under section 54F of the Act. It was explained that these two flats were sold by the builder by two separate agreements but they were already connected. The copy of the letter received from the builder along with the map were submitted to the AO as well as to the CIT(A) and this fact is not denied by the Revenue before us now. This shows that the two flats are connected and it had only one entrance. Therefore, the contention of the department that it was two flats is not supported by any evidence.*

25. Thereafter referring several case laws learned counsel concluded as under :-

> In view of the above facts, the judgement of the Hon'ble IT AT in the assessee' s own case for AY 2009-10 and the authorities cited above, it is proved beyond doubt that the two flats numbering 273 and 283 at Kalpataru Horizon constituted a single residential unit. The layout of the flat which has been given along with the letter of the builder establish beyond doubt that it was one single unit of residence. That the judgement of the coordinate bench of IT AT and Bombay High Court clearly establish when two units are purchased but are joined internally having a common kitchen and entrance, it is to be treated as a single residential unit. That the point that the approval for joining the two flats was not taken from the competent authority does not affect this case at all. On this point, the Chennai ITAT judgment in the case of B. Sevasubramanium vs. ITO 45 Taxmann.com 74 is very relevant. The relevant para of the judgment reads as under:
>
> > *"The provisions of section 54F mandate the construction of a residential house, within the period specified, however, there is no condition that the building plan of the residential house constructed should be approved by the Municipal Corporation or any other competent authority, If any person constructs a house without approval of building plan, he will be raising construction at his own risk and cost. As far as for availing exemption u/s 54F, approval of building plan is not necessary. The approved building plan, certificate of occupation, etc. are sought to substantiate the claim of new construction. In the present case, the fact that the assessee has raised new construction is evident from the interim order issued by the Municipal Corporation. [Para 6] "*

26. On careful consideration we find that the issue here is the claim of assessee of a single self occupied property as against the treatment by the Assessing Officer of it in two units and determining annual value accordingly.

It is also noted these two flats were treated by the ITAT in assessee's own case as a single unit for A.Y. 2009-10 as mentioned above in the submissions. Hence, now the Revenue cannot dispute and hold that there are separate units unless the above ITAT order is reversed by Hon'ble High Court. The learned CIT(A) is correct in appreciating the fact that these are contagious units having one entrance and one kitchen. As clearly emanating from the precedents cited above presence of two separate agreement for purchase and non-approval of the plan cannot be a key factor as to whether the two flats can be treated as a single unit or not. In these circumstances in our considered opinion there is no infirmity in the well reasoned order of learned CIT(A). Accordingly, we uphold the same.

27. In the result, this appeal by the Revenue stands dismissed.

Order has been pronounced in the Court on 13.5.2019.

Sd/-	Sd/-
(SANDEEP GOSAIN)	(SHAMIM YAHYA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 13/5/2019

<u>Copy of the Order forwarded to</u> :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Assistant Registrar)

ITAT, Mumbai

PS