



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

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

ITA no.1843/Mum./2017
(Assessment Year : 2012-13)

Satish S. Prabhu
B-2/1001, Saraswati CHSL
N.G. Acharya Marg, Chambur
Mumbai 400 071
PAN – AAIPP0075C

..... Appellant

v/s

Asstt. Commissioner of Income Tax
Circle-27(3), Mumbai

..... Respondent

Assessee by : Shri Aditya R. Ajgaonkar
Revenue by : Shri V. Vinod Kumar

Date of Hearing – 16.09.2019

Date of Order – 06.12.2019

ORDER

PER SAKTIJIT DEY. J.M.

Aforesaid appeal by the assessee is directed against the order dated 7th February 2017, passed by the learned Commissioner of Income Tax (Appeals)-25, Mumbai, for the assessment year 2012-13.

2. The dispute in the present appeal is confined to the disallowance of deduction claimed under section 54/54F of the Income Tax Act, 1961 (for short "*the Act*").

3. Brief facts are, the assessee, an individual, is a Chartered Accountant by profession. For the assessment year under dispute, the assessee filed his return of income on 30th September 2012, declaring total income of ₹ 25,92,570. The assessee was owner of two flats viz. Flats no.B-6 and B-15, in Shree Saraswati Co-operative Housing Society, Chembur. Flat no.B-15, was purchased by the assessee himself on 21st July 2013, for a sale consideration of ₹ 7.50 lakh, excluding stamp duty, registration charges and society transfer fee. Whereas, flat no.B-6, was inherited by the assessee on the death of his father in the year 1997. It is stated that assessee's father had purchased the said flat in the year 1970, for a consideration of ₹ 8,000. Subsequently, the assessee entered into a development agreement with the housing society and M/s. Nav Durga Construction Co. on 19th November 2005, for re-development of the property. As per the terms of the said development agreement, the assessee received two new flats being flat no.B-2/1001 and flat no.B-3/101, against surrender of the old flats being flat no.B-6 and B-15 respectively. As against surrender of flat no.B-15 and the new flat received in consequence thereof, the assessee offered capital gain and simultaneously claimed deduction under section 54 of the Act in the return of income. Insofar as the new flat received in lieu of old flat no.B-6, the assessee neither offered it initially to capital gain nor

claimed any deduction under section 54/54F of the Act. Subsequently, in the course of assessment proceedings, the assessee filed a letter offering the capital gain arising from flat no.B-6, and claimed deduction under section 54F of the Act in respect of the new residential flat received on surrender of flat no.B-6. Insofar as the capital gain in respect of flat no.B-15, purchased by the assessee himself and the new flat received in lieu thereof on re-development, the Assessing Officer allowed assessee's claim of deduction under section 54 of the Act. However, in respect of the new flat received on surrender of old flat no.B-6, the Assessing Officer did not allow assessee's claim of deduction on the reasoning that the deduction was neither claimed in the return of income filed by him nor by filing any revised return of income. Further, he held that Flat no.B-6, being a residential premise, the assessee cannot be allowed deduction under section 54F of the Act on transfer of such property. In this context, he observed, merely because the old as well as new flat was used by the assessee as office, it will not change its character as a residential house. Accordingly, he disallowed assessee's claim of deduction under section 54F of the Act in respect of the flat received on surrender of old flat no.B-6. The assessee challenged the aforesaid decision of the Assessing Officer before the first appellate authority. However, learned

Commissioner (Appeals) also sustained the disallowance made by the Assessing Officer.

4. Reiterating the stand taken before the Departmental Authorities, the learned Authorised Representative submitted, there is no dispute that the assessee was the owner of two flats at the time of entering into development agreement and on surrender of these two flats, the assessee received two new flats after re-development. He submitted, the flat inherited from the father was used by the assessee as an office, therefore, it was not shown in the books and being thought of as a commercial property assessee neither offered capital gain nor claimed deduction under section 54/54F in the return of income. However, in course of assessment proceedings the assessee filed a letter offering capital gain and claimed deduction under section 54F of the Act. He submitted, since the inherited flat was used as an office before and after development of the property, the assessee claimed deduction under section 54F of the Act. He submitted, if according to the Departmental Authorities the flat is a residential property, the assessee has to be allowed deduction under section 54 of the Act irrespective of assessee's claim of deduction under section 54F of the Act, as there cannot be any estoppel against law. He submitted, since the Assessing Officer has allowed deduction under section 54 of the Act in respect of one flat, deduction under section 54 of the Act against

the other flat should also be allowed. The learned Authorised Representative submitted, though before the Departmental Authorities, the assessee had claimed deduction under section 54F of the Act, however, deduction can be allowed to the assessee under the applicable provision. In this context, he submitted, the assessee has raised additional ground claiming deduction under section 54 of the Act.

5. The learned Departmental Representative submitted, the assessee had deliberately suppressed the fact that he was the owner of one more flat and has received a new flat on surrender of that flat. Therefore, assessee's claim of deduction under section 54/54F of the Act was not allowable. Further, he submitted, since the flat transferred by the assessee was a residential property, claim of deduction under section 54F of the Act is not allowable.

6. We have considered rival submissions and perused the material on record. Undisputed facts are, the assessee was the owner of two flats in a housing society. One flat was purchased by the assessee himself, whereas, the other one was inherited from his father. Subsequently, the assessee had entered into a development agreement with housing society and the developer and in terms of the said agreement, the assessee surrendered two flats owned by him and

in lieu of these two flats received two new flats from the developer. As regards the flat purchased by the assessee himself and the new flat received against that, the Assessing Officer has allowed assessee's claim of deduction under section 54 of the Act. The dispute is only with regard to the second flat inherited from his father. As transpires from the record, in the return of income the assessee neither offered the capital gain from the second flat nor claimed any deduction under section 54/54F of the Act. In the course of assessment proceedings, through a letter submitted before the Assessing Officer the assessee offered capital gain in respect of second flat and claimed deduction under section 54F of the Act. The Assessing Officer has disallowed the deduction claimed primarily for two reasons; firstly, the claim was not made either in the original return of income or by way of a revised return of income. Secondly; the flat transferred being a residential property, no deduction under section 54F of the Act can be allowed. Whereas, learned Commissioner (Appeals) has sustained the said disallowance on the reasoning that the assessee has suppressed the ownership of the second flat and the resultant capital gain and further, the flat sold being a residential property, deduction under section 54F of the Act cannot be allowed. Thus, from the aforesaid facts, it is clear that the assessee has transferred two flats and in lieu of those two flats has received two new flats on re-development. Merely because

the assessee did not offer or disclose the capital gain from the second flat in the return of income would not disentitle him from availing the statutory deduction if otherwise he is entitled to it. Therefore, we are unable to accept the reasoning of learned Commissioner (Appeals) that since the assessee did not disclose the ownership of the second flat, he will not be entitled to deduction under section 54F of the Act. As regards the second aspect of the issue, whether the assessee is entitled to claim deduction under section 54 or 54F of the Act, from the facts on record it is clear that according to the Departmental Authorities, the flat transferred being a residential property, the assessee can claim deduction only under section 54 of the Act. If that is the case, the deduction claimed by the assessee should have been allowed under the correct provision. Merely because the assessee has claimed deduction under section 54F of the Act, by treating the flat as a commercial property, assessee's claim of deduction under section 54 of the Act cannot be disallowed if the assessee fulfills the conditions of section 54 of the Act. In the facts of the present case, the Departmental Authorities have no doubt that the flat transferred by the assessee is a residential flat and on re-development the assessee has also received a residential flat. That being the case, the assessee is certainly entitled for deduction under section 54 of the Act. Merely because the assessee claimed a deduction under the wrong provision,

his claim cannot be disallowed if it is allowable under a different provision. In view of the aforesaid, while admitting the additional ground raised by the assessee being purely a legal ground which can be decided without requiring investigation into fresh facts, we direct the Assessing Officer to allow assessee's claim of deduction under section 54 of the Act in respect of the second flat. Additional grounds are allowed. Consequently, the ground raised by the assessee claiming deduction under section 54F of the Act having become redundant is dismissed.

7. In the result, assessee's appeal is allowed as indicated above.
Order pronounced in the open Court on 06.12.2019

Sd/-
M. BALAGANESH
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 06.12.2019

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai