

आयकर अपीलिय अधिकरण

मुंबई पीठ "ई "

श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष एवं

श्री अमरजीतसिंह, लेखा सदस्य के समक्ष

IN THE INCOME TAX APPELLATE TRIBUNAL

MUMBAI BENCH " E", MUMBAI

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &

SHRI AMARJIT SINGH, ACCOUNTANT MEMBER.

आअसं. 7109/मुं/2012 (नि.व.2004-05)

ITA NO. 7109/MUM/2012 (A.Y.2004-05)

आअसं. 91/मुं/2020 (नि.व.2011-12)

ITA NO. 91/MUM/2020 (A.Y.2011-12)

आअसं. 92/मुं/2020 (नि.व.2012-13)

ITA NO. 92/MUM/2020 (A.Y.2012-13)

Sanjay S. Dutt,

1101, Imperial Heights,

Smt. Nargis Dutt Road, Pali Hill, Bandra (W),

Mumbai 400 050

PAN:AAJPD-2027-K

: अपीलार्थी/ Appellant

बनाम/ Vs.

Asstt. Commissioner of Income –tax 11(1),

Aaykar Bhavan, M.K.Road,

Mumbai 400 020.

: प्रत्यर्थी/ Respondent

आअसं. 2414/मुं/2015 (नि.व.2005-06)

ITA NO. 2414/MUM/2015 (A.Y.2005-06)

Asstt. Commissioner of Income –tax 16(1),

Aaykar Bhavan, M.K.Road,

Mumbai 400 020.

: अपीलार्थी/ Appellant

बनाम/ Vs.

Sanjay S. Dutt,

1101, Imperial Hights,

Smt. Nargis Dutt Road, Pali Hill, Bandra (W),

Mumbai 400 050

PAN:AAJPD-2027-K

: प्रत्यर्थी/ Respondent

Assessee by : Shri Stany Saldana

Revenue by : Shri B.K. Bagchi

सुनवाई की तारीख/
Date of Hearing : 11/03/2022
घोषणा की तारीख /
Date of Pronouncement : 17/03/2022

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

These appeals for assessment years 2004-05 and 2005-06 are taken up together for adjudication as the issue raised in appeals germinate from the sale of same capital asset. The appeal for assessment years 2011-12 and 2012-13 are against an ex-parte order of Commissioner of Income Tax(Appeals)-7, Mumbai [in short 'the CIT(A)'], dated 15/11/2019 for the respective assessment years.

ITA NO.7109/MUM/2012(A.Y.2004-05):

2. This appeal by the assessee is against the order of Commissioner of Income Tax (Appeals)-3, Mumbai [in short 'the CIT(A)] dated 27/03/2012 for the assessment year 2004-05. The assessee in appeal has raised as many as ten grounds. The issues that emerges from the grounds of appeal are valuation of property as on 01/04/1981 and consequent determination of Long Term Capital Gain(LTCG) and denial of exemption under section 54F of the Income Tax Act, 1961 (in short 'the Act').

3. This appeal is time barred by 185 days. The assessee has filed an application seeking condonation of delay supported by an affidavit. After examining the same we are satisfied that the delay in filing of appeal is not intentional and has been caused due to bona-fide reasons mentioned in the affidavit. The Hon'ble Apex Court in the case of Ram Nath Sahu & Ors vs. Gobardhan Sao reported as 2002 AIR 1201(SC) has held that while dealing with application seeking condonation of delay, acceptance of explanation furnished should be the rule and refusal an exception, more so when no negligence or inaction or want of bonafide can be imputed to the defaulting party. Taking pedantic and hyper technical view of the matter for

rejecting the explanation furnished would cause enormous loss and irreparable injury to the party against whom the lis terminates. Thus, in view of the facts of the case and the law expounded by the Hon'ble Apex Court, delay in filing of appeal is condoned and the appeal is admitted to be heard and decided on merits.

4. Shri Stany Saldana appearing on behalf of the assessee submitted at the outset that the only issue he is pressing in this appeal is with respect to denial of exemption u/s.54F of the Act. The property sold was jointly owned by the assessee with his father Late Shri Sunil Dutt in the ratio of 27:73. The Tribunal in the case of assessee's father in ITA No.2972/Mum/2012 for assessment year 2004-05 decided on 10/12/2019 has held that the assessee therein is eligible to claim exemption u/s. 54F of the Act. The case of the assessee is on same footing. The Id. Representative for the assessee referred to para 24 of Tribunal order dated 10/12/2019(supra).

5. Shri B.K.Bagchi representing the Department defended the impugned order. However, the Id.Departmental Representative fairly admitted that the issue relating to exemption u/s. 54F has been decided by the Tribunal in the case of assessee's father who was joint owner of the property.

6. We have heard the submissions of rival sides and have examined the orders of authorities below. The solitary issue urged in the present appeal by the Id. Representative for the assessee is with regard to assessee's claim of exemption under section 54F of the Act. Undisputedly, the assessee was joint owner of property having 27% share. The 73% share in property was that of assessee's father.We find that the issue of exemption under section 54F of the Act had cropped up in the appeal of assessee's father before the Tribunal in ITA No.2972/Mum/2012. The Co-ordinate Bench decided the issue in favour of the assessee by observing as under:

"23. With regard to exemption u/s 54F, we notice that assessee has modified the development agreement for construction of the flats from 40 flats to 36 flats and 2 penthouses and distributed between them as per terms of original

agreement. Therefore, the modified agreement and its schedule, which is placed on record at page no. 43 of the paper book clearly indicates that the intention of the developer and the assessee to make 2 penthouses in 11th and 12th floor as penthouses and assessee was regularly pleading that these 2 penthouses were constructed by combining 4 flats at floors 11th and 12th. However, we notice that AO has rejected the contention of the assessee with the observation that there is no record that this combining of flats were made during the impugned assessment year. We cannot accept the contention of the AO for the reason that the purpose of modification of the development agreement was to combine 4 flats and to make 2 penthouses. Therefore, we are in agreement with the submission of Ld. AR that there exist 2 penthouses at the site developed by the developer as per the terms of agreement in modified development agreement.

24. Coming to the exemptions, we notice that the development agreement was entered by the assessee along with his son with share of 73:27 between them and it is clear that there exist 2 penthouses and two individual assessees. Therefore, each assessee will get separate exemption u/s 54F of the Act. This benefit is legally available to both the assessees. There are catena of cases in which courts have held that when there exists two portion of flats with one kitchen then the whole combined portion of the area will be treated as one single unit for the purpose of granting exemption u/s 54 as well as 54F. Accordingly, we direct the AO to grant exemption u/s 54F of the Act to each assessee and as per their choice. On record, assessee prefers to get penthouse occupied by his daughter as exemption u/s 54F and by legally AO should allow this penthouse as exemption u/s 54F of the Act. Accordingly, this ground raised by the assessee is allowed.”

Taking into consideration undisputed facts of the case and the decision of Co-ordinate Bench, we hold that the assessee is eligible for exemption under section 54F of the Act, hence, ground No.7 of appeal by assessee is allowed for parity of reasons.

7. In so far as other issues raised in grounds of appeal, no submissions were made by the Id. Authorized Representative of the assessee, hence, dismissed. In the result, appeal by the assessee is partly allowed in the terms aforesaid.

ITA NO.2414/MUM/2015, A.Y. 2005-06:

8. This appeal by the Revenue is directed against the order of CIT(A) -4, Mumbai dated 14/01/2015 for the assessment year 2005-06. The Revenue in appeal has raised solitary ground assailing the finding of CIT(A) in allowing Long Term Capital Gains on sale of land, whereas the agreement entered into by the assessee with the buyers of flats does not state that ownership of the land has been transferred to the buyers.

9. The Id. Authorized Representative of the assessee appearing on behalf of the assessee stated at the outset that the issue raised by the Revenue in appeal has already been adjudicated by the Tribunal in the case of assessee's father in ITA No. 2972/Mum/2012(supra). The Id. Authorized Representative of the assessee referred to the findings of the Tribunal at para -35 of the said order.

10. The Id. Departmental Representative representing the Department vehemently supported the assessment order, however, the Id. Departmental Representative admitted that the issue has been adjudicated by the Tribunal in the case of assessee's father in assessment year 2004-05.

11. Both sides heard. The Assessing Officer has disputed the claim of assessee in respect of sale of land as Long Term Capital Gain. The Assessing Officer rejected the contention of assessee that sale consideration includes consideration for land. In First Appellate proceedings, the CIT(A) granted relief to the assessee by following the order of his predecessor in the case of assessee's father and the decision of Tribunal in the case of ACIT vs. Jaimal K. Shah, 137 ITD 376. The CIT(A) allowed assessee's claim of Long Term Capital Gains is to be charged on sale of land. We find that there is no contrary material to dislodge the findings of CIT(A). Further this issue has been considered by the Co-ordinate Bench in the case of Late Shri Sunil Dutt, father of the assessee. The assessee and Late Shri Sunil Dutt were having joint ownership of the property in the ratio of 27:73. The Co-ordinate Bench decided this issue in favour of the assessee by observing as under:-

“35. Considered the rival submissions and material placed on record, we notice that in the case of CIT v Citibank 261 ITR 570 (Bom), the Hon'ble Bombay High Court, wherein it was held that as per the above ratio, the flat owners will get right of possession as well as right on portion of the undivided share in the land. We notice that as per the proportionate area of flats occupied by him in respect of the total area of the building i.e. undivided share, the owner of the flat will get an automatic membership in the cooperative society in proportion to the undivided share. Since cooperative society owns the total area of the land and being a member of the society, he gets the ownership of the undivided share. As per the sale deed, it is clear that assessee gets a membership on the cooperative societies, it does mean that flat owners not only owns a super structure and also ownership right on the undivided share, therefore we are inclined to accept the findings of Ld. CIT(A) in distributing the sale proceeds into sale proceeds attributable to the land and super structure. Accordingly, we reject the contentions of the revenue and dismiss the grounds of appeal raised by the revenue.”

The Revenue has not been able to controvert the aforesaid findings. Thus, in view of undisputed facts of the case and the aforesaid decision by the Tribunal, we find no merit in the appeal by the Revenue, hence, the same is dismissed being devoid of any merits.

ITA NO.91/MUM/2020, A.Y. 2011-12:

ITA NO.92/MUM/2020, A.Y. 2012-13:

12. The Id. Authorized Representative of the assessee submitted that the CIT(A) has decided the appeals for 2011-12 and 2012-13 in an ex-parte proceedings. These appeals were originally fixed for hearing before CIT(A) -4, Mumbai. The assessee initially received notice for appearing before the CIT(A) -4. The assessee appeared and filed written submissions. Thereafter, on account of restructuring in the Department, these appeals by the assessee were transferred to CIT(A) -7, Mumbai. Due to change in the jurisdiction after restructuring there was confusion, the assessee was following up before the CIT(A) -4, whereas the appeals were decided in ex-parte proceedings by the CIT(A) -7. The Id. Authorized Representative of the assessee for the assessee submitted that the assessee has prima-facie good case in his favour. If an opportunity is given to the assessee, the assessee would present its case before the CIT(A).

13. On the other hand, the Id. Departmental Representative vehemently defended the orders of CIT(A) for assessment years 2011-12 and 2012-13, respectively. The Id. Departmental Representative submitted that a perusal of the impugned orders would show that various notices were issued to the assessee. Despite service of notice, the assessee failed to appear before the CIT(A). The Id. Departmental Representative vehemently prayed for upholding the order of CIT(A) and dismissing the appeals of assessee.

14. Both sides heard. The assessee in these appeals for assessment years 2011-12 and 2012-13 has assailed ex-parte orders by the First Appellate Authority for the respective assessment years. A perusal of the impugned orders reveal that several notices were issued to the assessee and purportedly served as well. The assessee has only submitted written submissions and none appeared on behalf of the assessee for personal hearing. Taking into consideration entirety of facts, we deem it appropriate to restore these appeals back to the file of CIT(A) for denovo adjudication after affording reasonable opportunity of hearing to the assessee, in accordance with law. The assessee is directed to appear before the First Appellate Authority on service of notice and co-operate in the proceedings. The impugned orders for assessment year 2011-12 and 2012-13 are set-aside and the appeals by the assessee are allowed for statistical purpose.

15. To sum up: ITA NO.7109/Mum/2012 is partly allowed, ITA No. 2414/Mum/2015 is dismissed and ITA No.91/Mum/2020 & 92/Mum/2020 are allowed for statistical purpose.

Order pronounced in the open Court on Thursday the 17th day of March, 2022.

Sd/-

(AMARJIT SINGH)

लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated: 17/03/2022

Vm, Sr. PS(O/S)

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
6. गार्ड फाइल/Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai