

**IN THE INCOME TAX APPELLATE TRIBUNAL
“E” BENCH, MUMBAI**

**BEFORE SHRI KULDIP SINGH, JM &
MS PADMAVATHY S, AM**

**I.T.A. No. 3014/Mum/2023
(Assessment Year: 2013-14)**

Kenneth M. Misquitta A/72, Misquitta House, Old Police Station Road, Mumbai-400056. PAN : AANPM8889J	Vs.	ITO-25 (2)(5) Kautilya Bhavan, Bandra Kurla Complex, Bandra (East), Mumbai-400051
Appellant)	:	Respondent)

Appellant/Assessee by : Shri S.V. Joshi, AR
Revenue/Respondent by : Shri P.D. Chougule , Sr. DR

Date of Hearing : 18.12.2023
Date of Pronouncement : 20.12.2023

ORDER

Per Padmavathy S, AM:

This appeal is against the order of the Commissioner of Income Tax, Appeals, / National Faceless Appeal Centre dated 05.07.2023 for the AY 2013-14. The assessee raised the following grounds:

1) The Learned Commissioner of Income Tax (Appeals) (hereinafter referred to as 'the learned CIT(A)') erred in upholding the addition of Rs. 1,83,500/- made by the AO u/s. 50C

1.1) The Learned CIT(A) erred in holding that the AO was justified in Considering the market value at Rs. 2,01,57,500/- as against the value of Rs. 1,96,07,000/- adopted by the appellant.

1.2) The Learned CIT(A) ought to have held that as the difference between the value adopted by the stamp valuation authority does not exceed 110% of the consideration received by the assessee, the difference had to be ignored.

2) The Learned CIT(A) erred in holding that the cost of acquisition of property sold during the year was correctly adopted at nil by the Learned AO.

2.1) The Learned CIT(A) overlooked the fact that the valuation report dt 09-02-2016 by the registered valuer was available on record & the indexed cost was Rs. 6,95,232/- which ought to have been taken as cost of acquisition.

3) The Learned CIT(A) erred in disallowing deduction of Rs. 36 Lakhs claimed by the appellant u/s. 54F.

3.1) The learned CIT(A) erred in holding that as the appellant has not purchased a new residential house but only acquired perpetual tenancy, deduction u/s. 54F was not allowable.

3.2) The Learned CIT(A) failed to appreciate that a 'Perpetual Tenant' enjoys all the rights of an owner of the Property and is therefore, entitled to deduction u/s. 54F

4) The appellant craves leave to add to, delete, modify or alter any of the grounds of appeal.

2. The assessee is an individual filed the return of income for AY 2013-14 on 05.08.2013 declaring a total income of Rs. 6,94,670/-. The case was selected for scrutiny under CASS and the notice under section 143(2) of the Income Tax, 1961 (the Act) was duly served on the assessee. In the return of income the assessee has offered to tax the Long Term Capital Gain (LTCG) arising out of transfer of 1/3rd share in ancestral leasehold property. The assessee has claimed deduction under section 54F towards purchase of tenancy rights and purchase of

land. The assessee also claimed deduction under section 54EC of the Act towards investment in eligible Bonds. The Assessing Officer (AO) while completing the assessment making various additions amounting to Rs. 63,95,500/- towards LTCG. On further appeals, the CIT(A) confirmed the addition made by the AO. The assessee is in appeal before the Tribunal against the order of the CIT(A).

Addition made under section 50C – Ground No.1

3. During the course of assessment proceeding, the AO noticed that as per AIR the assessee has sold immovable property for a consideration of Rs. 65,35,667/- (1/3rd share of Rs. 1,96,07,000/-) which is the value as per the agreement. The AO held that the market value of the immovable property is Rs. 2,01,57,500/-. The AO brought to tax the difference between the market value and the agreement value under section 50C of the Act.

4. The ld. AR in this connection submitted that the difference between the market value and the agreement value i.e. between Rs. 1,96,07,000/- and Rs. 2,01,57,500/- is less than 5%. The ld. AR therefore, submitted that the 3rd proviso to section 50C which states that when the stamp duty value does not exceed 5% then the actual consideration received shall be deemed to be the full value of consideration, shall be applicable in assessee's case. The ld AR therefore submitted that no addition can be made under section 50C of the Act.

5. The ld. DR on the other hand, submitted that the 3rd proviso to section 50C was inserted only by the Finance Act, 2018 w.e.f. 01.04.2019 and therefore for the year under consideration, the assessee cannot take cover under proviso. The ld. DR accordingly, supported the order of the AO/CIT(A).

6. We have heard the parties and perused the material on record. In the given case the difference between the stamp duty valuation and the actual consideration is less than 5%. It is a settled position that the insertion of 3rd proviso to section 50C is curative in nature to take care of unintended consequences of the scheme of section 50C and therefore is retrospective. Accordingly we hold that the AO is not correct in making addition under section 50C.

Cost of acquisition considered as Nil – Ground No.2

7. The assessee had claimed indexed cost of acquisition by taking Rs. 3,00,000/- as cost of acquisition against the full value of consideration. The AO did not accept the cost of acquisition claimed by the assessee for the reason that the assessee has not submitted any purchase agreement or any other documentary evidence in support of the cost of acquisition of Rs. 3,00,000/-. Therefore, the AO considered the cost of acquisition as Nil. Before the CIT(A) the assessee submitted that the value of Rs. 3,00,000/- is based on the valuation report as of 01.04.1981 as per which the cost of acquisition on the said date was at Rs. 81,600/-. The assessee submitted that for the purpose of indexation this cost has been considered based on the valuation report. The assessee further submitted that the cost of acquisition is fixed based on estimated rental value which have been considered in the valuation report and accordingly the cost of acquisition should be allowed to be deducted from the full value of consideration. The CIT(A) did not accept the submissions of the assessee and upheld the order of the AO.

8. Before us the ld. AR submitted that the valuation report which is submitted by the assessee before the lower authorities is prepared by the professional and the AO/CIT(A) without giving proper reasons have simply rejected the valuation report and proceeded to consider the cost of acquisition as Nil. The ld. AR drew our attention to the relevant part of the valuation report (Page 42 to 51) where the valuation officer has given a detailed explanation for the basis on which the valuation of the property as on 01.04.1981 has been arrived at.

9. The ld. DR on the hand relied on the order of the lower authorities.

10. We have heard the parties and perused the material on record. The lower authorities have considered the cost of acquisition at Nil for the reason that the assessee had not produced any documentary evidence in support of the cost of acquisition. We noticed that the Revenue has not recorded any reasons for rejecting the valuation report as submitted by the assessee and has also not brought anything on record to state that the value as per the valuation report is not correct. In our considered view rejecting the valuation report without recording any reasons and considering the cost of acquisition as Nil is not correct. The Revenue ought to have made a reference to the Department Valuation Officer (DVO) in order to ascertain the cost of acquisition of the asset transferred instead of simply considering the same as Nil. In view of the discussion, we are of the view that it is just and proper to remit the issue back to the AO to consider the issue afresh taking into consideration the valuation report submitted by the assessee and decide in accordance with law. Needless to say that the assessee be given a proper opportunity of being heard. It is ordered accordingly. This ground is allowed for statistical purposes.

Disallowance under section 54 – Ground No.3

11. During the year under consideration, the assessee had claimed Rs. 36,00,000/- as deduction under section 54F of the Act against deposit in Capital Gains Accounts. The assessee submitted before the AO that within two years from the date of transfer of the capital asset, the assessee has invested Rs. 33,90,000/- in acquiring tenancy rights on 09.04.2014 and accordingly is eligible for deduction under section 54F. The AO did not allow the deduction claimed by the assessee stating that the amount is not utilized for purchase or construction of new asset. Aggrieved, the assessee filed further appeal before the CIT(A). The assessee submitted before the CIT(A) that out of the amount of Rs. 36,00,000/- deposited into the Capital Gain Account Scheme within the stipulated period the assessee has utilized Rs. 33,90,000/- for acquiring tenancy rights. The assessee further submitted that though the assessee has claimed a deduction under section 54F the AO has erroneously disallowed the same under section 54. The assessee also submitted that the property for which the tenancy rights are acquired is owned by assessee's family and that the assessee has paid heavy premium to purchase the tenancy rights which is nothing but the purchase price. It was also submitted before the CIT(A) that since the assessee had acquired perpetual tenancy rights, the same would fall within the definition of deemed owner under section 22 and the assessee relied on various judicial pronouncement in this regard. The CIT(A) did not accept the submissions of the assessee and upheld the disallowance made by the AO by holding that

“7.2. I have perused the records and considered the submissions carefully. The dispute is regarding allowability of exemption under section 54 of the I.T. Act in respect of capital gain earned by the assessee from sale of a residential property. Under the provisions of section 54, capital gain

arising from transfer of a residential house income from which is chargeable under the head income from house property is exempt if the capital gain is invested in purchase of a new residential house within one year before or two years after date on which transfer took place or assessee has constructed a new residential house within the period of three years after the date of transfer. In the present case, assessee had sold the residential property and purchased tenancy rights of a residential house and such right is stated to be for lifetime of the assessee. The said residential house is also owned by the appellant's family only and the assessee has paid heavy premium to purchase the tenancy rights and rent payable per month is very negligible.

7.3. The case of the assessee is that tenancy right was perpetual and assessee was therefore deemed owner of the property under section 22 of the Act. Effectively the argument of the appellant is that for all practical purposes, the appellant was owner of new residential property and therefore, assessee should be entitled for exemption under section 54 of the Act. According to the Assessing Officer as per requirement of section 54, the appellant had to purchase or construct a new residential house and then only is entitled for exemption under the said section. Acquisition of new residential house by any other mode is not prescribed and, therefore, appellant is not entitled for exemption.

7.4. Under the provisions of section 54, exemption of capital gain is available in respect of transfer of residential house owned by the appellant. The purpose of the section is to grant exemption in case the appellant acquires a new residential house by investing the capital gain as an owner. The words used in Section 54 are "purchase" or "construction" of a new residential house. The requirement of section is not that appellant may acquire a new residential house by any other mode.

7.5. Hon'ble Supreme Court in case of CIT v. T.N. Arvinda Reddy 120 ITR 46 in which Hon'ble Supreme Court, while considering the work 'Purchase' held that the word "purchase" appearing in section 54(1) has to be given its common meaning i.e. buy for a price or equivalent of price by payment in kind or adjustment towards a debt or for other monetary consideration. Thus, for application of provisions of section 54, the appellant has to buy a property as an owner. Provisions of section 54 are exemption provisions and, therefore, in case two interpretations are possible i.e. whether appellant should acquire the new residential house as owner or even the perpetual tenancy right would suffice, the interpretation favorable to the revenue shall be followed and this has been held by many Courts. It is an established dictum that the person invoking an exception or an exemption

provision to relieve him of the tax liability must establish clearly that he is covered by the said provision.

7.6. The provision refers to purchase or construction of a new residential house and it is quite obvious that the same should be as an owner and not as perpetual tenant. The appellant has averred that the lease is for more than twelve years and referred to the provisions of section 22. The appellant submitted that as the appellant in this case had perpetual lease, it has been argued that the appellant is deemed owner and therefore, should be entitled to exemption under section 54 of the Act. However, the provision of deemed owner is only for the purposes of section 22 to 26 as clearly mentioned in the said section, which relate to computation of income from house property. Therefore, argument of deemed owner is relevant only in connection with computation of income from house property and not in relation to exemption provisions of section 84 which is being dealt with now.

7.7. In view of the foregoing discussion, the claim of exemption under section 54 appeal is dismissed. Assessing Officer has rightly disallowed the of the Income tax Act. In the result, this ground of the appeal is dismissed. ”

12. The Ld. AR submitted that the tenancy rights acquired by the assessee is a perpetual one and by virtue of section 22, the assessee would be the deemed owner of the property. The ld. AR further submitted that the tenancy rights agreement (page 56 to 61) entered into by the assessee with his brother in his capacity as executor of his father's will is registered and the stamp duty paid on the same is Rs. 1,60,000/-. Our attention was drawn to the relevant document evidencing the registration of the tenancy rights agreement which is in page 53 to 55 of PB. The ld. AR also submitted that in the state of Maharashtra, entering into perpetual tenancy agreements is allowed and the assessee by acquiring such right has become the deemed legal owner of the property and therefore, would be eligible for deduction under section 54F. The ld. AR in this regard relied on the decision of Chennai Bench of the Tribunal in the case of N. Ramaswamy Vs. ITO (ITA No. 925/Chn/2019 dated 06.12.2019) and decision of Panji Bench of the

Tribunal in the case of Mukund M. Altekar Vs. ITO (ITA No. 1616/Pun/2015 dated 30.10.2017).

13. The Ld. DR on the other hand, supported the order of the lower authorities.

14. We have heard the parties and perused the material on record. The limited issue for our consideration here is whether acquisition of perpetual tenancy rights amounts to purchase / acquisition of the property and thereby the investment is eligible for deduction under section 54F. It is brought to our attention that a similar issue has been considered by the Chennai Bench of the Tribunal in the case of N. Ramaswamy (supra) where it has been held that -

4. We have considered the rival submissions on either side and perused the relevant material available on record. As rightly submitted by the Ld. representative for the assessee and the Ld. D.R., the Assessing Officer allowed the exemption as claimed by the assessee under Section 54F of the Act. It is not in dispute that the assessee entered into an agreement for perpetual lease for an unlimited period with M/s Mahindra Residential Developers Limited. The issue arises for consideration is whether the assessee has to purchase the property absolutely for claiming exemption under Section 54F of the Act or perpetual lease for unlimited period would amount to purchase of the property for claiming exemption under Section 54F of the Act. We have gone through the provisions of Section 54F of the Act which reads as follows:-

54F. CAPITAL GAIN ON TRANSFER OF CERTAIN CAPITAL ASSETS NOT TO BE CHARGED IN CASE OF INVESTMENT IN RESIDENTIAL HOUSE (1) Subject to the provisions of sub-section (4), where in the case of an assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of any long-term capital asset, not being a residential house (hereafter in this section referred to as the original asset), and the assessee has, within a period of one year before or two years after the date on which the transfer took place purchased, or has within a period of three years after that date constructed, one residential house in India (hereafter in this section referred to as the new asset), the capital gain shall

be dealt with in accordance with the following provisions of this section, that is to say,—

(a) if the cost of the new asset is not less than the net consideration in respect of the original asset, the whole of such capital gain shall not be charged under section 45 ;

(b) if the cost of the new asset is less than the net consideration in respect of the original asset, so much of the capital gain as bears to the whole of the capital gain the same proportion as the cost of the new asset bears to the net consideration, shall not be charged under section 45 :

Provided that nothing contained in this sub-section shall apply where—(a) the assessee,—(i) owns more than one residential house, other than the new asset, on the date of transfer of the original asset ; or(ii) purchases any residential house, other than the new asset, within a period of one year after the date of transfer of the original asset ; or(iii) constructs any residential house, other than the new asset, within a period of three years after the date of transfer of the original asset ; and(b) the income from such residential house, other than the one residential house owned on the date of transfer of the original asset, is chargeable under the head “Income from house property”.

Explanation For the purposes of this section,— “net consideration”, in relation to the transfer of a capital asset means the full value of the consideration received or accruing as a result of the transfer of the capital asset as reduced by any expenditure incurred wholly and exclusively in connection with such transfer.

(2) Where the assessee purchases, within the period of two years after the date of the transfer of the original asset, or constructs, within the period of three years after such date, any residential house, the income from which is chargeable under the head “Income from house property”, other than the new asset, the amount of capital gain arising from the transfer of the original asset not charged under section 45 on the basis of the cost of such new asset as provided in clause (a), or, as the case may be, clause (b), of sub-section (1), shall be deemed to be income chargeable under the head “Capital gains” relating to longterm capital assets of the previous year in which such residential house is purchased or constructed.

(3) Where the new asset is transferred within a period of three years from the date of its purchase or, as the case may be, its construction, the amount of capital gain arising from the transfer of the original asset not charged under section 45 on the basis of the cost of such new asset as provided in clause (a) or, as the case may be, clause (b), of sub-section (1), shall be deemed to be income chargeable under the head “Capital gains” relating to longterm capital assets of the previous year in which such new asset is transferred.

(4) The amount of the net consideration which is not appropriated by the assessee towards the purchase of the new asset made within one year before the date on which the transfer of the original asset took place, or which is not utilised by him for the purchase or construction of the new asset before the date of furnishing the return of income under section 139, shall be deposited by him before furnishing such return such deposit being made in any case not later than the due date applicable in the case of the assessee for furnishing the return of income under sub-section (1) of section 139 in an account in any such bank or institution as may be specified in, and utilised in accordance with, any scheme which the Central Government may, by notification in the Official Gazette, frame in this behalf and such return shall be accompanied by proof of such deposit ; and, for the purposes of sub-section (1), the amount, if any, already utilised by the assessee for the purchase or construction of the new asset together with the amount so deposited shall be deemed to be the cost of the new asset : Provided that if the amount deposited under this sub-section is not utilised wholly or partly for the purchase or construction of the new asset within the period specified in sub-section (1), then,—(i) the amount by which—(a) the amount of capital gain arising from the transfer of the original asset not charged under section 45 on the basis of the cost of the new asset as provided in clause (a) or, as the case may be, clause (b) of sub-section (1), exceeds (b) the amount that would not have been so charged had the amount actually utilised by the assessee for the purchase or construction of the new asset within the period specified in sub-section (1) been the cost of the new asset, shall be charged under section 45 as income of the previous year in which the period of three years from the date of the transfer of the original asset expires ; and (ii) the assessee shall be entitled to withdraw the unutilised amount in accordance with the scheme aforesaid.

5. The language employed by the Parliament is very clear that the assessee has to purchase within a period of one year before or after the date on which the transfer took place or the assessee has to construct a residential house within a period of three years after the sale of the property, capital asset. In this case, after the sale of the property, the assessee entered into a perpetual lease for an unlimited period. The assessee has every right to transfer the perpetual lease to third party in the open market and also has every right to continue in possession of residential house. Therefore, the question arises for consideration is whether the property acquired by the assessee by means of perpetual lease for unlimited period would amount to purchase within the meaning of Section 54F of the Act? We have carefully gone through the provisions of Section 2(47) of the Act and also 269UA(2)(iii)(f) of the Act. For the purpose of convenience,

we are reproducing Sections 2(47)(vi) and 269UA(2)(iii)(f) of the Act which read as follows:-

2(47) "transfer", in relation to a capital asset, includes,—
 (i) the sale, exchange or relinquishment of the asset ; or
 (ii) the extinguishment of any rights therein ; or
 (iii) the compulsory acquisition thereof under any law ; or
 (iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment ; or
 (iva) the maturity or redemption of a zero coupon bond ; or
 (v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882) ; or
 (vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property :

Explanation 1.— For the purposes of sub-clauses (v) and (vi), "immovable property" shall have the same meaning as in clause (d) of section 269UA.

Explanation 2.— For the removal of doubts, it is hereby clarified that "transfer" includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India ;

269UA(2)(iii)(f) "transfer,"—

(i) in relation to any immovable property referred to in subclause (i) of clause (d), means transfer of such property by way of sale or exchange or lease for a term of not less than twelve years, and includes allowing the possession of such property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882).

Explanation For the purposes of this sub-clause, a lease which provides for the extension of the term thereof by a further term or terms shall be deemed to be a lease for a term of not less than twelve years, if the aggregate of the

term for which such lease is to be granted and the further term or terms for which it can be so extended is not less than twelve years;

(ii) in relation to any immovable property of the nature referred to in sub-clause (ii) of clause (d), means the doing of anything (whether by way of admitting as a member of or by way of transfer of shares in a co-operative society or company or other association of persons or by way of any agreement or arrangement or in any other manner whatsoever) which has the effect of transferring or enabling the enjoyment of, such property.

6. A bare reading of Section 2(47)(vi) of the Act shows that the agreement or arrangement which has the effect of transferring or enabling the enjoyment of immovable property, has to be considered as transfer in relation to capital asset. In this case, there was a perpetual lease agreement for unlimited period. The assessee was in possession of residential house. Therefore, this Tribunal is of the considered opinion that in view of the definition found in Section 2(47)(vi) of the Act, the transaction of perpetual lease agreement by which the assessee took possession of property for unlimited period, has to be construed as purchase of property within the meaning of Section 54F of the Act.

7. Furthermore, Section 269UA(2)(iii)(f) of the Act clearly says that any lease for a term of not less than twelve years and includes holding possession of such property thereby taken, has to be construed as transfer. Of course, this is in the context of purchase of property by Central Government in the case of transfer. In other words, Section 269UA(2)(iii)(f) also defines transfer which includes lease for a term not less than twelve years. In this case, admittedly, the lease was not for less than twelve years. Hence, for all practical purposes, the acquisition of property by perpetual lease exceeding the period of twelve years, has to be construed as purchase within the meaning of Section 54F of the Act. In view of the scheme under the provisions of the Income-tax Act, as enunciated under Section 2(47)(vi) and Section 269UA(2)(iii)(f), this Tribunal is of the considered opinion that when the assessee acquired the residential house by means of perpetual lease exceeding twelve years, it has to be construed as acquisition of property / purchase of property within the meaning of Section 54F of the Act. Therefore, the assessee is entitled for exemption under Section 54F of the Act. Hence, this Tribunal is unable to uphold the order of the Principal Commissioner passed under Section 263 of the Act. Accordingly, the impugned order of the Principal Commissioner is quashed.

15. We also notice that a similar view is taken by the coordinate bench in the case of Mrs. Prema Shah vs ITO (199 ITD 60 (Mum-Trib)). In the given case, the assessee has entered into an Agreement of Tenancy dated 9th April 2014 with

one Shri Gerald Michael Misquitta whereby the tenancy rights are vested with the assessee for a monthly rental of Rs.1000 (page 57 of paper book). We further notice that this agreement is registered by paying a stamp duty of Rs.1,60,000. However from the perusal of the agreement it is not coming out clearly that the tenancy rights are acquired perpetually for an unlimited period and also that assessee has enduring right to possess and enjoy the property as residential house for unlimited period. It is also relevant to note that Shri Gerald Michael Misquitta has acted in his capacity as the Executer and Trustee of the Will of Shri Michael John Misquitta who is the landlord. In our considered view therefore, the issue needs factual verification of the nature of tenancy rights acquired and the rights acquired by the assessee in terms of the tenancy agreement. Accordingly we remit the issue back to the AO for a denovo consideration of the issue with a direction to take into consideration the tenancy agreement and the judicial precedence quoted above while deciding in accordance with law after giving a reasonable opportunity of being heard to the assessee. It is ordered accordingly.

16. Ground No.4 is general and does not warrant separate adjudication.
17. In the result, appeal filed by assessee is allowed for statistical purposes.

Order pronounced in the open court on 20-12-2023.

Sd/-
(KULDIP SINGH)
Judicial Member

Sd/-
(PADMAVATHY S)
Accountant Member

**SK, Sr. PS*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent

3. DR, ITAT, Mumbai
4. Guard File
5. CIT

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai