

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, 'सी' ,मुंबई ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES, 'C' MUMBAI**

श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं
श्री राजेश कुमार, लेखा सदस्य, के समक्ष

**Before Shri Joginder Singh, Judicial Member, and
Shri Rajesh Kumar, Accountant Member**

**ITA No.7688/Mum/2014
Assessment Year: 2011-12**

Shri Pradipkumar Purshottam Kanakia, C/o- Pratap Re-Rollers Pvt. Ltd 18, Steel Yard House, Iron Market, Sant Tukaram Road, Mumbai-400009	बनाम/ Vs.	DCIT, Circle-13(2), Aayakar Bhavan, Mumbai-400020
(निर्धारिती /Assessee)		(राजस्व /Revenue)
PAN. No.AFVVK8451P		

निर्धारिती की ओर से / Assessee by	Shri Dalpat Shah
राजस्व की ओर से / Revenue by	Shri A. Ramachandran-DR

सुनवाई की तारीख / Date of Hearing :	28/11/2016
आदेश की तारीख /Date of Order:	02/12/2016

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

The assessee is aggrieved by the impugned order dated 31/10/2014 of the Ld. First Appellate Authority, Mumbai. The only ground raised in the present appeal pertains to disallowing the claimed deduction u/s 54 of the Income Tax Act, 1961 (hereinafter the Act) amounting to Rs.63,62,400/-.

2. During hearing, the ld. counsel for the assessee, Shri Dalpat Shah, claimed that the impugned issue is covered by the decision of the coordinate Bench in the case of Rajesh Keshav Pillai vs Income Tax Officer 44 SOT 617 (Mum.), Ashok Syal vs CIT 209 taxman 376 (P&H), Krishna Gopal Nagpal vs DCIT 2 SOT 628 (Pune). On the other hand, the ld. DR, Shri A. Ramachandran, though defended the addition made by the ld. Assessing Officer but did not controvert that the impugned issue is covered in favour of the assessee.

2.1. We have considered the rival submissions and perused the material available on record. In view of the above, we are reproducing hereunder the relevant portion of the order dated 13/08/2010 (2011) 44 SOT 617 (Mum.) for ready reference and analysis:-

“2. Briefly stated the facts of the case are that the assessee owned two flats being the flat Nos. 41 and 51 in Shikha Building, Pali Hill, Bandra (West). Both the flats had been purchased on 5th Jan., 2001. The flat No. 41 was sold by the assessee on 16th June, 2005 for a sum of Rs. 1,01,00,000 and the flat No. 51 had been sold on 29th April, 2005 for a sum of Rs. 97,79,500. The assessee had thus earned income on account of long-term capital gain from sale of two flats in asst. yr. 2006-07. The indexed gain in respect of flat No. 41 was Rs. 88,55,558 whereas the indexed gain in respect of

the flat No. 51 was Rs. 85,55,508. The assessee invested the gain on sale of flats in two different flats i.e., flat in Sai Dham at Govind Patil Road for Rs. 81,57,624 and flat at Girnar 55, Pali Hill for a sum of Rs. 95,71,364. The total investment in two flats was Rs. 1,77,28,988 which was more than the total index gain on sale of two flats of Rs. 1,74,17,617. The assessee, therefore, claimed the entire capital gain as exempt under the provisions of s. 54. The said provisions are reproduced below as ready reference.

"54. (1) Subject to the provisions of sub-s. (2), where, in the case of an assessee being an individual or an HUF, the capital gain arises from the transfer of a long-term capital asset, being buildings or lands appurtenant thereto, and being a residential house, the income of which is chargeable under the head 'Income from house property' (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, a residential house, then. Instead of the capital gain being charged to income-tax as income of the previous year in which the transfer took place, it shall be dealt with in accordance with the following provisions of this section, that is to say,—

(i) if the amount of the capital gain is greater than the cost of the residential house so purchased or constructed (hereafter in this section referred to as the new asset) the difference between the amount of the capital gain and the cost of the new asset shall be charged under s. 45 as the income of the previous year; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be nil; or

(ii) if the amount of the capital gain is equal to or less than the cost of the new asset, the capital gain shall not be charged under s. 45; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be reduced by the amount of the capital gain."

2.1 The AO observed that phrase used in s. 54(1) was "capital gain arises from transfer of a long-term capital gain" and that the use of the word 'a' showed that exemption was available only in respect of sale of one capital asset. Similarly the assessee could purchase or construct only one residential house as the phrase used in s. 54(1) was a residential house. The AO referred to the decision of the Special Bench of the Tribunal in case of ITO vs. Ms. Sushila M. Jhaveri (2007) 109 TTJ (Mumbai)(SB) 299 : (2007) 107 ITD 321 (Mumbai)(SB) in which it was held that exemption under s. 54 should be allowed only in respect of investment in one residential house. In the said case, it was pointed out, the Tribunal had observed that wherever the legislature intended that investment

could be made in more than one asset, the word used was 'any' as was the case in ss. 54B, 54D, 54E, 54EA and 54EB. For example, s. 54E allowed exemption of capital gain if invested in any of the specified assets and, therefore, the word used was 'any' and not 'a'. But in case of ss. 54 and 54F the word used was "a" and not "any" which shows that the legislature intended to allow expenditure only in respect of one residential house. The Tribunal, therefore, concluded that the investment has to be in only one residential house for getting exemption in respect of sale of an asset. The AO also observed that when a statutory provision was plain and unambiguous, literal interpretation has to be adopted. Reliance was placed on the judgment of Hon'ble Supreme Court in case of Polestar Electronic (P) Ltd. & Anr. vs. Addl. CST 1978 CTR (SC) 20 : (1978) 41 STC 409 (SC) and the judgment of Hon'ble Supreme Court in case of Prakash Nath Khanna & Anr. vs. CIT (2004) 187 CTR (SC) 97 : (2004) 266 ITR 1 (SC), AO, therefore, held that the assessee was entitled to claim exemption under s. 54 only in respect of sale of one flat and the corresponding investment in one flat. Exemption was thus allowed only in respect of indexed gain of Rs. 88,55,558 in respect of flat No. 41 with respect to the investment of Rs. 95,71,364 in Girnar flat. The investment being more than capital gain in respect of sale of flat No. 41, the capital gain was exempted whereas the indexed gain of Rs. 85,55,058 in respect of flat No. 51 was held taxable. In appeal CIT(A) upheld the view taken by the AO aggrieved by which the assessee is in appeal before the Tribunal.

3. Before us the learned Authorised Representative for the assessee reiterated the submissions made before lower authorities that exemption under s. 54 was allowable in respect of any number of flats sold as there was no restriction placed in the section for allowing exemption only in respect of sale of one flat. However, he agreed that corresponding to each sale of flat there has to be investment in one residential property. It was pointed out that the decision of the Special Bench in case of Ms. Sushila M. Jhaveri (supra) was distinguishable as in that case the assessee had claimed exemption in relation to investment in two properties against the sales of one flat. In case of the assessee, the investments in two flats were corresponding to two different sales of flats. It was accordingly argued that the assessee should be allowed exemption fully as aggregate value of investment in the two flats was more than the aggregate capital gain from sale of flats. Alternatively it was also submitted that in case exemption was considered in respect of each set of purchase and sale taking separately, then investment in Girnar flat should be considered against the gain in respect of flat No. 41 which was fully exempt as the investment was more. As regards the sale of flat No. 51 the indexed gain was Rs. 85,55,058 against which investment made was only Rs. 81,57,624 and, therefore, only a sum of Rs. 3,97,434 could be taxed.

3.1 *The learned Departmental Representative on the other hand strongly supported the orders of authorities below and placed reliance on the findings given in the respective orders.*

4. *We have perused the records and considered the rival contentions carefully. The dispute is regarding computation of exemption under s. 54 which is available in case the long-term capital gain arising from sale of a residential house is invested either by way of purchase and construction of a residential house within the prescribed period. In this case the assessee had sold two flats during the year being the flat Nos. 41 and 51 in Shikha Building, Pali Hill, Bandra (W) resulting into indexed gain of Rs. 88,55,558 and Rs. 85,55,058 respectively. The capital gain had been invested by the assessee in a flat at Sai Dham for Rs. 81,57,624 and a flat at; Girnar for Rs. 95,71,364. The case of the assessee is that exemption under s. 54 is available in respect of sale of any number of flats with corresponding investment in a residential house whereas the view taken by the authorities below is that exemption can be allowed only in respect of sale of one residential property with corresponding investment in only one residential house. There is no dispute either in the computation of capital gain or in respect of fulfilment of any other condition prescribed in s. 54 such as the investment being within the specified period etc.*

4.1 *A perusal of provisions of s. 54(1) which has been reproduced at p. 2 earlier shows that capital gain arising from transfer of a long-term capital asset being a residential house the income of which is chargeable under the head "Income from house property" is exempt if the capital gain is invested in a residential house in the manner prescribed in the said section. There is no restriction placed anywhere in the s. 54 that exemption is available only in relation to sale of one residential house. Therefore, in case the assessee has sold two residential houses, being long-term assets, the capital gain arising from the second residential house is also capital gain arising from the transfer of a long-term asset being a residential house. The provisions of s. 54 therefore will also be applicable to the sale of second residential house and similarly to a third residential house and so on. Whenever the exemption available is restricted to one asset, a suitable provision is incorporated in the relevant section itself. For instance s. 23(2) exempts income from a property consisting of a house or a part of house which is in occupation of the assessee or which could not be occupied by the assessee because of his employment/business/profession being carried on at some other place. Based on such provisions contained in s. 23(2), income from any number of properties being residential house which are self-occupied will have to be treated as exempt. But a restriction has been placed in s. 23(4) which provides that where the property referred to in sub-s. (2) consists of more than one residential house, exemption would be available only in respect of one house and other self-occupied residential houses will be treated as let*

out. There is no such provision in s. 54 to restrict the exemption of capital gain only to sale of one residential house. The authorities below have taken the view that whenever more than one option is given to the assessee the word used is "any". The reference has been made to the provisions of s. 54E etc. We find from perusal of the said sections that the word "any" has been used because the assessee has option to invest in any of the assets mentioned therein. For instance, s. 54E provides exemption in respect of capital gain arising from transfer of a long-term capital asset if whole or any part of the net consideration is invested in any specified assets within six months from the date of transfer. Since the specified assets were more than one, the word "any" has been used because the exemption will be available if the investment is made in any of the specified assets. The situation in s. 54 is different. Considering the language used in s. 54(1), in our view exemption will be available in respect of transfer of any number of long-term capital assets being residential houses if other conditions are fulfilled.

4.2 The Revenue has placed reliance on the decision of Special Bench of the Tribunal in case of Ms. Sushila M. Jhaveri (*supra*) but the said case is distinguishable as in that case nowhere it was held that exemption will be available only in respect of sale of one residential house. In fact issue in that case was different. The issue was whether exemption was available in case the gain from sale of a house is invested in more than one residential house. It was held by the Special Bench that exemption will be available only when the investment was made in only one residential house. We are in full agreement with the decision of the Special Bench that exemption in respect of sale of a residential house will be available only when there is corresponding investment in one residential house. But the exemption will be available in respect of sale of any number of residential house if there are corresponding investments in residential house and all other conditions are fulfilled. Thus in case there is sale of more than one residential house, the exemption will be available in relation to each set of sale and corresponding investment in the residential house. However, we are unable to agree with the plea of the assessee that exemption has to be calculated considering the aggregate of capital gain and aggregate of investment in the residential houses. In case there are sales of more than one residential house, in our view exemption has to be computed considering each set of sale of residential house and the corresponding investment in one residential house and the combination which is beneficial to the assessee has to be allowed. In this case the learned Authorised Representative has submitted that indexed gain of Rs. 88,55,558 in respect of sale of flat No. 41 should be considered against the investment in flat at Girnar for Rs. 95,71,364 which is allowed and the investment being more entire indexed gain of Rs. 88,55,558 in respect of sale of flat No. 41 will be exempt. The indexed gain of Rs. 85,55,508 in respect of sale of flat No. 51 will have to be considered against the investment of Rs. 81,57,624 in the flat at

Sai Dham. Since the investment is less than the capital gain, difference of Rs. 3,97,434 will have to be taxed. We hold accordingly.

5. In the result, appeal of the assessee is partly allowed in terms of the order above."

2.2. We find that the Coordinate Bench in the aforesaid case, wherein, there was sale of more than one residential house held that exemption will be available in relation to each set of sale and corresponding investment in residential house, thus, we find that the impugned issue is covered by the aforesaid decision of the Coordinate Bench.

2.3. However, before coming to any conclusion, we are reproducing hereunder the provision of section 54 of the Act for ready reference and analysis:-

“54. (1) Subject to the provisions of sub-section (2), where, in the case of an assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of a long-term capital asset, being buildings or lands appurtenant thereto, and being a residential house, the income of which is chargeable under the head "Income from house property" (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 date³⁹[constructed, one residential house in India], then, instead of the capital gain being charged to income-tax as income of the previous year in which the transfer took place, it shall be dealt with in accordance with the following provisions of this section, that is to say,—

- (i) if the amount of the capital gain is greater than the cost of the residential house so purchased or constructed (hereafter in this section referred to as the new asset), the difference between the amount of the capital gain and the cost of the new asset shall be charged under section 45 as the income of the previous year; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be *nil*; or

(ii) if the amount of the capital gain is equal to or less than the cost of the new asset, the capital gain shall not be charged under section 45; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be reduced by the amount of the capital gain.

(2) The amount of the capital gain 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 not so utilised shall be charged under section 45 as the 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 such amount in accordance with the scheme aforesaid.”

A plain reading of the provision of section 54(1) of the Income-tax Act discloses that when an individual-assessee or Hindu undivided family-assessee sells a long term capital assets and within a specified period construct residential unit (new asset), the capital gain arises from the original asset, shall be dealt with in accordance with the provisions of this section. Such assessee can invest capital gains for purchase of residential building/house to seek exemption of

the capital gains tax. Section 13 of the General Clauses Act declares that whenever the singular is used for a word, it is permissible to include the plural. The contention of the Revenue is that the phrase "a residential house" would mean one residential house and it does not appear to be the correct understanding. The expression "a residential house" should be understood in a sense that building should be of residential in nature and "a" should not be understood to indicate a singular number. The combined reading of sections 54(1) and 54F of the Income-tax Act discloses that, a non residential building can be sold, the capital gain of which can be invested in a residential building to seek exemption of capital gain tax. However, the proviso to section 54 of the Income-tax Act, lays down that if the assessee has already one residential building, he is not entitled to exemption of capital gains tax, when he invests the capital gain in purchase of additional residential building. The context in which the expression, "a residential house" is used in Section 54 makes it clear that, it was not the intention of the legislation to convey the meaning that: it refers to a single residential house, if, that was the intention, they would have used the word "one." As in the earlier part, the words used are buildings or lands which are plural in number and that: is referred to as "a residential house", the original asset. An asset newly acquired after the sale of the original asset also can be buildings or lands appurtenant thereto, which also should be "a residential house." Therefore the letter "a" in the context it is used should not be construed as meaning

"singular." But, being an indefinite article, the said expression should be read in consonance with the other words "buildings" and "lands" and, therefore, the singular "a residential house" also permits use of plural by virtue of Section 13(2) of the General Clauses Act. – CIT V. D. Ananda Bassappa (2009) 223 (kar) 186: (2009) 20 DTR (Kar) 266 can be followed.

2.4. There could also be another angle. Section 54/54F uses the expression "a residential house". The expression used is not "a residential unit". This is a new concept introduced by the assessing officer into the section. Section 54/54F requires the assessee to acquire a "residential house" and so long as the assessee acquires a building, which may be constructed, for the sake of convenience, in such a manner as to consist of several units which can, if the need arises, be conveniently and independently used as an independent residence, the requirement of the Section should be taken to have been satisfied. There is nothing in these sections which require the residential house to be constructed in a particular manner. The only requirement is that it should be for the residential use and not for commercial use. If there is nothing in the section which requires that the residential house should be built in a particular manner, it seems to us that the income tax authorities cannot insist upon that requirement. A person may construct a house according to his plans and requirements. Most of the houses are constructed according to the needs and requirements and even compulsions. For

instance, a person may construct a residential house in such a manner that he may use the ground floor for his own residence and let out the first floor having an independent entry so that his income is augmented. It is quite common to find such arrangements, particularly post-retirement. One may build a house consisting of four bedrooms (all in the same or different floors) in such a manner that an independent residential unit consisting of two or three bedrooms may be carved out with an independent entrance so that it can be let out. He may even arrange for his children and family to stay there, so that they are nearby, an arrangement which can be mutually supportive. He may construct his residence in such a manner that in case of a future need he may be able to dispose of a part thereof as an independent house. There may be several such considerations for a person while constructing a residential house. We are therefore, unable to see how or why the physical structuring of the new residential house, whether it is lateral or vertical, should come in the way of considering the building as a residential house. We do not think that the fact that the residential house consists of several independent units can be permitted to act as an impediment to the allowance of the deduction under Section 54/54F. It is neither expressly nor by necessary implication prohibited. The ratio laid down by Hon'ble Delhi High Court in CIT vs Gita Duggal (2013) 357 ITR 153 (Del.), CIT vs D. Ananda Basappa (2009) 309 ITR 329 (Karn.)(para-3 & 6) and CIT vs Smt. K.G. Rukminiamma (2011) 331 ITR 211(Karn.)(Para 6 &

10) supports the case of the assessee. Hon'ble Delhi High Court in the case of CIT vs Gita Duggal (supra) affirmed the stand of the Tribunal taken in ITA NO.3613/Del./2010, order dated 07/06/2011. The vice versa is also applicable because exemption u/s 54 will be available in respect of any number of long term capital assets, being residential houses, if other conditions are fulfilled. If the sale proceeds of the long term capital asset is not utilised, within specified time, then it will be dealt with in accordance with law. In the present appeal, it is not the case of the Revenue that the proceeds received upon transfer of long term capital asset was not utilised by the assessee. Thus, considering the totality of facts, the appeal of the assessee is allowed.

Finally, the appeal of the assessee is allowed

This order was pronounced in the open court in the presence of the ld. representatives from both sides at the conclusion of the hearing on 28/11/2016.

Sd/-

(Rajesh Kumar)

लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-

(Joginder Singh)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 02/12/2016

Shekhar, P.S./नि.स.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant (Respective assessee)
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai,
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,

ITAT, Mumbai

6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**