

**आयकर अपीलीय अधिकरण "A" न्यायपीठ मुंबई में।**

**IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI**

**BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER  
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 226/Mum/2012

(निर्धारण वर्ष / Assessment Year : 2008-09)

Anil Hasmukhlal Oza, Flat No. 13, Building No. 26-B, 4 <sup>th</sup> floor, Govind Nagar Co.Op. Hsg. Soc., Sodawala Lane, Borivali (West), Mumbai -400092.	<b>बनाम/</b> v.	The ITO – Ward 25(1(4), Mumbai.
स्थायी लेखा सं./PAN : AAAP01325Q		
(अपीलार्थी / <b>Appellant</b> )	..	(प्रत्यर्थी / <b>Respondent</b> )

Assessee by	Shri Nitesh Joshi
Revenue by :	Shri Arun Kumar

सुनवाई की तारीख / **Date of Hearing** : 14-10-2016

घोषणा की तारीख / **Date of Pronouncement** : 08-12-2016

**आदेश / ORDER**

**PER RAMIT KOCHAR, Accountant Member**

This appeal, filed by the assessee, being ITA No. 226/Mum/2012, is directed against the appellate order dated 20<sup>th</sup> October, 2011 passed by learned Commissioner of Income Tax (Appeals)- 35, Mumbai (hereinafter called "the CIT(A)"), for the assessment year 2008-09, the appellate proceedings before the learned CIT(A) arising from the assessment order dated 30<sup>th</sup> November, 2010 passed by the learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income-tax Act, 1961 (Hereinafter called "the Act").

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called “the Tribunal”) read as under:-

“1) The learned Commissioner of Income Tax (Appeals) erred in denying exemption u/s 54 of the Income Tax Act, 1961 of Rs. 14,91,850/-.

2) The learned Commissioner of Income Tax (Appeals) has considered the claim of the appellant u/s 54F while the appellant has claimed exemption u/s 54 of the Act.

3) The learned Commissioner of Income Tax (Appeals) erred in stating that the appellant has failed to submit the evidence for construction of new house within the prescribed time.

4) The appellant submits that all the conditions u/s 54 except the deposit of funds in a separate bank account was complied with and, therefore, a liberal view be taken in the matter.

5) Without prejudice and in alternate, the appellant submits that the learned Commissioner of Income Tax (Appeals) ought to have allowed exemption u/s 54 for amount invested in purchase of plot of land and construction of new house till due date of filing of the return of income.”

3. The brief facts of the case are that the assessee is an individual deriving income from salary, capital gains and interest. The A.O. observed from AIR information that the assessee was having transaction in immovable property for Rs. 1,25,58,500/- on 16.10.2007 along with two other persons. The AO observed that the assessee has sold his share in a building for a consideration of Rs. 18,50,000/- through agreement dated 15.10.2007 . The assessee computed the capital gain on his share in building of Rs. 14,91,000/- on which the assessee claimed exemption u/s 54 of the Act. The assessee was asked to submit complete details like copy of agreement for sale and copy of

purchase agreement with respect to the sale of building and also evidences in support of exemption u/s 54 of the Act claimed by the assessee. The assessee submitted that the assessee has sold his property at Zaoba Wadi, Girgaon, Mumbai -400004 for Rs.18,50,000/- against which the assessee has claimed exemption u/s 54 of the Act wherein the assessee purchased property at native place at Rajasthan and constructed a residence house. The A.O. observed that the assessee has not put the un-appropriated amount of capital gain on sale of property in the specified capital gain account as per capital gain scheme account, and instead the assessee had deposited the amount in the fixed deposit account in the bank and hence conditions as stipulated u/s 54 of the Act was not complied with by the assessee. On being asked by the AO, the assessee submitted a copy of land purchase agreement for a consideration of Rs. 1,87,500/- for purchase of property in Rajasthan on 13.05.2008, but failed to furnish proof for construction of the house within the period of two years and it was observed by the AO that the substantial portion of capital gain was deposited in the fixed deposit and remained in the fixed deposit till 26<sup>th</sup> August, 2008, whereas the due date for filing the return of income u/s 139(1) of the Act was 31<sup>st</sup> July, 2008. Thus, the AO rejected the claim of the assessee for exemption u/s 54 of the Act as the assessee failed to deposit the un-appropriated capital gains in the capital gain account maintained with the bank as per capital gain scheme before the due date of filing of return of income with the Revenue. The assessee also failed to submit evidences of having spent the amount on construction of new house before the AO. Thus, the AO vide assessment orders dated 30.11.2010 passed u/s 143(3) of the Act rejected the claim of the assessee for exemption of Rs.14,91,850/- u/s 54 of the Act.

4. Aggrieved by the assessment order dated 30.11.2010 passed by the AO u/s 143(3) of the Act, the assessee filed first appeal with the learned CIT(A). During the course of appellate proceedings before the ld. CIT(A), the assessee

submitted the details of amount spent on the construction of the new residential house, which are as under:-

(i)	Purchase of plot of land	Rs. 1,87,500/-
(ii)	Amount spent on construction of house	<u>Rs. 17,55,750/-</u>
	Total	Rs. 19,43,250/-
		=====

The assessee submitted that in the intervening period, the sale proceeds of the old residential house were kept in a fixed deposit with the bank as the intention of the assessee was to utilize the sale proceeds in the construction of new residential premises . It was submitted that keeping the funds in the interim period in the fixed deposits with the bank instead of keeping in a separate capital gain account with bank as per capital gain scheme is just a technical omission . It was submitted that spirit of law to kept the money separately for construction was fully followed as the assessee kept the amount in bank in fixed deposit. In support, the assessee relied upon the decision of the Hon'ble Supreme Court in the case of Bajaj Tempo Ltd. v. CIT (1992) reported in 196 ITR 380(Bom.) , whereby the Hon'ble Bombay High Court held as under:-

*" The provision in a taxing statute granting incentives for promoting growth and development should be construed liberally and since the provision for promoting economic growth has to be interpreted liberally restrictions on it too has to be construed so as to advance the objective of the provisions and not to frustrate it"*

It was further submitted that an amount of Rs.17,55,750/- was utilized as on 12<sup>th</sup> March, 2009 and hence, it was submitted that since out of capital gain of Rs.18,50,000/- , the assessee did utilized Rs.17.55 lacs within three years ,

the exemption should be granted to the assessee in respect of pertaining to his share in the property.

The ld. CIT(A) observed that the assessee had merely submitted a copy of land purchase agreement for a consideration of Rs.1,87,500/- on 13<sup>th</sup> May, 2008 but failed to furnish any proof for construction within a period of two years before the AO. The ld. CIT(A) referred to the provisions of section 54F of the Act and came to the conclusion that the assessee has failed to re-invest the net consideration amount simultaneously or the assessee has not deposited the same with the capital gain account maintained with the bank before the due date of filing of return of income u/s 139(1) of the Act as per capital gain scheme. It was held that as the substantial portion of capital gain was put in fixed deposit and it remained in the fixed deposit till 26<sup>th</sup> August, 2008 ( as the due date for filing of return was 31<sup>st</sup> July, 2008) , the assessee was bound to comply the provisions of sub section 4 of Section 54 and deposit the amount as per the Capital Gains Accounts Scheme, 1988-GSR 724(E), dated 22-6-1988 and deposit the amount in the account within the list of authorised branches of the banks specified to receive deposits and maintain accounts-GSR 725(E), dated 22-6-1988, however, the assessee failed to do so during the relevant period i.e. during the intervening period from the date of sale of first house and the date of completion of the new house at Rajasthan, hence appeal of the assessee was dismissed by learned CIT(A) vide appellate orders dated 20-10-2011.

5. Aggrieved by the appellate order of the ld. CIT(A) dated 20-10-2011 ,the assessee filed second appeal before the Tribunal.

6. The ld. Counsel for the assessee at the outset, submitted that the Hon'ble Bombay High Court in its very recent decision in the case of Humayun Suleman Merchant v. Chief Commissioner of Income Tax, (2016) 73

taxmann.com 2 (Bombay) has held that exemption u/s 54F shall be allowed if the same is utilized for the purpose of construction of new house before the date of filing of return u/s 139 of the Act or the same has been deposited in the notified capital gain bank account before the date of filing of return u/s 139(1) of the Act, the exemption shall be allowed. The ld. Counsel submitted that the assessee is joint owner of the property , wherein the assessee share in property was sold on 15<sup>th</sup> October, 2007 for a consideration of Rs. 18,50,000/- wherein capital gain earned was Rs. 14,91,000/- which is not a disputed position. The due date of filing of return was 31<sup>st</sup> July, 2008 while the return of income was actually filed on 18<sup>th</sup> November, 2008. Thus, the ld. Counsel submitted that the assessee had not deposited the amount in the notified capital gain bank account before 31<sup>st</sup> July, 2008 i.e. due date prescribed u/s 139(1) of the Act , but the assessee had invested the amount for construction of the new residential house before filing of the return of income on 18<sup>th</sup> November, 2008 i.e. within time prescribed u/s 139 of the Act, of which the details of construction are filed vide paper book page No. 59 to 60. The ld. Counsel submitted that the assessee had invested the sale proceed of the property sold in the fixed deposit with the banks which were later utilized for the purpose of the purchase of land and construction of the new residential house. It is submitted that the decision of the Hon'ble Bombay High Court in the case of Humayun Suleman Merchant (supra) is directly applicable to the case of the assessee and exemption u/s 54 of the Act should be allowed for the amount spent on construction of new residential house at Rajasthan till the date of filing of return of income on 18-11-2008. It is submitted that the assessee has worked out the capital gain at Rs. 14.91 lacs while the investment made in the construction of new house property is Rs. 1.87 lacs for the plot , and Rs. 17.86 lacs as per chart upto 02-05-2009 towards construction of new residential house at Rajasthan and the amount spent towards construction of new residential house till the date

of filing of return on 18.11.2008 should be allowed and the assessee is entitled for the exemption u/s 54 of the Act.

7. The ld. D.R. fairly conceded that the order of the Hon'ble Bombay High Court in the case of Humayun Suleman Merchant (supra) is binding on the Revenue and exemption u/s 54 of the Act will be allowed for the amount spent on construction of new house at Rajasthan till the date of filing of return of income by the assessee on 18.11.2008 which is within time limit prescribed u/s 139 of the Act. It was submitted that the matter may be restored to the file of the AO for computing the amount of exemption u/s 54 of the Act in accordance with law and in accordance with aforesaid judgment of Hon'ble Bombay High Court in the case of Humayun Suleman Merchant (supra), as the assessee did not submitted any evidence of construction of new residential house before the AO and also learned CIT(A) rejected the claim of the assessee at threshold on the grounds that the sale proceeds of the house were not deposited in notified capital gain account maintained with bank .

8. We have considered the rival contentions and also perused the material available on record including the case laws relied upon. We have observed that the assessee is the owner of the property which was jointly owned and the assessee sold his share of the property on 15<sup>th</sup> October, 2007 for a consideration of Rs. 18.50 lacs. The assessee had earned capital gain of Rs. 14.91 lacs on the sale of the said property which is not a disputed position between rival parties. The assessee has deposited the proceed of the sale of the afore-stated property in the fixed deposit with bank instead of depositing in the notified capital gain account maintained with the bank as per the capital gain scheme before the due date of filing of return u/s 139(1) of the Act i.e. 31<sup>st</sup> July, 2008. The assessee did not also file return of income within the time prescribed u/s 139(1) of the Act i.e. 31<sup>st</sup> July, 2008 , rather the

assessee filed return of income on 18<sup>th</sup> November, 2008 which was albeit filed within time stipulated u/s 139 of the Act. The assessee has acquired the land in Rajasthan for a consideration of Rs. 1.87 lacs and cost of construction of new residential house is claimed at Rs. 17,86,490/- till 02-05-2009 as per paper book/page 59-60 filed before the tribunal, which contains the general details of various expenses incurred for the construction of the new residential house. The claim of the assessee was rejected at threshold by the authorities below as the assessee failed to deposit the sale proceed of the property sold in the notified capital gain account maintained with the bank as per capital gain scheme as also the assessee failed to file necessary evidences towards construction of new residential house at Rajasthan. We have observed that the ratio of the decision of the Hon'ble Bombay High Court in the case of Humayun Suleman Merchant (supra) is directly applicable and assessee will be entitled to claim exemption u/s 54 of the Act for all the amount utilized for the construction of new residential house at Rajasthan till the date of filing of return of income on 18.11.2008 which was filed within time stipulated u/s 139 of the Act. In the interest of justice keeping in view facts and circumstance of the case, this matter needs to be set aside and restored to the file of the AO for making necessary verification as to the amount of exemption which the assessee is entitled for exemption u/s 54 of the Act in accordance with the ratio of decision laid down by the Hon'ble Bombay High Court in the case of Humayun Suleman Merchant (supra) and in accordance with law, by the AO after verification of the evidences. Needless to say the A.O. shall provide proper and sufficient opportunity of being heard to the assessee in accordance with the principles of natural justice in accordance with law. The assessee is also directed to produce necessary evidences and explanations before the A.O. in its defense which shall be admitted by the A.O. for examination and verification of the assessee's contentions with respect to the purchase/construction of the new residential house at Rajasthan on merits that the amount have been genuinely and



bonafidely spent for the construction of the new residential flat at Rajasthan.  
We order accordingly.

9. In the result, the appeal filed by the assessee in ITA No. 226/Mum/2012 for the assessment year 2008-09 is allowed for statistical purposes.

Order pronounced in the open court on 8<sup>th</sup> December, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 08-12-2016 को की गई ।

Sd/-  
(MAHAVIR SINGH)  
JUDICIAL MEMBER

sd/-  
(RAMIT KOCHAR)  
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 08-12-2016

I

व.नि.स./ R.K., Ex. Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "A" Bench
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

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