

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD – BENCH ‘SMC’**

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER

आयकर अपील सं./ ITA No. 2899/Ahd/2016

निर्धारण वर्ष/Assessment Year: 2012-13

Kayvanbhai Surendrabhai Huttheesing [Kayvanbhai Surendrabhai Sheth] “Samyak”, Nr. Emerald Honda Show Room, Ambawadi Ahmedabad 380015. PAN : ACJPS 9493 C	Vs	ITO, Ward-5(2)(3) Nehru Bridge Corner Ahmedabad.
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अपीलार्थी/ (Appellant)	प्रत्यर्थी/ (Respondent)
Assessee by :	Shri Dhinal Shah, AR
Revenue by :	Smt.Anupama Singla, Sr.DR

सुनवाई की तारीख/Date of Hearing : 15/02/2018

घोषणा की तारीख /Date of Pronouncement : 07/03/2018

ORDER

Assessee is in appeal before the Tribunal against order of the Id.CIT(A), Ahmedabad-5 dated 2.9.2016 passed for the Asstt.Year 2012-13.

2. Grounds of appeal taken by the assessee are not in consonance with the Rule 8 of the Income Tax (Appellate Tribunal) Rules, 1963 - they are descriptive and argumentative in nature. In brief the grievance of the assessee revolves around two fold issues viz. the Id.CIT(A) has erred in confirming re-opening of the assessment, and (b) the Id.CIT(A) has erred in restricting deduction under section 54F of the Act to the extent of Rs.30 lakhs and not granting against full investment. As far as

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re-opening of the assessment is concerned the Id.counsel for the assessee did not press this ground of appeal, hence, it is rejected.

3. With regard to second issue, brief facts of the case are that the assessee has filed his return of income on 21.3.2013 declaring total income at Rs.9,85,610/-. It emerges out from the record that the assessee had sold land along with co-owners. He was having 1/6th share. The AO after granting deduction of expenses considered net consideration of the land in the share of assessee at Rs.59,14,747/-. According to the assessee, he has purchased a residential house within two years jointly with his son Shri Shravanbahi Kayanbhai Sheth for a consideration of Rs.75 lakhs. His son has contributed Rs.5.00 lakhs and rest was paid by the assessee. Calculation of Rs.75 lakhs consists following amounts:

(a) Utilisation of sale consideration by the assessee	: Rs.30 lakhs
(b) Contribution of joint-owner	: Rs.5 alksh
(c) Loan from ICICI Bank in the name of assessee	: <u>Rs.40 lakhs</u>
Total	: Rs.75 lakhs

The Id.AO has granted benefit under section 54F to the extent of Rs.30 lakhs, but did not grant with regard to set off of loan amounts. In other words, assessee claimed set off of capital gain arisen on sale of land against the loan amount treating as utilisation of capital gain for purchase of a house. This plea of the assessee has been rejected by the Id.Revenue authorities below.

4. The Id.counsel for the assessee while taking us through impugned order of the Id.CIT(A) has contended that the issue in dispute is squarely covered by the following decisions:

- i) ITO Vs. KC. Gopal, 170 taxmann 591 (Ker)
- ii) CIT Vs. Kapilkumar Agarwal, 382 ITR 56 (P&H)
- iii) J.V.Krishna Rao Vs. DCIT, 54 SOT 44 (Hyd.ITAT)
- iv) Muneerkhan Vs. ITO, 54 SOT 504 (Hyd.ITAT)
- v) Bombay Housing Corpn Vs. ACIT, 81 ITD 545 (ITAT)

5. He took us through section 54F of the Income Tax Act and contended that section 54 mainly postulate two conditions viz. (a) capital gain must arise as a result of transfer of any assets other than residential house, and (b) the assessee should purchase new asset for residential purposes within two years or should construct residential house within three years. The assessee in the present case has fulfilled both the above conditions, inasmuch as long term capital gain has arisen as a result of sale of land and the assessee has purchased new asset being residential house for Rs.70 lakhs. He also pointed out that so far as sub-clause (a) in section 54F is concerned, it provided for mode of calculation of exemption of long term capital gain. It contemplates that if cost of new asset is more than the net consideration, then whole of capital gain is exempt. In the present case, cost of new asset in the hands of the assessee is Rs.70 lakhs as against net consideration of Rs.59,14,747/- falling to the share of the assessee. Therefore, whole of long term capital gain of Rs.29,72,370/- is exempt.

6. The Id.DR on the other hand relied upon the order of the Id.CIT(A). He contended that order of the Id.CIT(A) is based on the decision of ITAT, Mumbai Bench in the case of Milan Sharad Ruparel, 27

SOT 61. She further contended that the assessee availed loan from bank and purchased residential house. He has not used that very amount for the purchase of house.

7. We have duly considered rival contentions and gone through the record carefully. This issue has been considered in various cases as relied upon by the Id.counsel for the assessee. We deem it pertinent to take note of head-note of decision rendered by Hon'ble Kerala High Court as well as Hon'ble Punjab and Haryana High Court cited supra, which reads as under:

Section 54 of the Income-tax Act, 1961 - Capital gains - Profit on sale of property used for residential purposes -Assessment year 1984-85 - Whether entitlement of exemption under section 54 relates to cost of acquisition of new asset in nature of a house property for purpose of own residence within specified period and it is not necessary that consideration received on sale of property as such should be utilised for construction of new building - Held, yes

Section 54F of the Income-tax Act, 1961 - Capital gains - Exemption of, in case of investment in residential house (Conditions precedent) - Assessment year 2009-10 -Whether section 54F nowhere envisages that sale consideration obtained by assessee Prom original capital asset is mandatorily required to be utilized for purposes of meeting cost of new asset - Held, yes - Whether, therefore, where investment made by assessee, although not entirely sourced from capital gain, but, was within stipulated time and more than capital gain earned by him, assessee was entitled to exemption under section 54F -Held, yes [Paras 14 & 19] [In favour of assessee]

8. In the case of CIT Vs. Kapil Kumar Agarwal (supra) the assessee has purchased property for Rs.3.32 crores. He has sold shares and capital gain of Rs.1.3 crore arisen. Property was purchased after availing loan from employer, and capital gain arisen on account of sale of shares was claimed under section 54F *qua* the loan amount utilized for

purchase of new house. This contention of the assessee was not accepted by the AO as well as CIT(A). However, on appeal, the Tribunal has reversed finding of both the authorities. The Hon'ble High Court has noticed the finding of the Tribunal and thereafter upheld it. The finding of the Hon'ble High Court in para-15 containing finding of the Tribunal reads as under:

"15. It has been categorically recorded by the Tribunal that the assessee had made investment in between February 2008 upto August 2008 i.e. well within the stipulated period. The property was purchased for Rs.3.32 crores whereas the shares which were sold had resulted in capital gain of Rs. 1.93 crores. The investment was more than the capital gain earned by him. The relevant finding reads thus: –

"In the present case, the first date of capital gain is November 8, 2008. The assessee can acquire a house within a period November 8, 2007 upto November 2010 i.e. one year prior to transfer of original capital assets and two years after the transfer of capital assets. The assessee had made investment in between February 2008 upto August 2008 i.e. well within period. Learned Assessing Officer has also not disputed about the investment made by the assessee. His grievance is that investment was made after taking loan from the employer and therefore, assessee cannot claim benefit under section 54F(1) qua the loan amount utilized for purchasing of the new house. Hon'ble Kerala High Court in the case of ITO v. KC Gopalan (supra) has held that in section 54, there is nocondition that assessee should utilize the sales consideration itself for the purpose of acquisition of new property. Similar are the other orders of the ITAT relied upon by the assessee. On perusal of section 54F(1) and sub section (4), it reveals that these sections do to put any restriction that only capital gain would be utilized for purchase of the new house. The law permits utilization of capital gain within the specified time, the assessee may use such funds for other purposes and may find resources from other source for investment in time. The section provides investment in a house prior to one year of the transfer of long term capital assets. It will make it clear that if the transfer has not taken place then from where the funds would come for making the investment. The investment must be from some other sources and when assessee would receive sales consideration on transfer of a long term capital assets, he will claim set off of the capital gains against the investment already made

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for the purpose of exemption under section 54F. Learned DR has relied upon an order of the ITAT reported in Sher Mohammad v. Dy. CIT (Inv.) [2009] 27 SOT 61 (Jodh.URO). In that case, the ITAT has held that if investment was made out of loan amount then exemption under section 54F(1) will not be available. In the opinion of the ITAT, the assessee has to demonstrate source of funds, if investment was made by the assessee from his own source and not from loan taken from the bank then exemption would be available. In our opinion, the section does not put any such restriction. Hon'ble Kerala High court has explained the position. Similarly, in a series of other orders, at the end of ITAT, it has been held that there is no condition that assessee should utilize the sales consideration only for the purpose of acquisition of new property. In view of the above discussion, we are of the view that learned revenue authorities have erred in holding that assessee is not entitled for exemption under section 54F(1) of the Income Tax Act, 1961 for a sum of Rs. 121,32,636/-. The investment of the assessee is more than the capital gain earned by him. Therefore, we allow the appeal of the assessee and delete the addition of Rs. 121,32,636/- in the total income of the assessee under the head "long term capital gain".

9. A perusal of the above would indicate that issue in dispute is squarely covered in favour of the assessee by the decision of Hon'ble Punjab & Haryana High Court cited supra. A perusal of computation of income made by the ld.AO on page no.8 of the assessment order would indicate that the ld.AO took net sale consideration falling to the share of assessee at Rs.59,14,747/-. The indexed cost of acquisition in the hands of assessee was computed at Rs.29,42,376/-. Thus, net LTCG worked out in the hands of assessee is of Rs.29,72,370/- i.e. (Rs.59,14,747 minus Rs.29,42,376). The ld.AO granted benefit of set off as under:

$$\frac{\text{Capital gain} \times \text{cost of new asset}}{\text{Net sale consideration}}$$

The cost of new asset was taken at Rs.30 lacs only and in this, set off was granted upto Rs.15,07,606/-. The balance i.e. total capital gain :

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Rs.29,72,370 minus Rs.15,07,606 = Rs.14,64,764/- has been taxed at the rate of 20%. I allow this appeal and direct the AO to take cost of new asset at Rs.70 lakhs instead of Rs.30 lakhs and calculate the amount of capital gain, if any. In other words, there will be no capital gain for tax in the hands of assessee.

10. In the result, appeal of the assessee is partly allowed.

Pronounced in the Open Court on 7th March, 2018.

**Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER**