

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

**BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA No.1507/M/2017
Assessment Year: 2011-12**

ACIT - 25(2), R.No.508, C-10, 5 th Floor, Pratyakshkar Bhavan, BKC Bandra (E), Mumbai - 400051	Vs.	Mr. Bipin N. Sagar, 701/7, Glen Eagle, Gulmohar Road, Opp. Irla Masjid, JVPD, Andheri (W), Mumbai - 400 049 PAN:
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Jagdish T. Punjabi, A.R.
Shri Ritu J. Punjabi, A.R.

Revenue by : Shri Sunil Kumar Agarwal, D.R.

Date of Hearing : 15.01.2019

Date of Pronouncement : 05.02.2019

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the Revenue against the order dated 28.04.2014 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2011-12.

2. The only issue raised by the Revenue in various grounds of appeal is against the order of Ld. CIT(A) directing the AO to delete the disallowance of Rs.1,88,18,852/- of exemption under section 54 of the Act which was disallowed by the AO on the ground that the assessee has purchased and sold three flats by

three separate agreements for flat No.701, 702 & 703 at Glen Eagle and thereafter converted them into one.

3. The facts in brief are that the AO observed on the basis of details filed by the assessee that assessee has sold three flats i.e. flat No.701, 702 & 703 at Glen Eagle and claimed exemption under section 54 of the Act. The AO accordingly issued show cause notice dated 19.02.2014 which was replied by the assessee vide letter dated 28.02.2014 submitting therein that all the flats were located on the same floor when purchased and later on the same were combined and converted into one flat. The assessee submitted before the AO that due to legal formalities, these were purchased by three separate agreements and when sold the assessee entered into three agreements again. The assessee fully complied with all the conditions as envisaged in the section 54 of the Act. The AO rejected the submissions of the assessee on the ground that there were three separate agreements for purchase/sale for these flats and assessee was paying maintenance charges for each of the flat i.e. 701, 702 & 703. The AO further noticed that as per the provisions of section 54, the deduction under section 54 of the Act is allowable if the capital gain has arisen from transfer of long term capital asset being building or lands thereto being a residential house. However, in the present case the AO observed that the assessee sold three flats by way of three separate agreements. Accordingly, the AO allowed the deduction in respect of long term capital gain in respect of flat No.701 which was shown as the residential address in the electricity bill of the assessee and disallowed the long term capital gain of Rs.78,80,279/-, in respect of flat No.702 Rs.1,09,38,573/- and

Rs.1,88,18,852/-in respect of flat No.703 by framing assessment under section 143(3) of the Act vide order dated 21.03.2014. The Ld. CIT(A) allowed the appeal of the assessee by observing and holding as under:

"5.5 I have considered the submission of the appellant and observation of the A.O., During the appellate proceedings, the Appellant has stated that the transfer is of one residential house. The three adjoining flats were merged and made it one residential house not by the Appellant but by previous owner. The Appellant ever since the date of purchase used it as one residential house. There is one electricity meter in respect of the three flats. As against a long term capital gain of Rs. 3,00,46,935, arising on transfer of a residential house, the Appellant has before the due date of filing return of income deposited a sum of Rs. 3,50,00,000 in an account opened under the Capital Gains Account Scheme.

5.6 Generally, it may not be possible to find a bigger residential unit and that requires combining two or more adjoining flats into one unit. However, that does not mean that each flat is in itself a separate residential unit. What is to be seen is whether the adjoining flats were actually united and used as a common single unit or not. Execution of separate agreements cannot decide this issue. The flats were constructed in such a way that adjustment units of flats can be combined into one. The acquisition of flats may be done independently but eventually there is a single unit and house for the purpose of residence. Recently, the jurisdictional Hon'ble Bombay High Court in the context of section 54 of the Act, in CIT vs. DevdasNaik [2014] 49 taxmann.com 30 (Bombay) decided similar issue as under:

"We are unable to agree. We found that the evidence based on which the claim was granted by the Commissioner of Income Tax (Appeals) and the Income Tax Appellate Tribunal has been noted by the Tribunal in paragraph 4 of its order. Prior thereto, the factual position has also been noticed that the Assessee alongwith his wife jointly owned bungalow. The bungalow was sold at Rs.3/-crores. With this sum, they bought three flats, one in the Assessee's name, another in the name of Assessee and his wife and third in the name of the wife. The Assessee claimed deduction under section 54 on purchase of two flats in which he is either a sole owner or a joint owner. Though these flats were acquired under two distinct agreements and from different sellers, what has been noted by the Tribunal as also the Commissioner of Income Tax (Appeals) is that the map of the general layout plan as well as internal layout plan in regard to flat Nos. 103 and 104 indicate that there is only one common kitchen for both the flats. The flats were constructed in such a way that adjacent units or flats can be combined into one. However, admitted fact is that the flats were converted into one unit and for the purpose of residence of the Assessee. It is in these circumstances, the Commissioner held that the acquisition of the flats may have been done independently but eventually they are a single unit and house for the purpose of residence.

This factual finding could have been made the basis for recording a conclusion in favour of the Assessee. We do not find that such a conclusion can be termed as perverse. Reliance placed by the Tribunal on the order passed by it in the case of MsSushila M. Jhaveri (supra) and which reasoning found favour with this Court is not erroneous or misplaced. The language of the section has been noted in both the decisions and it has been held that so long as there is a residential unit or house, then the benefit or deduction cannot be denied. In the present case, the unit was a single one. The flats were constructed in such a way that they could be combined into one unit. Once there is a single kitchen then, the plans can be relied upon. We do not think that the conclusion is in any way impossible or improbable so as to entertain this Appeal. In this peculiar factual backdrop, this Appeal does not raise any substantial question of law. The Appeal is devoid of any merit and is dismissed. No order as to costs."

Further, Hon'ble Allahabad High Court has in the case of Shiv NarainChoudhary v. CWT (108 ITR 104) held that -

"self contained dwelling units which are contiguous and situated in the same compound and within a common boundry and having unity of structure could be regarded as one house."

5.7 Further, there is no restriction placed in section 54 that exemption is allowable only in respect of sale of one residential house. There is an inbuilt restriction that capital gain arising from sale of residential house cannot be invested in more than one residential house. However there is no restriction that capital gain arising from sale of more than one residential flat cannot be invested in one residential house. The proposition that the long term capital gain arising on transfer of multiple residential houses can be invested in purchase / construction of one residential house. It is also supported by the decision of the jurisdictional bench of the Tribunal in the case of DCIT v. Ranjit Vithaldas [2012] 23 taxmann.com 226 (ITAT-Mum)] (ITA No. 7443 (Mum) of 2002; AY 1998-99; order dated 22.6.2012). It is held that no restriction placed in section 54 that exemption is allowable only in respect of sale of one residential house. Even if the assessee sells more than one residential houses in the same year and the capital gain is invested in a new residential house, the claim of exemption cannot be denied if the other conditions of section 54 are fulfilled. This aspect had been examined by the Mumbai Bench of the Tribunal in Rajesh Keshav Pillai v, ITO (2011) 44 SOT 617 (Mum.) in which it has been held that exemption u/s 54 will be available in respect of transfer of any number of long term capital assets being residential houses if other conditions are fulfilled. No rulings have been brought on record by the Id. DR to show that the capital gain arising from sale of more than one residential houses cannot be invested in one residential house. The provisions of section 54 as pointed out earlier apply to transfer of any number of residential houses by the assessee provided the capital gain arising there from is invested in a residential house. The exemption u/s 54 is available if capital gain arising from transfer of a residential house is invested in a new residential house within the prescribed time limit. The relevant para are as under:-

Having held that the two flats were two different residential houses, it is required to be examined whether the assessee is entitled for exemption u/s 54 of the Act in respect of the sale of more than one residential houses. We see no restriction placed in section 54 that exemption is allowable only in respect of sale of one residential house. Even if the assessee sells more than one residential houses in the same year and the capital gain is invested in a new residential house, the claim of exemption cannot be denied if the other conditions of section 54 are fulfilled. This aspect had been examined by the Mumbai Bench of the Tribunal in *Rajesh Keshav Pillai v. ITO (2011) 44 SOT 617 (Mum.)* in which it has been held that exemption u/s 54 will be available in respect of transfer of any number of long term capital assets being residential houses if other conditions are fulfilled. The learned DR appearing for the Revenue has placed reliance on the judgment of the Hon'ble High Court of Punjab and Haryana in the case of *Pawan Arya v. CIT (237 CTR 210) supra* to argue that the claim of exemption is not available in respect of sale of more than one residential house. On careful perusal of the said judgment, we find that no such proposition has been laid down in that case. The Hon'ble High Court in the said case, have only held that the capital gain arising from the transfer of a residential house is not admissible against the investment in second house. Thus, the only restriction is that the capital gain arising from the sale of one residential house must be invested in one residential house and not in two residential houses.

Another important aspect which needs to be examined is whether the exemption u/s 54 will be available, in case, capital gain arising from sale of more than one residential house, is invested in one residential house. The learned counsel appearing for the assessee argued that there was no restriction under section 54 that capital gain arising from two residential houses cannot be invested in one residential house. We find substance in the argument advanced by the Id. Counsel for the assessee. No rulings have been brought on record by the Id DR to show that the capital gain arising from sale of more than one residential houses cannot be invested in one residential house. The provisions of section 54 as pointed out earlier apply to transfer of any number of residential houses by the assessee provided the capital gain arising there from is invested in a residential house. The exemption u/s 54 is available if capital gain arising from transfer of a residential house is invested in a new residential house within the prescribed time limit. Thus there is an inbuilt restriction that capital gain arising from the sale of one residential house cannot be invested in more than one residential house. However, there is no restriction that capital gain arising from sale of more than one residential houses cannot be invested in one residential house. In case capital gain arising from sale of more than one residential houses is invested in one residential house, the condition that capital gain from sale of a residential house should be invested in a new residential house sets fulfilled in each case individually because the capital gain arising from sale of each residential house has been invested in a residential house. Therefore, even if two flats are sold in two different years and the capital gain of both the flats is invested in one residential house, exemption u/s 54 will be available in case of sale of each flat provided the

time limit of construction or purchase of the new residential house is fulfilled in case of each flat sold." (emphasis supplied)

6. It is clear from discussion, submissions and legal decision that the appellant has sold his residential house being flat No.701, 702 and 703 in Glen Eagle building for total sale consideration of Rs.4,50,00,000/-. The appellant has invested Rs.3,50,0000/- in capital gain account with the Oriental Bank of Commerce before due date for filing of return of income. The flats were constructed in such a way that they could be combined into one unit for the purpose of residence. The acquisition of flats have been done independently but eventually they are single unit for the purpose of residence. Execution of separate agreements cannot decide this issue. In the appellant's case, the AO has not disputed the evidence placed before him to prove that these three adjoining flats were in fact united as one Single unit having one kitchen However, there is no restriction placed anywhere in section 54 that exemption is available in relation to sale of one residential house. The provision of Section 54 is applied to transfer of any number of residential house by the assessee, provided the capital gain arising there from is invested in a proper manner within the prescribed time limit. The appellant has invested Rs.3,50,0000/- in capital gain account with the Oriental Bank of Commerce before due date of return of income.

6.1 After considering the totality of fact, the rival submissions, the applicable law and on the basis of discussion mentioned above, I have come to the conclusion, the appellant is eligible to claim the benefit of provision of section 54 of I.T.Act. Therefore, the A.O. is directed to delete the addition of Rs.1,88,18,852 on account of disallowance of exemption u/s 54 of the Act."

4. After hearing both the parties and perusing the material on record, we find that the Ld. CIT(A) has given a detailed finding and passed a very reasoned order after following the Hon'ble Bombay High Court on this issue. We, therefore, do not find any reason to deviate from the conclusion drawn by Ld. CIT(A) and accordingly the order of Ld. CIT(A) is upheld as assessee was using all three flats as a compact unit and has only one electricity bill for all three flats. In any case, the issue is covered by the decision of the Hon'ble Bombay High Court in the case of CIT vs. DevdasNaik [2014] 49 taxmann.com 30 (Bombay) as relied by the Ld. CIT(A). We, therefore, uphold the order of Ld. CIT(A) by dismissing the appeal of the Revenue.

5. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 05.02.2019.

**Sd/-
(Mahavir Singh)
JUDICIAL MEMBER**

**Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER**

Mumbai, Dated: 05 02.2019.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.