IN THE INCOME TAX APPELLATE TRIBUNAL

"F" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI N.K. PRADHAN, ACCOUNTANT MEMBER

ITA no.3489/Mum./2016
(Assessment Year : 2005–06)

Neelam Nananni
C/o Hemant & Co., C.As
Off no.311, Gold Mohur Building ……. Appellant
Princess Street, Mumbai 400 002
PAN – ADHPN4893L

v/s

Income Tax Officer
Ward–17(3)(3), Mumbai ……. Respondent

Assessee by : Shri Vipul Joshi
Revenue by : Shri Rajeev Gubgotra

Date of Hearing – 13.12.2018	Date of Order – 08.03.2019

O R D E R

PER SAKTIJIT DEY, J.M.

Aforesaid appeal has been filed by the assessee challenging the order dated 18th March 2016, passed by the learned Commissioner (Appeals)–32, Mumbai, for the assessment year 2005–06.

2. In ground no.1, the assessee has raised the issue of disallowance of deduction claimed on account of cost of improvement for computing long term capital gain.

3. Brief facts are, the assessee is an individual. For the assessment year under dispute, the assessee filed her return of income on 29th July 2005, declaring total income of ₹ 5,40,491, after claiming deduction under section 54 of the Income Tax Act, 1961 (for short *"the Act"*). Assessment in the case of assessee was originally completed under section 144 of the Act determining the total income at ₹ 69,66,219. Against the assessment order so passed, the assessee carried appeal before the first appellate authority and thereafter to the Tribunal. The Tribunal vide order dated 14th February 2013, restored the matter back to the Assessing Officer for de novo adjudication. In pursuance to the directions of the Tribunal, the Assessing Officer took up the assessment proceedings afresh. In the course of assessment proceedings, the Assessing Officer while verifying the computation of long term capital gain by the assessee noticed that it has claimed deduction of an amount of ₹ 40 lakh under section 48(1) of the Act towards cost of development/improvement. When the Assessing Officer called upon the assessee to furnish the necessary details to justify the claim of cost of development, as alleged by the Assessing Officer, the assessee could not furnish the required details and sought adjournment time and again. Accordingly, the Assessing Officer disallowed assessee's claim of deduction of ₹ 40 lakh towards cost of improvement. Though, the assessee challenged the aforesaid

disallowance before learned Commissioner (Appeals), however, he also sustained the disallowance on the reasoning that except furnishing a photograph of a bungalow the assessee could not produce any other evidence to demonstrate that it has incurred expenditure towards improvement/development of the property. Accordingly, he sustained the disallowance made by the Assessing Officer.

4. The learned Authorised Representative reiterating the stand taken before the departmental authorities submitted that the assessee had purchased a plot of land in the year 1999 for a consideration of ₹ 18 lakh. Thereafter, the assessee constructed a bungalow over the said plot of land and at the time of sale of the property the bungalow was still in existence. In this context, he drew our attention to the sale deed dated 17th May 1999 and sale deed dated 12th July 2004. He submitted, the sale deed under which the assessee sold the property clearly mentions existence of a building over the land. He also drew our attention to a photograph of a building kept in a paper book. He submitted, since existence of the building is very much evident, assessee's claim of deduction under section 48 of the Act towards cost of improvement/development cannot be disallowed entirely. He submitted, in case, assessee was unable to furnish evidence to support the fact that an amount of ₹ 40 lakh was paid towards construction of

the building, the Assessing Officer could have estimated the cost of improvement.

5. The learned Departmental Representative relied upon the observations of learned Commissioner (Appeals) and the Assessing Officer.

6. We have considered rival submissions and perused material on record. It is evident, both the Assessing Officer and learned Commissioner (Appeals) have disallowed assessee's claim of deduction towards cost of improvement/development primarily on the ground that the assessee failed to furnish any documentary evidence to demonstrate that it has incurred such expenditure. As observed by learned Commissioner (Appeals), except furnishing a photograph of the building the assessee could not furnish any other evidence to support its claim. However, from the copy of sale deed dated 17th May 1999 by virtue of which the assessee purchased the property from the original owner (copy of sale deed at page–235 of the paper book) for a consideration of ₹ 18 lakh, it appears that the property purchased by the assessee was a plot admeasuring 420 sq.mtrs. Whereas, sale deed dated 12th July 2004, under which the assessee sold the property mentions the existence of a house constructed over an area of 6,500 sq.ft. Therefore, assessee's claim that it has constructed a house over the plot of land cannot be discarded at the threshold. However, the

onus of demonstrating incurring of expenditure for construction of the building lies entirely upon the assessee. The assessee has to furnish credible evidence to demonstrate that after purchase of the plot the assessee has constructed the building and the actual amount of expenditure incurred by it towards construction of the building. Once the assessee brings all the evidences on record to justify its claim, the onus shifts to the Assessing Officer to consider allowability of assessee's claim qua the evidences furnished. It is relevant to observe, except furnishing the photograph of the building the assessee has not furnished any other evidence even at this stage also to support its claim that an amount of ₹ 40 lakh was spent towards cost of improvement/development. Therefore, assessee's claim cannot be allowed on mere face value. However, for enabling the assessee to justify its claim by furnishing credible supporting evidence, we are inclined to restore the issue to the file of the Assessing Officer for de novo adjudication after due opportunity of being heard to the assessee. This ground is allowed for statistical purposes.

7. In ground no.2, assessee has challenged disallowance of deduction claimed under section 54 of the Act.

8. Brief facts are, against the long term capital gain derived from sale of immovable property, the assessee claimed deduction under section 54 of the Act towards investment made in purchase of new

flats amounting to ₹ 68,84,388. The Assessing Officer disallowed assessee's claim of deduction under section 54 of the Act on two grounds. Firstly, the flat was purchased in financial year 2003–04 relevant to assessment year 2004–05 and secondly, the investment made towards purchase of new flats was not out of assessee's own funds. The assessee challenged the aforesaid disallowance before the first appellate authority.

9. Though, learned Commissioner (Appeals) agreed with the assessee that the investment in purchase of new residential house was made within the time allowed under section 54 of the Act, however, he upheld the disallowance by agreeing with the reasoning of the Assessing Officer that the assessee was unable to prove that the investment in new residential house is out of her own funds.

10. The learned Authorised Representative submitted, there is no requirement under section 54 of the Act that the investment in new house has to be made out of own funds of the assessee. The learned Authorised Representative submitted, there is also no requirement under section 54 of the Act that for claiming deduction under the said provision, the assessee has to invest the sale proceeds of the old asset towards purchase of the new house. He submitted, the assessee can make investment out of any other funds available with her including

borrowed fund. In support of such contention, learned Authorised Representative relied upon the following decisions:–

i) Asstt. CIT v/s. Dr. P. S. Pasricha - [(2008) 20 SOT 468 (Mum)] Now Approved in. CIT v/s. Dr. P. S. Pasricha - [I.T.A. No. 1825 of 2009; Order Dated 07.10.2009, Bombay High Court];

ii) Kapil Kumar Agarwal v/s. ACIT - [(2014) 63 SOT 22 (Del - Trib.) (URO)] Now Affirmed in: CIT v/s. Kapil Kumar Agarwal - [(2016) 382 ITR 56 (P&H)];

iii) I.T.O. v/s. K. C. Gopalan - [(2000) 162 CTR (Ker) 5661;

iv) CIT v/s. Anandraj - [(2016) 284 CTR 84 (Kam)];

v) Bombay Housing Corporation v/s. ACIT - [(2002) 81 lTD 545 (Mum)];

vi) Mrs. Prema P. Shah v/s. I.T.O. - [(2006) 100 lTD 60 (Mum)];

vii) DCIT v/s. Gaylord Investment & Trading P. Ltd. - [(2008) 21 SOT 407 (Mum)];

viii) Ishar Singh Chawla v/s. DCIT - [(2010) 130 TTJ (Mum.) (UO) 108];

ix) Yatin Prakash Telang v/s. ITO - [(2018) 171 lTD 705 (Mum.)];

x) Mr. Harmeet Gandhi v/s. ITO - [I.T.A. No. 286 / M / 09, Order Dated 30.04.20 10];

xi) Neelam Handa v/s. ITO - [I.T.A. No. 384 / Del / 16, Order Dated 13.05.2016];

xii) Ajit Vaswanit v/s. DCIT - [(2001) 117 Taxman 123 (Del) (Mag)];

xiii) Muneer Khan v/s. ITO - [(2010) 41 SOT 504 (Hyd. - Trib.)];

xiv) J. V. Krishna Rao v/s. DCIT - [(2012) 54 SOT 44 (Hyd. - Trib.)];

xv) Smt. Pushpa Devi Tirbrewala v/s. ITO - [(2013) 58 SOT 41 (Flyd. - Trib.)];

xvi) Gopilal Laddha v/s. ACIT - [(2014) 62 SOT 59 (Bang. - Trib.)];

xvii) Smt. Sumathi Gedupudi v/s. ACIT - [(2016) 156 lTD 419 (Hyd. - Trib.)];

xviii) Amit Parekh v/s. ITO - [(2018) 170 lTD 213 (Kol - Trib.)].

xix) ACIT v/s Dr. P.S. Pasricha, [2008] 20 SOT 468 (Mum.); and

xx) CIT v/s Kapil Kumar Agarwal, [2016] 382 ITR 56 (P&H).

11. The learned Departmental Representative submitted, as per the provision of section 54 of the Act, the assessee has to invest the capital gain either in purchase/construction of a new house or deposit it in capital gain account scheme. Therefore, if the investment is not made out of the capital gain, the assessee's claim of deduction under section 54 of the Act is not allowable. Further, he submitted, assessee has purchased two flats, whereas, as per section 54 of the Act deduction is allowable in respect of one flat.

12. We have considered rival submissions and perused material on record. At the outset, it is relevant to observe, learned Commissioner (Appeals) has recorded a factual finding that the investment in new house/flat is within the time limit prescribed under section 54 of the Act. Against the aforesaid decision of the learned Commissioner (Appeals), the Revenue has not preferred any appeal. Therefore, we have to proceed on the basis that the investment in new flat has been

made by the assessee within the period stipulated under section 54 of the Act. That being the case, the only issue which requires our consideration is, whether the provision contained under section 54 of the Act makes it mandatory to invest the capital gain/sale proceeds arising out of the original asset to be invested in purchase/construction of new residential house for claiming deduction. On a careful reading of the provisions contained under section 54 of the Act as a whole, we do not find any restriction/condition imposed mandating investment of the capital gain/sale proceeds towards purchase of new house for claiming deduction under section 54 of the Act. What the provision postulates is, for claiming deduction the assessee has to make investment in purchase of a new house one year before or two years after the date on which the transfer of original asset took place. The deposit of capital gain in capital gain account scheme in sub–section (2) of section 54 of the Act becomes applicable only in a case where the capital gain is not utilized for the purchase of new house within the stipulated time. In the facts of the present case, undisputedly, the investment in purchase of new house has been made within the period stipulated under section 54(1) of the Act. Moreover, investment made in purchase of new house amounts to ₹ 68,84,388, whereas, the net long term capital gain computed by the Assessing Officer himself without allowing assessee's claim of cost of development/improvement is ₹ 58,13,728. Therefore, the quantum of investment made by the

assessee towards purchase of new house is much more than the long term capital gain computed by the Assessing Officer. That being the case, the provision of section 54(2) of the Act does not apply. There being no pre–condition under section 54(1) of the Act providing for investment of the long term capital gain in purchase of new house for claiming deduction under section 54 of the Act, the departmental authorities cannot import such restriction/condition to the statutory provision. The decisions cited by the learned Authorised Representative clearly support this view. In fact, the Hon'ble P&H High Court in CIT v/s Kapil Kumar (supra) has clearly and categorically held that section 54 of the Act does not require that the sale proceeds from transfer of original capital asset must be used for meeting cost of new asset.

13. The issue can be looked at from another angle. As discussed earlier, the provision of section 54(1) of the Act allows deduction from taxation of capital gain in a case where the assessee has invested in purchase of new house before one year from the date of transfer of the original asset. Thus, at that stage, the capital gain has not accrued to the assessee. If the reasoning of the departmental authorities that the assessee has to invest the capital gain in purchase of new house to qualify for deduction is accepted, the provision becomes otiose. In view of the aforesaid, we hold that since the assessee has made investment in purchase of new house within the period prescribed

under section 54(1) of the Act, she is entitled to avail deduction under the said provision. As regards the contention of the learned Departmental Representative that the assessee has purchased two flats, it needs to be observed, assessee's claim of deduction under section 54 of the Act has not been disallowed by the departmental authorities on the said reasoning. In any case of the matter, as per the provision of section 54 of the Act applicable to the impugned assessment year, the expression *"a residential house"* used in section 54(1) of the Act does not mean *"one residential house"*. Moreover, there is no allegation by the departmental authorities that the flats are not in the same building or are not inter–connected. In this view of the matter, we do not find merit in the submissions of the learned Departmental Representative. Ground no.2, is allowed.

14. In the result, assessee's appeal is partly allowed.

Order pronounced in the open Court on 08.03.2019

SD/–
N.K. PRADHAN
ACCOUNTANT MEMBER

SD/–
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 08.03.2019

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The CIT(A);

(4) The CIT, Mumbai City concerned;

(5) The DR, ITAT, Mumbai;

(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

(Sr. Private Secretary)
ITAT, Mumbai