

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI ' D ' BENCH
MUMBAI BENCHES, MUMBAI**

BEFORE SHRI G E VEERABHADRAPPA, PRESIDENT & SHRI VIJAY PAL RAO, JM

ITA No. 5011/Mum/2010
(Assessment Year 2007-08)

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| The Asst Commr of Income Tax Cr 23(2), Mumbai | Vs | Shri Deepak S Bheda 61/B Aishwarya CHS Ltd Goshala Lane Mulund (W) Mumbai 81 |
| (Appellant) | | (Respondent) |

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| PAN No. | AGKPB 9160G |
| Assessee by | Dr K Shivram/Sanjay R Parikh |
| Revenue by | Sh C G K Nair |
| Dt.of hearing | 14 th June 2012 |
| Dt of pronouncement | 15 th ,June 2012 |

ORDER

PER VIJAY PAL RAO, JM

This appeal by the revenue is directed against the order dated 23.3.2010 of Commissioner of Income Tax(Appeals) for the assessment year 2007-08.

2 The revenue has raised the following grounds in this appeal:

1. On the facts and circumstance of the case and in law, the Ld. CIT(A) erred in allowing the disallowance of claim of the assessee made u/s 54EC ignoring the fact that an assessee claiming benefit of section 54F has to comply with both sub- section(1) and sub-section(4) of the section 54F and thereby cannot avail the benefit of section 54EC.

2.(i) On the facts and circumstance of the case and in law, the Ld. CIT(A) erred in allowing assessee's claim for exemption u/s 54F ignoring the fact that plan of the residential house .as approved by the Municipal Corporation of Greater Bombay consisted of four independent units, that modification of the plan subsequently was not approved by the competent authority, and that the assessee had failed to submit the copy of the design of the flat and layout of the project.

2(u) On the facts and circumstance of the case and in law the Id. CIT(A) erred in allowing the claim of the assessee for exemption under section 54F ignoring the observation of the AO at para 3 on page 2 of the assessment order that the entire building was yet to be constructed though the assessee had paid full amount of Rs. 2.60 Crores

2(iii) On the facts and circumstance of the case and in law the Id CIT (A) erred on allowing the claim of the assessee for exemption u/s 54F without insisting on the assessee to produce evidence of purchase or construction of a residential house within the period stipulated u/s 54F and erred in accepting the agreement for purchase dated 07.07.2007 as the evidence of purchase/construction of residential house when it was physical not in existence

3 Ground number 1 regarding the exemption under section 54 EC of I T Act.

3.1 The assessee has sold his ancestral property on 13.12. 2006 for a consideration of Rs. 3, 40, 00, 000/-. The cost of the ancestral property was taken at nil therefore the entire consideration was taken as long term capital gain. Out of the total capital gain of Rs. 3.40 crores, the assessee invested a sum of Rs. 2.60 crores for the purchase of housing unit and Rs. 50 lakh invested in REC bonds. Apart from claiming exemption under section 54F, the assessee also claimed exemption under section 54 EC on account of investment in REC bonds.

3.2 The Assessing Officer denied the claim of the assessee on the ground that when the assessee availed the exemption under section 54F, the balance amount can only be invested in the banks or financial institutions as notified in the capital gain account scheme 1988 and not for any investment made under section 54 EC. In support of his decision, the Assessing Officer referred sub. section 4 of section 54F and viewed that the amount can not appropriate to towards purchase of residential house on sale of flat will not be eligible for exemption.

3.3 On appeal the Commissioner of Income Tax(Appeals) allowed the claim of the assessee.

4 Before us the Id DR has submitted that in view of sub section (1) and sub. section (4) of section 54F, the exemption is available only to the extent of amount of capital gain which has been invested in purchase of residential house and the balance amount which is not appropriated by the assessee towards purchase of new asset within the period as prescribed under section 54F and also not deposited by the assessee prior to the due date of furnishing of return of income under section 139 (1) in the account in such bank or institution as may be specified in and utilise in accordance with any scheme with the Central Government and may be notified in the Gazette. The Id DR has relied upon the order of the Assessing Officer and submitted that after availing the exemption under section 54F, no further exemption can be availed on same capital gain under section 54 EC.

4.1 On the other hand, the Id A.R of the assessee has submitted that there is no restriction under the provisions of section 54 that an exemption is claimed under section 54 for a part of capital gain, then no exemption can be availed for the amount of capital gain, which was invested in the REC bonds as per section 54 EC. He has supported the order of Commissioner of Income Tax(Appeals).

5 We have considered the rival contentions as well as relevant material on record. The Assessing Officer denied the benefit claimed by the assessee under section 54 EC towards the investment made in REC bonds for a sum of Rs. 50 lakh out of total long-term capital gain of Rs. 3.40 crores. The Assessing Officer was of the view that once the exemption has been claimed under section 54F and the entire capital gain has not been utilised for the purchase of residential house, then the net consideration which is not appropriated by the assessee towards the purchase of new asset and also not deposited in the banks or institution as specified and

notified in the official Gazette by the Central Government as per the provisions of sub section (4) of section 54F, the assessee cannot avail the exemption under section 54 EC. It is to be noted that it is not a case of availing double exemption on the same amount but the assessee has claimed exemption under section 54F as well as under section 54 EC for the respective amount of capital gain invested in purchase of new house and REC bonds. Wherever any such restriction is deemed fit, the legislature has provided in the statute a sufficient check under chapter VI-A of the Income Tax Act. As far as the claim of exemption under section 54F and under section 54 EC, there is no such restriction in the statute that the assessee cannot claim the exemption under both sections, even if the conditions provided under the respective sections are complied with and the same does not result in availing double exemption on the same amount.

For ready reference be quoted section 54 EC as under:

“54EC. (1) Where the capital gain arises from the transfer of a long-term capital asset (the capital asset so transferred being hereafter in this section referred to as the original asset) and the assessee has, at any time within a period of six months after the date of such transfer, invested the whole or any part of capital gains in the long-term specified asset, the capital gain shall be dealt with in accordance with the following provisions of this section, that is to say,—

(a) if the cost of the long-term specified asset is not less than the capital gain arising from the transfer of the original asset, the whole of such capital gain shall not be charged under section 45;

(b) if the cost of the long-term specified asset is less than the capital gain arising from the transfer of the original asset, so much of the capital gain as bears to the whole of the capital gain the same proportion as the cost of acquisition of the long-term specified asset bears to the whole of the capital gain, shall not be charged under section 45 :

[**Provided** that the investment made on or after the 1st day of April, 2007 in the long-term specified asset by an assessee during any financial year does not exceed fifty lakh rupees.]

(2) Where the long-term specified asset is transferred or converted (otherwise than by transfer) into money at any time within a period of three years from the date of its acquisition, the amount of capital gains arising from the transfer of the original asset not charged under section 45 on the basis of the cost of such long-term specified asset as provided in clause (a) or, as the case may be, clause (b) of sub-section (1) shall be deemed to be the income chargeable under the head "Capital gains" relating to long-term capital asset of the previous year in which the long-term specified asset is transferred or converted (otherwise than by transfer) into money.

Explanation.—In a case where the original asset is transferred and the assessee invests the whole or any part of the capital gain received or accrued as a result of transfer of the original asset in any long-term specified asset and such assessee takes any loan or advance on the security of such specified asset, he shall be deemed to have converted (otherwise than by transfer) such specified asset into money on the date on which such loan or advance is taken.

[(3) Where the cost of the long-term specified asset has been taken into account for the purposes of clause (a) or clause (b) of sub-section (1),—

(a) a deduction from the amount of income-tax with reference to such cost shall not be allowed under section 88 for any assessment year ending before the 1st day of April, 2006;

(b) a deduction from the income with reference to such cost shall not be allowed under section 80C for any assessment year beginning on or after the 1st day of April, 2006.]

Explanation.—For the purposes of this section,—

(a) "cost", in relation to any long-term specified asset, means the amount invested in such specified asset out of capital gains received or accruing as a result of the transfer of the original asset;

[(b) "long-term specified asset" for making any investment under this section during the period commencing from the 1st day of April, 2006 and ending with the 31st day of March, 2007, means any bond, redeemable after three years and issued on or after the 1st day of April, 2006, but on or before the 31st day of March, 2007,—

(i) by the National Highways Authority of India constituted under section 3 of the National Highways Authority of India Act, 1988 (68 of 1988); or

(ii) by the Rural Electrification Corporation Limited, a company formed and registered under the Companies Act, 1956 (1 of 1956), and notified¹⁴ by the Central Government in the Official Gazette for the purposes of this section with such conditions

(including the condition for providing a limit on the amount of investment by an assessee in such bond) as it thinks fit:]

[**Provided** that where any bond has been notified before the 1st day of April, 2007, subject to the conditions specified in the notification, by the Central Government in the Official Gazette under the provisions of clause (b) as they stood immediately before their amendment by the Finance Act, 2007, such bond shall be deemed to be a bond notified under this clause;]

[(ba) "long-term specified asset" for making any investment under this section on or after the 1st day of April, 2007 means any bond, redeemable after three years and issued on or after the 1st day of April, 2007 by the National Highways Authority of India constituted under section 3 of the National Highways Authority of India Act, 1988 (68 of 1988) or by the Rural Electrification Corporation Limited, a company formed and registered under the Companies Act, 1956 (1 of 1956).]"

5.1 The expression 'the whole or any part of capital gains in the long term specified assets' makes it clear that the exemption under section 54 EC is available even when the part of capital gain is invested in specified long-term asset. There is no dispute that the assessee has invested out of the total capital gain in REC bonds within the prescribed period of time as provided under section 54 EC. Therefore, once the conditions as prescribed under section 54 EC are complied with, than the deduction cannot be denied on the ground that the assessee has also availed the exemption under section 50 4F against the part of the capital gain.

6 In view of the above discussion, we find no reason to interfere with the order of Commissioner of Income Tax(Appeals), qua this issue and the same is upheld.

7 The next issue is regarding exemption under section 54F:

7.1 Out of the total capital gain of Rs. 3.40 crores arising from sale of ancestral property, the assessee invested Rs. 2.60-crores for the purchase of 4 flats bearing number 9A,9B, 10A and 10 B. The assessee claimed exemption under section 54F against this amount of Rs. 2.60 crores invested towards purchase of flats; but the Assessing Officer allowed the exemption only in respect of one flat by holding that

these are separate and independent residential units having separate kitchen and entrance; therefore, cannot be said as adjacent flats; even though the builder has referred them as composite unit.

7.2 On appeal the Commissioner of Income Tax(Appeals) allowed the claim of the assessee under section 54F in respect of the consideration of Rs. 2.60 crores towards purchase of 4 flats by following the decision of Special Bench of this Tribunal in case of ITO vs Ms Sushila M Jhaveri reported in 107 ITD 327.

8 Before us the Id DR has referred the grounds of appeal and submitted that at the time of purchase agreement dated 11.7.2007 these new residential houses were not physically in existence; therefore, when the flats were not constructed, then the transaction of purchase was not completed and the exemption under section 54F cannot be allowed.

9 At the threshold, we find that the ground number 2 (I) to 2 (iii) do not emanate from the impugned order. Even, the Assessing Officer has not disputed the fact of purchase of 4 flats in question within the stipulated period and also allowed the exemption in respect of one flat instead of 4 flats as claimed by the assessee. Therefore, the ground number 2 (1) to 2 (iii) do not arise from the impugned order and even are contrary to the accepted factual proposition by the Assessing Officer. Accordingly these grounds of the revenue's appeal are rejected as not arising from the orders of the authorities below.

10 Even otherwise, the proposition advanced by the revenue under ground number 2 would amount to seek enhancement of assessment, which is not permissible under the proceedings before this Tribunal as this Tribunal has no jurisdiction to do so.

11 However, irrespective of the grounds raised by the revenue, if we go to the real dispute of disallowance of exemption under section 54F, the question arises for our consideration and adjudication is whether these 4 flats purchased by the assessee can be treated as one residential unit as held by the Special Bench of this Tribunal in case of Ms Sushila M Jhaver (*supra*).

11.1 The agreement by which the assessee has purchased these flats, clearly stipulates that the building in question consisting of duplex houses on top two floors of 9th and 10th floors of the building. The flat number 9A, 9B, 10 A and 10 B are so situated that the flat number 9A and 9B at 9th floor are just below the flat number 10A and 10B at 10th floor. The agreement clearly mentions that one duplex flat was converted from 4 units. This fact has not been disputed that the builder has agreed to convert originally planned to 4 flats into one duplex flat as borne out from the agreement between the assessee and the builder for the purchase of these flats. Thus, if the requirement of the assessee family is met-out only by enlarging the residential unit by merging of 4 flats originally planned into one unit and that too prior to handing over of the possession of the said residential unit, then the said converted residential unit will be treated as a residential house as stipulated under section 54F.

11.2 The case of the assessee is better than where more than one units are purchased which are adjacent to each other and are converted into one house for the purpose of residence by having common passage, common kitchen because in the case of the assessee the conversion was agreed by the builder prior to purchase.

12 The Special Bench of this Tribunal in case of Ms Sushila M Jhaver (supra) held in para 11 as under:

"11. In view of the above discussion, it is held that exemption under ss. 54 and 54F of the Act would be allowable in respect of one residential house only. If the assessee has purchased more than one residential house, then the choice would be with assessee to avail the exemption in respect of either of the houses provided the other conditions are fulfilled. However, where more than one unit are purchased which are adjacent to each other and are converted into one house for the purpose of residence by having common passage, common kitchen, etc., then, it would be a case of investment in one residential house and consequently, the assessee would be entitled to exemption."

13 Having regard to the facts and circumstances of the case and following the decision of Special Bench of this Tribunal in case of Ms Sushila M Jhaver (supra), we are in agreement with the view and the findings of the Commissioner of Income Tax(Appeals) on this issue.

14 In the result, the appeal of this revenue is dismissed.

Order pronounced on this 15th,day of June 2012

Sd/-

Sd/-

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| (G E VEERABHADRAPPA) President | (VIJAY PAL RAO) Judicial Member |
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Place: Mumbai : Dated: 15th, June 2012

Raj*

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| 1 | Appellant |
| 2 | Respondent |
| 3 | CIT |
| 4 | CIT(A) |
| 5 | DR |

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BY ORDER

Dy /AR, ITAT, Mumbai