आयकर अपीलीय अधिकरण "बी" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

श्री डी. मन्नमोहन, उपाध्यक्ष **एवं** श्री संजय अरोड़ा, लेखा सदस्य के समक्ष ।
BEFORE SHRI D. MANMOHAN, VP AND SHRI SANJAY ARORA, AM

आयकर अपील सं./I.T.A. No. 7091/Mum/2012
(**निर्धारण वर्ष /** Assessment Year: 2009-10)

Smt. Maya A. Ajwani 7, Alankar Building, Plot No. 251, Sulochana Shetty Marg, Sion (West), Mumbai-400 022	**बनाम**/ Vs.	ITO-7(2)(4), Aayakar Bhavan, M. K. Road, Mumbai – 400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. ACYPA 3752 H		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से / **Appellant by**	:	Shri Tarun Ghia
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri Love Kumar

सुनवाई की तारीख / **Date of Hearing**	:	05.02.2015
घोषणा की तारीख / **Date of Pronouncement**	:	10.04.2015

आदेश / O R D E R

Per Sanjay Arora, A. M.:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-13, Mumbai ('CIT(A)' for short) dated 08.10.2012, dismissing the assessee's appeal contesting its assessment u/s.143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2009-10 vide order dated 14.11.2011.

2. The facts of the case are simple and largely undisputed, so that it is only a question of the application or otherwise of the relevant provision of law to the facts of the case. The assessee, a co-owner (along with her spouse, Shri Ashok Vishindas Ajwani) of a residential property, being Flat No. 1401, Mount Everest, CHS, Bhakti Park, Wadala (E),

Mumbai, transferred her capital asset in the form of a shop at Sion for a consideration of Rs.85 lacs, disclosing a capital gain of Rs.83,25,400/-, which was claimed exempt as under:

- u/s. 54F: Rs. 26 lacs
- amount deposited in capital gain scheme account u/s.54E: Rs.63.60 lacs

Exemption u/s.54F was in respect of purchase of residential flat at Andheri on 24.03.2009 for a consideration of Rs.1,28,50,215/-. It is the claim u/s.54F which forms the subject matter of the dispute between the parties. The assessee owning another residential house, i.e., apart from the Wadala Flat, being Flat No. 14, Gope Niwas Bldg., Bombay Middle Class Co-operative Hsg. Society Ltd., Sion (E), Mumbai, was thus on the date of transfer of the residential asset, the shop at Nand-Dham, Sion on 06.10.2008, did not satisfy the condition of section 54F, which per *proviso* thereto excluded an assessee owning more than one residential house, i.e., other than new asset (the Andheri house), with reference to the investment in which exemption u/s.54F was being claimed, being the residential houses at Wadala and Sion, from the benefit of exemption there-under. The assessee's claim that the Sion house was, in fact, gifted by her to her husband on 03.10.2008 vide a gift deed of even date (PB pgs. 82-100), so that she was on the relevant date (06.10.2008) owner of only one house, i.e., the Wadala residence, and therefore not excluded by the *proviso* to section 54F, did not find favour with the Assessing Officer (A.O.). The same was only a devise to evade tax in-as-much as the assessee had 'gifted' her property to her husband three days prior to the relevant date only with the view to eschew the provision of section 54F. The same would be to no avail as section 27(i) clearly provides that the transfer of a house property to, among others, spouse, for other than adequate consideration, would stand to be ignored, so that the assessee-transferor would deemed to be the owner of the residential house and, thus, continue to be considered as its 'owner' in the eyes of the law. The assessee argued that the provision of section 27 was only for the limited purpose of Chapter IV-C, i.e., sections 22 to 26, did not find acceptance with the ld. CIT(A), who confirmed the

disallowance of the assessee's claim u/s. 54F, relying on the decision in the case of *G. K. Shetty vs. ITO* [2008] 112 ITD 103 (298 ITR (AT) 49 (Pune)/copy on record). Aggrieved, the assessee is in second appeal.

3. Before us, the assessee's case remained the same. In addition, the Authorized Representative (AR) relied on the decision in *ITO vs. Rasiklal N. Satra* [2006] 98 ITD 335 (Mum). The owner of 'a' residential house (i.e., the new asset) in section 54F implies a complete residential house and not a shared, even if undivided, interest in the residential house. When a property is owned by more than one person, it cannot be said that any of them is the owner of the property. No single person can, of his own, sell the entire property. Joint ownership is different from absolute ownership, and it is only the latter, which means ownership to the exclusion of all others, that is contemplated u/s.54F. In view of the said decision, it was argued that the condition of *proviso* to section 54F, which proscribes ownership of more than one residential house, i.e., other than the new asset, on the date of the transfer of the capital asset under reference, is not violated. The assessee was owning the Wadala property jointly with her husband, which therefore cannot be regarded as 'ownership' for the purpose of section 54F, so that she is holding only one residential house, the Gope Niwas building flat at Sion, i.e., even if the gift thereof by the assessee to her husband is to be disregarded. Further, section 27(i) of the Act, deeming gift to specified persons as of no consequence in-as-much as the income from that asset would continue to be assessed in the assessee-donor's hands, is for the limited purpose of assessment of the income from house property, and would therefore not apply. The ld. DR would, on the other hand, rely on the orders by the authorities below, claiming that the gift to be only a device set up by the assessee to evade tax and, therefore, rightly disregarded by the authorities below.

4. We have heard the parties, and perused the material on record.

4.1 We may to begin by reproducing section 54F in its relevant part:

> '**Capital gain on transfer of certain capital assets not to be charged in case of investment in residential house.**

54F. (1) Subject to the provisions of sub-section (4), where, in the case of an assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of any long-term capital asset, not being a residential house (hereafter in this section referred to as the original asset), and the assessee has, within a period of one year before or two years after the date on which the transfer took place purchased, or has within a period of three years after that date constructed, a residential house (hereafter in this section referred to as the new 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 new asset is not less than the net consideration in respect of the original asset, the whole of such capital gain shall not be charged under section 45 ;

(*b*) if the cost of the new asset is less than the net consideration in respect 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 the new asset bears to the net consideration, shall not be charged under section 45:

Provided that nothing contained in this sub- section shall apply where-

(*a*) the assessee,-

(*i*) owns more than one residential house, other than the new asset, on the date of transfer of the original asset; or

(*ii*) purchases any residential house, other than the new asset, within a period of one year after the date of transfer of the original asset; or

(*iii*) constructs any residential house, other than the new asset, within a period of three years after the date of transfer of the original asset; and

(*b*) the income from such residential house, other than the one residential house owned on the date of transfer of the original asset, is chargeable under the head "Income from house property".

Explanation.—For the purposes of this section,—

"net consideration", in relation to the transfer of a capital asset, means the full value of the consideration received or accruing as a result of the transfer of the capital asset as reduced by any expenditure incurred wholly and exclusively in connection with such transfer.

(2) Where the assessee purchases, …..

(3) Where the new asset is transferred within a period of ……

(4) The amount of the net consideration which is not appropriated…:

Provided that if the amount deposited under this sub-section is not utilised….'

4.2 As would be apparent from the foregoing narration of the facts, which are undisputed, as well as the respective cases of both the sides, the moot question is whether the gift by the assessee to her husband of the Gope Niwas Bldg. flat, vide gift deed dated 03.10.2008, is to be recognized or not for the purpose of considering her ownership of the said house. The reason is simple. This is as if it is not to be, the reliance by the assessee on the decision in *Rasiklal N. Satra* (supra) would be of little assistance. This is as even if the joint ownership of the Mount Everest flat is not regarded as owning one residential house, the same cannot, without doubt, be said to be, or considered as, owning nothing. But only as owning a property jointly, i.e., part ownership. What the law bars is owning more than one residential house, and which need not necessarily be a complete house, so that full (or absolute) ownership, as against joint, would only be an ownership of a part, though undivided, of a house.

We may, though, before proceeding further; much having been made of the word 'ownership' or 'owner' in relation to a capital asset, discuss the same. In our view, irrespective of the provision of section 32 or s. 22 r/w s. 27; the latter for the purposes of Chapter-IV-C, cannot but be considered as arising out of a transaction of a transfer, as defined u/s.2(47). This is as it cannot be that while a transfer has taken place, giving rise to 'capital gain', i.e., where in relation to a capital asset, the transferor continues to be the owner or the transferee is not consider as one. That to our mind would be a contradiction in terms, making the law internally inconsistent. The apex court, as far back as in *R. B. Jodha Mal Kuthiala vs. CIT* [1971] 82 ITR 570 (SC), clarified that the owner is a person who can exercise the rights of an owner, i.e., not on behalf of another, but in his own right. The same, though rendered in the context of section 22, in our view, would continue to be a guide post where the law seeks to grant some benefit or right to an owner or with reference to ownership, of-course keeping the relevant provisions in view, as sec. 27(i).

4.3 With this background, we may proceed to apply the law to the issue at hand. We find no provision in law for the assessee to continue to be regarded as the owner or even a part owner of the property (the Sion residential flat) gifted by her to her husband on 03.10.2008. Even if the same is for the purpose of enabling availing benefit under section 54F, we cannot by any score treat as not valid in the eyes of law. The law does not oblige a person to pay maximum taxes or authorize disregarding a lawful transaction if the same has the effect of reducing his tax liability. The transfer is by no means sham or bogus, notwithstanding that the assessee would continue to reside with her family, including her husband, in the said house, i.e., both before and after its gift to her husband. That is, true, the assessee, along with her family, including her husband, continues to reside in the Gope Niwas Bldg., both before and after the gift, so that the same has no purpose apart from the change of the ownership, which is to be reckoned as on the date of the transfer (of the original asset, i.e., 06.10.2008). Whether, therefore, the change of the ownership was effected a few days or, why, even a day earlier, to the relevant date, is of no moment. The gift deed, duly registered, has to be given its full legal fact, which is of a change in its ownership from the assessee to her husband, Shri Ashok Vishindas Ajwani. Pinning on some altruistic notion, as we observe the Revenue to, cannot entitle it to the read the law except in terms of its clear and unambiguous language, so that only what stands specifically provided is to be excluded. There is no stipulation in law with regard to the ownership pattern, or its quantification, i.e., of the assessee's other family members, including spouse, or even of the transferee/s. The same clearly provides for consideration of the ownership of residential house/s only of the assessee, and on a particular date.

4.4 We may finally discuss the reliance by the ld. CIT(A) on the decision in the case of *CIT v. Maharaj Kumar Kamal Singh* [1973] 89 ITR 1 (SC). The same, in our view, is clearly misplaced. As explained by the hon'ble apex court therein, section 27(ii) of the Act takes place of section 9(4)(a) of the Income Tax Act, 1922, i.e., under which Act the said decision was rendered, merely making explicit what was implied in section 9(4)(a), so that it does not affect a change in law. Section 27 of the Act, clause (i) of which is

factually applicable, and stands invoked by the authorities below, clearly clarifies that the same, as afore-stated, shall apply only for the purposes of sections 22 to 26, i.e., for computing the income under the head 'income from the house property' (i.e., Chapter IV-C. Even otherwise, section 64(1)(iv) is broadly worded to include any income, arising directly or indirectly to the spouse of an assessee from the assets transferred thereto by him without adequate consideration, save where in connection with an agreement to live apart, which exclusion also finds place in section 27(i), in the assessee's income. The said provision is also made subject to section 27(i), so that the two are to be read together and in harmony. However, even section 64(1)(iv) shall not apply in-as-much as the same would only imply assessing the income arising to the assessee (or her husband) from the Wadala property as her income, since gifted to the latter, while the subject matter of the dispute in the instant case is the income arising on transfer of a shop at Sion, Mumbai. Accordingly, reliance on the decision in the case of *Maharaj Kumar Kamal Singh* (supra) as well as on s.27(i) by the Revenue would be to no avail.

5. In view of the foregoing, we find no warrant in law and, accordingly, no merit in the Revenue's case for disregarding the gift of a house property by the assessee to her spouse prior to the transfer date (of the original asset) for the purpose of reckoning eligibility to exemption u/s.54F of the Act. We decide accordingly.

6. In the result, the assessee's appeal is allowed.
परिणामतः निर्धारिती की अपील स्वीकृत की जाती है ।

Order pronounced in the open court on April 10, 2015

Sd/-	Sd/-
(D. Manmohan)	(Sanjay Arora)
उपाध्यक्ष / Vice President	लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 10.04.2015
व.नि.स./Roshani, 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)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

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