

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "SMC-2" : DELHI
BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER

ITA.No.4210/Del./2019
Assessment Year 2009-2010

Shri Vijay Kumar Wanchoo, New Delhi. PAN ABXPW5033F C/o. Pawan Kr. Gupta, 2 nd Floor, C-8, Kalindi Colony, Ring Road, New Delhi – 110 065.	vs.	The Income Tax Officer, Ward – 2 (5), Room No.407, A-2D, Sector-24, Noida – 201 301. U.P.
(Appellant)		(Respondent)

For Assessee :	Shri Avineesh Mitta, C.A.
For Revenue :	Shri R.K. Gupta, Sr. D.R.

Date of Hearing :	06.07.2020
Date of Pronouncement :	07.07.2020

ORDER

This appeal by the Assessee has been directed against the Order of the Ld. CIT(A)-1, Noida, Dated 29.11.2018, for the A.Y. 2009-2010.

2. I have heard the Learned Representative of both the parties through video conferencing and perused the material available on record.

3. Learned Counsel for the Assessee did not press Ground Nos.1 and 2 with regard to reopening of the assessment and service of the notice under section 143(2) of the I.T. Act, 1961. These grounds are accordingly dismissed as not pressed.

4. On Ground No.3, assessee challenged the Orders of the authorities below in denying exemption under section 54 of the I.T. Act, 1961, to the assessee on the long term capital gains arising on transfer of residential house.

4.1. Briefly the facts of the case are that during the year under consideration, assessee sold two residential flats situated at Andheri, Mumbai and purchased one residential flat at Noida. The details filed on record shows that the assessee has modified the flats in two flats (units) and sold through two different registrations. The A.O. noted that assessee has sold flat A-401 and flat B-401, 4th Floor, Brighton Tower Cooperative Housing Society Ltd., Plot No.356, Cross Road No.2, Lokhanwala Complex, Andheri (West), Mumbai. The assessee purchased one flat at Noida

bearing flat No.Aster-1/902, 8th Floor, Super Tech Emerald Court, Sector-93A, Noida. Thus, the assessee calculated the gross amount of capital gain from the sale of two flats and claimed exemption under section 54 of the I.T. Act, 1961 in gross amount investment in one residential house. The A.O, however, noted that the exemption under section 54 in respect of the aggregate amount of capital gain and aggregate value of investment in residential value was not found allowable under section 54 of the I.T. Act. The A.O. was of the view that Section 54 makes it clear that the said Section speaks of exemption in respect sale of a residential house and purchase of a “*residential house*”. As per the provisions of the said Section there is no restriction on sale of any number of houses, but, there must be purchase of a corresponding house on which exemption under section 54 could be taken. The A.O. further noted that there must be a set of sale and purchase of one residential house to claim exemption under section 54 of the I.T. Act. The A.O, therefore, held that the amount of capital gains in respect of sale of one property can be treated exempt against purchase

of one property purchased for Rs.52,02,800/-. However, in respect of property sold for Rs.28,65,000/-, on which capital gains of Rs.20,10,427/- has been worked-out and there is no corresponding purchase of residential house, therefore, no benefit could be allowable under section 54 of the I.T. Act, 1961. The A.O. accordingly made addition of Rs.20,10,427/-.

4.2. The Ld. CIT(A) noted in the impugned order that admittedly assessee has sold two residential units by two separate transfer deeds duly registered and in turn has purchased one residential flat in Noida within the permitted period from the sale of the residential flats. The Ld. CIT(A) confirmed the findings of the A.O. and dismissed the appeal of assessee.

5. Learned Counsel for the Assessee submitted that it is not in dispute that assessee used both the residential flats at Andheri for residential purposes and modified both the flats from two units to one unit only. Thus, the conditions of Section 54 are satisfied in the present case. He

has submitted that since out of the sale proceeds of the two flats, assessee has purchased one flat at Noida, therefore, assessee is entitled for exemption under section 54 of the I.T. Act. He has submitted that the issue is covered by the Orders of the Mumbai Bench of the Tribunal as under :

- (i) Order of ITAT, Mumbai D-Bench, Mumbai in ITA.No.5547/Mum./2011 Dated 29.06.2012 in the case of ACIT 18(1), Mumbai vs., Sh Dinesh A Vora, Mumbai.
- (ii) Order of ITAT, Mumbai A-Bench, Mumbai in ITA.No.7443/Mum./2002 Dated 22.06.2012 in the case of DCIT vs., Shri Ranjit Vitthaldas.

6. On the other hand, Ld. D.R. relied upon the Orders of the authorities below.

7. I have considered the rival submissions and perused the material on record. The ITAT, Mumbai A-Bench, Mumbai in the case of DCIT vs., Shri Ranjit Vitthaldas in ITA.No.7443/Mum./2002 vide Order Dated 22.06.2012 held as under :

“10. 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. Income-tax Officer [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 Id. 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.

11. *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 Id. 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 therefrom 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 gets 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.

12. *In relation to flat in Vishnu Villa, the AO has given a finding that the flat had been used for the purpose of business and, therefore, is not eligible for exemption u/s 54 which allows exemption only in respect of residential house income from which is chargeable under the head "income from house*

property”. The AO has drawn his conclusion based on the ground that the assessee had not returned any income from Vishnu Vila Flat. The AO had treated the Ramkrishna Sadan flat as self occupied property and, therefore, in his opinion, the income from Vishnu Vila property could be exempt from house property only if the same was used for business as only one flat could be treated as self occupied property. The CIT(A) has not accepted the finding given by the AO and we agree with the view taken by CIT(A). The assessee had shown no income from Vishnu Vila flat because the assessee had treated both the flats as one residential house which had been used as a self acquired property. Therefore, only on the ground that the assessee had not shown any income from the Vishnu Vila property, it cannot be concluded that the flat had been used for the purposes of business when there is no material to support the said conclusion. Even at the time of hearing before

the Tribunal, the Ld. DR did not produce any material to show that the Vishnu Vila flat had been used for the purposes of business. Therefore, the flat in Vishnu Vila had to be treated as residential house, the income from which is chargeable to tax under the head "income from house property". The only requirement of section 54 is that income should be chargeable to tax under the head "house property income" and it is not necessary that income should have been actually charged. Therefore, capital gain arising from the sale of the Vishnu Villa flat would be eligible for exemption u/s 54 subject to fulfilment of other conditions.

13. *In view of the foregoing discussion, we direct the AO to allow the capital gain exemption u/s 54 of the Act after verifying that the new residential house had been constructed within prescribed time limit."*

7.1. The ITAT, Mumbai D-Bench, Mumbai in the case of ACIT 18(1), Mumbai vs., Sh Dinesh A Vora, Mumbai in ITA.No.5547/Mum./2011 vide Order Dated 29.06.2012 held as under :

“This appeal by the revenue is directed against the order dated 5/5/2011 of Commissioner of Income Tax(Appeals) for the assessment year 2007-08.

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

- i) On the facts and circumstances of the case and in law, the learned CIT(A) erred in holding that the assessee is entitled for relief of Rs.21,30,127/- u/s. 54 of the Income Tax Act 1961.*
- ii) On the facts and circumstances of the case and in law, the learned CIT(A) erred and failed to appreciate that the assessee purchased four separate flats by separate agreements and sold by a single agreement and is therefore ineligible for exemption u/s. 54 of the Income Tax Act, 1961.*
- iii) On the facts and circumstances of the case and in law, the learned CIT(A) failed to appreciate that in similar facts of the case the Hon'ble IT AT, Mumbai Bench in the case of Dr. P. S. Pashricha (20 SOT 468) has held otherwise. The judgment has been subsequently affirmed by the Hon'ble Bombay High Court vide their order dated 07/10/2009 in Appeal No. 1825 of 2009.”*

3 The assessee sold four flats bearing numbers 301, 302, 401 and 402 in building 'Sand Pebble' at Villiage Ambloi, Andheri (W) Mumbai vide a single sale agreement dated 17.5.2006. The assessee has claimed deduction under section 54 of the IT Act. The Assessing Officer was of the view that according to Sec.54, subject matter of sale should be a residential house and therefore, only one house used for residence is sold or transferred, giving rise to capital gain will be exempted under section 54. As the assessee has sold four flats; therefore, the Assessing Officer denied the exemption under section 54.

3.1 On appeal, the Commissioner of Income Tax(Appeals) allowed the claim of the assessee by following the CBDT instructions vide letter number 207/24/76-IT(A - I I) dated 25.3.1977 as well as the decision of this Tribunal in case of Hamayan S Rangila in ITA No. 1239/Mum/2010.

4 Before us the Id DR has submitted that the assessee purchased these four flats by separate agreements and therefore, these were separate and independent units. However, the assessee sold all these 4 flats by a single agreement. He has further submitted that sec 54 has clearly stipulated that the capital gain arising from transfer of a long term capital asset being the residential house; therefore, the assessee is not eligible for exemption under section 54 of the Income Tax Act. He has relied upon the order of Assessing Officer as well as the decision of this Tribunal in case of ACIT vs Dr P S Pasricha reported in 20 SOT 468 (Mum).

4.1 On the other hand the learned and AR of the assessee has submitted that the assessee own 50% share in the residential house in question. The said house comprising of four residential units and all are adjacent and usable as one unit. Thus, the four residential units were used as one residential house and therefore, the

capital gain, on sale of the residential house comprising four adjacent flats, is eligible for deduction under section 54 of the IT Act. He has further submitted that the issue is covered by the CBDT circular number 207/24/76 IT (II) dated 25.3.1997 as well as by the decision of this Tribunal in case of Hamayan S Rangila (supra).

5 We have considered the rival submissions of the parties as well as relevant material on record. The expression used in section 54 is "transfer of a long term capital asset' being the residential house" refers to a residential house which may comprise more than one building or buildings structure; but the same are used as a single residential house. Further, the terms buildings or lands as used in the earlier part of section 54 makes it clear that a residential house may comprises of more than one land and buildings. Thus, even if more than one unit are adjacent to each other and are being used as a single residential house by the assessee and his family members. The same would be considered as residential house u/s 54 of the IT Act. The Assessing Officer has not disputed the fact that all these flats were used by the assessee as residential house; therefore, the requirement of section 54 is the capital gain arising from transfer of a residential house is fulfilled.

5.1 To clarify such a situation, the CBDT has explained the expression 'residential house; vide circular dated 25.3.1977 (supra). The coordinate bench of this Tribunal, in the case of Hamayan S Rangila in ITA No. 1239/Mum/2010 vide order dated 23.2.2011 has considered and decided an identical issue in para 6.1 as under:

"6.1 The first issue is whether the provisions of section 54 can be applied to capital gain arising from sale of more than one residential house. In our view the section 54 exempts capital gain arising from sale of a long term capital asset being a residential house and therefore it will apply to sale of any residential house provided other conditions are fulfilled. This position has also been clarified by CBDT vide circular F.No.207/24/76 IT(ii) dated 25.3.97 in which it has been clearly mentioned that capital gain arising on transfer of each house will qualify for exemption in case the assessee had sold more

than one residential houses. The other issue is whether capital gain arising from sale of two flats can be exempted under section 54 if the gains are invested in one residential house. In our view this issue is also to be answered in favour of the assessee because the requirement of section 54 is that the capital gain arising from transfer of a residential house should be invested in a residential house. The requirement is that the investment should be in one residential house. There is no bar on investing the capital gain arising from sale of more one residential house in one residential house. Therefore in our view, the capital gains arising from sale of more than one residential house will be eligible for exemption under section 54 if gains from both the houses are invested in the same residential house. This view is also supported by the decision of tribunal in case of Rabindra K.Merchant Vs JCIT (supra) in which case exemption under section 54 and 54F both were found allowable in respect of investment in the same residential house. We therefore set aside the order of CIT(A) and allow the appeal of the assessee."

5.2 The decision in case of Dr P S Pasricha (supra) as relied upon by the Id DR is not applicable in the facts of the present case when all the 4 flats were used by the assessee and his family as one residential house. Further, the said case is on the point of purchase of more than one residential house and therefore, the facts and issue in the said case are entirely different.

6 In view of the facts and circumstances of the case and following the order of coordinate bench of this Tribunal (supra), we find no error or illegality in the order of Commissioner of Income Tax (Appeals) in allowing the claim of exemption under section 54 of the I T Act.

7. In the result, the appeal of the revenue is dismissed."

7.2. Considering the facts of the case in the light of above decisions of the Tribunal, it is clear that assessee has purchased two residential flats at Andheri bearing flat A-401 and flat B-401, 4th Floor, Brighton Tower Cooperative

Housing Society Ltd., Plot No.356, Cross Road No.2, Lokhanwala Complex, Andheri (West), Mumbai and assessee modified both the flats and converted two units as one residential unit. This fact is also mentioned in statement of facts and by the A.O. in the assessment order. The assessee has further sold both the flats through two separate sale deeds. It is an admitted fact that assessee has purchased residential flat at Noida within the permitted time period from the sale of the residential flats. Thus, the above decisions of the ITAT, Mumbai Bench are squarely apply to the facts and circumstances of the case that assessee is entitled for exemption under section 54 of the I.T. Act, 1961. The issue is, thus, covered by the aforecited Orders of the ITAT, Mumbai Bench (supra). In view of the above, I set aside the Orders of the authorities below and delete the entire addition of Rs.20,10,427/-. In the result, Ground No.3 of the appeal of the Assessee is allowed.

8. In the result, appeal of the Assessee is partly allowed.

Order pronounced in the open Court.

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Delhi, Dated 07th July, 2020

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'SMC-2' Bench, Delhi
6.	Guard File.

// BY Order //

Assistant Registrar : ITAT Delhi Benches :
Delhi.