

IN THE INCOME TAX APPELLATE TRIBUNAL MUMBAI
BENCH "H", MUMBAI

Before Shri R.C. Sharma (A.M.) & Shri Pawan Singh (JM)

ITA No. 4566/Mum/2017(Assessment year: 2013-14)

Hemant Shah 10, Oomed Sadan 58, Sion, Mumbai 400 022 PAN : AADPS2405E	Vs	ACIT-20(1), Mumbai
APPELLANT		RESPONDEDNT

Appellant by	Shri Paresh Vakharia
Respondent by	Shri Manoj Kumar Singh Sr DR & R. Bhoopati Sr DR
Date of hearing	13.12.2019
Date of pronouncement	25.02.2020

ORDER

PER PAWAN SINGH, JM :

1. This appeal by assessee is directed against the order of learned Commissioner of Income –tax- 32 ['ld.CIT(A)'], Mumbai for assessment year 2013-14. The assessee has raised the following grounds of appeal:-

“Ground 1 :

Clubbing of exempt long term capital gain income of minor child Natisha and Aditya

1.1 The Learned CIT(A) erred in confirming the clubbing of the exempt long term capital gains income of Rs 1,06,27,312/- of the minor child Natisha with the income of the appellant.

1.2 The Learned CIT(A) erred in confirming the clubbing of the exempt long term capital gains income of Rs 1,06,36,324/- of the minor child Aditya with the income of the appellant.

Ground 2 :

Disallowance of Exemption u/s 54F of the Act (Rs 2,66,82,526/-)

In the facts and circumstances of the case and in law:

2.1 The learned CIT(A) erred in confirming denial of exemption of long term capital gains of Rs 2,66,82,526/- u/s 54F of the Act although all the conditions of section 54F were complied by the appellant.

2.2 The Learned CIT(A) failed to appreciate the submission of your appellant that your appellant was not 'owner' of the residential houses within the meaning of sub-clause (ij) of clause (a) of proviso to section 54F of the Act and consequently, erred in denying exemption of the long term capital gain referred to above.

Without prejudice to the foregoing ground of appeal, the Learned CIT(A) failed to appreciate the submission of your appellant that the residential houses were jointly held with other person and accordingly, as per the judgment of the Hon'ble Madras High Court in the case of Smt. P.K. Vasanthi Rangarajan (23 taxmann.com 299) cited before her; the exemption u/s 54F of Rs 2,66,82,526/- claimed by your appellant could not have be denied.”

2. The brief facts of the case are that the assessee is an individual. The assessee declared his total income at Rs.43,19,257/- for relevant assessment year. In the computation of income the assessee computed long term capital gain on sale of shares of Rs. 3,17,86,086/- and a residential house for Rs. 60,40,636/- and claimed exemption u/s 54 & 54F of Rs. 3,27,96,082/- and exemption of Rs. 50,00,000/- u/s 54EC. The case was selected for scrutiny. During the assessment the assessee was asked as to why exemption u/s 54F be not denied to the assessee as the assessee owned more than two residential houses on the date of sales of shares. The assessee filed its reply dated 09-10-2015. In the reply the assessee stated that he has purchased two flats in the year 2015 when living with his father at Sion and wanted to shift to a new

premise. However, he could not shift to new premises as his father's health deteriorated and he could not leave him alone at Sion. The two flats purchased in 2015 were in the same compound which can be considered as one property. Both the flats were never occupied that intended to be occupied single unit and should be considered as a single unit for allowability of deduction u/s 54F. The assessee submissions of assessee was not accepted by AO and rejected claim of assessee u/s 54F of Rs. 2,66,82,526/- and added to the total income of the assessee.

3. The AO further noted that income of two minor children was also clubbed with the assessee after claiming exemption u/s 54F for (long term capital gain) LTCG earned by them on sale of shares and mutual funds individually. The AO also issued show cause notice as to why the benefit u/s 54F should not be denied in the hands of minor. The assessee also filed his reply to the show cause on the denial of exemption u/s 54. In the reply, the assessee stated that income of the minors is to be clubbed after computing the same in accordance with law. Further capital gain is to be allowed as per chapter IV-E and minors are entitled for the benefits of section 54F. The assessee also relied on the decision of Kolkata Tribunal in DCIT Vs Rajeev Goyal [22 taxmann.com 34]. The reply of the assessee was not accepted and

AO disallowed exemption of Rs. 2,11,90,716/-.The AO completed the assessment u/s 143(3) on 10-12-2015 determining total income at Rs.5,22,65,417/- and denied the exemption claimed by assessee u/s 54F to the extent of Rs.4,79,46,206/-.On appeal before the Id. CIT(A), the action of assessing officer was confirmed. Thus, further aggrieved by the order of Id. CIT(A), the assessee filed present appeal before this Tribunal.

4. We have heard the submission of the learned authorised representative (Id.AR) of the assessee and the learned departmental representative (Id. DR) for the revenue and perused the material available on record. The Ld.AR of the assessee submits that assessee being an individual, earned long term capital gain along with his minor children Aditya and Natisha on sale of equity shares of a private limited company. The Id. AR for the assessee explained the details of asset wise LTCG on sale of equity shares and mutual funds and sale of house property.

particulars	Assessee (A)		
	AY	No. of shares	Amounts Rs.
Date of acquisition	From AY 1987-88 to 1995-96	126000	9,73,918/- (indexed cost)
Details of sales	AY 2013-14	126000	3,27,60,000/-
LTCG			3,27,60,000/-
STCL			-1,03,510/-
LTCG net STCL			3,16,82,572/-
Benefit u/s 54 EC claimed : allowed			50,00,000/-
Benefit u/s 54F(investment in CGAS)			2,62,82,572/-
Income chargeable under the head capital gain			Nil
Benefit u/s 54F denied			2,66,82,572/-
Assessee's LTCG			2,66,82,572/-

In case of Aditya Shah (Minor Child)

particulars	Aditya Shah (Minor Child)		
	AY	No. of shares	Amounts Rs.
Date of acquisition	From AY 1987-88 to 1995-96	60,000	3,24,642/- (indexed cost)
Details of sales	AY 2013-14	42,000	1,09,20,000/-
LTCG			1,05,95,358/-
STCL			-----
LTCG net STCL			1,05,95,358/-
Benefit u/s 54 EC claimed : allowed			-----
Benefit u/s 54F(investment in CGAS)			1,05,95,358
Income chargeable under the head capital gain			Nil
Benefit u/s 54F denied			1,05,95,358/-
Assessee's LTCG			1,05,95,358/-

In case of Natisha Shah (Minor Child)

particulars	Natisha Shah (Minor Child) -		
	AY	No. of shares	Amounts Rs.
Date of acquisition	From AY 1987-88 to 1995-96	60,000	3,24,642/- (indexed cost)
Details of sales	AY 2013-14	42,000	1,09,20,000/-
LTCG			1,05,95,358/-
STCL			--
LTCG net STCL			1,05,95,358/-
Benefit u/s 54 EC claimed : allowed			--
Benefit u/s 54F(investment in CGAS)			1,05,95,358
Income chargeable under the head capital gain			Nil
Benefit u/s 54F denied			1,05,95,358/-
Assessee's LTCG			1,05,95,358/-

Total LTCG claimed, allowed and denied,

Particulars	Amounts Rs.
Details of sales	5,46,00,000/-
LTCG	5,29,76,798/-
STCL	-103,510/-
LTCG net STCL	528,73,288/-
Benefit u/s 54 EC claimed : allowed	50,00,000/-

Benefit u/s 54F(investment in CGAS)	478,73,288/-
Income chargeable under the head capital gain	Nil
Benefit u/s 54F denied	478,73,288/-
Assessee's LTCG	478,73,288/-

B- Details of long term capital gain on sales of Mutual Funds of minors

Particulars	Aditya	Natisha	Total
Sales value -Rs	20,77,464/-	24,28,578/-	45,06,042/-
Indexed cost Rs.	20,36,498/-	23,96,624/-	44,33,123/-
LTCG Rs	40,966/-	31,954/-	72,920/-
Date of purchase	12.04.2010.	23.04.2010	
Date of sale	05.12.2012	05.12.2012	
Period of holding	2 years	2 years	
Benefits claimed u/s 54F (investment in CGAS)	40,966/-	31954/-	72,920/-
Benefit u/s 54F disallowed	40,966/-	31,954/-	72,920/-

C- LTCG on sale of house property by assessee;

Particulars	Juniper flat Flat 1601	Mayflower flats - 1601/1602	Total
Date of purchase	15.10.2007 (AY-2008-09)	16.12.2007 (AY-2008-09)	
Date of occupation certificate	22.07.2009	22.07.2009	
Date sale	06.12.2012	01.12.2012	
Period oh holding	5 years	5 years	
LTCG	25,41,264/-	34,99,372/-	60,40,636/-
Benefit u/s 54 claimed and allowed	25,41,264/-	34,99,372/-	60,40,636/-

5. In view of the aforesaid explained facts the Id. AR for the assessee explained that the assessee and minors invested the capital gain in the capital gain account scheme for availing exemption u/s 54F. Accordingly, minors, viz. Aditya and Natisha have no income

chargeable to capital gain in view of the investment in capital gain account scheme.

6. The Ld.AR submits that as per definition of income u/s 2(24)(vi), capital gain is defined as “capital gain chargeable u/s 45”. Section 45(1) of the Act which is a charging section exclude the charge of capital gain in case of investment is made in accordance with section 54F. Consequently, such capital gain does not accrue or arise and, therefore, does not form part of gross total income. If capital gain is not charged u/s 45, there is no capital gain chargeable to tax. Therefore, the investment made by minor children u/s 54F left no chargeable capital gain which could be clubbed u/s 64(1A) in hands of assessee. The AO clubbed the capital gain income of children without considering investment by them u/s 54F. The assessee has challenged the action of lower authorities in wrongful clubbing of gross capital gain of minor children. In support of his submission, the Ld.AR of the assessee relied upon the decision of Tribunal in Govind Rohira 95 ITD 77 and Madanlal Bassi 88 ITD 557 and Rajiv Goyal 81 ITD 379. The ld. AR for the assessee submits that in view of the facts explained and the case law relied by him; the ground No. 1.1& 1.2 are liable to be allowed.

7. On the other hand the Id. DR for the revenue supported the order of the lower authorities. The Ld. DR further submits that when the assessee himself is not eligible for exemption u/s 54, how the same could be given to the minor children, whose income is required to be clubbed with his income. The lower authorities have rightly disallowed the claim of exemption. In support of his submissions the Id. DR for the revenue relied on the decision of Delhi Tribunal in ITO Vs Subash Chandra Wadhwa 366 TTJ 075/ 2001(6) TMI-ITAT Delhi.
8. We have considered the rival submissions of the parties and have gone through the orders of the lower authorities. During the assessment the AO clubbed the income / capital gain of both the minors with the assessee without considering the facts that the minors' income was invested in capital gain accounts scheme (CGAS). The Id CIT(A) affirmed the action of the AO by taking view that section 64(1A) of the Act states that while computing the income of any individual , there shall included all such income accrued or arise to his minor children. It was also held that the assessee is also not entitled for the benefits of section 54F; the same cannot be extended to the minors. We have noted that the lower authorities have not disputed the date of acquisition and sale of assets, nature of asset and the period of holding, at the hand on the minors. Further, there is no dispute that the gains

earned by minors were invested in CGAS. We have further noted that after the investment made by minor children u/s 54F left no chargeable capital gain which could be clubbed u/s 64(1A) in hands of assessee.

9. The coordinate bench of Kolkata Tribunal in Rajeev Goyal (supra) held that in case of clubbing of income of minors child, deduction u/s 54EC is to be allowed on minors' income from LTCG separately and only net income is to be clubbed. In Madan Lal Bassi (supra), Chandigarh bench of Tribunal also held that under section 45(1), any profits or gains arising from the transfer of a capital asset are chargeable to income-tax. Save as otherwise provided in various sections including section 54F. In other words, if section 54F is applied, only the amount of capital gains found taxable after application of above provisions can be charged to income-tax. Therefore, to find out whether there is any profit or gain chargeable to tax under section 45(1), the provisions of both the sections are to be read together. Section 54F cannot be read in isolation. Considering the aforesaid decisions of the Tribunal the AO / CIT(A) was not justified in denying the exemption of capital gain to the minors, which was invested in capital gain accounts scheme (CGAS).
10. The case law relied by the ld. DR for the revenue in Subhash Chandra Wadhwa (supra) is not helpful to him as the facts of this case are entirely based on different facts. In that case the assessee claimed the assessee claimed deductions which was separately allowable under

section 10(32) and has already been allowed to him. And the assessee was further claiming deduction u/s 80I for each of the children and thus his claim was not admissible. However, the facts of the case in hand are entirely different. Therefore, we direct the AO to allow exemption with regard to the capital gain earned and invested on behalf of both the minors in CGAS. In the result the ground No. 1.1 & 1.2 are allowed.

11. Ground No. 2 relates to denial of exemption u/s 54F of the Act to the assessee. The ld. AR for the assessee submits that the AO denied exemption u/s 54 on the ground that the assessee is the owner of more than one residential house on the date of transfer of shares from long term capital gain arose. However, the fact is that the builder has not made conveyance of the property to the assessee or to the society (not formed at that point of time). The Ld.AR of the assessee submits that he has filed copy of the agreement between assessee and builder. Thus, the assessee has not acquired title to the property which can be considered as ownership. Besides that the properties are jointly held which is evident from the copy of agreement which is placed on record. Such general holding is not exclusively ownership and does not breach the claim of exemption u/s 54F. In support of his submission, the Ld.AR of the assessee relied upon the decision of Hon'ble Supreme

Court in Alipati Ventaramaih 57 ITR 185 (SC); Gujarat High Court in Ushaben Jayantilal Sodhan 93 taxmann.com 453 (Guj (HC), decision of Tribunal in Rasiklal Satra (98 ITD 335), Ashok Chouhan (176 ITD 717), Smt. Vasanti Rangarajan 23 taxmann.com 299 (Madras HC), Kapil Nagpal (63 taxmann.com 336 (Delhi HC).

12. On the other hand, the Ld. DR for the revenue supported the order of lower authorities. The Ld. DR further submits that the assessee was owner of more than one residential house and the exemption claimed u/s 54F cannot be allowed if the assessee is owner of more than one residential house as on the date of transfer of share. In support of his submission, the Ld. DR for the revenue relied upon the decision of Hyderabad Tribunal in Apsara Bhavana Sai (148 ITD 658). To support the clubbing of income of assessee with minors relied upon the decision of Yogi Aggarwal (96 ITD 288).

13. In the rejoinder submission, the Ld.AR of the assessee submitted that the decisions relied upon by Ld. DR for the revenue in Apsara Bhavana Sai (supra) is of non-jurisdictional Tribunal, while the assessee has relied on the decision of jurisdictional Tribunal in Rasiklal Satara (supra), Ashok Chouhan (supra) and Hon'ble Madras High Court in Vasanti Rangarajan (supra), therefore, in view of the decision of Hon'ble Madras High Court in Vasanti Rangarajan (supra), the

reliance by Id. DR is not a good law. On the decision of Yogi Aggarwal relied by Id. DR, the Id. AR of assessee submits that this decision is completely distinguishable on fact. Similarly, the facts in Subhash Chandra Wadhwa relied by Id. DR for the revenue is not based on the exemption provision like 54F under consideration, rather relates to deduction of Chapter-VI of section 80L or 80I are not applicable on the facts of the case of assessee.

14. We have considered the rival submissions of the parties and have gone through the orders of authorities below. The AO denied the exemption u/s 54 to the assessee by taking view that the assessee is owner of more than one residential house on the date of transfer of shares from which the assessee earned LTCG. Before the Id. CIT(A), the assessee furnished exhaustive written submission as recorded in para- 4 of the impugned order. The Ld. CIT(A) upheld the action of AO by taking view that exemption under section 54F cannot be allowed as he is the owner of more than one residential house on the date of transfer of shares. Before us, the Id. AR of the assessee explained that the assessee purchased flat no. 1601 in Juniper on 15.10.2007 and flat no. 1601/1602 in Mayflower on 16.12.2007. The dates of occupation of certificate of all the flats are 22.07.2009. The flat no. 1601 was sold on 06.12.2012 and Mayflower flats were sold on 01.12.2012. The period

of holding for all the flats were claimed for five years and the assessee claimed LTCG of Rs. 25,41,264/- and 34,99,372/- respectively. The entire benefit/gain earned by assessee was invested in CGAS. The assessee further claimed that neither the possession of the asset was given nor conveyance deed was executed. Thus, interest in the asset was transferred. We have noted that there is no clarity about the facts whether the assessee owned any other residential house or not, in the order of Assessing Officer as well as Id. CIT(A). Therefore, we deem it appropriate to restore this issue to the file of Assessing Officer to decide the issue afresh. The assessee is also directed to bring all the facts with clarity before Assessing Officer. Needless to order that before passing the order, the Assessing Officer shall grant opportunity of hearing to the assessee and pass order in accordance with law. Hence, this ground of appeal is allowed for statistical purpose.

15. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 25-02-2020.

Sd/-

Sd/-

(R.C. Sharma)	(Pawan Singh)
ACCOUNTANT MEMBER	JUDICIALMEMBER

Mumbai, Dt : 25th February, 2020

Pk/-

Copy to :

1. Appellant
2. Respondent

3. CIT(A)
4. CIT
5. DR

By order

Asstt. Registrar, ITAT, Mumbai