

IN THE INCOME TAX APPELLATE TRIBUNAL "SMC", BENCH MUMBAI
BEFORE SHRI R.C.SHARMA, AM
ITA No.6792/Mum/2016
(Assessment Year :2010-11)

Shri Jitendra V Faria Room No.09, 'C'Block, 3 rd Floor, Hari Niwas, L J Road, Shivaji Park, Dadar (W), Mumbai – 400 028	Vs.	ITO 18(2)(1), 400012	Mumbai-
PAN/GIR No.		AAAPF1956E	
Appellant)	..	Respondent)	

Assessee by	Shri Sanjay R. Parikh
Revenue by	Ms. Beena San osh
Date of Hearing	27/04/2017
Date of Pronouncement	27/04/2017

आदेश / O R D E R

PER R.C.SHARMA (A.M):

This is an appeal filed by the assessee against the order of CIT(A)-33, Mumbai dated 08/08/2016 for the A.Y. 2010-11, in the matter of order passed u/s 143(3) of the IT Act.

2. In this appeal, assessee is aggrieved by the action of CIT(A) in directing the AO to tax the entire capital gains on share of old property in the hands of assessee as against 50% assessed by the AO.

3. Rival contentions have been heard and record perused.

4. Facts in brief are that the assessee carries on business in hardware and aluminum sections. During the year under appeal he has shown capital gains on sale of residential property which he owned with his wife.

The property was situated at 8/12, Jai Mahavir Apartments, J. P. Road,

Andheri (West), Mumbai-400053. The working of the long-term capital gains was given to the ITO. As per the working 50% was given to the assessee amounting to Rs.51,27,500/- and after indexation capital gains accrued amounted to Rs.43,01,665/-, the assessee has invested in a new residential house with stamp duty and registration for Rs.42,65,856/- and on the balance Rs.35,809/- tax amounting to Rs.7,376/- has been paid. While making assessment, AO observed that the new property purchased was in the name of two persons namely the assessee and his brother Shri Kunal Velji Faria and therefore he concluded that the exemption claimed by the assessee will be restricted to 50% inspite of the fact that it was made clear to him in writing that the name of the assessee's brother was included for the sake of convenience and the entire amount was paid by the assessee.

5. In an appeal filed by the assessee before the CIT(A), CIT(A) directed the AO to tax the entire capital gains on sale of property in the hands of assessee as against 50% assessed by the AO. Assessee is in further appeal before us.

6. I have considered rival contentions and carefully gone through the orders of the authorities below. From the record, I found that assessee was the owner of a flat in Jai Mahavir Apartment, J. P. Road at Andheri (West) jointly with his wife Mrs. Manisha J. Faria. The said flat was sold for Rs. 1,02,55,000/-. The assessee computed long term capital gains at Rs. 43,01,665/- being 50% share in the property. The assessee invested Rs. 42,01,665/- in another residential property i.e., flat in "Parag" situated

on J. P. Road, Andheri (West). The assessee claimed exemption u/s. 54 of Rs. 42,01,665/- and offered capital gains at Rs. 35,809/-. The name of the assessee's brother was added in the Agreement of new property so purchased for the sake of convenience. However, the entire investment for the purchase of new property i.e. Parag, along with stamp duty and registration charges were paid by the assessee. This fact has been confirmed by the AO on page 2 of the Assessment order as under:-

“The entire cost of the new property is borne by the assessee through the property is in the joint name with his brother...”

7. Since, the new house was purchased by the assessee by incorporating name of his brother, AO restricted deduction u/s.54 to the extent of 50% value of new property, however, AO did not agree with assessee's contention and restricted exemption u/s.54 to Rs.21,32,929/- i.e., 50% of the cost of the new flat. In an appeal before CIT(A), he has directed AO to tax the entire capital gains in assessee's hands by disregarding the fact that 50% of the sale in old house was owned by his wife. I found that wife has already offered her share of capital gains in her return of income filed with the Department. Thus, there is no justification in the order of CIT(A) for taxing the entire capital gains in the hands of the assessee.

8. Now coming to the allegation of the AO that since assessee has incorporated name of his brother, he is entitled to only 50% of the investment so made in the new house. There is no justification in the AO's action, in so far entire investment was made by the assessee and only for the safety reason he has included the name of his brother. I found that in

the assessment order itself at page 2, the AO has observed that entire cot of new property was borne by the assessee though the property is in the joint name with his brother.

9. Under these facts and circumstances, there is no justification for giving 50% benefit of investment in the new house. The issue is also covered by the decision of hon'ble Delhi High Court in the case of CIT v Ravinder Kumar Arora (2012) 342 ITR 38 (Del) wherein High Court held that the assessee was entitled to full exemption u/s. 54F when the full amount was invested by the assessee even though the property was purchased in the joint names of the assessee and his wife. It may be appreciated that even in the case before the hon'ble Delhi High Court, the AO had allowed exemption only to the extent of 50%. The question raised by the Revenue before the hon'ble High Court reads as under:

"Whether the Income-tax Appellate Tribunal was correct in law in granting the exemption under section 54F. of the Income-tax Act, 1961, to the assessee for the whole consideration of Rs. 3,28,15,000 for the purpose of the new asset (the residential property) in the joint names of the assessee and his wife, and not to the extent of 50 per cent. share of the assessee in the new asset?"

The hon'ble High Court has at pages 42 and 43 held as under:

"9. At the outset, the important factual findings recorded by the Tribunal in this case are that it was the assessee who independently invested in the purchase of new residential house though in his own name but along with the name of his wife also and that it was the assessee who paid stamp duty and corporation tax at the time of the registration of the sale deed of the house so purchased and has also paid commission and legal expenses in connection with the purchase of the house. The Tribunal further records that whole of the purchase consideration has been paid by the assessee and not even a single penny has been

contributed by the wife in the purchase of the house. The Tribunal also noted the argument that the property was purchased by the assessee in the joint names with his wife for "shagun" purpose and because of the fact that the assessee was physically handicapped. The Tribunal further concludes that as a matter of fact, the assessee was the real owner of the residential house in question.

10. On the aforesaid facts, we are of the view that the conditions stipulated in section 54F stand fulfilled. It would be treated as the property purchased by the assessee in his name and merely because he has included the name of his wife and the property purchased in the joint names would not make any difference. Such a conduct has to be, rather, encouraged which gives empowerment to women. There are various schemes floated by the Government itself permitting joint ownership with wife. If the view of the Assessing Officer (AO) or the contention of the Revenue is accepted, it would be a deogatory step.

11. Even when we look into the matter from another angle, the facts remain that the assessee is the actual and constructive owner of the house. In CIT v. Podar Cement P. Ltd. [1997] 226 ITR 625 (SC), the Supreme Court has also accepted the theory of constructive ownership. Moreover, section 54F mandates that the house should be purchased by the assessee and it does not stipulate that the house should be purchased in the name of the assessee only. Here is a case where the house was purchased by the assessee and that too in his name and wife's name was also included additionally. Such inclusion of the name of the wife for the above stated peculiar factual reason should not stand in the way of the deduction legitimately accruing to the assessee. The objective of section 54F and the like provision such as section 54 is to provide impetus to the house construction and so long as the purpose of house construction is achieved, such hyper technicality should not impede the way of deduction which the Legislature has allowed. Purposive construction is to be preferred as against the literal construction, more so when even literal construction also does not say that the house should be purchased in the name of the assessee only. Section 54F of the Act is the beneficial provision which should be interpreted liberally in favour of the exemption/deduction to the taxpayer and deduction should not be denied on hyper technical ground. The Andhra Pradesh High Court in the case of Late Mir Gulam Ali Khan v. CIT [1987J 165 ITR 228 (AP) has held that the object of granting exemption under section 54 of the Act is that an assessee who sells a residential house for purchasing another house must be given exemption so far as capital gains are concerned. The word "assessee" must be given wide and liberal interpretation so as to include his legal heirs

also. There is no warrant for giving too strict an interpretation to the word "assessee" as that would frustrate the object of granting exemption. "

10. This decision of the Delhi High Court was subsequently followed by Delhi High Court itself in case of Kamal Wahal 351 ITR 4.

11. In view of the above discussion, I do not find any merit in the action of AO for restricting exemption u/s.54 to the extent of 50% of the value of the new house. The CIT(A) was also not justified in directing the AO to tax entire capital gain on sale of old property in the hands of assessee when 50% of the old house was owned by his wife and she had paid capital gain separately for her share of the house.

11. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on this 27/04/2017

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 27/04/2017

Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai

Taxpundit.org