IN THE INCOME TAX APPELLATE TRIBUNAL

"F" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

ITA no. 3787/Mum./2018
(Assessment Year : 2013–14)

Dr. Vijay Athalye
1, Prachi Building
G.V. Scheme Road no.2 ..... Appellant
Mulund (E), Mumbai 400 081
PAN – AABPA7953P

v/s

Income Tax Officer
Ward–29(3)(5), Mumbai ..... Respondent

Revenue by : Smt. Vidisha Kalra
Assessee by : Shri Devendra Jain

Date of Hearing – 31.07.2018	Date of Order – 07.09.2018

O R D E R

PER SAKTIJIT DEY, J.M.

Aforesaid appeal by the assessee is directed against order dated 7th March 2018, passed under section 263 of the Income Tax Act, 1961 (for short *"the Act"*) by the learned Principal Commissioner of Income Tax–29, Mumbai, for the assessment year 2013–14.

2. Brief facts are the assessee an individual is a doctor by profession and runs a pathology laboratory. For the assessment year under dispute, the assessee filed his return of income on 30th

September 2013, declaring total income of ₹ 6,75,960. The return of income filed by the assessee was selected for scrutiny and the Assessing Officer completed the assessment under section 143(3) of the Act vide order dated 29th February 2016, determining the total income at ₹ 7,06,240. The learned Principal Commissioner of Income Tax in exercise of power under section 263 of the Act called for the assessment record of the assessee and after examining it was of the view that the assessment order passed by the Assessing Officer is erroneous and prejudicial to the interest of Revenue, because, assessee's claim of deduction under section 54 of the Act, was allowed in respect of two flats instead of one. Thus, he issued a show cause notice to the assessee to explain why the assessment order should not be revised. In response to the show cause notice the assessee challenged initiation of proceedings under section 263 of the Act on the preliminary ground that the Assessing Officer after making full enquiry with regard to assessee's claim of deduction under section 54 of the Act, having allowed it, exercise of power under section 263 of the Act is invalid. As regard the merits of the issue, it was submitted that as per the provision of section 54 of the Act applicable to the relevant assessment year, assessee is eligible to claim deduction under section 54 of the Act in respect of two adjacent flats if they have common entrance, common kitchen and in all respect is a single unit.

Thus, it was submitted that in these circumstances, the assessment order cannot be termed as erroneous and prejudicial to the interests of revenue. The learned Principal Commissioner of Income Tax, however, did not find merit in any of the submissions of the assessee. He observed, if the assessing officer allows a claim without making any enquiry, the revisional authority has jurisdiction to revise the order passed by the Assessing Officer. As regards the merits of the issue, the learned Principal Commissioner of Income Tax held that since the assessee has invested the capital gain in purchase of two flats the deduction under section 54 of the Act has to be restricted to one flat. Accordingly, he set aside the assessment order with a direction to the Assessing Officer to restrict the deduction u/s 54 of the Act to one flat purchased by the assessee.

3. The learned Authorised Representative submitted, the observations of the revisional authority that before allowing assessee's claim of deduction under section 54 of the Act the Assessing Officer has not made any enquiry is factually incorrect and without any basis. Drawing our attention to notice dated 13th January 2016, issued under section 142(1) of the Act a copy of which is at Page−1 of the paper book, the learned Authorised Representative submitted that in the annexure to the said notice, the Assessing Officer has specifically raised the issue relating to allowability of deduction under section 54

of the Act in respect of two flats. He submitted that in response to the said notice and query raised by the Assessing Officer, the assessee vide letter dated 21st January 2016, justified its claim under section 54 of the Act stating that the investment of capital gain is in respect of a new residential house, though, as per the building plan was shown as two flats, however, they are located in such a way that there is single entrance and only one kitchen. Therefore, all practical purposes it is a single residential unit. The learned Authorised Representative submitted, after considering the submission of the assessee and examining the documentary evidences filed in support, the Assessing Officer completed the assessment allowing the deduction claimed under section 54 of the Act. The learned Authorised Representative submitted, the aforesaid fact clearly reveal that the Assessing Officer has not only made enquiry with regard to assessee's claim of deduction under section 54 of the Act but being satisfied with assessee's explanation he allowed assessee's claim of deduction. The learned Authorised Representative submitted, considering the judicial precedents on identical issue which were available at the relevant point of time, the Assessing Officer allowed assessee's claim of deduction. That being the case, it cannot be said that the assessment order is erroneous and prejudicial to the Revenue. In any case of the matter, keeping in view the provisions of section 54 of the Act

applicable for the relevant assessment year and the judicial precedents governing the issue, it can be said that the view expressed by the Assessing Officer is a possible view. Therefore, only because the Assessing Officer's view is not acceptable to the revisional authority, the assessment order cannot be held to be erroneous and prejudicial to the interests of Revenue. In support of the aforesaid contention, the learned Authorised Representative relied upon the following decisions:–

i) MOIL Ltd. v/s CIT, [2017] 396 ITR 244 (Bom.);

ii) Shivlal Choudhuri v/s PCIT, [2017] 88 taxmann.com 861;

iii) Narayan Tatu Rane v/s ITO, [2016] 70 taxmann.com 227;

iv) Metacaps Engineering and Mahendra Construction Co. v/s CIT,]2017] 86 taxmann.com 128;

4. As regards the merits of the issue, the learned Authorised Representative submitted, as per the provision of section 54 of the Act applicable to the impugned assessment year, the expression used is investment in *"a residential house"*. He submitted, the expression *"a residential house"* has been interpreted by High Courts and different Benches of the Tribunal not to mean one residential house. He submitted, as per the said interpretation if more than one flat adjacent to each other are joined together and have a common entrance with common kitchen and in all respect is a single residential unit,

deduction under section 54 of the Act is allowable. The learned Authorised Representative submitted, in any case of the matter, the assessee has factually proved before the Assessing Officer that the two flats purchased by the assessee have been converted to one and in all respect it is a single residential unit. Therefore, assessee's claim of deduction under section 54 of the Act. For such proposition, he relied upon the following decisions:–

i) *Sri D. Anand Basappa v/s ITO, ITAT, Bangalore Bench, order dated 28.10.2003;*

ii) *K.G. Vyaa v/s Seventh ITO, ITAT, Mumbai Bench, order dated 06.01.1986; and*

iii) *K.C. Kaushik v/s Fifth ITO, [1990] 51 taxman 051.*

5. The learned Departmental Representative relied upon the observations of the earned Principal Commissioner of Income-tax.

6. We have considered rival submissions and perused materials on record. We have also applied our mind to the decisions relied upon. It is evident from the impugned order passed under section 263 of the Act, the learned Principal Commissioner of Income tax has held the assessment order to be erroneous and prejudicial to the interests of Revenue on the reasoning that the Assessing Officer has failed to examine whether assessee's claim of deduction under section 54 of the Act in respect of two flats purchased by him is in compliance to the

conditions mentioned under the said provision. Therefore, the first issue which requires consideration is, whether assessee's claim of deduction under section 54 of the Act was examined by the Assessing Officer in course of the assessment proceedings. As brought to our notice by the learned Authorised Representative, the Assessing Officer in course of the assessment proceedings issued a notice under section 142(1) of the Act to the assessee on 13th January 2016. As per annexure to the said notice, a copy of which is at Page−2 of the paper book, the Assessing Officer has specifically called upon the assessee to justify its claim of deduction under section 54 of the Act in respect of two independent flats and has also proposed to restrict the said deduction to any one flat of assessee's choice. In response to the aforesaid query of the Assessing Officer, the assessee vide letter dated 21st January 2016, has explained the reason why it is eligible to claim deduction under section 54 of the Act in respect of both the flats. It was explained by the assessee that though in the sanctioned plan of the building the flats have been shown as independent flats, however, they are located in such a way that there is single entrance and only one kitchen. Thus, for all practical purposes, it is a single residential unit. In support of its claim of deduction under section 54 of the Act, the assessee has also relied upon certain judicial precedents. Thus, it is evident, in course of the assessment proceedings the Assessing

Officer has not only examined assessee's claim of deduction 54 of the Act, in respect of the flats purchased but he has decided assessee's claim after taking note of the assessee's explanation in the context of ratio laid down in the judicial precedent cited before him. Therefore, the observation of the learned Principal Commissioner of Income-tax that the Assessing Officer has not examined the issue is factually incorrect. As regards the observation of the DCIT that in view of Explanation−2 to section 263 of the Act the Commissioner of Income-tax has jurisdiction to revise the assessment order if he feels that enquiry which ought to have done has not been done, in our view, Explanation−2 to section 263 of the Act cannot be interpreted in a manner to suggest that by virtue of such explanation, the revisional authority is clothed with unbridled power to invoke his jurisdiction under section 263 of the Act simply because in his opinion the enquiry conducted by the Assessing Officer is either insufficient or not carried out in a manner acceptable to him. If the material on record reveal that the Assessing Officer in course of the proceedings has made proper enquiry and arrived at a conclusion after considering all aspects of the issue and if such conclusion is not opposed to law, the revisional authority cannot hold the order of the Assessing Officer erroneous and prejudicial to the interests of Revenue by citing lack of enquiry or insufficient enquiry by taking the aid of Explanation−2 of section 263

of the Act. In the facts of the present case it is evident that the Assessing Officer has accepted assessee's claim of deduction under section 54 of the Act after conducting necessary enquiry. Moreover, as per the existing provision of section 54 of the Act, applicable to the relevant assessment year, the expression *"a residential house"* has been interpreted not to mean one residential house. Therefore, applying the aforesaid interpretation laid down in various judicial precedents if the Assessing Officer allows assessee's claim after considering the fact that the two flats have been converted to one residential unit having single entrance and one kitchen, the view adopted by the Assessing Officer cannot be considered to be erroneous since it is a possible view. That being the case, one of the conditions of section 263 of the Act is not fulfilled. Therefore, the assessment order cannot be subjected to the proceedings under section 263 of the Act.

7. Even otherwise also, the assessee has a strong case on merit. As could be seen from the facts available on record, though, as per the building plan the residential units purchased by the assessee have been shown as two flats, however, the material on record clearly suggest that both the flats are adjacent to each other and have been converted to one residential unit having single entrance and a common kitchen. The aforesaid factual position has not been controverted by the learned Principal Commissioner of Income-tax. Therefore, as per

the provision of section 54 of the Act, applicable to the impugned assessment year, *"a residential house"* does not mean one residential house. This interpretation has been given in various judicial precedents, a few of which have been cited before us by the learned Authorised Representative. In these decisions, it has been held that if the flats purchased by the assessee are adjacent or contiguous to each other and are used as a single residential unit having common entrance and common kitchen, they have to be considered as a single residential unit satisfying the condition of section 54 of the Act.

8. Further, it is necessary to observe, the directions of the learned Principal Commissioner of Income-tax to the Assessing Officer while setting aside the assessment order is conflicting and contradictory. While in Para–6 of the impugned order, he has directed the Assessing Officer to examine the claim of the assessee, to the effect that the two flats are single units, and decide the issue after affording opportunity of being heard to the assessee, whereas, in Para–7 of the order, he has directed the Assessing Officer to restrict the deduction under section 54 of the Act to one flat at ₹ 54,12,800. Once the learned Principal Commissioner of Income-tax directs the Assessing Officer to restrict the deduction under section 54 of the Act to one flat, the other direction for examining assessee's claim that the residential unit is a single unit becomes redundant. The aforesaid facts reveal that the

impugned order has been passed mechanically. Be that as it may, on overall consideration of facts and material on record in the light of the decisions cited at the bar, we are of the view that exercise of jurisdiction under section 263 of the Act in the present case is invalid. Accordingly, we quash the impugned order passed under section 263 of the Act and restore the assessment order passed by the Assessing Officer. Grounds raised are allowed.

9. In the result, assessee's appeal is allowed.

Order pronounced in the open Court on 07.09.2018

Sd/-
MANOJ KUMAR AGGARWAL
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 07.09.2018

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

(Sr. Private Secretary)
ITAT, Mumbai