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

BEFORE SHRI R.C.SHARMA, AM &
SHRI RAMLAL NEGI, JM

ITA No.3526/Mum/2017
(**Assessment Year:2010-11**)

Smt. Delilah Raj Mansukhani, Flat No.1, Ground Floor, 216, Shalimar Bldg. Netaji Subhash Road, Marine Drive, Mumbai-400020.	Vs.	I.T.O., 26(2)(3), Mumbai (Presently 35(1)(3).
PAN: AGVPM1739P		
Appellant)	..	**Respondent**)

Assessee by	Shri Mayur Kisnadwala (CA)
Revenue by	Shri E. Sridhar
Date of Hearing	**26/12/2018**
Date of Pronouncement	**12/03/2019**

आदेश / O R D E R

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

This is an appeal filed by the assessee against the order of the ld. CIT(A)-46, Mumbai dated 10/03/2017 for the A.Y. 2010-11 in the matter of the order passed u/s.143(3) of the Income Tax Act, 1961 (in short the Act). The assessee has raised the following grounds of appeal:

"1. On the facts and circumstances of the case and in law, the Ld CIT(A) erred in upholding the order of the Ld. AO granting partial deduction u/s 54F/54.

2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in directing the AO to take the cash component at Rs. 2,59,97,500/- instead of Rs. 2,53,00,000/- for computing the sale consideration.

3. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in directing the AO to refer the matter of determining the fair market

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value as in 01.04.1981 of the asset sold, thereby ignoring the binding decision of the Hon'ble Bombay High Court in the case of CIT vs. Puja Prints (2014) 360 ITR 697 and other decisions which were brought to the notice of the Ld. CIT(A).

4. *On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in directing the AO to adopt the fair market value as on 01.04.1981 of the asset sold as determined by the DVO and there by ignoring the valuation report issued by the assessee by the registered valuer.*

5. *On the facts and circumstances of the case and in law, the order of the Ld. CIT(A) enhancing the assessment on account of rental income for alternate accommodation of Rs. 2,60,000/- is bad in law.*

6. *On the facts and circumstances of the case and in law, the Id. CIT(A) erred in enhancing the assessment holding that the rent received for alternate accommodation of Rs. 2,60,000/- is eligible to tax.*

7. *On the facts and circumstances of the case and in Law, the Learned CIT(A) erred in holding that the levy of interest u/s 234B and 234C are consequential in nature.*

8. *On the facts and circumstances of the case and in law, the CIT(A) erred in confirming the action of A.O. of initiating of the penalty proceedings u/s. 271(1)(c).*

The appellant craves eave to add, alter, amend, delete or modify any of the above-referred grounds of appeal"

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2. Rival conten ions have been heard and record perused. Facts in brief are that the assessee is an individual deriving income from Salary and Other Sources. During the year under consideration, the Assessee, vide agreement dated 04.07.2009 granted development rights of her share (50%) in the property "Dommus Josephi" Plot No 160, Perry Road, Bandra (W), Mumbai (except an FSI of approx. 2,850 square feet), which was gifted to her by her uncle Joseph Aloysius Fernandes, to Calvin Properties Developers (Developers). As regards the floor space index (FSI) of approx. 2,850 square feet carpet area, it was retained / reserved by her

for construction of her residence in the new building proposed to be constructed by the Developers (page 14, Article 3.1).Hence, as per the terms mentioned in the development agreement (DA), the Assessee is entitled to a consideration of Rs. 2,53,00,000/- and the cost of construction of the two residential units admeasuring 1,425 sq. ft. each, one on the first and the other on the second floor as the said FSI continued to belong/owned by the Assessee in terms of Article 4 of the DA

3. During the course of assessment proceedings with respect to the assessee's claim of long term capital gain, the Assessing Officer asked the assessee to file copy of valuation report of registered valuer and her bank statements. Since the assessee was not having copy of valuation report she asked her registered valuer to provide with a duplicate copy of valuation report. It was informed by the registered valuer that the fair market value of the property as on 01/04/1981 was Rs. 41,20,000/-.

4. During the course of assessment proceedings, vide order sheet noting dated 15.3.2013 and notice dated 19.3.2013, the AO directed the AR of the assessee to file a copy of the valuation report of the registered valuer and also her bank statements. Vide letter dated 22.3.201, the assessee informed the AO that she had misplaced the documents and will obtain a copy from the registered valuer and the bank respectively and submit them. As a layman, she understood that the said amount was the FMV of 100% of the property and hence she had made an error in the

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computation of long term capital gains and accordingly revised the workings and immediately paid the differential tax of Rs. 39,68,885. Accordingly, in her letter dated 22.3.2013, she fairly informed the AO about the error.

5. However, on receipt of the copy of valuation report from the registered valuer, it was noticed that the FMV of the entire property, as on 1.4.1981, was Rs.82,40,000/- and thus the original long term capital gains computation, wherein the cost of acquisition (FMV) for the assessee was taken at Rs.41,20,000/- (Rs.82,40,000/- / 50% share of the assessee) and loss computed at Rs.6,97,200/- was the correct computation. Hence, along with a copy of said valuation report, vide letter dated 25.3.2013, above fact was explained to the AO with a request that the revised computation filed along with the letter dated 22.3.2013 be ignored and pass assessment order appropriately and credit be granted for all taxes paid. All the above submissions were duly accepted by the AO and no further queries / clarifications were sought by the AO on this issue.

6. However, after considering the assessee's reply, the A.O. declined claim of deduction U/s 54/54F of the Act in respect of second flat as the assessee has purchased two units, whereas as per the A.O. the Section states that "a" residential house should be purchased/constructed".

7. Finally the Assessing Officer allowed deduction only respect of one flat. By the impugned order, the ld. CIT(A) confirmed the action of the

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Assessing Officer against which the assessee is in further appeal before us.

8. We have heard the rival contentions and carefully gone through the orders of the authorities below. The Assessing Officer declined the assessee's claim with respect to two flats given by the builder by relying on the decision of the Hon'ble Bombay High Court in the case of K.C. Kaushik Vs P.B. Rane, ITO (1990) 84 CTR 62 (Bom). The Assessing Officer observed that both the units have separate main doors for each and the units were not adjoined together. The Assessing Officer further stated that there was no inside staircase between two units that both the units has been utilized with separate kitchens

9. The ld. AR of the assessee has relied on the decision of the Hon'ble Andhra Pradesh High Court in the case of CIT Vs. Syed Ali (2013) 352 ITR 418 wherein the Hon'ble High Court has *held that:*

> *" the exemption under section 54 only requires that the property purchased by assessee out of sale proceeds should be of residential nature and the fact that residential house consisted of several independent units cannot be an impediment for granting relief under said section, even if such independent units are situated side by side, on different floors or are purchased under separate sale deeds. The High Court of Andhra Pradesh in the said case has agreed with the findings off the decision of the High Court of Karnataka in the case of D. Anand Basappa (supra). Therefore, considering the totality of the facts and circumstances in the light of consistent view of different High Courts, it is held that Commissioner (Appeals) has correctly decided that the assessee is entitled for exemption under section 54 as regards the investments/cost of construction*

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claimed by the assessee in respect of all the units. In view of that matter, there is no justifiable reason to interfere with the decision of the Commissioner (Appeals) on this count and the same is upheld. [Para 5]

In the case of CIT v. D. Anand Basappa [2009] 309 ITR 329/180 Taxman 4 (Kar.), the High Court has held that 'a residential house' as mentioned in section 54(1), has to be understood in a sense that the building should be of a residential nature and the word 'a' should not be understood to indicate a singular number.

Revenue's Special Leave Petition before the Hon'ble Apex Court against the judgment of B. Ananda Basappa (Supra) has been dismissed by the Supreme Court."

10. Further reliance was also placed by the ld AR of the assessee on the decision of Hon'ble Delhi High Court in the case of CIT Vs. Gita Duggal in ITA No. 1237/2011 and submitted that the decision relied by the Assessing Officer in the case of K.C. Kaushik vs. P.B. Rane, ITO (supra) were distinguishable on facts in so far as there was successive sales and purchases of residential flats.

11. After going through the various judicial pronouncements with regards to the assessee's eligibility for claim of exemption in respect of more than one units acquired by the assessee out of the capital gains, we found that for the purpose of claiming deduction u/s 54/54F, there is no such requirement that, two units constituting of one residential house property, should not have separate main doors or they should be adjoined together or there should be inside staircase between two units, etc. It will depend on the building construction plan whether units can be adjoined by inside staircase or by common door or not. In the present case, the

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assessee's residential house, with respect to which the assessee is claiming deduction u/s 54/54F of the Act, comprises of two adjacent units, on the first and second floor of the same building. Both units constitute one residential house for the purpose of section 54/54F of the Act.

12. There are catena of decisions, wherein, it has been held that, even if the assessee purchases different residential units, which are located on different floors and are used as a residential house, for the purpose of section 54/54F, it cannot be held that the assessee has purchased more than one residential house. Also, there are decisions to the effect that, where two adjacent units are purchased and used by the assessee as a single residential house, both units would be considered for claiming exemption notwithstanding the fact that they are converted into one residential unit or not

13. By the Finance Act, 2014, an amendment was brought in Section 54/54F of the Act which is effective from 01/04/2015 i.e. from A.Y. 2015-16 whereby the phrase "a residential house" was replaced by "one residential house". The effect of this amendment was dealt with in by the Hon'ble Madras High Court in CIT v. Smt. V.R. Karpagam 373 ITR 127 (pages 29-32A of CLPB), wherein it was held:

> *"9. It is relevant to note herein that an amendment was made to the above-said provision with regard to the word 'a' by the Finance (No.2) Act, 2014, which will come into effect from 01.04.2015. The said amendment reads as follows:*

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32a. Words "constructed, one residential house in India" shall be substituted for "constructed, a residential house" by the Finance (No.2) Act, 2014, with effect from 01.04.2015.'

10. The above-said amendment to Section 54F of the Income Tax Act, which will come into effect only from 01.04.2015, makes it very clear that the benefit of Section 54F of the Income Tax Act will be applicable to constructed, one residential house in India and that clarifies the situation in the present case, i.e. post amendment, viz., from 01.04.2015, the benefit of Section 54F will be applicable to one residential house in India. Prior to the said amendment, it is clear that a residential house would include multiple flats/residential units as in the present case where the assessee has got five residential flats. We may also mention here that all the Authorities below have clearly understood that the agreement signed by the assessee with M/s. Mount Housing Infrastructure Ltd., is that the assessee will receive 43.75% of the built- up area after development, which is construed as one block wh ch may be one or more flats. In that view of the matter what was before th Assessing Officer is only equivalent of 56.25% of land transferred, equivalent to 43.75% of built up area received by the assessee. This built up area got translated into five flats. Hence, we are of the opinion that the transaction in this case was not with regard to the number of flats but with regard to the percentage of the built up area, vis-a-vis, the Undivided Share of Land."

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The circular issued by the Board clarifying the intent of the amendment effective AY 2015-16 reads as under:

20. Capital gains exemption in case of investment in a residential house property

20.1 The provisions contained in sub-section (1) of section 54 of the Income-tax Act, before its amendment by the Act, inter alia, provided that where capital gain arises from the transfer of a long-term capital asset, being buildings or lands appurtenant thereto, and being a residential house, and the assessee within a period of one year before or two years after the date of transfer, purchases, or within a period of three years after the date of transfer constructs, a residential

house, then, the amount of capital gains to the extent invested in the new residential house is not chargeable to tax under section 45 of the Income-tax Act.

20.2 The provisions contained in sub-section (1) of section 54F of the Income-tax Act, before its amendment by the Act, inter-alia, provided that where capital gains arises from transfer of a long-term capital asset, not being a residential house, and the assessee within a period of one year before or two years after the date of transfer, purchases, or within a period of three years after the date of transfer constructs, a residential house, then, the portion of capital gains in the ratio of cost of new asset to the net consideration received on transfer is not chargeable to tax.

20.3 Certain courts had interpreted that the exemption is also available if investment is made in more than one residential house. The benefit was intended for investment in one residential house within India. Accordingly, sub-section (1) of section 54 of the Income-tax Act has been amended to provide that the rollover relief under the said section is available if the investment is made in one residential house situated in India.

20.4 Similarly, sub section (1) of section 54F of the Income-tax Act has been amended to provide that the exemption is available if the investment is made in one residential house situated in India.

20.5 Applicability: —These amendments take effect from 1st April, 2015 and will accordingly apply in relation to assessment year 2015-16 and subsequent assessment years.

On the facts of the case, the two residential units constructed by the Developer for the Assessee is "a" (one) residential house only, we observe that in any case, the Board having accepted all the decisions wherein courts have interpreted that the word "a" qualifies residential house and not the quantum/number of houses, for all years prior to the amendment deduction/benefit is available on multiple houses, this controversy does

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not survive. This is an acceptance by the Legislature that prior to the amendment deduction u/s. 54/54F is available on purchase of more than one residential unit also and that it has accepted the interpretation of the courts in this regard.

14. The relevant assessment year under consideration is 2010-11 which is prior to the A.Y. 2015-16 wherein an amendment has been brought by the Finance Act, 2014. Accordingly, the Assessing Officer was not justified in declining the claim of exemption to the assessee in respect to two units of the house property allotted by the developer to the assessee. Accordingly, the Assessing Officer is directed to allow exemption in respect of both the units. We order accordingly.

15. In this appeal, the assessee is also aggrieved by the action of the ld. CIT(A) for referring the matter back to the DVO for determination of fair market value as on 01/4/1981.

16. We have heard the rival contentions and found that the Assessing Officer had accepted the valuation report of the registered valuer determining the Assessee's half share of FMV as on 1.4.1981 at Rs. 41,20,000 (and the indexed cost of acquisition at Rs. 2,59,97,200), which was submitted by the Assessee during the course of assessment and hence the issue regarding the determination of the FMV as on 1.4.1981 does not arise from the assessment order of the AO and was not an issue taken up in appeal by the assessee before the learned CIT(A). The FMV as

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on 1.4.1981, accepted by the AO, was found to be excessive by the CIT(A) (because it is trite that increased FMV as on 1.4.1981 would lead to reduced tax on capital gains) and therefore vide letter dated 13.6.2014, after recording the reasons for disturbing the FMV, the ld. CIT(A) directed the Assessing Officer to refer the matter to the DVO for determination of fair market value as on 01/4/1981. The ld. CIT(A) has dealt with this issue after relying on the decision of the Hon'ble Bombay High Court in Rallis India Ltd. v. CIT 374 ITR 462 (Bom.)(for the same AY 2002-03) and held that that though the AO cannot make a reference to the DVO once the assessment order is passed, the CIT(A) can make a reference to the DVO for determination of the FMV as on 1.4.1981, or direct the AO to make such reference. We observed that in the case of Rallis India Ltd., though the AO had not referred the matter of valuation of FMV as on 1.4.1981 to the DVO, he had not accepted such FMV at Rs. 46.70 crores as claimed by the assessee but estimated it at Rs. 17.48 crores thereby resulting in enhanced capital gains. Hence, in its appeal before the CIT(A), the assessee, inter alia challenged the FMV of the land as on 1-4-1981, done by the AO; in other words, the issue of valuation was before the CIT(A) for adjudication.

17. Against this factual matrix, the Hon'ble court therefore held in para 13 as under:

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"In this case, the issue of the FMV as on 1st April, 1981 was admittedly raised by the Petitioner in its appeal before the CIT(A). Thus the CIT(A) during the appellate proceedings before him can exercise powers under Section 55A of the Act and can make such enquiry in terms of Section 250(4) of the Act, either himself or direct the Assessing Officer to do so and report in terms of Section 250(4) of the Act"

However, the facts of present case are different in so far as the A.O. has not disputed the fair market value as on 01/4/1981, therefore, the assessee has not raised any ground before the ld. CIT(A).

18. Whether as per section 55A, as applicable to the year under consideration, reference to the DVO can only be made where the AO is of the opinion that the value as claimed by the assessee is less than fair market value; not in the case when in his opinion value claimed by assessee is higher than actual fair market value?, we observe that the erstwhile section 55A which is applicable for the year under consideration empowers the AO to refer valuation of property to the DVO only in case when AO is of opinion that the fair market value as claimed by the assessee in accordance with the registered valuer is less than its actual fair market value. In other words, prior to the amendment made vide Finance Act 2012, AO can refer the valuation only when in his opinion the value as claimed by the assessee is less than fair market value, not in the case when in his opinion value claimed by assessee is higher than actual fair market value. Relevant extract of section 55A as applicable for Assessment Year 2010-11 as under:

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> *55A. With a view to ascertaining the fair market value of a capital asset for the purposes of this Chapter, the Assessing Officer may refer the valuation of capital asset to a Valuation Officer—*
> *(a) in a case where the value of the asset as claimed by the assessee is in accordance with the estimate made by a registered valuer, if the Assessing Officer is of opinion that the value so claimed is less than its fair market value.*

However subsequent to the amendment made vide finance act 2012 under section 55A, wherein the word "is less than its fair market value" is substituted by the word "is at variance with fair market value", now AO can refer the valuation to DVO for both the instances but that too only for the assessment year 2012-13 and thereafter as the said amendment applies prospectively.

19. For the above proposition, we rely on the decision of the Bombay High Court in CIT v. Puja Prints 360 ITR 697 (pages 52-57 of CLPB), wherein it was held:

> *7. We find that Section 55A(a) of the Act very clearly at the relevant time provided that a refer nce could be made to the Departmental Valuation Officer only when the value adopted by the assessee was less then the fair market value. In the present case, it is an undisputed position that the value adopted by the respondent-assessee of the property at Rs.35.99 lakhs was much more than the fair market value of Rs.6.68 lakhs even as determined by the Departmental Valuation Officer. In fact, the Assessing Officer referred the issue of valuation to the Departmental Valuation Officer only because in his view the valuation of the property as on 1981 as made by the respondent-assessee was higher than the fair market value. In the aforesaid circumstances, the invocation of Section 55A(a) of the Act is not justified.*
>
> *8. The contention of the revenue that in view of the amendment to Section 55A(a) of the Act in 2012 by which the words "is less than the fair market value" is substituted by the words "is at variance with its fair market value" is clarificatory and should be given retrospective effect. This submission is in face of the fact that the 2012 amendment was made effective only from 1 July 2012. The Parliament has not given retrospective effect*

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to the amendment. Therefore, the law to be applied in the present case is Section 55A(a) of the Act as existing during the period relevant to the Assessment Year 2006-07. At the relevant time, very clearly reference could be made to Departmental Valuation Officer only if the value declared by the assessee is in the opinion of Assessing Officer less than its fair market value.

9. The contention of the revenue that the reference to the Departmental Valuation Officer by the Assessing Officer is sustainable in view of Section 55A(a)(ii) of the Act is not acceptable. This is for the reason that Section 55A(b)of the Act very clearly states that it would apply in any other case i.e. a case not covered by Section 55A(a) of the Act. In this case, it is an undisputable position that the issue is covered by Section 55A(a) of the Act. Therefore, resort cannot be had to the residuary clause provided in Section 55A(b)(ii) of the Act. In view of the above, the CBDT Circular dat d 25 November 1972 can have no application in the face of the clear position in law. This is so as the understanding of the statutory provisions by the revenue as found in Circular issued by the CBDT is not binding upon the assessee and it is open to an assessee to contend to the contrary."

20. Thus, we found that the above decision of the Hon'ble Jurisdictional High Court is squarely applied to the assessee's case. Respectfully following the decision of the Hon'ble Jurisdictional High Court which is binding on us, we hold that the assessee's case is covered by Section 55A(b)(ii) is bad in law, especially when this aspect was also dealt with in the above decision.

21. We further observe that the above position was reiterated by the Hon'ble court, in Rallis India Ltd. v. CIT 374 ITR 462 (Bom.). It held:

"15. It is a settled position that the provisions of Section 55-A of the Act which were amended in 2012 by substituting the following words "as it variance with its FMV" for "is less than its FMV" is clarificatory and not retrospective as held by this Court in CIT v. Puja Prints [2014] 360 ITR 697/24 Taxman 22/43 taxmann.com 247. Therefore, the Revenue did not contend that the provisions of Section 55-A of the Act is retrospective. It, therefore, follows that where admittedly the value arrived at by the Registered Valuer of

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the land is more than its FMV, no jurisdiction is acquired by the authorities to invoke Section 55-A of the Act."

In para 17, the court reiterated that before the Revenue makes a reference, to the DVO, in term of Section 55A of the Act, it should be of the opinion that the value determined by the Registered Valuer as the FMV of the property as on 1st April, 1981 is less than its FMV. Only on having formed the above opinion, it is entitled to call upon the DVO to submit a report with regard to its FMV as on 1st April, 1981. In the Assessee's case neither the FMV as per the registered valuer's valuation report was less that the FMV estimated by the DVO, nor is it a case where the FMV of the asset claimed by the Assessee is not supported by a registered valuer's valuation report. Accordingly reference to the DVO was bad in law. We direct accordingly.

22. In the resul , appeal of the assessee is allowed in part in terms indicated hereinabove.

Order pronounced by listing the result on the Notice Board of the Bench under Rule 34(4) of the Appellate Tribunal Rules, 1963.

Order pronounced in the open court on this 12/03/2019

Sd/-	**Sd/-**
(RAMLAL NEGI)	**(R.C.SHARMA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 12/03/2019
*Ranjan

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.

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

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai

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