Income Tax Appellate Tribunal - Mumbai
Acit vs Mrs. Leela P. Nanda on 7 October, 2005
Equivalent citations: 2006 102 ITD 281 Mum, 2006 286 ITR 113 Mum, (2006) 105 TTJ Mum 192
Bench: G Veerbhadrappa, Vice, S Kapoor
ORDER Salil Kapoor, Judicial Member

1. This appeal filed by the Revenue is directed against the order of CIT (A)-XI, Bombay dated 15th September 1993 for assessment year 1991-92. The proceedings arise out of assessment made Section 143(3) of the Income Tax Act, 1961.

2. The first and second ground of appeal relates to exemption Under Section 54 in respect of cost of second flat purchased by the assessee.

3. Brief facts, as stated and as borne from the record are that the assessee agreed to sell her residential flat at "Shivthirth" Building to Parikh family for Rs. 51,51,000/-. The deal was done through two brokers and it was agreed to pay 1% brokerage to each of them. Since the sale consideration exceeded Rs. 10 lakhs the statement in Form No. 37-1 was submitted before the appropriate authority. The appropriate authority passed an order Under Section 269UD(1) acquiring the flat for central government and the consideration was fixed at Rs. 50,62,398/-.

4. The assessee entered into an agreement on 16.10.1990 for purchase of Flat No. 1201 in Green Acres, Lokhandwala Complex. Stamp duty was paid and transfer was completed. Rajiv Nanda, son of the assessee joined as second name holder for the said flat. On 25.10.1990 Shri Rajiv Nanda also entered into an agreement for purchase of second flat No. 1202 at Green Acre, Lokhandwala Complex and assessee joined as second name holder. To acquire second property a loan of Rs. 7,25,000/- was given by the assessee to her son Rajiv Nanda. He was unable to arrange for repayment of the loan so the assessee agreed to purchase the second flat and absolve him of the loan and entered into an agreement dated 03.05.1991. Original documents and possession was also handed over to the assessee of Unit No. 1202 and the entire beneficial interest was transferred to her. It was mentioned in the agreement that due to the close relationship between the parties the premises No. 1202 shall continue to stand in the joint names of the parties.

5. The Unit Nos. 1201 and 1202 were adjacent flats and were purchased by the assessee for self-residence as she had a big family and had been converted into a single residence. It was with regard to purchase of second flat No. 1202 that the exemption Under Section 54 was refused to the assessee by the Assessing Officer. The ld. CIT (A) allowed the deduction to the assessee and held as under:

2.1 Reading of Section 2(47) suggest that the expression 'transfer' includes as per Clause (v) any transaction involving the allowing of the possession of any immovable property to be taken or to be retained in part in performance of a contract. In the appellant's case thee is no dispute about the possession of the flat. In the case of K.G. Vyas v. 7th ITO 16 ITD 195 (supra) the ITAT held that "in the present case, all the four flats had been purchased by the assessee in the same building for the purpose of his own residence and were being used by him for that purpose only. The mere fact that

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the assessee had purchased them jointly either in the name of his wife or in the names of his sons would not materially affect or alter the factual position that he was the owner of all the four flats and that he was also living in them along with the members of his family. The fact that on a future date the assessee might divide the properties among the members of his family was of no relevance or consequence for the purpose of allowing relief to the assessee under Section 54, since the assessee had fulfilled the conditions laid down under Section 54 namely, that he had purchased a house for his own residence by investing the sale proceeds of his former residential house in the purchase of those four flats. Also considering the strength of the assessee's family with ten members the accommodation acquired by the assessee in the form of four flats in the same building was commensurate to his requirements.

Accordingly, the assessee was entitled to exemption under Section 54 in respect of total amount invested in four flats.

6. The learned DR Shri Manoj Kumar stated that although both the flats have been purchased by the assessee within specified period but the exemption Under Section 54 was not available to her for the investment in the Flat No. 1202. He further stated that the assessee, in fact, never bought the second flat as it was not transferred on her name. The signing of unregistered agreement dated 03.05.1991 cannot be construed as purchase of the second flat. He also stated that if it is presumed that the assessee has purchased the second flat, even then she was not eligible for deduction Under Section 54 of the Income-tax Act for the purchase of second flat. He relied on the decisions of Bombay High Court in the case of K.C. Kaushik v. P.B. Rane, Vth Income-tax Officer and Ors. reported in 185 ITR 499 (Bom.) and on the decision of Bombay Tribunal in the case of Mrs. Gulshan Banoo Mukhi v. JCIT reported in 83 ITD 649 (Mum.).

7. Mrs. Shobha H. Jagtiani, ld. Counsel for the assessee stated that the assessee had domain and possession both the units, which constitute one residential house. She further stated that the agreement dated 03.05.1991 for purchase of unit No. 1202 was not required to be registered. The payment was made as an adjustment towards the debt. The said transaction constitute purchase within the meaning of Section 54 of the Income-tax Act. She relied on the decision of Bombay High Court in the case of CIT v. Mrs. Hilla J.B. Wadia reported in 216 ITR 376 and on the decision of CIT (AP) v. T.N. Aravinda Reddy reported in 120 ITR 46 (SC).

8. With regard to the second objection of the Revenue that the assessee is not entitled to exemption Under Section 54 on the purchase of second residential house, the counsel stated that both the units i.e. 1201 and 1202 constitute one single residential house as they were adjacent flats which had been converted into a single residence by the assessee and as such the same should be considered for exemption Under Section 54.

9. The counsel for the assessee also relied on the decision of Bombay Tribunal in the case of K.G. Vays v. 7th ITO reported in 16 ITD 195 (Bom) and on the judgment of Allahabad High Court in the case of Shiv Narain Chaudhari v. CWT (Lucknow) reported in 108 ITR 104 (Allah.).

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10. We have heard both the parties in detail and have also gone through the facts of the case and case law relied on by both the parties. There is no dispute with regard to the fact that the assessee had purchased Flat No. 1201 and invested in Flat No. 1202 within the specified period, as required Under Section 54 of the I.T. Act. The dispute revolves around investment made by the assessee by way of adjustment of loan for the purpose of buying a Flat No. 1202. Whether the said transaction of buying Flat No. 1202 can be treated as "purchase" for the purpose of claiming exemption Under Section 54 of IT Act. If it is held that the assessee had purchased the flat for the purpose of Section 54 then second question will be whether the assessee had purchased one residential house or two residential houses, as the exemption Under Section 54 is available for purchase of a residential house.

11. Hon'ble Supreme Court in the case of T.N. Aravinda Reddy, cited supra, has held that the word 'purchase' in Section 54(1) had to be given its common meaning i.e. to buy for a price or equivalent of price by payment in kind or adjustment towards a debt or other monetary consideration. In the case of Mrs. Hilla J.B. Wadia, cited supra, the Hon'ble Bombay High Court has held that what needs to be establish is that whether the assessee has acquired a right in specific flat and whether substantial investment has been made within the period which will entitle the assessee to obtain possession of the flat. There Lordships have also referred to the CBDT's Circular No. 471 dated 15.10.1986 with regard to allotment of DDA Flats. The CBDT had stated that allotment letter issued by the DDA under Self Financing Schemes gives a title of the property to the allottee and payment of instalments is a follow up action and taking delivery of the possession is only a formality.

12. Now, coming to the facts of the case, the property in question is unit No. 1201 which was registered in the name of Rajiv Nanda and the assessee. The funds were provided by the assessee as loan to Shri Rajiv Nanda for purchase of this flat. The assessee had purchased Unit No. 1202 from Rajiv Nanda by agreement dated 03.05.1991 and had absolved him of the loan. It was also agreed between them that due to the close relationship between the two parties, the premises shall continue to stand in both the names. The original documents and the possession of unit No. 1202 was handed over to the assessee. The assessee had acquired the domain, substantial interest and possession of flat. In view of the above noted judgments, as relied by the assessee, it cannot be said that the assessee had not purchased the unit No. 1202 within the meaning of Section 54(1). As such, we hold that the assessee had purchased unit No. 1202 within the time prescribed Under Section 54.

13. Coming to the second issue of the matter, the Flat Nos. 1201 & 1202 were adjacent flats which were converted into a single residence by the assessee and were being used for the self residence of the assessee and family members. It has been held by Hon'ble Allahabad High Court in the case of Shiv Narain Chaudhari v. CWT (Lucknow) while explaning the meaning of house for exemption Under Section 51(iv) of WT Act, that self-contained dwelling unit which are contiguous and situated in same compound and within common Boundaries and having unity of structure could be treated as one house.

14. The Bombay Tribunal in the case of K.G. Vays, cited supra, has held that, the four flats purchased by the assessee in the same building for the purpose of his own residence, will entitle him for relief Under Section 54. The mere fact that assessee had purchased them jointly either in the name of his

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wife or in the names of his son would not materially affect or alter the factual position that he was the owner of the flats.

15. In the case of K.C. Kaushik, cited supra, as referred by the learned DR, the issue was different. In the said case it was held that out of two house properties purchased by the assessee, he was entitled to relief Under Section 54 against the purchase of any one of the houses. The issue before us is whether the two adjoining flats which are contiguous and converted into a single residence should be treated as one residential house or two separate residential houses.

16. The facts in the case of Mrs. Gulshan Banoo Mukhi, cited supra, are also different as it was not a case of two adjoining flats converted into a single residence.

17. In our view two contiguous flats converted into a single residential premise should be treated as a residential house for the purpose of Section 54. As there is no dispute that the purchase of Flat No. 1201 and 1202 has been made within the prescribed time and for the purpose of self residence, the deduction has been correctly allowed by the CIT (A). The order of the CIT (A) is upheld. As such first and second ground of the appeal are dismissed.

18. The third ground relates to claim for payment of brokerage amounting to Rs. 1,01,000/- to two brokers.

19. The claim of the assessee is based on the fact that she has paid brokerage to two brokers amounting to Rs. 1,01,000/- for arranging the sale. Their part of the work, which was assigned to them, to find out the acceptable buyer for the assessee was complete. Had the appropriate authority not intervene, the assessee would have sold flat to Parikh family as agreed. The fact that the particular flat was acquired by the Central Government does not mean that the two brokers did not perform their duty or did not render their service for which brokerage was due to them and was paid accordingly. The Assessing Officer disallowed the claim on the basis that flat was acquired by Central Govt. and was not sold to Parikh family. On appeal the ld. CIT (A) allowed the claim on the ground that the payment was made for specific services, which were rendered by them. He held that brokerage was paid for services rendered, even though such services did not resulted into sale, the same is to be allowed as these were meant for the purpose of sale of the flat.

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20. We have heard both the parties. We are of the view that the said payment made to the brokers was an expenditure incurred wholly and exclusively in connection with transfer of the asset as provided Under Section 48(1). Hence the same was deductible while working out the capital gain. The expenditure was for the services of the brokers, which resulted in arranging the sale of the flat to Parikh family. The assessee was not able to sell the flat to Parikh family because it was acquired by the appropriate authority but the brokerage had become due and was paid by the assessee. The expenditure on brokerage was incurred by the assessee in connection with the sale of the flat. We uphold the finding of the CIT (A) and decline to interfere the same. The third ground is dismissed.

22. The appeal of the Revenue is dismissed. This order is pronounced at Mumbai in the open court on this day of 7th October two thousand and five.