

Income Tax Appellate Tribunal - Mumbai

Ishwar Singh Chawla , Mumbai vs Assessee on 30 July, 2009

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH 'I' : MUMBAI

BEFORE SHRI D.K. AGARWAL, (JM) AND SHRI B. RAMAKOTIAH , (AM)

ITA No.5011/M/2009  
Assessment Year : 2006-07

Mr. Ishar Singh Chawla  
201/202 Karma Stambh  
Opp. MTNL Office, Vikroli (W)  
Mumbai-400 083. . . . . (Appellant)  
P.A. No. (AAAPC 7308 P)

Vs.

Dy. Commissioner of Income tax  
Ward 23(1)  
Mumbai. . . . . (Respondent)

Appellant by : Shri R.K. Bothra  
Respondent by : Ms. Vandana Sagar

ORDER

Per D.K. AGARWAL (JM).

This appeal preferred by the assessee is directed against the order dated 30.7.2009 passed by the ld. CIT(A) for the Assessment Year 2006-07.

2. The brief facts of the case are that the assessee, an individual, derives income from house property, business, long term capital gain and other sources. The return was filed declaring total income of Rs.16,28,370/- which was subsequently revised on a total income of Rs.18,29,960/-. During the course of assessment it was inter alia A.Y:06-07 observed by the AO that the assessee has disclosed an amount of Rs.1,81,660/- being taxable capital gain on sale of flat and plot as under :-

Capital gain on sale of flat at Altamount Road Rs.1,37,11,000 Capital gain on sale of plot at Rajkot Rs. 2,51,063 Rs.1,39,62,063 Less: Invested in flat at Bandra Rs.1,37,80,405 Taxable capital gain Rs. 1,81,660 On examination, it was further observed by the AO that the assessee has acquired a new residential house with the help of borrowed funds from Punjab National Bank. However, the funds received on transfer of property was not used to clear the loan liability availed of for acquiring the new residential house as the loan with PNB was still continuing in the subsequent years and assessee is claiming interest on borrowed funds as a deduction from his income. According to the AO Sec.54(1) was not applicable in the case of assessee, the assessee was asked to show cause as to why the exemption on capital gains should not be denied to him. In response, the assessee after filing copy of loan account with bank, details of receipt in respect of house property which was sold

and utilisation thereof, and copy of ledger account in the books of I.S. Chawla (HUF), submitted that all the three conditions are satisfied and hence he is eligible for deduction u/s.54(1) of the A.Y:06-07 Act. However, the AO did not accept the assessee's explanation and he concluded vide para-14 of the assessment order as under :

"14. Thus, as per provisions of Section 54(2), if the amount is not appropriated by the assessee towards purchase of a new asset made within one year before the date of transfer of original asset then either he has to deposit it in capital gain account with specified institutions. The term 'appropriated' has not been defined in the Act. Hence the general dictionary meaning will have to be adopted. The dictionary meaning of 'appropriate' is "devote(money etc.) to special purposes". It is therefore clear from the wording used that money has to be used for purchase of a new house and the intention of Legislature is very clear in this regard. Only then can the assessee claim deduction u/s.54. Besides assessee cannot isolate sec.54(1) from sec.54(2), because the opening words of sec.54(1) is "subject to provisions of sub-section 2". Assessee cannot adopt an interpretation which is beneficial to him by selective usage of clauses. In view of what is stated above I hold that assessee has not utilized the entire gains accrued on transfer of original asset for purchase of a new asset. The capital gains chargeable to tax is worked out as under :-

Total capital gains as per return of income .... Rs.1,39,62,063 Less: Utilised for purchase of property as per para 10 .... Rs. 82,22,826 Rs. 57,39,237 Less: Stamp duty paid .... Rs. 6,45,000 Rs. 50,94,237 =====

Accordingly the AO added Rs.50,94,237/- as long term capital gains and completed the assessment at an income of Rs.65,37,107/- vide order dated 10.11.2008 passed u/s.143(3) of the Income tax Act, 1961(the Act).

A.Y:06-07

3. On appeal the ld. CIT(A) while relying on the decision of the Tribunal in Smt. Pramila A. Parekh (ITA No.7381/Bom/1994 dated 18.7.2005) and in Milan Sharad Ruparel (ITA No.1920/M/06 dated 16.10.2008) has observed that the purchase of new house is prior to the sale of old property and it has been acquired out of borrowed funds. The sale proceeds have been utilised for the repayment of loan. The AO has allowed exemption to the extent of such repayment. However, this is not correct in view of the decisions of the Tribunal cited above and accordingly held that the appellant is not entitled to exemption claimed u/s.54 of the Act at all. Thus, she enhanced the assessee's income to the extent.

4. Being aggrieved by the order of the ld. CIT(A) the assessee is in appeal before us taking following grounds of appeal :

"1. On the facts and circumstances of the case, whether the ld. CIT(A) was correct in holding that the appellant is not entitled to claim exemption/deduction for capital

gain under section 54 of the Income tax Act, 1961(sic) on the ground that the new flat was purchased out of borrowed funds and not out of the sale proceeds of the flat sold.

2. On the facts and circumstances pf the case, whether the ld. CIT(A) was justified in enhancing the amount of taxable capital gain from Rs.1,66,660/- to Rs.1,39,62,063/-."

5. At the time of hearing the ld. Counsel for the assessee submits that the issue is covered in favour of the assessee by the order of the A.Y:06-07 Tribunal in ACIT vs. Dr. P.S. Pasricha in ITA No.6808/Mum/2003 for Assessment Year 2001-02 dated 11.1.2008, upheld by the Hon'ble Jurisdictional High Court in CIT vs. Dr. P.S. Pasricha in Income tax Appeal No.1825 of 2009 dated 7.10.2009. He also placed on record the copy of the aforesaid order/judgment.

6. On the other hand the ld. DR supports the order of the AO and the ld. CIT(A).

7. We have carefully considered the submissions of the rival parties and perused the material available on record. From the assessment order, and the material available on record we find that the assessee has sold self occupied flat at Altamount Road, on 16.12.2005 resulting into LTCG of Rs.1,37,11,000/- and the assessee has purchased a new residential house at Lords Apts., Bandra on 20.01.2005 at a cost of Rs.1,37,80,405/- for which the Assessee has claimed deduction u/s.54, as according to him the condition of purchasing the flat for claiming the deduction u/s.54(1) is satisfied. The new flat was purchased by partly taking bank loan from Punjab National Bank & partly from own funds. The assessee has purchased the new flat by paying Rs.20,45,637/- from saving account and through I.S. Chawla HUF Deposit Account and also by taking loan from Punjab National A.Y:06-07 Bank of Rs.1,17,50,000/-. The assessee has partly repaid the bank loan of Punjab National Bank Rs.70,42,802/- up to 31.03.2006 out of the proceeds of sale of SOP flat. As such the assessee has paid total amount of Rs.90,88,439/- (Rs.20,45,637/- + Rs.70,42,802/-) up to 31.03.2006. Further the assessee has also repaid the bank loan of Rs.1,65,837/- from 01.04.2006 till 31.10.2006 i.e. due date of filing of return. However , the AO was of the view that the assessee has not utilised the entire capital gains accrued on transfer of original asset for purchase of a new asset and hence, he worked out long term capital gains at Rs.50,94,237/-. On appeal, the ld. CIT(A) observed that the purchase of new house is prior to sale of old property and it has been acquired out of borrowed funds, the sale proceeds have been utilised for repayment of loan and hence, the appellant is not entitled to exemption claimed u/s.54 at all.

8. In ACIT vs. Dr. P.S. Pasricha (supra) the facts of the case are that the assessee has acquired a residential flat in the building known as "Dilwara" at Cooperage, Mumbai at cost of Rs.3,22,464/-. The said property was sold during the year for a total consideration of Rs.1,40,00,000/-. After claiming deductions for expenses incurred for sale and cost, long term capital gains was worked out by the assessee at Rs.1,24,02,738/-. The assessee claimed an exemption under section A.Y:06-07 54(1) of the Act to the extent of Rs.1,04,78,750/- and returned the taxable capital gain at Rs.19,23,988/-. After the sale of the above property, the assessee purchased a commercial property at Kolhapur for a total consideration of Rs.125.28 lakhs and gave the said property on rent to M/s. Huges Telecom Ltd. Thereafter, within the period specified under section 54(1) of the Act, the

assessee purchased two adjoining residential flats at Mumbai for a total consideration of Rs.1,04,78,750/- on which deduction was claimed under section 54(1) of the Act. The AO disallowed the claim of deduction under section 54 on two grounds namely(1) that the sale proceeds from original asset were not deployed fully in the new asset (2) the assessee has not purchased one single property, but, two units. On appeal, the ld. CIT(A) allowed the claim of the assessee. On second appeal by the revenue it has been held by the Tribunal vide para -9 and 10 of its order dated 11.1.2008 as under :-

"9. Having heard the rival submissions and from careful perusal of the orders of the lower authorities and provisions of section 54 of the Act, we find that assessee has initially utilized the sale proceeds on sale of its residential flat in commercial properties and later on he purchased two residential flats within a period specified in sub section(2) of section 54 of the Act, and these facts are not disputed by the Revenue. The Revenue's main dispute is that the sale proceeds were utilized for purchase of a commercial property and residential house was purchased out of the funds obtained from different sources, as such, the identity of heads has been changed. We do not find much force in this argument as the A.Y:06-07 requirement of section 54 is that the assessee should acquire a residential house within the period of one year before or two years after the date on which transfer took place. Nowhere, it has been mentioned that the same funds must be utilized for the purchase of another residential house. The requirement of the law is that, the assessee should purchase a residential house within the specified period and source of funds is quite irrelevant. For the sake of reference, we extract the provisions of section 54 as under :.....

10. Since the assessee has purchased the residential house before the due date of filing of the return of income, its claim is not hit by sub-section(2) of section 54 of the Act. We, therefore, of the view that assessee is entitled for deduction under section 54(1) of the Act....."

9. The above order of the Tribunal has been upheld by the Hon'ble Bombay High Court vide para-2 of judgment dated 7.10.2009(supra) as under:-

"2. Having seen the finding of fact recorded by the Tribunal in paragraph No.9, that the assessee had initially utilized the sale proceeds of sale of his residential flat for purchase of commercial properties and later on he purchased two residential flats within a period specified in sub section(2) of section 54 of the Act. In this view of the matter, the view taken by the Tribunal cannot be faulted. The appeal is without any substance. Hence, the same stands dismissed in limine with no order as to cost."

In the absence of any distinguishing feature brought on record by the revenue we respectfully following the order of the Tribunal upheld by the Hon'ble Jurisdictional High Court (supra), hold that the assessee is entitled for deduction u/s. 54(1) of the Act and accordingly the AO and A.Y:06-07 the ld. CIT(A) were not justified in disallowing the claim of the assessee. The grounds

taken by the assessee are therefore allowed.

10. In the result, the assessee's appeal stands allowed. Order pronounced in the open court on 4.3.2010.

Sd/-  
(B. RAMAKOTAIAH)  
ACCOUNTANT MEMBER

Sd/-  
( D.K. AGARWAL )  
JUDICIAL MEMBER

Mumbai, Dated: 4.3.2010.  
Jv.

Copy to: The Appellant  
The Respondent  
The CIT, Concerned, Mumbai  
The CIT(A) Concerned, Mumbai  
The DR " " Bench

True Copy

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.

	Details	Date	Initials	Designation
1	Draft dictated on	15.2.2010		Sr.PS/PS
2	Draft Placed before author	17.2.2010		Sr.PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
6.	Kept for pronouncement on	4.3.10		Sr.PS/PS
7.	File sent to the Bench Clerk	5.3.10		Sr.PS/PS
8	Date on which the file goes to the Head clerk			
9	Date of Dispatch of order			