Income Tax Appellate Tribunal - Bangalore
Sri D. Anand Basappa vs The Income Tax Officer on 28 October, 2003
Equivalent citations: 2004 91 ITD 53 Bang, (2005) 92 TTJ Bang 597
Bench: P Mohanarajan, D R Shah
ORDER Deepak R. Shah, Accountant Member

1. This appeal by assessee is arising out of the order of Commissioner of Income Tax (Appeals), Mysore Dt.22.01.2003.

2. The only issue in appeal is as follows:

"The Assessing Officer erred in restricting the benefit under Section 54 in respect of flat bearing No. G-02 on a total investment of Rs. 55.20 lakhs as against the claim of the assessee in respect of investment in two residential flats next to each other converted into a single flat, on a total investment of Rs. 107.81 lakhs. The learned CIT(A) erred in confirming the same."

3. Briefly the facts :

For the Assessment Year 1996-97, the assessee filed the return of income on 28.3.2001 in response to notice under Section 148. During the year, apart from having agricultural income, the assessee had capital gains arising on transfer of property bearing No. 9, Brunton Road, Bangalore. The assessee transferred this property for a total consideration of Rs. 212.50 lakhs. The assessee further invested during the year Rs. 107.81 lakhs. Thus the assessee claimed exemption under Section 54 in respect of capital gains arising on the sale of Brunton Road property against the investment made in the residential flat. As per the agreement with the developer of the residential flat M/s. Ormonde Developers Pvt. Limited. The assessee agreed to purchase two residential flats, bearing Nos. G-01 and G-02 both next to each other. The agreed consideration towards each of the flat was Rs. 52.60 lakhs and Rs. 55.20 lakhs aggregating to Rs. 107.81 lakhs. The argument of the assessee is that the two residential flats were converted into one big flat and thus the benefit under Section 54 should be with reference to both the flats. This point was negated by the Assessing Officer. Though the investment by the assessee on the residential flat was accepted at Rs. 107.81 lakhs, the benefit of the provisions of Section 54 could be allowed only against Rs. 55.20 lakhs being the investment made on part of the flat.

4. Learned CIT (A) concluded that the exemption in respect of investment in "a residential house" means one and not any. Since the intention of legislature is clear to provide for purchasing or constructing "one residential house" and since there are two different residential units with two different municipal numbers, exemption is available only in respect of one such house. Considering various case laws learned CIT(A) order held as under:

"The assessee's case is squarely covered by a recent decision of the Income Tax Appellate Tribunal (Mumbai) in the case of Mrs. Gulshanbanoo R. Mukhi v. JCIT reported in 83 ITD 649. In this case the Hon'ble Tribunal have also referred to the decisions of the Gujarat High Court in the case of Shivnarayan Chaudhari v. CWT (1977) (108 ITR 104) (All.), K.G. Vyas v. Seventh ITO (1986) (16 ITD

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195) (Bom). The Tribunal has held as under:

"We have heard the rival submissions and perused the material available on record. The provisions of Section 54(1) are reproduced above. Our first endeavour is to ascertain whether the provisions are capable of giving meaning by a plain reading. In Section 54(1)(i), the words used are 'if the amount of the capital gain is greater than the cost of the residential house so purchased or constructed...' If we take up the plea of the learned counsel for assessee, the revenue is emphasizing that "a residential house" means "a residential house" thereby one residential house. We find that it is not the emphasis of the revenue but it is the wordings of the provisions itself. We are dealing with a situation where the Legislature wants to confer some benefit to the assessee under "certain conditions." If we take the ordinary and grammatical connotations, then "a residential house" means a dwelling unit. In Bombay one flat will mean one residential house. The assessee's requirements may be many. But what we are concerned is with the plain reading of the provisions of the Act. The decisive factor is not the perception of the assessee but the clear intent of the law. Pitted against each other, the intend of law has to prevail. According to us Section 54(1), 54(1)(i) and 54(1)(ii) uses the words "a residential house" and "the residential house" for the same thing. Similarly, "the residential house" is purported to be referred to as "the new asset" for the rest of the provisions. It has to be presumed that Legislature is oblivious of the section of words. If the Legislature had an intention to exempt more than one unit it could have been done by simple words like "residential house or houses", "the new asset/assets." Similarly in Clauses (i) & (ii), the cost of acquisition of new asset is directed to be taken as Nil if the new asset is sold within three years of its purchase. If the legislature intended more than one residential unit, here also it could have used the words "if there are more than one units the cost of acquisition in respect of new asset should be the date on which it is acquired." The whole scheme of Section 54(i) & (ii) spells out that what the Legislature means unambiguously is one residential house. The Hon'ble Supreme Court in CIT v. Vegetable Products Limited. (88 ITR 192) (1973) has held that if the language of the statute is plain, the fact that the consequences of giving effect to it may lead to some absurd result is not a factor to be taken into account in interpreting a provision. It is for the Legislature to step in and remove the disparity. Further, the Supreme Court in CED v. Alladi Kuppuswamy (1977) (108 ITR 439) has opined "it is true that a physical statute should be construed strictly so as to be given every benefit of doubt to the subject. But where the phraseology of a particular section of the statute takes within its sweep the transaction which is taxable, it is not for the court to strain and stress the language of the section so as to enable the tax payer to escape the tax." Weighing on the scale of these observations of the Hon'ble Supreme Court, we are of the view that the provisions in question do not create any ambiguity and the language is plain. We appreciate that the plain interpretation may result in some inconvenience, for that matter looking at Bombay realities some absurdities, but the same cannot prevail over the plain meaning of the statute. The question of giving benefit of doubt to the subject also arise when there is some ambiguity, but where the provisions, as we have already described, are plain and unambiguous, we find ourselves helpless to interpret the section in such a way with a view to avoid the contemplated hardships. The case laws cited by the learned counsel for the assessee pertain to interpretations of provisions prior to 1.4.1983. They cold have been helpful have we found some difficulty with the meaning of the provisions. Since the meaning of the provisions is plain, simple and unambiguous, these external aids of interpretation and drawing analogies from case laws do not benefit the cause of the assessee. The revenue has demonstrated that in assessee's case, the

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so-called family requirements also do not existed in the sense that three daughters were married and living abroad. They occasionally visit their parents and are non-residents. Consequently, the size of the family as being projected, cannot be considered on the common parlance connotations. Besides, the residential need of the assessee could not be established for the second flat as the same was let out. In any case, this issue does not have much bearing as we held that the provisions in question are clear and they mean purchase or construction of one residential house. Under these circumstances we uphold the order of the lower authorities on this issue. This issue arising out of several grounds is dismissed."

Respectfully following the above decision, I hold that the claim of exemption under Section 54 in respect of two flats is not allowable as the provisions of Section 54. The Assessing Officer is justified in disallowing such claim."

It was also held that the decision of Income Tax Appellate Tribunal, Mumbai in the case of Smt. Fulwanti C. Rathod v. ITO (ITAT) 'E' Bench is not applicable as the said decision is in respect of exemption under Section 54 of the Act. Hence the assessee is in appeal before us.

5. Learned counsel for assessee Shri Devraj made elaborate arguments. According to the assessee, he invested an amount of Rs. 1,07,81,249 (Rs. 52,60,916 in flat No. G-1 and Rs. 55,20,333 towards flat No. G-2) on two adjacent residential flats. The assessee further incurred registration and stamp duty charges of approximately 15% which worked out to approximately Rs. 16.20 lakhs. Thus, the total cost of the flats worked out to Rs. 124.01 lakhs. Took the possession of the flats in May, 1997. The assessee had the intention of using both the flats as one large apartment and accordingly requested the developer to merge both. The developer handed over the possession of the single large flat (with two khata numbers and two different registration). However, due to family compulsions the assessee could not move in. Having difficulty in finding one tenant for the large flat, he was forced to reconvert into two and leased out the same on monthly rentals. A copy of the confirmation of the developer of having agreed to convert into one large flat, which was produced before the Assessing Officer during the assessment proceedings was also filed before us. Sri Devraj further submitted that the Assessing Officer erred in assuming the wording used in Section 54 to be "one residential unit." When, in fact, the word used in Section 54 is "a residential house." It is argued that what the assessee acquired was one large residential house consisting of two flats. The fact that two registrations are made in respect of two flats and two khatas are allotted in respect of thereof, do not make any difference to the claim of the assessee. In support of his claim regarding interpretation of a residential house as mentioned in Section 54, reliance has been placed on the following decisions.

1. K.G. Vyas v. Seventh ITO (16 ITD 195) (Bombay)

2. Shivnarayan Chaudhari v. CWT (1977) (108 ITR 104)(All)

3. Kodandas Chanchimoal (155 ITR 272)(Guj)

4. Smt. Brinda Kumari

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5. Smt. Fulwanti C. Rathod v. ITO (ITAT) 'E' Bench, Mumbai.

Sri Devraj further submitted that meaning of residential house as it appears in Section 54 as thus:

"The wording used in Section 54 of the Act is "residential house" and not "residential unit." All the court decisions cited in the earlier written submissions, support this contention that irrespective of the number of residential units, as long as they are in the same building, these units together is a residential house. Whenever the provisions of the Act wanted to refer to a residential unit, the same have been specifically provided for. For Eg. (i) The II proviso to Section 23 (as it stood before the amendment effective assessment year 2002-03) has referred to "a residential unit." (ii) Depreciation schedule (Annexure I to Income Tax Rules) Entry I(3) refers to a 'dwelling unit.' The new Section 23 - Sub-section (2) (effective assessment year 2002-03), has referred to a house. A reading of the sub-section indicates that the house can be more than one unit (using the terminology house or part of a house).

It was further submitted that the language of Section 54 prior to 1983 and subsequent to 1983, so far as the exemption available under Section 54, the words "a residential house" remains for all the time. Since the majority of the view before the Bombay Tribunal is in favour of assessee, learned CIT(A) was not correct in following the decision of Mrs. Gulshanbanoo Mukhi case only. It was further submitted that the reliance on the decision of Hon'ble Bombay High Court in K.C. Kaushik v. P.B. Rane, ITO (185 ITR 499) by Assessing Officer is also misplaced as in the said case the assessee never claimed the deduction for more than one residential units. Thus the assessee is entitled to deduction under Section 44 in respect of both the residential units which is part of one entire building comprising several residential apartments. In he end it was submitted that there is difference of opinion among the Bombay Bench of the Tribunal. Thus both the views are possible. Since the issue is concerning grant of benefit to the assessee,it should be so interpreted so as to tilt in the favour of assessee rather than revenue since two views are reasonably possible. In view of the decision of Supreme Court in Vegetable Products Limited, the view favourable to the assessee should be adopted.

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6. Learned Departmental Representative Smt. Archana Choudhary submitted that the facts of the case need to be noted. From the facts it is clear that though the assessee intended to merging two flats into one large apartment, the same was not done till filing of return of income. The two flats are occupied by two different families. Though the developer agreed to convert the flats into one large apartment, they were never merged. The decisions relied upon in the case of K.G. Vyas (supra) is on the peculiar facts of the case. In the said case there was a common kitchen and common ration card with the entire family and hence though there were four flats since they were living together exemption under Section 54 was granted in respect of investment in all these four apartments. Since intention of legislature is to provide exemption for one residential house and since the assessee acquired two such houses with different identical units due to separate sale deeds, separate municipal numbers, separate electric and water meters, etc. These two units cannot be considered as "a residential house." The decision of ITAT, Bombay in Gulshanbanoo Mukhi case (supra) was strongly relied upon. The decision of other High Courts relied on by learned counsel for assessee is not dealing with the issue directly and hence cannot be relied remotely for interpreting the word "a

residential house" for the purpose of claiming exemption under Section 54, it was therefore urged that the order of learned CIT(A) be upheld.

7.1 We have considered the rival submission and the relevant facts of the case and decisions relied upon. We shall see whether the assessee is entitled deduction under Section 54 in respect of both the apartments acquired or only one of them. The deduction under Section 54 is allowed in respect of 'a residential house.' Similar wordings are also there under Section 54F. It is the interpretation of the Assessing Officer that 'a residential house' means 'one residential house' and not more than one, whereas it is the contention of the assessee that 'a residential house' means 'any residential house', not necessarily 'one residential house'. Since what the assessee acquired is though stated to be two apartments, yet both the apartments are adjacent. There is a common entrance and common kitchen. The assessee desires to use it as one house only. However, due to certain circumstances could not do so. Similar issue has been considered by various benches of ITAT, Mumbai. Initially, the issue came up before Bombay Bench in 16 ITD 195 in the case of K.G. Vyas v. Income Tax officer. The Tribunal therein allowed the claim of the assessee holding that since all the four apartments were in one building though on different floors but under occupation of the same family, the deduction under Section 54 was allowable. Later on ITAT, Mumbai in 83 ID 649 in the case of Mrs. Gulshanbanoo R. Mukhi v. JCIT held that since there is an amendment in Section 54 and 54F with effect from 1.4.1983 and since the intention of the legislature is clear to allow deduction only in respect of 'one house', 'a residential house' shall be only 'one residential house' and deduction under Section 54 is allowable only for 'one residential house'. Later on, ITAT, Mumbai itself, without noticing the decision of Gulshanbanoo case (supra), in the case of Smt. Fulwanti C. Rathod in ITA No. 1092/Mum/1995 dt.3.5.2002 relying upon the decision K G Vyas's case (supra) held that the assessee is entitled to deduction in respect of all the flats, being consecutively numbered under one roof occupied by members of one family, are eligible for deduction under Section 54 while computing long term capital gains.

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7.2 We, therefore, examine as to whether 'a residential house' should be treated as 'one residential house' or whether 'more than one residential house' can be considered eligible for deduction under Section 54. Reading the provisions of Section 54-it can be held that there is no bar like Section 54F to claim deduction for ore than one residential house. If the assessee is holding 'a residential house' called building-A and on sale of such house if the assessee acquires property-X, the assessee is eligible for deduction under Section 54. Similarly, in the same year, if the assessee sells residential house 'B' and acquires a house property 'Y' out of such proceeds, still the assessee is eligible for deduction under Section 54. This means that there is no bar in acquiring more than one residential house to claim deduction under Section 54 unlike Section 54F. If this be the case, then it can be held that if the assessee acquires even two adjacent houses to meet his needs out of the proceeds of only one residential house, he cannot be denied exemption under Section 54. What is to be examined is whether the conditions of Section 54 are satisfied at the time of investment in each property. In the present case, it can be seen that both the properties were acquired simultaneously i.e. within the period specified in Section 54. To put it in different words, when the assessee sold the original property and earned capital gain out of same, what is to be seen is whether the sale proceeds of original asset has been utilised in acquiring another house property. We find that both the apartments were acquired simultaneously and hence the conditions for acquiring 'a residential

house' within the time specified are complied with. The assessee is therefore eligible for deduction under Section 54 in respect of both the apartments simultaneously acquired.

7.3 We are inclined to lean in favour of decision of ITAT, Bombay in the case of K G Vyas and subsequent unreported case in the case of Smt. Fulwanti C Rathod in preference to the decision rendered by the same Tribunal in Mrs. Gulshanbanoo's case (supra). We are unable to agree with the ratio laid down in Gulshanbanoo's case (supra) for the reasons that there is no amendment in provisions of Section 54 subsequent to 1.4.1983 to the extent of acquisition / construction of 'a residential house'.

7.4 The scope and effect of amendment on Section 54 with effect from 1.4.1983 is explained in circular No. 346 Dt.30/6/1982 (138 ITR St.23) issued by CBDT as under:

"Modification of the provisions relating to exemption of capital gains on transfer of self-occupied house property on investment in other house property for self-occupation - Section 54 - 19.1 Under Section 54 of the Income Tax Act, capital gains arising on the transfer of a house property which in the two years immediately preceding the date of its transfer was used by the assessee or a parent of his for self-residence is exempted from income tax if the assessee within a period of one year before or after that date, purchase or within a period of two years after the date of such transfer constructs a house property for the purpose of his own residence. The exemption of capital gains is restricted to the amount of such capital gain utilised for the purchase or construction of the new house property. Where the amount of capital gain is greater than the cost of the house property so purchased or constructed, the balance amount of capital gains is charged to tax. If, however, the amount of capital gain is equal to or less than the cost of the house property purchased or constructed, the capital gain is completely exempted from income tax. if such house property purchased or constructed is transferred within a period of three years of its purchase or construction the capital gain on the property so transferred is calculated by reducing the cost of its acquisition by the amount of the capital gain exempted from income tax.

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19.2 The conditions of self-occupation of the property by the assessee or his parent before its transfer and the purchase or construction of the new property to be used for the residence of the assessee for the purposes of exemption of capital gains created hardship for assessees. This was usually due to the fact of employment or business of the assessee at a place different from the place where such property was situated.

19.3 The Finance Act has made the following modifications in Section 54 of the Income Tax Act, namely--

i) The conditions of residence by the assessee or his parent in the property which was transferred, as also residence by the assessee in the new property purchased or constructed by him have been removed.

(ii) The period for construction of a new property has been raised from two years to three years since assessees sometimes experience difficulty in complying with the existing time limit of two years for

the construction of a house property.

iii) It is clarified that this exemption will be allowed only in the case of individual assessees.

iv) It has been provided that this exemption will apply only in relation to long term capital gains, that is gains arising from the transfer of a house property which had been held by the assessee for a period exceeding 36 months.

19.4 This provision will take effect from 1st April, 1983 and will accordingly apply in relation to the assessment year 1983-84 and subsequent years. [Sections 11 and 23(a) and (b) of the Finance Act]"

From the amendment as explained it is seen that there is no amendment in clause relating to investment in new house property.

7.5 Assigning grammatical meaning, in Gulshanbanoo case (supra) it was held that particularly in place like Bombay 'a residential house' means 'a dwelling unit.' This also does not appeal to us. A meaning under the Act applicable to whole of India cannot be given with reference to particular area only. This can be better understood referring to decision of Hon'ble Allahabad High Court in case of Shiv Narain Chandhani (supra). In said case under Wealth Tax Act, 1957, execution under Section 5(1)(iv) is available in respect of "one house or part of house belonging to assessee." It was observed on pages 107 & 108 thus:

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"To attract the exemption under Clause (iv) of Section 5(1) of the Act the house owned by the assessee should be used by the assessee exclusively for residential purpose. In the present case the assessee is a Hindu undivided family consisting of four adult male members Each of them is occupying one residential unit in the building bearing door Nos. 92 and 92-A. It is well settled that though a Hindu undivided family is ordinarily joined not only in estate but also in food and worship, the members of such family need not have a common residence. In other words, the family may continue to remain undivided even though different members of the family are residing separately. If a building otherwise comes within the meaning of the word "house", the mere fact that different members of the Hindu undivided family who own that building, a living separately in different self contained portions thereof, will not, in our opinion constitute that building into many houses."

Hence 'a residential house' can contain more than one residential unit and still can be considered 'a residential house' only.

7.6 It is also observed in Gulshanbanoo's case (supra) that the intention of the legislature is clear to grant exemption for only one house. We are unable to find any such intnetion anywhere stated. It cannot be presumed that if the legislature intended more than one residential unit, it could have used the words 'house or houses'. It can equally also be held that if the intention of legislature is to restrict the deduction for only one house, then instead of using the word 'a residential house' the words 'one residential house' would have been used therein. It may also be noted that under General Clauses Act, as per Section 13, shingular shall include plural and vice-versa. Reliance placed on the decision of Hon'ble Supreme Court in Vegetable Products Limited case to the extent that if the

language of the statute is plain, the fact that the consequences of giving effect to it may lead to absurd result, is of no effect in interpreting the provisions. However, the same decision also holds that if there is ambiguity in interpretation of the provisions, the one which is in favour of the assessee, should be adopted. The varying decisions at extreme ends can definitely result into saying that there is an ambiguity in the provision. Thus the one in favour of the assessee is to be adopted rather than applying a strict meaning by saying that there is no ambiguity. Thus this issue is decided in favour of the assessee.

8.1 The next ground of appeal is as under:

"The Assessing Officer erred in restricting the agricultural income to Rs. 5 lakhs as against the returned income of Rs. 10 lakhs by the assessee. The learned CIT(A) erred in confirming the same."

8.2 At the time of hearing learned counsel for assessee did not press the ground rather the issue was conceded. For want of prosecution and since the counsel for assessee conceded the issue, this ground of appeal is dismissed.

In the result the appeal is partly allowed.

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