THE INCOME TAX APPELLATE TRIBUNAL
"SMC" Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Amarjit Singh (JM)

I.T.A. No. 6613/Mum/2019 (Assessment Year 2013-14)

Madhu B.Khatri A-301, Bathia Building No.1, S.V.Road Borivali(W) Mumbai-400092 PAN : AITPK8826F	Vs.	ITO,Ward-32(2)(2) C-11, R.No.304, 3rd Floor Pratyakshkar Bhavan BKC, Bandra(E) Mumbai-400 051
(Appellant)		(Respondent)

Assessee by	Shri Prakash Jhunjhunwala
Department by	Ms. Usha Gaikwad
Date of Hearing	18.05.2021
Date of Pronouncement	01.07.2021

O R D E R

Per Shamim Yahya (AM) :-

This appeal by the Assessee is directed against the order of learned CIT(A)-45 dated 23.05.2019 and pertains to Assessment Year 2013-14.

2. The grounds of appeal read as under :

1.0 On facts and circumstances of the case and in law, Ld. CIT(A) erred in confirming the addition of long term capital gain of Rs.37,47,819/- on transfer of a residential house on erroneously considering the notional sale consideration of Rs.92,11,288/- though the market value determined by the Stamp valuation department u/s.50C is ofRs.53,70,125/-;

2.0 The Ld. CIT(A), before confirming the sale consideration determined by Ld. AO on adopting the market value of 2 residential flats, ought to have considered the understated facts, being;

a) The Ld, AO determined the sale consideration on considering the excessive area of 2 flats wherein the carpet area had been hypothetically converted into built-up area on the basis of incorrect presumptions;

b) The sale consideration had been determined on considering the ready reckoner rate without considering the locational disadvantages, etc;

3.0 The Ld. CIT(A) ought to have ought to have admitted the appellant's alternate prayer made u/s.50C(2) to refer the valuation matter to DVO to determine the fair value of the capital asset transferred during the year;

4.0 On facts and circumstances of the case and in law, Ld. CIT(A) erred in confirming the disallowance of deduction u/s.54 of Rs.35,68,144/- in respect of the 2nd flat acquired by the appellant;

4.1 The Ld. CIT(A), before confirming the disallowance of deduction u/s.54 of Rs.35,68,144/-, ought to have considered the understated vial facts being;

a) The 2 small flats acquired by the appellant in same building constitutes as one residential house;

b) The amendment to Sec 54 made in Finance Act 2014 w.e.f. 01/04/2015 would not apply retrospectively.

3. Brief facts of the case are that in the assessment order, the AO allowed deduction u/s 54 on one residential house of Rs.35,68,144.

4. Against the above order, Ld.CIT(A) noted that elaborate assessees submission as under:-

'In assessment order, Ld, AO allowed the deduction u/s.54 on one residential house of Rs.35,63,244/- *and ought to have allowed the deduction of Rs.71,36,288/-.*

The appellant humbly submits that Ld. AO ought to have allowed the deduction it/s.54 on both flats of Rs.71,36,288/- *[instead of 1 flat of* Rs.35,68,144/-] *and in this respect, the appellant humbly submits as under :-*

3.1 *The appellant had acquired a residential house being flats nos.* 102&302 *which are situated in same residential building. The appellant, under redevelopment agreement, was allotted the 2 flats by the developer and since the size of such flats were very small (carpet area of 492 Sq.fts per flat), accordingly the appellant had treated such 2 flats as a residential house. There is a common kitchen since the appellant had used one small size flat as her Kitchen and another flat had been held as bedrooms. The Ld. AO is not justified in considering the 2 flats as two residential houses and ought to have considered as a residential house.*

The appellant had acquired the 2 flats under the same development agreement executed with the developer on 30/04/2012. *The appellant, under development agreement, had surrendered her old residential house along with parcel of land and had been allotted the 2 flats in the same building on the same piece of land. Thus, the 2 flats would constitute ns a residential house and would be eligible for deduction u/s.*54 *of the Act.*

In *understated judicial decisions, Hon'ble High Courts and ITAT's had decided that 2 or more flats in same building would still constitute as a residential house :*
a) CIT vs. Gumaninaljain 8O Taxmann.com 21 (Mad-HC)
"The 15 flats, even if they are located in different blocks would not disentitle the assessee from getting the benefit of section 541-.
The *order of Tribunal which has been called in question is correct, there is no infirmity in the said order it does not call for any interference and the said order deserves to be confirmed.*

Once it is in the same location/address, the question of whether it is in the same block or in different blocks does not arise for consideration. As long as ail (he flats are in the same address/location even if they/ are located in separate blocks or towers it does not alter the position. In the instant case, after all, all the flats are a product of one development agreement of the same niece of land being said land.
'Therefore, even if flats/apartments are in different blocks any different towers as long as they are in same address/location it does not disentitle the assessee from getting the benefit of section 54F. .

Therefore, tile sole and sheet anchor submission of revenue that the 15 flats in the instant case are located in the different blocks does not impress 'will not disentitle the assessee from getting the hem-fit of section 54F as all file flats are in the same location /address and all flats are by products of one development agreement with the same builder.

main/ flats, gets proportionate undivided share in land only for the slime piece of land. Therefore, assessee does not buy more than one property in that sense of the matter. Flats, apartments are completely based on co ownership.
It is concluded Unit the assessee is entitled to the benefit of section 54F."

b) *ITO vs. Sureddy Venkata Ramanamamma 83 taxmann.com 99 (Visakhapatnam-ITAT)*

'The only issue to be decided is whether on the facts and in the ircnmstani.es of the case, the assessee is eligible for exemption under section 54F for all the flats received in pursuance of a development agreement the issue is no longer res integra. The Co-ordinate Bench of the Tribunal, Vishakapatnam in the case of ITO v. Ravuri Kishore [IT Appeal Nos. 498 to 500 (Vizag.) of 2013, dated 28-3-2017J, it teas held that the expression "a residential house' in action 54F has to be understood in a

sense that building should be of a residential nature and "a" should not be understood to indicate a single number and where an assessee had purchased two residential flats, is entitled to exemption under section 54F, in *respect of capital gains on sale of it its property on purchase of both flats. Deduction under section 54F is allowable with respect to the residential house consisting of several independent units. Where all the flats are a product of one development agreement of the same piece of land even if flats are in different blocks and different towers, as long as they are in same address/location, it does not disentitle the assessee from getting the benefit of section 54F. I he legal proposition before the amendment of section* 54F by the Finance Act, *2014 with effect from 1-4-2015, in the case of development agreement, is very clear that if the land owner receive* number of flats, even though they are located in different blocks any different toners, once they are in same address/location ant! all the flats are a product of one development agreement, then the assesses is eligible for exemption under section 541- in respect of all the flat*."*

c) Sanjay B. Pahadia ITA No.6099/Mum/2014
"Undoubtedly, the benefit of deduction is available to an assessee in respect of only 'one' residential house. But no limit has been prescribed under the laic upon the size, shape and nature of the residential house property. Thus, it mm/ also happen sometimes that a smaller unit may not be sufficient for use of an assessee's family and therefore, he may choose to combine more than one unit so as to make it useful for him and his family. No such embargo has been laid down by the law as would be clear from the plain reading of section 54 / 54F. Under these circumstances, the AO is also not permitted to read any such restrictions under the law while examining the claim of the assessee."

d) CIT vs. Devdas Naik 49 *taxmann.com* 30 *(Bom-HC)*

"Assessee claimed deduction under section 54 on purchase of two flats -Though these flats mere acquired under different agreement bat map of general layout plan and internal layout plan indicated that there was only one common kitchen for both flats and both flats were used as a single unit - Flats were constructed in such u way that adjacent units or flats could be combined into one -Whether though acquisition of flats had been done independently but eventually they were a single unit and house for purpose of residence, claim under section 54 could not be denied."

3.2 *Without prejudice to the above, the appellant submits that the provision of Sec. 54 (prior to amendment in Finance Act, 2014)permitted to avail the deduction on more than one residential house. The Ld. AO erroneously held that the deduction u/s 54 is eligible only in respect of one residential house on ignoring the fact that the amended prolusion of Sec.* 54 *is applicable w.e.f. 01/04/2015 onwards. The provision of Sec. 54 (prior to amendment in Finance Act, 2014) is reproduced as under;-*

"Subject to the provisions of sub-section (2), inhere, in the case of an assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of a long-term capital asset being buildings or lands appurtenant thereto, and being a

residential house, the income of which is chargeable under the head "Income from house property" (hereafter in this section referred to as the original asset), and the assessee has within a period of one. year before or two years after the date on which the transfer took place purchased or has within a period of three years after that date constructed, a residential house then, instead of that capital gain being charged to income-tax as income of the previous year in which the transfer took place, it shall be dealt with in accordance ....."

(i) if the amount of the capital gain is greater than the cost of the residential house so purchased or constructed (hereafter in this section referred to as the new asset), the difference between the amount of the capital gain and the cost of the new asset shall be charged under section 45 as the income of the previous year; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be nil; or if the amount of the capital gain is equal to or less than the cost of the new asset, the capital gain shall not be charged under section 45; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be. reduced by the amount of the / capital gain.";

Thereafter, the Finance Act, 2014 w.e.f. 01/04/2015 substituted the words" a residential house" with "one residential house", however it is most vital to note that such amendment is applicable from Asst. year 2015-16 onwards. Accordingly, prior to amendment in Sec. 54 *made w.e.f. 01/04/2015, the deduction u/s 54 would be eligible even for purchase/construction of more than one house. The words "a residential house" incorporated in Sec 54 (prior to amendment) cannot to be construed as a single residential unit. The words "being buildings or lands appurtenant thereto" issued before the words "a residential house" would mean that the buildings or lands (which are 'plural' terms) are eligible for deduction u/s.54 of the Act, The words "a residential house "means that the buildings or lands should be in the nature of a residential house and not of commercial nature.*

The legislative intent (prior to amendment) of allowing the deduction u/s 54 *was to provide an incentive to a seller of the residential house to re-invest the capital gain for repurchase of the residential house and the only condition prescribed was that the re-investment should be made in the residential house. The statute has not prescribed the manner in winch the residential house should be purchased and thus it would be a sufficient compliance if the capital gain* is *re-invested in the residential house irrespective whether it is one house or two houses, In case the legislative intention would have been to allow the deduction u/s 54 only for one house, there the words used in Sec 54 would have beer, "a residential unit" or "one residential house".* However, *the words incorporated in Sec.* 54 *(prior to amendment) were "a residential house", "being buildings or lands appurtenant thereto" , "if the amount of capital gain is greater than the cost of the residential house..... and the cost of the new asset .....",accordingly the appellant is eligible to claim the deduction u/s 54 in respect of purchase of both residential house;*

In this respect, the appellant relies on under stated judicial decisions :-

(i) *CIT vs.* V.R. *Karpagam* 373 *ITR* 127 *(Mad-HC)*

"An amendment was made to section 54F *with regard to the word* V *by the Finance* ("No.2) *Act, 2014. The 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."*

b) CIT vs. *Gita Duggal 52Taxmann.com* 246 *(SC)*

"High Court by impugned order held that merely because n residential house consist of several independent residential unit, deduction under section 54/54F could not be disallowed - Whether special leave petition filed against impugned order was to be dismissed - Held, yes."

CIT *vs. Gita Duggal 30 Taxmann.com* 230 *(Del-HC)*

"On *appeal, the Commissioner (Appeals), as well as the Tribunal held that the words 'a residential house' appearing in section* 54/54F *cannot be construed to mean a single residential house since under section 13(2) of the General Clauses Act, a singular includes plural. .....*

Section 54/54F *uses the expression 'a residential house'. The expression used is not "a" residential unit'. This is n new concept introduced by the Assessing Officer into the section. Section* 54/54F *requires the assessee to acquire a 'residential house' and so long as the assessee acquires a building, which may he constructed, for the sake of convenience, in such a manner as to consist of sere ml units which can, if the need arises, he conveniently any independently used as an independent residence, the requirement of the section should be taken to have been satisfied, there is nothing in. these sections which require the residential house to be constructed in n particular manner. The only requirement is that it should be for the residential use and not for commercial use. If there is nothing in the section require* that the residential house should he built in n particular manner, it* sm.'/s *that the income-tax authorities cannot insist upon that requirement."*

C) CIT vs. K.C. Rukminiamma 131 *ITR 211 (Knr-HC)*

"The context in which the expression 'a residential house' is used in s. 54 makes it dear that it was not the intention of the legislation to convey the meaning that it refers to a single residential house. If that was the intention, they would have used the word "one". As in the earlier part, the words used are buildings or lands which are plural in number and that is referred to as "a residential house", the original asset. An asset new newly acquired after the sale of the original asset also can be building or lands appurtenant thereto, which also should be "a residential house".

Therefore the letter 'a' in the context it is used should not be construed as meaning "singular". But, being an indefinite article, the said expression should be read in consonance with the other words 'buildings' and 'lands' and, therefore, the singular 'a residential house' also permits use of plural by virtue of s. 13(2) *of the General Clauses Act.-CIT vs.D. Ananda Basappa (2009)* 223 CTR *(Kar) 186 : (2009) 20* PTR *(Kar) 266 followed."*

d) CIT vs. D. *AnandaRasappa 20 DTR* 266 *(Kar-HC)*
"Expression "n *residential house" should be understood in a sense that the building should be of residential nature and* V *should not be understood to indicate a singular-number — That apart, the apartments purchased In/ the assessee are situated side by side and the builder has effected modification of the flats to make it as one unit- Fact that the flats were found to be occupied by two different tenants is no ground to hold that the apartment is not one residential unit - Therefore, assessee is entitled to exemption under s.* 54."

e) CIT vs. Syed All Adil 33 *Taxmann.com 212* (AP-HC)
"Profit on sale of property used for residential house - Whether exemption under section 54 *only requires that property purchased by assessee out of sale proceeds should be of residential nature and fact that residential house consisted of several independent units could not be an impediment for granting relief under said section, even if such independent units were situated side by side, on different floors or were purchased under separate sale deeds - Held, yes [Para 10] [In favour of assessee I,"*

f) Vittishna Conjeevaram vs. ITO 36 *Taxmann.com* 542 *(Hyd-lTAT)*

"The Assessing Officer as well as the Commissioner (Appeals), while interpreting the expression 'a residential house', have come to a conclusion that such expression would mean a single residential unit... 'Flat' and not all the seven flats and, accordingly, have restricted the exemption under section 54F to the cost of one flat only. However, the Karnntaka High Court, while interpreting the words "a residential house' as appearing in section 54 in case of CITv. Suit. K.G. RukminiAmnta 120111 331 ITR 211/196 Tallinn 87/12010} 8 taxmann.com 121 (Kar.) has held that the expression 'a residential house' as appearing in section 54 cannot be interpreted in a manner to suggest that the exemption would be restricted to a single residential unit. The Karnntaka High Court held that 'a residential house' as mentioned in section 54(1) has to be understood in a sense that the building should he of a residential nature and the word 'a' should not be understood to indicate a singular number. The jurisdictional High Court in the case of CIT v. Syed Ali Adil 12013] 352 ITR 418/215 Taxman 283/33 taxmaiin.com 212 (A P) agreed with the aforesaid view of the Karnataka High Court. [Para 8].

Considering the totality of the facts and circumstances in the light of consistent view of different High Courts including the jurisdictional High Court, the lower authorities were not correct in restricting the exemption under section 54F to only

one flat. In the aforesaid view of the matter, the assessee is entitled to exemption under section 54F in respect of all the seven flats."

g) *Mehar R. Surti vs. ITO 37 CCH 213 (Mum-ITAT)*
"Deduction u/s 54 *is eligible even for purchase of more than one house. The assessee has deposited Rs.1.25 crore in the capital gain account within the proscribed period and further the said amount has been invested in another flat thus eligible to exemption u/s 54F."*

h) Prem Praknsh Bhutani vs. ACIT
31 SOT38 (Del-ITAT)
"Assessing Officer held Unit benefit of section 54 could be given only in respect of one residential house acquired by assessee and not for a spate of residential houses which he constructed out of consideration received - On appeal, Commissioner (Appeals) opined that exemption under section 54 was to be given in respect of two flats which could be taken us resilience of assessee's family as well as his son's family -Whether fact that residential house consists of several independent units cannot be mi impediment to allowance of exemption antler section 54 - Held, yes-Whether; therefore, Commissioner (Appeals), having accepted assessee's case in principle, was not justified in examining question question as to who could be considered as member of assessees family and thereby restricting exemption claimed under section 54 *to two flats-Held, yes."*

A humble prayer is made to direct the Li. AO to allow the deduction u/s 54 of Rs. 71,36,288/- as againstRs.35,68,144/- allowed in assessment."

5. Thereafter, Ld.CIT(A) observed that dismissal of SLP by Hon'ble Supreme Court without any discussion on merits is not binding. He referred to two head notes of ITAT deciding against assessee and observed that he is bound to follow them.

6. Thereafter, he directed as under:-

5.3 It can be seen from both the decisions it is held that undoubtedly only one residential house is eligible for deduction. However, it is also held that in view of the smallness of the flats, adjacent flats may be combined to make single unit with common kitchen as per the plan, then the deduction can be claimed for combined unit consisting of more than one flat. The decision of ITAT Mumbai and Bombay High Court do not explicitly state that the assessee can claim deduction under the section for multiple units in different floors or different blocks. Adjacent flats combined to make one unit and benefit may be claimed. However in this case, the assessee received flat No.102 and 302 in 1st floor and 3rd floor. Obviously the flats in separated

floors (1st and 3rd floors) cannot be combined to make a single unit. The claim of the assessee that one flat is made kitchen and other flat used as bedroom is not possible in practice as the same are not adjacent flats in the same floor. Be that as it may, the appellant has not filed any floor plan of the two flats to demonstrate that the units were joined. The A.O. also has not made any verification in this regard. Therefore, the A.O. is directed to verify the plans/floor plans whether two units are joined with proper approvals to make a single residential unit. If both the flats are joined with approvals etc., he is directed to grant the deduction u/s 54 in respect of both the units. Otherwise, the assessee is eligible for deduction in respect of only one unit as allowed by the AO. The ground is adjudicated as above. This ground is treated as dismissed for statistical purpose.
In the result, the appeal is dismissed.

7. Against the above order assessee is in appeal before us.

8. We have heard both the parties and perused the records. Ld. Counsel of the assessee claimed that the issue is fully covered in favour of assessee. He referred to following decisions.

1. CIT VS. Gumanmal Jain 80 Taxman.com 21 [Madras High Court)
2. CIT VS. Smt. K.G. Rukminiamma 196 Taxman 87 [Karnataka High Court)
3. CIT VS. Smt. V.R. Karpagam 50 taxman.com 55 [Madras High Court)
4. ITO VS. Smt Sureddy Venkata Ramanamamma 83 Taxman.com 99 [Vishakhapatnam - Trib.)
5. CIT VS. Gita Duggal 30 Taxman.com 230 [Delhi High Court)
6. CITVS.Syed Ali Adil 33 Taxmann.com 212 [AP High Court)
7. Arun K. Thiagarajan VS. CIT(A) 117 taxmann.com (Karnataka High Court)
8. CIT VS. D Ananda Basppa 180 Taxman 4 [Karnataka High Court)

9. Per contra Ld. DR relied upon order of authorities below.

10. Upon careful consideration, we note that the assessment year involved in this case in prior to the amendment restricting the deduction under section 54 to one flat/home. Ld. CIT(A) despite noting that there are various Hon'ble High Court decision in favour of assessee chose to follow the ITAT decision to the contrary, by observing that he must follow ITAT decision. Here, we note that Ld.CIT(A) has grossly misled himself with respect to the cannons of judicial discipline. It is settled

law that when on an issue there is no jurisdictional High Court decision other Hon'ble High Court decision has to be followed by subordinate Courts and Tribunals. Hence Ld.CIT(a) should have followed the Hon'ble High Court decisions in favour of assessee. By writing that Hon'ble Supreme court has dismissed the SLP against those orders without any discussion on merits, Ld.CIT(A) has further displayed his scant regard to the principle of stare decisis. The dismissal of S.L.P without a speaking order by Hon'ble Supreme Court does not in any manner reduce the precedential value of Hon'ble High Court decision. Hence, we set aside the order of Ld.CIT(A) and direct that the deduction u/s 54 claimed by the assessee is to be allowed.

11. In the result, the assessee's claim of deduction is allowed.

Pronounced in the open court on 01.07.2021

Sd/-	Sd/-
(AMARJIT SINGH)	(SHAMIM YAHYA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 01/07/2021
Sr.PS. Thirumalesh
Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai