

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH 'D', MUMBAI**

**BEFORE SHRI D. MANMOHAN, VICE PRESIDENT AND
SHRI D. KARUNAKARA RAO, ACCOUNTANT MEMBER**

**I.T.A. NO. 6497/M/2011
ASSESSMENT YEAR: 2008-2009**

Shri Raj Babbar, 20, Nepathya, Gulmohur Road, JVPD Scheme, Mumbai – 400 049. PAN: AABP0031F	Vs.	ITO-11(1)(3), Aayakar Bhavan, Mumbai-400 020.
(Appellant)		(Respondent)

Appellant by	:	Shri H.N. Motiwala & Dalpat Shah
Respondent by	:	Shri A.B. Koli, Sr.AR

Date of Hearing: 6.12.2012

Date of order: 2.1.2013

ORDER

Per D. KARUNAKARA RAO, AM:

This appeal filed by the assessee on 26.9.2011 is against the order of CIT (A)-3, Mumbai dated 28.06.2011 for the assessment year 2008-2009.

2. In this appeal, assessee raised the following grounds which read as under:

"1. The CIT (A)-3, Mumbai erred in holding that the deduction u/s 54F was allowable with reference to sale consideration of Rs. 8,00,000/- actually received on sale of plot of land at Lonavala reinvested in construction of the residential house and **not with reference to Rs. 16,87,000/-** being the full value of consideration deemed to have been received as adopted by the Assessing Officer u/s 50C of the Income Tax Act.

2. The said CIT (A) erred in not appreciating that the **appellant had invested Rs. 17,65,752/- for construction of two additional floors** over the existing residential house within the stipulated period u/s 54F and the appellant was not the owner of more than one residential house and therefore, deduction of Rs. 14,71,837/- being the Capital Gain as computed by the assessing Officer was allowable u/s 54F.

3. The said CIT (A) also erred in holding that the appellant was entitled to deduction u/s 54F in respect of construction of only one of the two floors constructed above the existing residential house when the appellant explained that both the floors constituted one house only.

4. The said CIT (A) on the above grounds, erred in holding that the appellant was **entitled to deduction of only Rs. 5,84,837/-** claimed by the appellant."

3. There is a preliminary issue to be attended by us and it relates to the condonation of **delay of 13 days** in filing the appeal before the Tribunal. In this regard, assessee filed an affidavit dated 27.7.2012. According to the assessee, the CIT (A) order dated 28.6.2011 was received on 15.7.2011. Counting from 15th July, the due date for filing appeal before the Tribunal expires on 15.9.2011. Whereas, the appeal was filed on 26.9.2011 and the delay is 13 days. In para 5 of the affidavit, assessee mentioned that he was out of Mumbai from 10th September, 2011 to attend to the Assembly Elections in UP held in January, 2012. However, assessee signed the appeal papers on 19.9.2011 as seen from the Form of appeal in Form no 36, the verification portion, ie 4 days after the expiry of the due date. Thus, the delay of 4 days is attributable directly to the assessee. Rest of the delay is relatable to the staff or the Representative or to the closed holidays, if any. Regarding the reasonable cause for delay, assessee attributed the same to his busy schedules and political engagements. He has made a prayer for condoning the small delay and admitting the appeal for addressing to the grievances of the assessee. On the other hand, Ld DR dutifully opposed the admission of the appeal and mentioned that the Bench may take a view in the matter.

4. On perusal of the contents in the affidavit, we find that the assessee is a sitting MP and is occupied with various responsibilities as a representative of people in general and election in UP in particular. Although it is not denied that the assessee is in Mumbai on the due date ie 15.9.2011, as he left Mumbai only on 10.9.2011, he could only sign the papers on 19.9.2011 due to his political schedules. Thus, the submission that he is a busy individual is undisputed. Considering the smallness of the delay and the reasons given in the affidavit, we find the delay of 13 day is condonable and therefore, we admit the appeal.

5. Briefly stated the relevant facts of the case are that the assessee is a Member of Parliament (MP) and a film actor. He is proprietor of M/s. Babbar Visuals too. Assessee filed return of income declaring total income of Rs. 2,51,470/-. Assessee purchased a plot of land for Rs 48,812/- at *Lunawala* in 1984 and sold the same for

a sum of Rs. 8 lakhs and the Long term capital gains works out to Rs. 5,84,837/-. The cost of acquisition after indexation works out to Rs 2,15,163/-. During the assessment proceedings, AO noticed that market value of the plot as per Stamp duty Authorities is Rs 16,87,000/-. Accordingly, AO pressed the provisions of section 50C of the Act in to service and recomputed the long term capital gains at Rs 14,71,837/- against the assessee claim of Rs. 5,84,837/-. Further, AO noticed that assessee claimed exemption u/s 54F of the Act in respect of the capital gains as he applied the gains in construction of a residential property. In toto, the assessee spent Rs. 33 lakhs in respect of the property. There is no dispute about the invoking the provision of section 50C between the parties. The dispute is restricted to the claiming of deduction u/s 54F of the Act. As per the AO, assessee also owns a house, therefore, as per section 54F(1)(a), assessee is not entitled for deduction. AO also noted that assessee invested the said capital gains prior to two years before the transfer of asset. Accordingly, the deduction claim was rejected and the assessment was completed determining the total income of Rs. 36,66,250/-. Aggrieved with the same, assessee filed an appeal before the CIT (A).

6. During the first appeal proceedings, assessee informed that the sale proceeds were utilized in the construction of additional two floors on the existing only residential Bungalow at 20, Nepathy Gulmohar Road, Ville Parle (W), Mumbai. A sum of Rs. 33 lakhs was spent during the period 1.4.2006 to 31.3.2008. Total cost of construction of additional floor was at Rs. 17,65,752/- and cost prior to July, 2006 was at Rs. 15,34,353/- , which was spent for purchasing TDR, BMC permission etc. It was submitted that the assessee owns only one house on which additional floors are constructed. Other contentions of the assessee read as under:

".....The AR contended that the appellant isd entitled to claim of deduction u/s 54F r.w. first proviso as the appellant does not own more than one residential Bungalow at the time of construction of new two floors on the same. Further, the construction of new asset is within 3 years from the date of transfer ie from date of sale on 6.7.2007. The AO also stated that the construction was started from July, 2006 and completed up to March, 2008 and the total cost of construction of one floor was at Rs. 17,65,752/- during the period and cost prior to July, 2006 was at Rs. 15,34,353/- for purchasing TDR, BMC permission etc. The above expenses in far exceed of long term capital gains. The total cost during July, 2006 to March, 2008 was amounting

to Rs. 33 lakhs. The AO was not therefore, justified in rejecting the claim. The AR relied in the case of CIT vs. P.V. Narsimhan (181 ITR 101) (Mad.) wherein it was held where the assessee has reconstructed the demolished first floor in the existing house within stipulated time allowed u/s 54. The assessee is entitled to get deduction u/s 54 as it amounts to construction of new unit. In CIT vs. J.R. Subramanian (165 ITR 571) (Kar) it was held the new construction started before the date of sale but completed within a stipulated period from the date of sale as provided u/s 54 will be entitled the claim u/s 54 of the Act. In B.B. Sarkar vs. CIT (132 ITR 150) (Cal) it was held that amount spent on both purchase of house and further on construction of additional floor on it, is eligible to claim deduction u/s 54. In Saleem Fazelhoy vs. DCIT (106 ITD 167) (Mum) it was held that expenditure incurred on making house habitable is considered as investment in purchase of house, and hence deduction u/s 54F is allowable. The AR submitted that the claim made u/s 54F is proper as the appellant has fulfilled all the conditions as provided u/s 54F read with the first proviso. Therefore, relying on above decision the AR submitted the deduction of Rs. 14,71,837/- of long term capital gains u/s 54F of the Act is allowable to the appellant."

7. On considering the above submissions of the assessee, CIT (A) partly allowed the appeal of the assessee and confirmed the AO's finding on the applicability of the provisions of section 50C of the Act and computation of long term capital gains of Rs 14,71,837/-. However, he held that the assessee is eligible for exemption only on the capital gains of Rs 5,84,837/-. Thus, CIT (A) denied exemption on the balance. CIT (A) is of the view that the provisions of section 50C creates a fiction in the provisions for computing the capital gains only whereas, actual consideration received is Rs. 8 lakhs which is computed as per the provisions of section 50C r.w.s 48 and section 54F(1) of the Act. The long term capital gains relatable to the increased market value as per the ready reckoner of SRO should not be available for deduction u/s 54F(1) of the Act. Accordingly, AO directed to allow exemption only on the capital gains of Rs. 5,84,837/-. In the process, he has taken the strength from the decision of ITAT, Bangalore Bench in the case of Gouli Mahadevappa vs. ITO [2011] 49 DTR 207 (Bang) which is relevant for the proposition that the capital gains and net consideration had to be worked out within the framework of section 54F of the Act without creating any fiction of other section. Fiction, if any, is available only with respect to full value consideration. Other relevant parts of the para 2.3 of the impugned order read as under:

"Thus, the capital gain arising from the transfer of any long term capital asset for the purpose of section 54F has to be worked out applying section

48 without imposing section 50C into it. As regards to net consideration, the section itself has made it clear in the Explanation the method in which it has to be arrived at. Needless to mention that the words "such capital gains" and capital gains mentioned in section 54F(1)(a) and (b) of the Act refer to "the capital gains" arising from the transfer of any long term capital asset worked out as mentioned in section 54F(1) of the Act r.w.s 48 and not worked out as mentioned in section 54F(1) r.w. sections 48 and 50C of the Act. When this interpretation is adopted, every provisions of the Chapter will fall in line without producing any absurd result and thereby giving a fruitful purpose of enactments. Alternatively, as canvassed by the learned authorized representative, if the terms capital gains "in section 54F introduced section 50C of the Act would be defeated, because whatever may be the capital gains arrived at by imposing section 50C of the Act would be exempt, if the net consideration, however meager it may be, it invested in the new asset." In light of these facts, the exemption u/s 54F(1) is allowed at Rs. 5,84,837/- and addition of balance long term capital gains of Rs. 8,87,000/- arrived at after imposing section 50C is confirmed. This ground is..... partly allowed."

8. Aggrieved with the above, assessee is filed an appeal before the Tribunal. Ld counsel mentioned that the there no dispute on the facts. The undisputed facts are that the assessee owns a plot of land at *Lonawala* and its purchase cost in July 1984 is Rs 48,812. The indexed cost for the AY 2008-09 is Rs 2,15,163/-. Further, the assessee sold the same on 6.7.2007 for Rs 8 lakhs and the sale deed supports the same. Rs 16,87,000/- is the full value consideration of the plot as per the SRO records. Assessee invested Rs 33 lakhs by 15.2.2008 on the new asset *in toto* and Rs 17,65,752/- (sic- Rs 18,75,752) during the period from July 2006-March 2008. Ld Counsel argued that the when Rs 17,65,752/- is not less than the 'net consideration' of Rs 16,87,000/- (as per SRO), in view of the provisions of clause (a) of 54F(1) of the Act, the assessee is not chargeable to capital gains on this property. For this relied on various decisions of the Tribunal. As per the said clause (a), Ld Counsel mentioned that as the net consideration as per the sale deed (Rs 8 lakhs) and as per the FVC of the 50C (Rs 16,87,000/-) falls short of the 17,65,752/-, the assessee is not chargeable to capital gains. It is submitted that the CIT (A) is incorrect in denying exemption u/s 54F in respect of full value of consideration of Rs 8.87 lakhs (Rs 16.87 lakhs – Rs 8 lakhs). Ld Counsel mentioned that the decision of the Tribunal in the case of *Gouli Mahadevappa, supra* has not discussed the said clause (a), which stipulates the chargeability of capital gains u/s 45 of the Act. Further, Ld Assessee relied on the decisions of the Tribunal in the cases of *Gouli Mahadevappa*

128 ITD 503 (para 8) and Jaipur bench decision in the case of Gyan Chand Batra 133 TTJ 482.

9. On the other hand, Ld DR for the revenue heavily relied on the orders of the AO and the CIT(A).

10. We have heard the parties and perused the orders of the revenue and the paper book filed before us. The issue in question relates to the extent of capital gains exempt u/s 54F(1) of the Income tax Act, 1961, when the 'full value of the consideration' as per the provisions of section 50C is adopted for computation of capital gains. This is relevant in the context of computation of capital gains by two methods ie (i) by using the 'full value of the consideration' as per the sale deed as per the provisions of section 48 of the Act and (ii) by using the deemed 'full value of the consideration' as per the provisions of section 50C of the Act. Relevant provisions read as follows.

Section 48: *The income chargeable under the head "Capital gains" shall be computed, by deducting from the **full value of the consideration** received or accruing as a result of the transfer of the capital asset the following amounts, namely :—*

(i) expenditure incurred wholly and exclusively in connection with such transfer;
(ii) the cost of acquisition of the asset and the cost of any improvement thereto:

Section 50C. (1) *Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed [or assessable] by any authority of a State Government (hereafter in this section referred to as the "stamp valuation authority") for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed [or assessable] shall, for the purposes of [section 48](#), be **deemed** to be the **full value of the consideration** received or accruing as a result of such transfer.....*

Therefore the quantity of capital gains vary depending on the 'full value of consideration' used in the computation. If the deemed FVC is adopted, the resultant capital gains are relatively more. Details of variants are already given above. Now we shall examine the provisions of section 54F of the Act, which

actually deal with the procedure of computation of allowable exemption and the conditions thereof.

Section 54F

[Capital gain on transfer of certain capital assets not to be charged in case of investment in residential house.

54F. (1) [Subject to the provisions of sub-section (4), where, in the case of an assessee being an individual or a Hindu undivided family], the capital gain arises from the transfer of any long-term capital asset, not being a residential house (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 (hereafter in this section referred to as the new asset), the capital gain shall be dealt with in accordance with the following provisions of this section , that is to say

(a) If the cost of the cost of the new asset is not less than the net consideration in respect of the original asset, the whole of such capital gains shall not be **charged under section 45;**

(b) If the cost of the new asset is less than the net consideration in respect of the original asset, so much of the capital asset as bears to the whole of the capital gain the same proportion as the cost of the new asset bears to the net consideration shall not be **charged under section 45:**

Provided.....

.....

.....

Explanation,- for the purpose of this section,-

"net consideration", in relation to the transfer of a capital asset, means the full value of the consideration received or accruing as a result of the transfer of the capital asset as reduced by any expenditure incurred wholly and exclusively in connection with such transfer."

11. From the provisions of section 54F (1), it is evident that the provisions of section (a) and (b) read with the explanation on 'net consideration' decides if any chargeable capital gains u/s 45 exists or not subject to the conditions specified therein. As per the provisions of section 54F(1)(a) of the Act, no capital gains are chargeable u/s 45 of the Act, "If the cost of the cost of the new asset is not less than the net consideration in respect of the original asset". The principle of proportionate exemption vide clause (b) above is put into service. Now, the question is what is the meaning of the expression 'net consideration'? The same is defined in

the Explanation below the section 54F(1) and the same reads that "*For the purpose of this section (54F), net consideration', in relation to the transfer of a capital asset, means the full value of the consideration received or accruing as a result of the transfer of the capital asset as reduced by any expenditure incurred wholly and exclusively in connection with such transfer.*" It is a settled issue that the provisions of section 54F of the Act are code by itself. Thus, the plain reading of the provisions of sections 45, 48, 50C and 54F of the Act suggest that there is nothing to bar benefits of exemption u/s 54F in respect of the capital gains relatable to the FVC as per the deemed fiction u/s 50C of the Act. Clause (a) of section 54F(1) specifies that *If the cost of the new asset is not less than the net consideration in respect of the original asset*, there is no chargeable capital gains u/s 45 of the Act. In the instant case, the *cost of the new asset is Rs. 17,65,752/- and 'net consideration' as defined is '..the full value of the consideration received or accruing as a result of the transfer of the capital asset as reduced by any expenditure incurred wholly and exclusively in connection with such transfer' ie Rs 16,87,000 as per sec 50C and Rs 8 lakhs as per the sale deed.* The said clause (a) refers to the provisions of section 45 of the Act. In the given facts of the instant case, no chargeable capital gains arises u/s 45 of the Act. Thus, in this case, with investment of Rs. 17,65,752/- in new asset, *the cost of the new asset is not less than the net consideration (NC) in respect of the original asset.* Of course, the 'net consideration' has two variants depending on FVC adopted and in this case, the NCs are quantitatively lesser than the cost of the new asset leaving no chargeable capital gains u/s 45 of the Act. Therefore, in our opinion, the assessee is not chargeable to any capital gains considering the given facts of the case and also the said clause (a) of section 54F(1).

12. We shall now take up the orders of the Tribunal cited by the parties. First, we shall take up the decision in the case of Sri Gouli Mahadevappa 128 ITD 503 (Bang) dt 16.07.2010. Facts are that the assessee sold plot for Rs 20 lakhs. The consideration as per the SRO is Rs 36 lakhs. Assessee purchased new asset for Rs 24 lakhs and invested entire sale proceeds. AO calculated capital gains at Rs 14,06,494 and allowed exemption to the extent of FVC of Rs 20 lakhs and not on FVC of Rs 36 lakhs. On these facts, the Tribunal held that the deeming fiction on

FVC given in section 50C cannot be extended to section 54F (para 8.19) as the same is an exemption provisions and is a complete code in itself and it does not override others (Ace builders 281 ITR 210).

13. Thus, the *cost of the new asset is Rs. 24 lakhs and 'net consideration' as defined is '...the full value of the consideration received or accruing as a result of the transfer of the capital asset as reduced by any expenditure incurred wholly and exclusively in connection with such transfer'* ie Rs 36 lakhs as per sec 50C and Rs 20 lakhs as per the sale deed. Therefore, it is case where the cost of the new asset is not less than net consideration u/s 50C and more than the net consideration as per the sale deed. Therefore, the decision of the Tribunal in this case is distinguishable on facts. Therefore, clause (a) of section 54F(1) of the Act does not apply.

14. Next, we shall examine the facts and the applicability of the decision in the case of Prakash Karnawat (supra) dt 18.11.2011. In this case, the assessee sold a property for Rs 40 lakhs. Sale value as per the DVO at Rs 74,58,880/-. Assessee invested the said sum of Rs 40 lakhs in Bonds. Finally, AO taxed difference of Rs 34,58,880/-. Since, the assessee contended where the entire sum of Rs 40 lakhs is invested, the provisions of section 50C cannot be invoked. On these facts, the Tribunal held that in principle, deeming provisions of section 50C on '*full value consideration*' will not be applicable to section 54F as these provisions are asset specific and it only meant for section 48 of the Act. Further, Tribunal held that where the entire sale consideration is invested in Bonds as per section 54EC of the Act, the assessee is entitled to deduction u/s 54F and provisions of section are not applicable. Literal meaning of the provisions of clause (a) of section 54F(1) of the Act was advocatged. In the process, the Explanation to section 54F(1) of the Act, where '*net consideration*' was defined, was relied. Tribunal decision of Bangalore bench in the case of Gouli Mahadevappa 128 ITD 503 (para 8) and Jaipur bench decision in the case of Gyan Chand Batra 133 TTJ 482 were followed. This case is also distinguishable on the facts that considering the full value consideration as per the deemed provisions of section 50C, the net consideration is much higher than the invested amount, whereas in the present case, the net consideration by all methods

ie with or without application of 50C is lesser than the investment in the new asset. Further, we have examined the decision of the Tribunal in the case of Gyan Chand Batra 133 TTJ 482 dated 13.08.2011. Relevant facts of this case are that the assessee sold property for Rs 10.81 lakhs and full value consideration as per the SRO is 19,24,987/-. Assessee purchased flat for Rs 16.74 lakhs. It was held that in view of the provisions of section 54F(1), the assessee is entitled to deduction. The conclusions reads that the "deeming fiction s provided in section 50C in respect of the words 'full value of consideration' (FVC) is to be applied only to section 48 and, therefore, meaning of full value of consideration as referred to in Explanation to section 54F(1) is not governed by the meaning of the words 'full value of consideration' as mentioned in section 50C"

15. Thus, the gist of the above decisions suggest that the deeming fictional meaning of section 50C cannot be imported for the purpose of explaining the meaning of the 'net consideration' mentioned in Explanation u/s 54F(1) of the Act. In effect, for working out the exempt income also, the deeming fiction does not have any effect in the circumstances where the cost of the new asset is not less than the net consideration whether computed as per the section 48 or 48 rws 50C. On this facts of the present case, where the assessee undisputedly invested 33 lakhs (1.4.06-31.3.2008) in toto and Rs 17,65,752/- (July 2006-march 2008) was invested during the specified period) mentioned in section 54F(1), considering the provisions of the clause (a), the assessee is not chargeable gains for taxation u/s 45 of the Act. Relevant facts are tabulated as under:

	As per the sale deed	As per the 50C of Act
Sale consideration	8,00,000	16,87,000
Cost of Acquisition	2,15,163	2,15,163
Capital gains	5,84,837	14,71,837

Cost of the new asset is Rs 17,65,752/-.

16. It is noticed that the CIT(A) confirmed the addition on a couple of reasons, namely (a) the provisions of section 54F(1) does not permit invoking of the provisions of section 50C of the Act. Therefore, 'net consideration'/full value consideration should be as per the sale deed figures and not as per the deemed full

value consideration figures; and (b) the assessee is new asset includes only the Ground plus 1st floor only and not in respect of two floors (sic). Further, we find that the CIT(A) has not discussed the provisions of the clause (a) and (b) of section 54F(1) of the Act in his order. Actually, the assessee's house consists of Ground plus 4 floors. He relied on SB decision in the case of Sushila M Jhavari, supra and restricted the investment in first floor only and denied exemption in respect of the investment in other floors. Elaborate discussion on why such restriction was not given. Probably, CIT(A) is of the opinion that the Ground plus 1st floor is one house and other floors refers to other residential house. The said SB decision never disapproved the allowability of the investment of capital gains in a residential house, which may include two flats with one kitchen and the same are functionally one dwelling unit, may located at two different floors, may be adjacent vertically and horizontally. CIT(A) has not appreciated the facts of the present case, where the assessee's house constructed include ground plus 4 floors, where the Ground floor is a big living room, 1st floor: Kitchen plus 2 bed room; 2nd floor: three bed rooms; 3rd floor: three bed rooms and 4th floor: 3 bed rooms. Thus, the said details which are disputed by the revenue suggest that functionally, the assessee's house in question constitutes one residential house only. Therefore, the assessee's claim is in tune with the said SB decision in the case of Sushila M Jhavari (supra). CIT(A) restricting the exemption of capital gains to Rs 5,84,837 is not proper.

17. Therefore, based on the factual matrix of the present case, where the assessee invested total full value consideration of Rs 16,87,000/- (as per the SRO) in the residential house, which is one house only as it has only one kitchen, and these FVC is less than the invested amounts of 17,65,752/-, during the specified period, the assessee is not chargeable to tax on the capital gains u/s 45 of the Act. Whether we compute the capital gains apply FVC as per the sale deed or the deemed FVC as per the section 50C, the net consideration is less than the investment in one residential house. None of the decisions of the Tribunal cited above are against such interpretation. Therefore, considering the provisions of section 54F(1)(a) of the Act, we are of the opinion that the order of the CIT(A) is not proper in denying exemption in respect of the capital gains relatable to the deemed full value of the

consideration mentioned in section 50C of the Act. Accordingly, the grounds raised by the assessee are allowed and in favour of the assessee.

18. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on this 2nd day of January, 2013.

Sd/-
(D. MANMOHAN)
VICE PRESIDENT

Sd/-
(D. KARUNAKARA RAO)
ACCOUNTANT MEMBER

Date : 2.1.2013
At : Mumbai
Okk

Copy to :

1. *The Appellant.*
2. *The Respondent.*
3. *The CIT (A), Concerned.*
4. *The CIT concerned.*
5. *The DR "D", Bench, ITAT, Mumbai.*
6. *Guard File.*

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By Order

Assistant Registrar
ITAT, Mumbai Benches, Mumbai