आयकर अपीलीय अधिकरण "ई" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

श्री संजय अरोड़ा, लेखा सदस्य **एवं** श्री अमित शुक्ला, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI SANJAY ARORA, AM AND SHRI AMIT SHUKLA, JM

आयकर अपील सं./I.T.A. No. 132/Mum/2013
(**निर्धारण वर्ष /** Assessment Year: 2009-10)

Income Tax Officer-21(2)(4), Room No. 503, 5th Floor, C-10, Pratyaksh Kar Bhavan, Bandra Kurla Complex, Bandra (E), Mumbai-400 051	**बनाम**/ Vs.	Saroja S. Mekal 201, Plannet Industrial Estate, Subhash Road, Vile Parle (E), Mumbai-400 057
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AACPM 8430 E		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से/**Appellant by**	:	Shri Pitambar Das
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri P. D. Joshi

सुनवाई की तारीख / **Date of Hearing**	:	13.05.2014
घोषणा की तारीख / **Date of Pronouncement**	:	21.05.2014

आदेश / O R D E R

Per Sanjay Arora, A. M.:

This is an Appeal by the Revenue directed against the Order by the Commissioner of Income Tax (Appeals)-32, Mumbai ('CIT(A)' for short) dated 10.10.2012, allowing the assessee's appeal contesting its assessment u/s.143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2009-10 vide order dated 19.12.2011.

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2. The brief facts of the case, as gathered from the record, are that the assessee, an individual, claimed exemption u/s.54F of the Act in respect of the long term capital gains (LTCG) arising to it on the sale of an industrial gala at Pragati Industrial Complex, Pune for Rs.40.50 lacs vide sale agreement dated 21.07.2008 (PB pgs.20-26), in view of the purchase of a residential flat in a building known as 'Radha Krishna Niwas' at Vile Parle (E), Mumbai (from a builder, R. R. Constructions) along with one, Shri Swapneil Santosh Makel, for a consideration of Rs.101 lacs (vide Article of Agreement dated 24.03.2009/PB pgs.9-18), claiming the entire amount of LTCG arising thus to her (at Rs.26,58,147/-) as exempt. Of the total consideration, Rs.91 lacs, representing 90% thereof, is to be contributed by the assessee and the balance 10% by the other co-owner, a family member. During the year, the assessee paid Rs.40 lacs to the builder, besides another Rs.5,19,312/- towards stamp duty & registration charges (PB pg.1) for the Radha Krishna (new) flat, and which formed the basis for the claim of deduction u/s.54F in its respect. The same was found not acceptable by the Assessing Officer (A.O.) in-as-much as the assessee had on the relevant date, i.e., the date of transfer of industrial gala, the original asset, more than one residential house, being:

a) Residential flat at 204, Koteshwar Palace, Sahar Road, Andheri (E), Mumbai-400 069 (hereinafter referred to as 'Flat A');

b) Flat No.401, Radha Krishna Niwas, Mumbai (hereinafter referred to as 'Flat B').

Even though the purchase agreement for Flat B is dated 24.03.2009, the date of its purchase would be that of its allotment, i.e., 27.07.2007. The assessee had, in fact, already claimed exemption u/s.54F for the purchase of 'new flat' or the 'new asset' at Rs.40 lacs for the A.Y. 2007-08.

In appeal, the assessee found favour with the ld. CIT(A) on the basis that the Flat 'B' itself was the new asset, so that it could not be said that the assessee had more than one residential house, excluding the new asset, as on the date of the transfer of the original asset, i.e., 21.07.2008. Any investment made during the period 21.07.2007 and 21.07.2010 would thus qualify for exemption u/s.54F. The payment of Rs.45.19 lacs

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toward the new asset during the year fell in this period. The same exceeding the consideration arising on the sale of the original asset, i.e., Rs.40.50 lacs, the entire LTCG was exempt u/s.54F. The assessee's appeal having been allowed thus, the Revenue is in appeal.

3. We have heard the parties, and perused the material on record.

3.1 It would be relevant to, to begin with, reproduce the relevant provision. Section 54F, in its relevant part, reads as under:

> '**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 new asset is not less than the net consideration in respect of the original asset, the whole of such capital gain 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 gain 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** that nothing contained in this sub-section shall apply where-
>
> (*a*) the assessee,-
>
> (*i*) <u>owns more than one residential house, other than the new asset, on the date of transfer of the original asset; or</u>
>
> (*ii*) purchases any residential house, other than the new asset, within a period of one year after the date of transfer of the original asset; or
>
> (*iii*) constructs any residential house, other than the new asset, within a period of three years after the date of transfer of the original asset; and

(*b*) the income from such residential house, other than the one residential house owned on the date of transfer of the original asset, is chargeable under the head "Income from house property".

Explanation.—For the purposes 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.'

[emphasis, by underlining, ours]

The Revenue's case, as projected per its grounds, is that the first appellate authority had failed to consider that Flat 'B' stood already purchased by the assessee on 27.07.2007, i.e., prior to the transfer of original asset on 21.07.2008, by paying Rs.51 lacs to the builder, so that she had, as on the relevant date, two residential flats, i.e., Flat A & Flat B and, accordingly, no deduction u/s.54F could be allowed. The same overlooks, as pointed out by the ld. CIT(A), the fact that Flat B is the new asset (*qua* the cost of which relief u/s.54F is being claimed), so that it is to be excluded. The assessee, thus, has only one residential house, Flat A, on the relevant date, excluding the new asset, precluding the application of clause (a)(i) of *proviso* to section 54F(1). Merely because some investment stands made, or continues to be made, therein, i.e., the new asset, in a subsequent year, the current year, would not make it a different asset. The assessee, by paying the balance installments and, thus, meeting the *balance cost* (of Rs.45.19 lacs - his total share, inclusive of incident costs, being at Rs.96.19 lacs), is only completing the purchase of Flat 'B', a residential house. It being termed as the 'new asset' in the provision is only for identification, so as to differentiate it from the residential house/s being already owned by the assessee, i.e., as on the relevant date, the date of the transfer of the original asset (21.07.2008).

3.2 It could be argued that the provision envisages a purchase (or construction) of a new residential house, i.e., other than those already owned by the assessee. And which is not so in the instant case in-as-much as Flat 'B' stood already purchased during the

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previous year relevant to A.Y. 2008-09 and, thus, owned by the assessee, so that the primary condition of section 54F(1), i.e., purchase or construction of a residential house, stands not met for the current year. This in fact is the case of the Revenue as made by the A.O. We consider the same to be a negative or restrictive manner of reading the provision; rather, one which is not in harmony or in keeping with the spirit thereof. The restrictions, as of a maximum of two residential houses; retention of one *qua* which deduction is availed for a period of three years (lest the same becomes a trade), etc., stand clearly spelt out in the section itself (section 54F). Once the purchase of a residential house has crystallized, as ostensibly on 27.07.2007 in the present case, any capital gain arising on a long-term capital asset (non-residential) could be appropriated toward its cost as long as the conditions of the section are met. A beneficial provision, as section 54F, has even otherwise to be construed liberally. The decisions by the tribunal, as in the case of *Anagha Ajit Patnekar vs. ITO* [2006] 9 SOT 685 (Mum) and *Mrs. Krishnadevi Kejriwal vs. ITO* (in ITA Nos. 93/Mum/2009 & 2961/Mum/2008 dated 25.06.2010) support the assessee's case.

3.3 It would at this stage be relevant to discuss another aspect of the matter, and which to our mind is the moot point arising in the instant case, not addressed by the first appellate authority, i.e., as what constitutes a 'purchase' for the purposes of section 54F or, for that matter, the other *para materia* provisions. The same, without doubt, is related to the issue discussed by us at para 3.2 above, and which explains our stating of it as another aspect of the matter. That is, to put it succinctly: Whether the purchase of Flat B took place on 27.07.2007 or on 24.03.2009? This is relevant as only upon 'purchase' could an assessee be said to have satisfied the qualifying condition of s. 54F(1), entitling it to exemption there-under. There is no question of the issue not arising in the instant case, as contended before us by the ld. AR, forming in fact the substratum of the Revenue's case. It would accordingly become relevant to determine whether the purchase of Flat B had taken place during the previous year relevant to AY 2008-09 or the current year, or, in short, the date of its purchase.

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In this regard it is to be noted that the word 'purchase', along with 'construction', is specified in the provision *qua* the 'new asset' in contradistinction to the word 'transfer' employed in respect of the 'original asset' on which LTCG arises. Clearly, therefore, the same is being used to represent a mode of acquisition of the new asset. The hon'ble jurisdictional high court has explained the same in *CIT vs. Mrs. Hilla J. B. Wadia* [1995] 216 ITR 376 (Bom) (PB pgs.38-41) as acquiring substantial domain or control over the property by virtue of almost the entire payment thereof. In fact, in the case of allotment of flats through self-financing schemes, as by the DDA, the same is considered as an acquisition by way of construction, entitling the assessees to complete the test of dominion over an increased period of time, i.e., three years, as provided by the statute for the same (construction) after the date of transfer. In the facts of the present case, the assessee paid Rs.51 lacs in July, 2007, receiving the letter of allotment. Whether the same would amount to a purchase of the relevant asset would be the next and the relevant question to be asked. Even though the same may not by itself be considered as constituting a 'purchase' in terms of test laid down by the hon'ble court in the case cited supra, the subsequent payments would definitely lead to one, so that the payments made in July, 2007 can, in retrospective, only be considered as toward purchase of Flat B, the new asset. But for the payments in July, 2007, it may be appreciated, the payment/s during the relevant previous year (Rs.40 lacs) would not result in the payment of the entire sum during the current year, even as we observe substantial payment to have been made, meeting the test of substantial control, by December, 2008, whereat therefore the purchase, as explained by the hon'ble court, can be said to have taken place or matured. A reasonable construction of the provision, thus, would only be of the purchase, as indeed construction, being a manner of acquisition, which is to be completed within the time as provided under the provision, i.e., one year before or two years subsequent to the date of transfer of the relevant capital asset. Further, determination of the purchase date of Flat B in December, 2008 would, however, result in no adverse impact on the assessee's case either for A.Y. 2007-08 or for the current year.

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4. In view of the foregoing, we find no infirmity in the assessee's case and, accordingly, uphold the impugned order. The Revenue fails in result.

5. In the result, the Revenue's appeal is dismissed.
परिणामतः राजस्व की अपील खारिज की जाती है ।

Order pronounced in the open court on May 21, 2014

Sd/-	Sd/-
(Amit Shukla)	(Sanjay Arora)
न्यायिक सदस्य / Judicial Member	लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 21.05.2014
व.नि.स./Roshani, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**

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