**IN THE INCOME TAX APPELLATE TRIBUNAL,**
**AHMEDABAD D BENCH, AHMEDABAD**
**[Coram: Pramod Kumar AM and S S Godara JM]**

ITA No. 19/Ahd/16
Assessment year: 2011-12

**Rajat B Mehta** **…….....Appellant**
*Care of: Haribhakti & Co*
*Chartered Accountants, 18, Haribhakti Colony, Race Course*
*Vadodara [PAN:ACDPM0223C]*

***Vs***

**Income Tax Officer**
**International Taxation, Vadodara** **…….…….....Respondent**

**Appearances by**
**Urvashi Shodhan** *for the appellant*
**V K Singh** *for the respondent*

Dates of hearing of the appeal : February 6 and 7, 2018
Date of pronouncing this order : February 9, 2018

**O R D E R**

**Per Pramod Kumar, AM:**

1. This appeal calls into question correctness of the order dated 31st October 2015 passed by the learned CIT(A) in the matter of assessment under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act) for the assessment year 2011-12. Grievance of the assessee, in substance, is against the CIT(A) upholding the action of the Assessing Officer in restricting the deduction under section 54 of the Act to Rs 60,00,000, as against claim of deduction for Rs 78,00,000 made by the assessee.

3. The issue in appeal lies in a narrow compass of material facts, as culled out from the material on record. The assessee is a non-resident who is, though now domiciled in New Zealand, maintaining his connections with his motherland. He had a fairly spacious house, on a 839 square meter plot, at 11 Madhav Park, Manjal Pura, Vadodara in Vadodara which he sold off during the relevant previous year for a consideration, net of expenses, of Rs 2,46,00,000 and earned long term capital gain of Rs 1,89,77,426. Whatever may have been the compulsions of this sale of property by the assessee, like an overwhelming majority of non-resident Indians, the assessee did not entirely severe his India connection as far holding property in India is concerned. He invested a portion of the sale proceeds, Rs 78,00,000 to be precise, in another residential unit, though a much smaller one admeasuring 1,952 sq ft, i.e. Row House No. C 6, Anandvan Complex, Vadodara. In effect thus while he continued to have a house in Vadodara, his investment in the house property was scaled down. It was in this backdrop that out of the long term capital gain of Rs 1,89,77,426 that the assessee claimed a deduction, under section 54 of the Act, for an amount of Rs 78,00,000. The assessee's claim was that he has invested, within permissible time limit and out of this capital gain earned by him, Rs 78,00,000 in the new house. During the course of scrutiny assessment proceedings, however, this claim did not find favour with the Assessing Officer.

The Assessing Officer noted that the assessee had entered into two separate contracts, though on the same date, for purchase of house property and the furniture and fixtures therein. The payment of Rs 60,00,000 was under contract for the purchase of house property and the remaining payment of Rs 18,00,000 was made under contract for the purchase of furniture and fixtures in the said property. A complete list of the items of furniture and fixtures was also set out. The Assessing Officer proceeded on the underlying assumption that these two separate contracts are independent of each other and are to be considered in isolation of each other. The Assessing Officer was of the opinion that clearly **"the assessee has executed the separate deed** *(for sale of furniture and fixtures etc)* **to save stamp duty on it,** *(and)* **now the assessee is trying to evade income tax**" He was further of the view that most of these items are removable, and, that it cannot be said that furniture was purchased to make the house habitable. While the Assessing Officer did not have an issue with the proposition that expenses incurred to make the house habitable will qualify for deduction under section 54F, as was held by a coordinate bench of the Tribunal in the case of **Srinivas R Desai Vs ACIT [(2013) 155 TTJ 743 (Ahd)]**, he was of the view that expenses incurred on buying furniture cannot be said to be expenses incurred for making the house habitable. In effect, he viewed the payment made, under the separate agreement for sale of furniture and fixtures, entirely on standalone basis and independent of the purchase of house. On the basis of this line of reasoning, the Assessing Officer declined deduction under section 54 F to the extent of Rs 18,00,000 paid under a separate agreement for furniture and fixtures in the residential property purchased by the assessee. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. The assessee is not satisfied and is in further appeal before us.

4. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position. We may add that though this case was fully heard on 6th February 2018, and the order was reserved thereon, this case was again fixed for hearing on 7th February 2018 and both the parties were heard on certain propositions put to them during the course of fresh hearing.

5. Let us look at the sequence of events so far as the purchase of residential unit C-6 Anandvan Complex is concerned. The assessee entered into a banakhat (i.e. agreement to buy) on 19th January 2011, for the purchase of said property. This agreement, inter alia, provided as follows:

> **That, whereas THE PURCHASER has agreed to purchase and THE SELLER has agreed to sell the property owned by him which is described below on the terms and conditions recited hereinafter:-**
>
> **DESCRIPTION OF THE PROPERTY TO BE GIVEN IN SALE:**
> **Land/property situated, lying and being in District – Vadodara.**
> **Registration Sub-District-Vadodara Village Vadodara-Kasba on the land bearing R S No-376/1, 376/2 and 379 City Survey No.2732, 2733, 2744, 2680 and T.P. Scheme No.18 and FP No.338 "Anandvan Compalex" (Annapurna Co. Op. Hsg Ltd) scheme of row houses has been constructed at IG Marg, Opp. Bhavan's School, Lal Baug Road, Vadodara. In the said Society, Block No.C/6, having total plot area 1952 in which 885 sq. ft. construction at ground floor and 1000 sq. ft. construction at final floor and 315 construction at second floor and the said Block is bounded as follows:-**
> **EAST - Society Road**
> **WEST - Common Road**

**NORTH - Block No. C/5**
**SOUTH - Block No. C/4**
**The said Flat includes water connection, drainage and electricity etc.**

**THE TERMS AND CONDITIONS OF THE SALE– AGREEMENT ARE AS UNDER:-**

**1. The seller has agreed to sale and the purchaser has agreed to purchase the above referred property for the consideration of the sum of Rs.78,00,000/- (Rs. Seventy Eight Lakhs only).**

**2. Whereas, the purchaser is agreed to give and the seller has agreed to accept an earnest money deposit of Rs.30,00,000/- (Rs. Thirty Lakhs only) by cheque No.685409 of ING Bank Ltd, Chhani Br., Racecourse Circle, Vadodara. The seller hereby confirms the receipt of the earnest money.**

**3. It is also agreed between the parties that the purchaser have to pay the remaining amount of Rs.48,00,000 (Rs. Forty Eight Lakhs only) by cheque dated 31st January 2011 at the time of execution of sale-deed.**

**4. The seller has agreed to handover the possession of the said Block No. C/6 on 31st January, 2011 and also hand over all the original documents including property card and approved Building and Lay Out Plan and other necessary documents of the said Property.**

**5. That, in the case of Seller fails to handover the possession on or before the above stated date and fails to handover all the original and above referred documents of the said property Block No. C 6 in that case this agreement will stand Null and Void and the Seller has to repay the amount of Rs.40,00,000/- (Rupees Forty Lakhs only) immediately.**

**6 ……**

*(Emphasis, by underlining, supplied by us;*
*other parts of the agreement not reproduced as these are not relevant for our purposes)*

6. The sale consideration was thus fixed at Rs 78,00,000 in this duly notarized agreement, the advance payment of Rs 30,00,000 was made through banking channels, and there are no disputes whatsoever about the bonafides of this agreement. Yet, when it came to the actual sale transaction, the payment of Rs 78,00,000 was split into two parts- as payment for the property and payment for the furniture etc. On 4th February 2011, admittedly in furtherance to the above agreement to sell, these two separate agreements were executed. In the sale deed dated 4th February 2011 executed in favour of the assessee by the person selling C6 Andandvan property, it was, *inter alia*, stated, as loosely translated from the document written in Gujarati language, that "**that the said property title is clear and marketable, we have the full right and authority to sell this property, the said property at present is in the possession of we the second party and it is agreed between us, both the parties, to sell the same on permanent basis, with the common facilities, for a sale consideration of Rs 60,00,000 (In words Rs Sixty Lakhs only) and that the said sale consideration includes consideration for all the luxury facilities and common right authority available**". The assessee has paid Rs 30,00,000, vide ING Vaishya Bank Ltd cheque no. 354375 dated 4.2.2011, under this said agreement. On the same day, the assessee had entered into a separate agreement, under which he paid Rs 18,00,000 by the very next cheque leaf of

the same bank i.e. cheque no. 354376 dated 4.2.2011 on INNG Vaishya Bank Ltd. This sale agreement for sale of furniture and fixtures, *inter alia*, stated as follows:

> ***Today on date 04.02.2011 the Scheme organized in the name of "Anandvan Complex" (Annapurna Co-Operative Housing Society Ltd.) House No-C-6, in the property the sale agreement for fixed furniture and A.C.***
> ***…….***
> ***That the property under sole ownership, possession and occupation which is situated at Registration District-Vadodara and Sub-District-Vadodara of Mouje-Kasba bearing R. S. No.-376/l, 376/2 and 379 its City Survey No.-2734/B, T. P. Scheme No.-18, Final Plot No.-338 the construction of the Complex (Annapurna Co-Op. Hou. Soc. Ltd) in the row house the House No.-C-6, the property with complete construction. That the first party sold the said property on date 4-2-2011 by the Registered Sale Deed No.-918 to the second party. So the fixture and furniture and the following items are as under.***
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> ***Name No of items***
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> *(The description of the furniture and fixture has a long list of items, including, for example, such as Ceiling Fan, Wall mounted Fan, Whirlpool Freeze 450 litres, RO Machine, Geyser, Samsung Microwave, Feber Cooking, Bad Wooden, Metros, Bed, Computer Table, Side Table, Almari Wooden, Platform 31, Lexus OTG, Wooden Stull, LCDs, Philips Music System with Speaker, 8x12 Wooden Cabinet, Kitchen Cabinets, Centre Tpoy, Fol Ceiling Light, 9FB fully Automatic front loading machine, Branj topy, Wooden dressing table, Kenstar Cooler, Dressing table 2x2, Wooden Inavir, Notice Board 4.10x2, Dressing Table 2.9x2.8, Stone Maliya wooden, Platform Cota Stone, Wooden Ceiling 18x2, Shoes Cabinet, Flower Port, Decorative frame, Wooden Cabinet for cloth 36x8, Jogging Cycle, Wooden Malya Cloth Cabinet, Revolving Chair, Wooden Book Cabinet, Sofa 3 sitter, Diwan 4 sitter, Corner Tpoy, Dining Table with 6 chair, Wooden Cabinet 7.8, Bran queen Statute, Sofa chair, Decorative frame, Wooden Double Bed 6.3x6.10, Wooden Maliya, Study Table, Glass false ceiling decorative in bathroom, Bed 6.3, Mattress 6.3, Computer Cabinet, Wooden Almari, Glass False Ceiling, AC Split ONIDA, Bonding pump, bathtub with accessories, Revolving Chair, Sofa Chair, Wooden Dressing table with cabinet, Godrej Almari, Samsung Window AC, Sintex Tank 2000 Ltrs, Sofa 2 sitter, Window Shutter stainless steel 4x3, wooden double room, Centre Tipoy, Side Almari Wooden, Curtain Window Elec Motor Pump, Sintex Tank 500 ltrs, Centre Tipoy, Stepper etc)*
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> ***That from you the second party the amount of sale consideration received the amount of consideration as shown in details above for fixture and furniture and in consideration of the same this sale agreement is executed by first party in favour of you the second party.***
>
> ***That hereinafter regarding this fixture and furniture and the other things and property you the second party and your heirs, ancestors have became the sole owners and to make use of it on the basis of ownership right to occupy you and your heirs ancestors are entitled you have right and authority to do so.***
>
> ***That hereinafter regarding the fixture and furniture sold and on the other things and property that neither the first party nor any of our heirs, ancestors shall have any kind of right, share, interest or relation or authority."***

7. What is quite clear from these arrangements is that the actual consideration for purchase of the house property in question is Rs 78,00,000 and the splitting of consideration, as rightly noted by the Assessing Officer, is an artificial arrangement; in substance and in effect the house is sold for Rs 78,00,000 and it was not open to the assessee, as evident from the contents of the banakhat (i.e. agreement to sell), to buy the house for Rs 60,00,000 and

furniture separately for Rs 18,00,000. Even if the assessee was to buy the house, without the furniture, it would have been Rs 78,00,000 anyway- as is clearly specified in the agreement to sell. Whatever may have been the cause or trigger for the splitting of the consideration, Rs 60,00,000 for the house and Rs 18,00,000 for the furniture and fixtures, such a splitting of consideration had no bearing on *de facto* consideration for purchase of house property. That's what, as we have noted earlier as well, the agreement to sell makes clear in unambiguous terms. These two agreements, therefore, cannot be considered in isolation with each other on standalone basis. Let us in this light take a look at the provisions of Section 54 which are as follows:

> 54. (1) Subject to the provisions of sub-section (2), where, 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 the 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 with the following provisions of this section, that is to say,—
>
> > (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 …….
> >
> > *(Emphasis, by underlining, supplied by us; other parts of section 54 not reproduced as the same are not relevant for our purposes)*

8. It is in this backdrop that the question that we have to essentially take a judicial call on is as to what is the cost of the new residential house so purchased by the assessee at C 6 Anandvan Complex. As we do so, we must bear in mind the fact that the expression used in the statute is "cost of the residential house so purchased" and it does not necessarily mean that the cost of the residential house must remain confined to the cost of civil construction alone. A residential house may have many other things, other than civil construction and including things like furniture and fixtures, as its integral part and may also be on sale as an integral deal. There are, for example, situations in which the residential units for sale come, as a package deal, with things like air-conditioners, geysers, fans, electric fittings, furniture, modular kitchens and dishwashers. If these things are integral part of the house being purchased, the cost of house has to essentially include the cost of these things as well. In such circumstances, what is to be treated as cost of the residential house is the entire cost of house, and it cannot be open to the Assessing Officer to treat only the cost of only civil construction as cost of house and segregate the cost of other things as not eligible for deduction under section 54. Let us, in this light, address ourselves to the facts of this case. Quite clearly, for the detailed reasons set out earlier in this order, the two separate agreements for sale of house property and the furniture and fixtures cannot be considered in isolation of each other on standalone basis, and have to considered essentially as a composite contract- particularly in the light of the undisputed contents of the agreement to sell dated 19th January 2011. Given these facts, the cost of the new asset has to be treated as Rs 78,00,000. The cost of the

residential house is Rs 78,00,000 as the assessee did not have any choice about buying or not buying the furniture at the assigned values, as irrespective of the purchases of the furniture also, the assessee was under an obligation to pay the same amount of Rs 78,00,000. If at all there was any beneficiary of this splitting up arrangements, the beneficiary was the seller of this property inasmuch as the personal effects in question, which were assigned the value of Rs 18,00,000, were not covered by the definition of capital asset under section 2(14), and, accordingly, gains on sale of these personal effects were outside the ambit of taxable capital gains. Only if the Assessing Officer had read the agreement to sell carefully and considered the same in the light of actual sale deeds, he could have easily identified the manner in which the revenue authorities were possibly taken for a ride, and he could have initiated suitable remedial action. That, however, was not done. Instead, the Assessing Officer proceeded to decline benefit of Section 54 to the assessee to the extent of consideration assigned to these personal effects. Even if Rs 18,00,000 was indeed to be assigned to the personal effects that the assessee had to, per force, buy at the time of buying the residential house- as apparently was the case, the cost of the new asset in house was to be taken as the composite cost i.e. Rs 78,00,000. Whether the assessee was to buy these furniture and fixtures or not, the sale consideration was the same. The assignment of value to the personal effects at Rs 18,00,000 thus could not be considered in isolation with the purchase of the house. It was not, as the circumstances would suggest, an option open to the assessee to buy or not to buy the furniture and fixtures at this price. The arrangements for separate purchase of furniture and fixtures were indeed artificial, but the remedy did not lie in declining deduction under section 54 to the buyer to that extent. The remedy was in bringing the right amount of capital gains to tax by ignoring the nomenclature of sale of personal effects, specifically excluded under section 2(14)(ii) from the definition of capital assets, as sale of residential property. That, however, was not done. It could not have been open to the authorities below to treat the payment of Rs 18,00,000 on account of furniture and fixtures on standalone basis, and thus exclude it as a separate item rather than as a "cost of the residential house so purchased". In our considered view, therefore, the assessee is entitled to deduction under section 54F by treating entire amount of Rs 78,00,000 as the "cost of the residential house" purchased within specified time limit under section 54.

9. When the above position was put to the learned Departmental Representative, he was fair enough in not really being very aggressive in disputing our perspectives on the artificial splitting of contracts. He, however, pointed out that it was never the case of the assessee that these two agreements were required to be viewed together- particularly in the light of the agreement to sell. The case of the assessee, according to learned Departmental Representative, was that the assessee incurred the expenses on furniture and fixtures to make the residential property habitable, and it was in this context that the reliance was placed on this Tribunal's decision in the case of **Srinivas R Desai** *(supra).* It was thus contended that an altogether different case cannot be made out at this stage and we must confine ourselves to adjudicating upon assessee's stand that the expenditure incurred on additional furniture and fixtures would constitute permissible costs of making the residential unit habitable or not. We are not inclined to approve the objection so taken by the learned Departmental Representative. It is only elementary that under rule 11 of the Income Tax Appellate Tribunal Rules 1963, this Tribunal, in deciding the appeal, is not bound to remain confined to the original or additional grounds of the appellant, as long as the party affected by the ground, on which the decision of the Tribunal rests, has had a sufficient opportunity of being heard on that ground. There is no dispute that the learned Departmental Representative has been heard

on the ground on which we are deciding this appeal, and it is not even his case that he was not given adequate opportunity to address us on this ground. As a matter of fact, the hearing in this case was fixed again on 7th February 2018 only to hear the parties on the aspect of the matter on which the appeal is eventually decided. Coming to the correctness of the plea taken by the assessee, that aspect of the matter is no longer really relevant at this stage. Be that as it may, it is difficult to miss the fact that rather than going by the first principles and examining the claim of the taxpayer on that basis, more often than not, most of the us are tempted to identify the highest common factors of an available judicial precedent vis-à-vis the case in our hands, and treat it as a covered matter. Whatever be the merits of this approach, and there are certainly many merits in this approach, even when it results in a lapse, such a lapse cannot be allowed to prejudice the legitimate interests of the assessee. Here is an NRI who decided to sell a fairly spacious house in his hometown, and yet, to keep his India connection alive, invested a part of these sale proceeds in a smaller residential unit, but he has been declined the legitimate deduction under section 54 in respect of the same, only for the reason, as the circumstances suggest, that he is made an unwilling party to artificially splitting of sale consideration to minimise the capital gains burden of the seller. Leaving even this aspect of the matter aside, quite clearly the sale of furniture and fixtures was an integral part of the deal of buying the house property. Whichever we way look at it thus, the assessee was wronged in partial denial of deduction. Now that the facts on record demonstrate that the actual consideration for the new house property was Rs 78,00,000, he is being sought to be declined resultant relief on the ground that this particular plea was not taken earlier. That is certainly not a fair treatment to an assessee. What matters really is that whether the assessee deserves the relief on merits or not, and when the assessee deserves the relief on merits, such technicalities should not be allowed to come in the way of justice to the assessees. We are, therefore, not inclined to uphold the technical objection raised by the learned Departmental Representative.

10. In the light of the above discussions, as also bearing in mind entirety of the case, we uphold the grievance of the assessee, and, accordingly, direct the Assessing Officer to delete the disallowance of deduction under section 54 to the extent of Rs 18,00,000. The assessee will get the relief accordingly.

11. In the result, the appeal is allowed in the terms indicated above. Pronounced in the open court today on the 9th day of February, 2018.

***Sd/xx*** ***Sd/xx***
**S S Godara** **Pramod Kumar**
(Judicial Member) (Accountant Member)
**Ahmedabad, Dated the 9th day of February, 2018**

*Copies to:* *(1)* *The appellant* *(2)* *The respondent*
*(3)* *CIT* *(4)* *CIT(A)*
*(5)* *DR* *(6)* *Guard File*

*By order*

*Assistant Registrar*
*Income Tax Appellate Tribunal*
*Ahmedabad benches, Ahmedabad*