

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH : KOLKATA

[Before Hon'ble Shri A.T.Varkey, JM & Shri M.Balaganesh, AM]

I.T.A No.1763 /Kol/2016

Assessment Year : 2012-13

A.C.I.T., Circler-36,
Kolkata

(Appellant)

-vs.-

Smt. Reshmi P. Loyalka
Kolkata

[PAN : ABBPL 0120 E]
(Respondent)

C.O.No.58/Kol/2016

(A/o I.T.A No.1763 /Kol/2016)

Assessment Year : 2012-13

Smt. Reshmi P. Loyalka
Kolkata

(Appellant)

-vs.-

A.C.I.T., Circle-36,
Kolkata

[PAN : ABBPL 0120 E]
(Respondent)

For the Department : Shri Goulen Hanshing, CIT, DR

For the Assessee : Shri S.Jhajharia, AR

Date of Hearing : 09.05.2018

Date of Pronouncement : 23.05.2018.

ORDER

Per Shri M.Balaganesh, AM

1. This appeal of the revenue and cross objection of the assessee arise out of the order for the Asst Year 2012-13 of the Learned Commissioner of Income Tax (Appeals)-10, Kolkata [in short the Ld. ITA] in Appeal No. 34/CIT(A)-10/Cir-36/2015-16/Kol dated 02.05.2016 against the order passed by the D.C.I.T- Circle-36, Kolkata [in short the ld AO] under section 143(3) of the Act dated 27.03.2015 for the Asst Year 2012-13.

First let us take up the revenue appeal

2. Though the revenue had raised several grounds before us, the only effective issue to be decided in this appeal is as to whether the Id CITA was justified in granting exemption u/s 54 of the Act in respect of reinvestment made by the assessee in three houses , in the facts and circumstances of the case.

3. The brief facts of this issue are that the assessee is a lady senior citizen. The assessee on 08.07.1988, along with her two sister-In-laws purchased a piece of land for construction of residential house property at 7, Gulmohar Avenue, Rajpkari, New Delhi-110038 and constructed a house along with her two sister-in-laws on the said purchased land. On 11.09.1997, a family settlement with other two sister-In-laws released their share in respect of the land and building constructed on the same in favour of the assessee, and thereafter she, the assessee became absolute owner of the said land and the house constructed thereon on and from 11.09.1997, which was being used by the assessee as residence for the family, consisting of her husband, her two sons, and the respective families of the two sons. The assessee sold the residential house property on 11.11.2011 for a total sum of Rs.84 crores, and after reducing the indexed cost of acquisition and expenses for completion of sale, net Long Term Capital Gain amounted to Rs.83,53,62,186/-. The assessee invested Rs.50,00,000/- in 54EC capital Gain Bond and set-aside Rs.33,50,00,000/- for building new residential property for herself and her family members. The remaining amount of Rs. 49,53,62,186/- was offered to tax and entire tax along with interest was paid before filing of the Income Tax Return for the subject A.Y 2012-13.

For having alternate residential accommodation for herself and her family consisting of two sons and their family, the appellant had purchased two adjacent lands, and given advance for the third adjacent plot till 31.03.2012, totaling to Rs.16,54,00,176/-. Between 01.04.2012 and 31.07.2012, the assessee had purchased the third adjacent piece of land and also started construction on the three plots simultaneously. The

aggregate amount spent for construction between 01.04.2012 and 31.07.2012 was RS.7,39,84,298/- The assessee invested Rs 9,51,63,162/- in Capital Gain Deposit Account on 31.7.2012. The total of the three amounts comes to Rs 33,45,47,636/- (16,54,00,176 + 7,39,84,298 + 9,51,63,162). Subsequently the amounts were withdrawn by the assessee from Capital Gain Deposit Account and proceeds utilized for construction of house within the prescribed time. The assessee claimed that she thus spent / utilized for construction of the three row houses including the cost of land for use of herself and her family. Even though there were 3 structures / buildings, all services and facilities were common as under:-

Common name and name plate of the residential house of family and it has been named "LOYALKA", there is only one name plate for the three buildings. The row and buildings is known as residential of "Loyalka". The neighbors, visitors, postman, courier delivery persons recognizes the three buildings as residence of Loyalkas having common entry and exit gate and Common outer boundary walls. Letters and documents are delivered at one place, and the reception area is common. Common worship place is used by the family members. Common kitchen and dining space is used by all family members. Common garden and greenery lanes are used by family members. Common garden and greenery lanes are there for the common use for the family members. Common car parking lot, common facility for guest, guest room for family guest, common generator and , common Drainage and Rainwater harvesting, common and combined rainwater harvesting water pipes for the group of three buildings, common facility for the domestic helps, connectivity through common passage and arrangements on Ground floor, first floor, terrace. Communication connectivity through common phone lines in the three buildings and common Garbage disposal area.

The assessee submitted that though there are 3 residential buildings, it is actually one residential house serving the same purpose as the old house did, that is being the

residence of the Loyalkas. The assessee claimed exemption u/s 54 of the Act in respect of reinvestment made in 3 new residential houses.

4. The assessee during the course of assessment proceedings, produced the copy of sale deed of her house property, deed of plots of land, occupation certificate of constructed residential houses and copy of receipt of cess issued by District Town Planner, Cum-Member Secretary, Composition Committee, Gurgaon. The assessee also produced copy of bills raised by the supplier of building construction material, copy of bills raised by interior decorator, copy of acknowledgement of cheque/ draft receipt by DLF Ltd, copy of bill raised by the architectural planning and design consultant, copy of bill of service charges raised by the party for facilitating purchase of different plots, details of utilization of capital gain till 31.7.2012, copy of electricity bill of new residential houses and other relevant documents. The assessee stated that she looked out for a comparatively much smaller plot for building her residential house. In spite of her best efforts, she could not locate a single plot of desired size at desired location. Hence she bought 3 adjacent plots of land measuring 514.40 sq.yards each, aggregating to 1543.20 sq.yards at Block -G, DLF Phase-I, Gurgaon, Haryana. Three structures were constructed on the three plots of land, which together constitutes one residential house for the assessee and only her family members i.e her spouse, sons, daughter in laws and grand children. No part of the complex has either been let out or used otherwise than as residence of the assessee and her family. The local laws required to put foundations for three structures, so there are three structures but they constitute 'residential house' of assessee and is used for providing residential house to the same family which resided in the old residential house which was sold. The location where the plots were purchased, the construction is allowed on a zoning basis that is a foundation is to put each plot of land. Hence, three interconnected structures were built to comply with the building regulations. On request of assessee, the local authorities waived the requirement of construction of internal boundary wall for three plots and no additional fee was levied in

this regard. It was specifically informed to the Id AO by the assessee that in case it was not intended to have on residence, the assessee herself and her family would have definitely preferred to have buildings or flats at different locations. The zeal and desire of living together in one residence was important factor to have residence at the same location.

5. The Id AO on perusal of the various documents filed before him observed that

- a) Payment receipt given by District Town Planner, Gurgaon and various correspondences / receipts made by DLF Ltd in respect of any action / intimation are given separately for each plot ;
- b) The electricity bills were issued separately by the local Electricity Board / Nigam for each of the residential houses constructed on the three separate plots;
- c) Even for the construction or other materials required for construction of your house on the said plots and / or services have been taken of the interior designer, the supplier / designer raised bill separately for each of the plots ;
- d) From the copy of occupation certificate, it is seen that the competent authority has granted permission for the occupation of the residential houses constructed on each of the plots vide separate occupation certificate.

5.1. The Id AO also observed that the legislature in its wisdom had provided exemption u/s 54 of the Act only in respect of reinvestment made in one residential house. Since in the instant case, the assessee had made reinvestment in 3 residential houses, the exemption would be eligible only for one house of the assessee. The assessee submitted that three conveyance deeds, three occupancy certificates and three electrical meters will not alter the fact that the three buildings are being used as 'a residential house'. All the arguments advanced by the assessee that the provisions of section 54 of the Act uses the expression 'a residential house', meaning thereby, the reinvestment should be done in a residential house and it does not restrict the scope of reinvestment in more than one

residential house. The amendment in section 54 of the Act had been brought only from 1.4.2015 applicable from Asst Year 2015-16 onwards wherein the section specifically uses the expression 'one residential house' removing any ambiguity thereon. Hence prior to that date, the assessee was entitled to reinvest in more than one residential house. What is relevant is only reinvestment to be made in residential house. These arguments were not appreciated by the Id AO and accordingly exemption u/s 54 of the Act was denied by the Id AO for two houses while completing the assessment. The Id AO also placed reliance on the *Special Bench decision of Mumbai Tribunal in the case of ITO vs Sushila M.Jhaveri reported in 107 ITD 327* wherein it was held that *the legislature had used the word 'a' in section 54 and 54F. Had the legislature intended for investment in more than one asset, it could have easily used the words 'in any residential house' or 'residential house or houses' in sections 54 and 54F instead of the words ' a residential house'. So the clear intention of the legislature was to allow exemption u/s 54 and 54F in respect of investment in one residential house.* The Id AO further observed that this Special Bench decision of Mumbai Tribunal in the case of Sushila M Jhaveri has been since approved by the *Hon'ble Bombay High Court in the case of CIT vs Raman Kumar Suri in ITA No. 6962 of 2010 dated 27.11.2012. The Hon'ble Bombay High Court again considered the identical issue in the case of CIT vs Devdas Naik in ITA No. 2483 of 2011 dated 10.6.2014.*

5.2. The Id AO also observed that the assessee during the course of assessment proceedings had revised its claim of exemption u/s 54 of the Act to the tune of Rs 33,45,47,636/- as against Rs 33,50,00,000/- claimed originally. Accordingly, the difference of Rs 4,52,364/- was added to the total income of the assessee. Based on the aforesaid observations, the Id AO held that the assessee is allowed to claim exemption u/s 54 of the Act to the tune of Rs 11,68,03,844/- in respect of one residential house constructed at Plot 4/5 , which bears the highest cost amongst the three houses, and

balance claim of Rs 21,77,43,792/- was disallowed and added to the total income of the assessee.

6. The Id CITA observed that during the course of appeal hearing, the assessee filed documents which partook the nature of additional evidences, as the same was not filed before the Id AO. This document was a copy of an order from the Directorate General, Town & Country Planning, Haryana to the effect confirming that all the three plots on which 3 row houses have been constructed is a combined single plot. The said evidence was not filed before the Id AO, the same was admitted and treated as additional evidence and accordingly the Id AO was requested to forward a remand report in the matter in terms of Rule 46A of the Income Tax Rules , after duly examining the said document. The Id CITA observed that the Id AO in the remand report neither raised any objections regarding the admissibility of the additional evidence, nor made any submission regarding such evidence, which had been forwarded to him for his comments. Accordingly he held that the Directorate General had given an occupancy certificate treating the reinvestment made by the assessee in a single combined plot on which construction has been carried out by the assessee having common infrastructure and facilities as listed above. The Id CITA further held that the legislature in its wisdom had purposefully made the amendment in section 54 of the Act by using the expression 'one residential house' with prospective application only with effect from Asst Year 2015-16 onwards. Hence the same cannot be applied retrospectively for the year under appeal resulting in denial of exemption in more than one house. Even on this count, the Id CITA held that the assessee would be entitled for exemption u/s 54 of the Act for the entire sum of Rs 33,45,47,636/- Aggrieved, the revenue is in appeal before us.

7. We have heard the rival submissions and perused the materials available on record. The short point of dispute to be resolved in this appeal is two fold:-

a) Whether the reinvestment made by the assessee in 3 residential houses having common amenities, kitchen, common entrance, common house name, common electrical, common storage, common water, common garden, common boundary wall, common guard room, etc would give eligibility to claim exemption u/s 54 of the Act by construing all the three units as a single residential house ?

b) Whether the reinvestment made by the assessee in more than one residential house by making construction in 3 adjacent plots, would make him eligible to claim 100% exemption u/s 54 of the Act prior to amendment in section 54 i.e prior to 1.4.2015 ?

7.1. The primary facts stated hereinabove and submission of documents before the lower authorities remain undisputed and hence the same are not reiterated for the sake of brevity. We find that the Id AO had predominantly relied on the 3 occupancy certificates issued by the District Town Planner for each of the house for denial of exemption u/s 54 of the Act for 2 residential houses. We find that the assessee had inter connected the buildings using steel bridges to allow movement within the houses and by having the following common infrastructure. Stating these facts , the District Town Planner, Gurgaon (Planning) , Department of Town and Country Planning, HUDA Office Complex, Sector -14, Gurgaon, had addressed a letter in Memo No. DTP(G)/2015/1923 dated 14.8.2015 addressed to The Director General , Town & Country Planning, Haryana, Chandigarh with a request for permission of clubbing the plots G-4/5, G-4/6 and 6/6 , DLF Phase-I. Gurgaon as a combined plot and consequentially issuing a combined occupancy certificate. This letter is enclosed in page 30 of the paper book. We find that in this letter, it has been specifically mentioned by the District Town Planner, Gurgaon, that the ownership of the 3 plots pertain to the same applicant and their family is living together having common electrical, common water, common storage, common guard room, common boundary wall, common garden, common pathways and inter connected the building using steel bridges to allow movement within the houses and connect them. We find that the

combined zoning plan also has been submitted before the Directorate General, DTCP, Haryana, Chandigarh. On perusal of all the relevant documents, the Directorate General, DTCP, Haryana, Chandigarh vide his proceedings in Memo No. – Misc-2247/SD(BS)/2015/18284 dated 22.9.2015 addressed to the assessee herein had mentioned the same :-

Please find enclosed a copy of the approved zoning plan of the above said plots bearing Drg.No. DGTCP-5364 dated 21.09.2015 for necessary action.

The above said zoning plan is approved with the following conditions:-

- 1. That the site coverage and number of dwelling units shall be as per the Rules of 1965/zoning clauses.*
- 2.The maximum permissible coverage shall be calculated considering the combined plot as a single plot and you shall demolish the construction beyond compoundable limit.*
- 3. Further you shall submit an undertaking in the office of DTP, Gurgaon to use the building for four dwelling units only.*
- 4. No construction would be allowed in the setbacks, which is required for ventilation circulation of adjoining plots.*
- 5. Building lines/setbacks will be maintained straightly as per approved zoning plan.*

7.2. We find that the assessee during the course of hearing before the Id CITA furnished a copy of an order from the Directorate General, Town & Country Planning, Haryana to the effect confirming that all the three plots on which 3 row houses have been constructed is a combined single plot. These papers are enclosed in pages 28 to 30 of the paper book filed before us. This was treated as an additional evidence and remand report was sought for from the Id AO. The Id AO neither raised any objections regarding the admissibility of the additional evidence, nor made any submission regarding such evidence, which had been forwarded to him for his comments. Hence it could be safely concluded that the Id AO did not have any adverse comments to make with regard to the additional evidence.

7.3. We find that the competent authority had given a modified occupancy certificate as a combined single plot as above. It is well settled that once the modification certificate is given, it always relates back to the original date of certificate. In this regard, reliance has been rightly placed by the Id AR on the decision of the *Hon'ble Bombay High Court in the case of CIT vs Hindustan Samah Awas Ltd reported in 377 ITR 150 (Bom)*. In this decision, the assessee had preferred application before the Municipal Authority for seeking completion certificate well within time. The approval was issued by Municipal Authority on 10.10.2008 . The revenue disallowed the claim of deduction u/s 80IB(10) of the Act on the ground that the completion certificate was not obtained on or before 31.3.2008. The Hon'ble Bombay High Court held that the assessee is entitled for deduction u/s 80IB(10) of the Act as the assessee had preferred an application within time for seeking completion certificate and the delay in issuance of the same by the Municipal Authority is not attributable to the assessee. We hold that the modified occupancy certificate as a combined single plot would relate back to the original date of certificate issued by the competent authority. We also hold that the principle of '*Doctrine of Relation Back*' would certainly come to the rescue for the assessee herein. The Black Law's Dictionary defines 'relation back' as :-

"The doctrine that an act done at a later time is, under certain circumstances, treated as though it occurred at an earlier time".

The Hon'ble Supreme Court in the case of Delhi Jal Board vs Mahinder Singh reported in (2000) 7 SCC 210 in the context of Service Jurisprudence had applied this 'Doctrine of Relation Back' and held that the findings of a disciplinary enquiry exonerating an officer would have to be given effect to as they relate back to the date on which the charges are framed. If the Disciplinary Officer ends in favour of the officer, it is as if the officer had not been subjected to any disciplinary enquiry and accordingly his promotion and other service related benefits cannot be denied to him. We hold that the same analogy would apply with equal force to the facts of the instant case also. In view of this modified occupancy certificate considering the three plots as a combined

single plot, it could be safely concluded that the assessee had reinvested in only one residential house and accordingly entitled for exemption u/s 54 of the Act to the tune of Rs 33,45,47,636/- for the year under appeal.

7.4. We find that the assessee had placed reliance on the following decisions before the ld AO itself :-

- a) *Hon'ble Delhi High Court in the case of CIT vs Gita Duggal in ITA No. 1237/2011 dated 21.2.2013 reported in 357 ITR 153 (Del)*
- b) *Hon'ble Andhra Pradesh High Court in the case of CIT vs Syed Ali Adil in ITA No. 410 of 2012 dated 20.12.2012 reported in 352 ITR 418 (AP)*
- c) *Hon'ble Karnataka High Court in the case of CIT vs Smt K.G.Rukminiamma reported in 331 ITR 211 (Kar)*
- d) *Hon'ble Karnataka High Court in the case of CIT vs D Ananda Basappa reported in 309 ITR 329 (Kar)*
- e) *Hon'ble Madras High Court in the case of CIT vs Smt V.R.Karpagam in Appeal No. 201 of 2014 dated 18.8.2014 reported in 50 taxmann.com 55 (Mad HC)*

We find that the ld AO had specifically mentioned that in all the above cases , the flats were located in the same apartment and accordingly the facts of the assessee's case are not similar to them. In this regard, we find that the assessee had factually purchased 3 adjacent plots of land and made construction thereon by inter connecting the buildings using steel bridges to allow movement within the houses and by having the following common infrastructure :-

Common name and name plate of the residential house of family and it has been named "LOYALKA", there is only one name plate for the three buildings. The row and buildings is known as residential of "Loyalka". The neighbors, visitors, postman, courier delivery persons recognizes the three buildings as residence of Loyalkas having common entry and exit gate and Common outer boundary walls. Letters and documents

are delivered at one place, and the reception area is common. Common worship place is used by the family members. Common kitchen and dining space is used by all family members. Common garden and greenery lanes are used by family members. Common garden and greenery lanes are there for the common use for the family members. Common car parking lot, common facility for guest, guest room for family guest, common generator and , common Drainage and Rainwater harvesting, common and combined rainwater harvesting water pipes for the group of three buildings, common facility for the domestic helps, connectivity through common passage and arrangements on Ground floor, first floor, terrace. Communication connectivity through common phone lines in the three buildings and common Garbage disposal area.

We have already stated hereinabove that the modified occupancy certificate has been issued to the assessee considering the entire building as a combined single building. Hence even as per the ld AO's own analogy, the ratio laid down by various high courts in the aforesaid decisions would be squarely applicable to the facts of the instant case and even on that count, the reinvestment made in the sum of Rs 33,45,47,636/- would be eligible for exemption u/s 54 of the Act to the assessee. The relevant operative portion of the said judgements are not reiterated herein as they remain undisputed even as per the ld AO's order.

7.5. We also find that the ld AO had stated in his order that the special bench decision of Mumbai Tribunal in the case of Sushila M Jhaveri had been approved by the Hon'ble Bombay High Court in the case of *CIT vs Raman Kumar Suri in ITA No. 6962 of 2010 dated 27.11.2012*. *The Hon'ble Bombay High Court again considered the identical issue in the case of CIT vs Devdas Naik in ITA No. 2483 of 2011 dated 10.6.2014*. The ld DR was not able to place on record the copy of the said orders for our perusal. In any case, when there is divergent view taken by different high courts on an issue, the legal construction that is favourable to the assessee is to be taken. Hence by placing reliance

on the decision of the Hon'ble Supreme Court in the case of Vegetable Products reported in 88 ITR 192 (SC), we hold that the view favourable to the assessee should be taken and accordingly the decisions of Hon'ble Karnataka High Court , Hon'ble Madras High Court , Hon'ble Delhi High Court and Hon'ble Andhra Pradesh High Court would be applicable to the assessee herein. We further find that the Special Leave Petitions preferred by the revenue before the Hon'ble Supreme Court has been dismissed in the following cases:-

- a) CIT vs D Ananda Basappa – SLP(C) No. 20867 of 2009 dt 10.8.2009 reported in 320 ITR (Statutes) 1 against the judgment of Hon'ble Karnataka High Court.
- b) CIT vs Gita Duggal – SLP of revenue dismissed reported in 228 Taxman 62 against the judgment of Hon'ble Delhi High Court.

7.5.1. Accordingly we hold that prior to the amendment in section 54 of the Act with effect from Asst Year 2015-16 onwards, as long as the investment is made in residential house/(s), then the assessee would be eligible for exemption u/s 54 of the Act for the entire reinvestment subject to the maximum of long term capital gains amount. Only after Asst Year 2015-16, the exemption u/s 54 of the Act would have to be restricted to reinvestment in one residential house only and the said amendment cannot be applied retrospectively. Accordingly, both the questions raised by us supra and taken up for adjudication are decided in favour of the assessee and hence the grounds raised by the revenue are dismissed.

8. The Cross Objections preferred by the assessee were stated to be not pressed by the Id AR at the time of hearing before us. Accordingly, the same is dismissed as not pressed.

9. In the result, both the Cross Objection of the assessee and the appeal of the revenue are dismissed.

Order pronounced in the Court on 23.05.2018.

Sd/-
[A.T.Varkey]
Judicial Member

Sd/-
[M.Balaganesh]
Accountant Member

Dated : 23.05.2018.

[RG SPS]

Copy of the order forwarded to:

- 1.Smt. Reshmi P.Loyalka, 29, R.N.Mukherjee Road, 2nd Floor, Kolkata-700001.
2. A.C.I.T., Circle-36, Kolkata.
3. C.I.T.(A)-10, Kolkata. 4. C.I.T.-12, Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head of Office/D.D.O.. ITAT, Kolkata Benches

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ITA No.1763/Kol/2016 & CO.No.58/Kol/2016
Smt. Reshmi P.Loyalka
A.Yr.2012-13