

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI

BEFORE SHRI ANIKESH BANERJEE, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA 4012/Mum/2023
(Assessment year : 2011-12)

| | | |
|---|----|---|
| Abdul Nayab Shaikh (Deceased) L/H-Mr. Abdul Samad Shaikh Comrade Watch House C-6A, Sona Shopping, 31, Hill Road, Bandra West, Mumbai- 400 050 PAN : AANPS9431J | vs | ITO 23(1)(1), Mumbai Room No.106, Matru Mandir Mumbai |
| APPELLANT | | RESPONDENT |

Assessee by : Shri Ajay Singh & Akshay Pawar
Respondent by : Shri Manoj Kumar Sinha (SR.DR)

Date of hearing : 02/05/2024
Date of pronouncement : 07/ 05/2024

ORDER

PER ANIKESH BANERJEE, J.M:

The Instant appeal of the assessee was preferred against the order of the Learned Ld. National Faceless Appeal Centre, Delhi [in short, 'Ld.CIT(A)'], order is passed under section 250 of the Income-tax Act, 1961 (in short, 'the Act'), date of order 18.10.2023 for Assessment Year 2011-12. The impugned order was emanated from the order of the Ld. Income-tax Officer-23(1)(1), Mumbai (in

short, 'the A.O.') passed under section 143(3) / 147 of the Act date of order 22/11/2018.

2. The assessee has taken the following grounds of appeal:-

"I) On Facts and circumstances of the case since the alleged income escaped assessment for Assessment Year 2011-12 and proposed to be assessed is below Rs.50 lacs, the Notice issued u/s.147 is time barred and hence without jurisdiction and bad in law.

II) On facts and circumstances of the case the Assessing Office erred in denying the exemption u/s.54 of the income tax Act, 1961 on the ground that the investment in residential house is not in the name of the Assessee, but in the name of Spouse / relatives of the Assessee.

III) On Facts and Circumstances of the case the learned CIT (Appeals), National Faceless Appeal Centre erred in confirming the addition of Rs.51,10,050/- on account of long term capital gain on Sale of residential immovable property assessed by the Assessing Officer u/s.143(3) /147 of the Income tax Act, 1961.

IV) Without prejudice to the above, on facts and circumstances of the case & on merits and judicial pronouncements the Assessee is entitled to full exemption of Long term capital gain u/s.54 of the Income-tax Act, 1961 and accordingly there is no taxable Long term capital gain assessable in Assessment Year 2011-12."

3. The assessee has taken the following additional ground also: -

"1. The Ld. CIT(A) failed to appreciate that the residential property sold on 26/10/2010 was in joint name of deceased assessee and his wife Mrs. Gulbanu Shaikh, therefore capital gain ought to have been assessed in hands of deceased assessee and his wife, as according to section 4 of the Act the income has to be assessed in right persons' hand, therefore assessing total capital gain in hands of assessee is not justified."

3. Brief facts of the case is that the assessee was the owner of residential house bearing Flat No.4 at Bandra Sunbeam CHS, Mumbai with joint ownership with his wife Mrs. Gulbanu Shaikh and value of the property was Rs.18 lakh, purchased on dated 18/02/2000. The said property was duly sold in the value of

Rs.1,30,00,000/- and transfer of property was held on dated 26/10/2010. Market valuation was lesser amount to Rs.88,56,500/- but the Ld. Assessing Officer accepted the valuation of Rs.1,30,00,000/- and the assessee had no objection on that. After that, the assessee purchased 3 new residential units in the following manner:-

| <u>Flat No.</u> | <u>Name of Owners</u> | <u>Value</u> |
|------------------------|---|---------------------|
| 508A | Mrs. Gulbanu Shaikh& Mr. Samad Shaikh (Son) | Rs.49,00,000/- |
| 508B | Assessee, Mr. Nasir Shaikh (Son) | Rs. 46,00,000/- |
| 509 | Mrs. Gulbanu Shaikh& Mr. Shahid Shaikh (Son) | Rs. 25,00,000/- |

The assessee had not filed any return of income under section 139(1) and not declared the income from capital gain. After receiving of notice under section 148, the assessee filed return with total income Nil. During the assessment proceedings, the computation was filed and the assessee claimed the exemption under section 54F on the capital gain originated from the sale of house property. Though the property was in joint ownership. But the Ld.Assessing Officer had calculated the capital gain by considering the sale value Rs.1,30,00,000/- in the hands of assessee and restricted the exemption under section 54F to only Rs.46 lakhs related to purchase of one new property bearing flat No.508B. But the other purchase of flats, the Ld.Assessing Officer had not considered and rejected the same. As the reason, the Ld.Assessing Officer explained that the assessee had

not involved within these purchases. The assessee claimed that the entire amount was deposited in the bank with a joint ownership with wife of the assessee and the amount was paid directly from this bank account for purchasing new flats. The assessee claimed the eligibility under section 54F. During the assessment proceedings, the Ld.Assessing Officer calculated the capital gain amount to Rs.51,10,026/- and calculated tax amount to Rs.9,74,005/-, after interest, the demand stands amounting to Rs.27,48,810/-. Being aggrieved, the assessee filed appeal before the CIT(A). Ld.CIT(A) fully relied on the judicial precedents and upheld the assessment order. Being aggrieved, the assessee filed appeal before us.

4. The assessee is deceased person. The appeal is filed through the legal heir of the assessee, Mr. Abdul Samad Shaikh. During the proceedings, the Ld.AR of assessee has filed the additional ground which is taken into consideration for the adjudication.

5. The Ld.AR for assessee has filed a written submission which is kept in the record. The Ld.AR first argued that the property is in joint name with assessee and his wife, copy of purchase deed **APB pages 11-18** and the capital gain ought to have been assessed in hands of deceased assessee and his wife. The legal issue was taken in additional ground by the Ld.AR.

6. The Ld.DR argued vehemently and opposed the additional ground of the assessee as the ground is taken by the Ld. AR first time before the bench.

Abdul Nayab Shaikh (Deceased)/L/H Mr. Abdul Samad Shaikh

7. The Ld.AR in argument placed computation in relation to the joint ownership of the property and the exemption claimed under section 54F. The computation is annexed herewith:—

| | <i>"Total</i> | <i>50% share of</i> | <i>50% share</i> |
|---|-------------------------|-------------------------|-------------------------|
| | | <i>Assessee</i> | <i>Wife-joint owner</i> |
| <i>Sale proceedings Residential House being</i> | | | |
| <i>Flat No.4 situated at "SUNBEAM" CHS</i> | | | |
| <i>Bandra (West), Mumbai-400 050.</i> | | | |
| <i>Jointly owned by Late Mr. Abdul Nayab Shaikh</i> | | | |
| <i>& his wife Mrs. Gulbanu Nayabi Shaikh</i> | | | |
| <i>Sold as per Agreement dt. 26.10.2010</i> | <i>1,30,00,000</i> | <i>65,00,000</i> | <i>65,00,000</i> |
| <i>Less: Indexed Cost of the purchased as per</i> | | | |
| <i>Agreement dt.18.02.2000 jointly by</i> | | | |
| <i>Mrs. Gulbano Abdul Nayab Shaikh</i> | | | |
| <i>and late Mr. Abdul Nayab Shaikh</i> | | | |
| <i>Cost</i> | <i>18,00,000</i> | | |
| <i>Stamp Duty paid</i> | <i><u>1,02,750</u></i> | | |
| | <i><u>19,02,750</u></i> | | |
| <i>1) Indexed Cost</i> | | | |
| <i><u>1902750 x 711</u></i> | <i>= 34.80 lacs</i> | <i><u>34,80,000</u></i> | <i><u>17,40,000</u></i> |
| <i>389</i> | | | <i><u>17,40,000</u></i> |
| <i>Long Term Capital Gain</i> | <i>95,20,000</i> | <i>47,60,000</i> | <i>47,60,000</i> |
| <i>Less : Exemption u/s 54 of Income-tax Act 1961</i> | | | |
| <i>a) To Mr. Abdul Nayab for purchase of</i> | | | |
| <i>Residential flat NO.508-B</i> | | | |
| <i>Cost</i> | <i>46,00,000</i> | | |
| <i>Stamp Duty</i> | <i><u>2,12,600</u></i> | | |
| | <i><u>48,12,600</u></i> | <i>48,12,600</i> | <i>48,12,600</i> |
| <i>b) To MrsGulbano Abdul Nayab Shaikh</i> | | | |
| <i>For purchase of flat Nop.508-A</i> | | | |
| <i>Cost</i> | <i>49,00,000</i> | | |
| <i>Stamp Duty paid</i> | <i><u>2,27,600</u></i> | | |
| | <i>51,27,600</i> | <i>51,27,600</i> | <i>-</i> |
| | | | <i>51,27,600</i> |

Abdul Nayab Shaikh (Deceased)L/H Mr. Abdul Samad Shaikh

(Stamp duty paid is not
Considered as cost of flats
Purchased by A.O.)

| | | | |
|---|------------|---------|-----------|
| Long Term Capital Gain / (Loss) chargeable to tax | - 4,20,200 | -53,600 | -3,67,600 |
|---|------------|---------|-----------|

Note :

- 1] *The property sold, was jointly purchased by Assessee Late Abdul Nayab Shaikh and his wife Mrs. Gulbano Abdul Nayab Shaikh in February, 2000. [Copy of the purchase agreement available on record]. Said property was jointly sold in October, 2010 [Copy of the agreement available on record]*
- 2] *The Capital Gain as Sales of property was invested in purchase of new residential property as under:-*

| | | |
|-----|--|--------------|
| [a] | By Mr. Abdul Nayab Shaikh in Flat No.508-B | Rs.48,12,600 |
| [b] | By Mrs.Gulbano Abdul Nayab Shaikh in Flat No.508-A | Rs.51,27,600 |
- 3] *Therefore, both the joint owners are individually eligible to exemption U/s 54 of Income Tax Act, 1961."*

The Ld.AR argued and placed that the entire addition as made on the basis of the order of Hon'ble **High Court of Bombay** in the case of **Prakash vs ITO ITA No.15/2002 dated 12/09/2008**. The Ld.AR further mentioned that the claim of 54F is in assessee and his wife made by purchasing the new residential house and the entire amount was duly invested in the new property. The assessee and his wife both are the joint owners of the original property. So, both were also the owners of the new properties, i.e. flat No.508A and 509. In any case, the addition should be made in proper hands. In this connection, the Ld.AR relied on the order of the Hon'ble **Apex Court** in the case of **Income-tax Officer vs CH Atchaiah 218 ITR 239 (SC)**. The relevant observation of the Hon'ble Apex Court is as below:-

"This question has also been troubling the High Courts in the country. As a matter of fact, the Patna and Andhra Pradesh High Courts have taken different views. Be that as it may, we may mention that the Patna High Court in Mahendra

Kumar Agrawallay. ITO [1976] 103 ITR 688, the Punjab and Haryana High Court in Rodamal Lalchand v. CIT [1977] 109 ITR 7, the Andhra Pradesh High Court in Choudry's case [1986] 158 ITR 224 and the Delhi High Court in Punjab Cloth Stores v. CIT [1980] 121 ITR 604 have taken the view which we have taken. On the other hand, the Madras High Court in CIT v. Blue Mouniain Engineering Corporation [1978] 112 ITR 839 and the Patna High Court in its earlier decision in CIT v. Pure Nichitpur Colliery Co. [1975] 101 ITR 79 have taken the opposite view. The Andhra Pradesh High Court first expressed the other view, then in Choudry's case [1980] 158 ITR 224 (AP). it took the view which we have taken and then again in B'. R. Construction,s' case [1993] 202 ITR 222 (AP) [FB]. it has gone back to the other view and reiterated the view taken in the judgment under appeal. In Ramanlal Mudanal v. CIT (1979) 116 ITR 657 Sabyasachi Mukharji J., speaking for a Bench of the Calcutta High Court, recognised the distinction in the language employed in section of the 1922 Act and section 4 of the present Act, but that was a case of an unregistered firm where the Income-tax Officer had assessed the incomes in the hands of the partners individually. In such a situation, the learned judge held the Income-tax Officer cannot, at the same time, bring the unregistered firm to tax in respect of the very same income, Section 183 was also referred to in that connection."

8. The Ld.AR respectfully relied on the order of the Hon'ble **High Court of Bombay** in the case of **Nirmala L Mehta vs A Balasubramanyam, CIT & Ors 269 ITR 1**. The relevant paragraph is reproduced below:-

"The problem arose because the petitioner in her return for the assessment year 1988-89 filed on June 30, 1988, offered the prize money of the lottery to tax rather a fundamental error of law on the part of the assessee, but that error of law once detected by the petitioner, it was urged before the Commissioner of Income-tax that the prize money earned by the petitioner could not be taxed under the Income-tax Act, 1961. It is true that it was at a later stage that such contention was raised by the petitioner, but the said contention was a pure question of law and the Commissioner of Income-tax ought to have considered the said contention on its merits and ought not to have declined to entertain it on the ground of delay. There cannot be any estoppel against the statute, article 265 of the Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied or collected without authority of law.

The Constitution Bench of the Supreme Court in Amalgamated Coalfields Ltd. v. Janapada Sabha, AIR 1961 SC 964, held thus (page 965) :

"It may be stated at the outset that the tax now impugned has been imposed by the local authority from March 12, 1935, and that the first occasion when its validity was attacked was in only 1957, though if the petitioners are right in their submissions their acquiescence might not"

9. The Ld.AR vehemently argued and also invited our attention in the written submission which is placed, in **APB pages 110-118** filed before Ld.CIT(A) on dated 11-09-2023 during the appeal hearing. The relevant part of the submission is reproduced as below:-

"3.5.Mukkamala Srihari Rao Vs Assistant Commissioner of Income-tax (ITAT Ranchi) Appeal Number: ITA No. 196/Ran/19 Date of Judgement/Order : 01/08/2022 Related Assessment Year : 2015-16 - In the instant case the assessee has applied the sale consideration received from sale of capital asset towards purchase of residential flat in the name of his wife and son, the assessee is eligible to claim deduction u/s. 54F of the Act subject to fulfillment of all other conditions provided u/s. 54F of the Act. We, thus, reverse the finding of the Id. CIT(A) and allow ground raised by the assessee and direct the AO to allow the benefit of deduction u/s. 54F of the Act at Rs. 89,45,000/- for two flats purchased in the name of assessee's wife and son.

3.6. As held by the Karnataka High Court in the case of DIT v Mrs. Jennifer Bhide (2011) ITA 169/2011 (349 ITR 80), the entire Section 54 does not expressly provide that to claim the exemption under the said section the new property should be purchased or the construction of the property should be in the name of the taxpayer only. What the section requires is the reinvestment of the capital gain. Therefore, "if the assessee has reinvested the gain amount within the time allowed, that is a sufficient compliance of the law and he should be allowed the deduction.

3.7. Mumbai ITAT in the case of Jitendra V Faria v. Income-tax Officer, 18(2)(1), Mumbai [2017] 81 taxmann.com 16 upheld assessee's claim where he has claimed 54 exemption for a property purchased in the joint name with his brother. After confirming the facts, the ITAT provided the desired relief and observed that though the name of the assessee's brother was added in the

Agreement of new property so purchased, it was just for the sake of convenience only. In fact, "the entire investment for the purchase of new property along with stamp duty and registration charges were paid by the assessee and he is the real owner of the property. Therefore, under the facts and circumstances of the case." there is no justification for restricting the benefit to 50% of investment in the new house."

10. The Ld.DR vehemently argued and fully relied on the order of the Revenue Authorities. The Ld.DR invited our attention in assessment order paras 16– 17 and read before the Bench. The relevant paragraphs No. 16-17 are reproduced as below:-

"16. In the present case, the assessee has purchased three immovable properties, out of which only one property was purchased in assessee's name. Having observed above and in view of the undisputed position on the fact that the Assessee, admittedly, though sold the property owned by yet purchased the new property in the name of near relatives out of the sale proceeds in question, with clear intention to transfer the property to those 'relatives'. The Assessee, admittedly, had no domain and/or right whatsoever on the said properties purchased in the names of the near, relatives. This fact itself, therefore, disentitled him to claim any exemption as there were various non compliances of the conditions as per the scheme of Section 54 and 54F of the IT Act as mentioned above.

17. In view of the above mentioned specific and categorical judgment of the jurisdictional High Court, claim of the exemption under section 54 is restricted to one property purchased in the name of the Assessee. Assessee's contention and further claim made in the written submission is not accepted as the Assessee failed to divert capital gain received for the purpose of purchase of new property, in his own name, as envisaged in the scheme provided in section 54 of the I.T. Act. In view of the above detailed reasoning, claim of relief in terms of section 54 is restricted to the property purchased in the name of the Assessee."

11. The Ld.DR further invited our attention on paras 6.18 to 7 of the appeal order, which are as under: -

“6.1.8 From the readings of the judgments cited it is thus clear that in order to claim exemption u/s 54 the property should have been purchased in the name of the appellant. Therefore respectfully following the judgment of the Hon'ble Bombay High Court in the case of Prakash vs. ITO (ITA no. 15 of 2002) which is also strengthened by the judgment of the Hon'ble Punjab and Haryana Court in the case of CIT Faridabad vs. Dinesh Verma (ITA no. 381 of 2014), I find no reason in interfering with the order of the AO. The ground of appeal 1 is dismissed.

6.2 The appellant in his ground of appeal 2 has challenged the initiation of penalty u/s 271(1)(c) and also the charging of interest u/s 234. As the ground regarding the initiation of penalty is being offered on the same. Similarly as the charging of interest is consequential no comment is being offered on the same.

7. The appeal is dismissed.”

12. We heard the rival submissions and considered the documents available in the records. Both the parties agitated the issue related to the validity of claim of exemption under section 54F and the income in proper hands. The “original asset” was in ownership of assessee and his wife. Both are the eligible owners of the “original asset”. In an ordinary sense, property is something that a person exclusively owns and something peculiar to a person. Property is ownership of something, thus, giving an exclusive and unrestricted right. In the case of **McAlister v. Pritchard (1921), 287 Mo 494 date of order 09/04/1921** the Hon'ble **Supreme Court of Missouri, Division One**, held that the term ‘property’ is believed to be extended to every category of valuable rights and interests. Thus, anything that a person owns can be considered to be a person's property.

Here, the assessee and his wife both are the beneficial owners of property and the income levied from this property will be taxed in the individual hands of both the parties. We respectfully relied on the order of Hon'ble **Apex Court** in the case of **CIT vs Poddar Cements Pvt Ltd (2997) 226 ITR 625 (SC)**

"The question is who is the "owner" referred to in this Section? Is it the person in whom the property vests or is it he who is entitled to some beneficial interest in the property? It must be remembered that [Section 9](#) brings to tax the income from property and not the interest of a person in the property. A property cannot be owned by two persons, each one having independent and exclusive right over it. Hence, for the purpose of [Section 9](#), the owner must be that person who can exercise the rights of the owner, not on behalf of the owner but in his own right."

The learned Judge observed that "it is true that equitable considerations are irrelevant in interpreting tax laws. But, those laws, like all other laws, have to be interpreted reasonably and in consonance with justice". Again at page 577, it was held that "for determining the person liable to pay tax, the test laid down by the Court was to find out the person entitled to that income". Again at page 578 it was observed : "No one denies that an evacuee from Pakistan has a residual right in the property that he left in Pakistan. But the real question is, can that right be considered as ownership within the meaning of [Section 9](#) of the Act. As mentioned earlier that Section seeks to bring to tax income of the property in the hands of the owner. Hence, the focus of that Section is on the receipt of the income. The meaning that we give to the word "owner" in [Section 9](#) must not be such as to make that provision capable of being made an instrument of oppression. It must be in consonance with the principles underlying the Act."

In our opinion, the above observations of this Court clearly fixes the liability on a person who receives - or is entitled to receive the income from the property in his own right. In spite of this, the assessing officers of various circles instead of uniformly following the ratio laid down in this case have taken different diametrically opposite views depending upon the pronouncements of the concerned High Courts in the circles on the scope of [Section 22](#) of the Act. The High Courts of Allahabad, Punjab and Haryana, Rajasthan, Calcutta and Patna have taken the view by correctly understanding the ratio laid down in Jodha Mal's case and the High Courts of Bombay, Delhi and Andhra Pradesh have taken a different view wrongly distinguishing on facts in Jodha Mal's case."

Now the question will come in respect to the additional ground. The assessee claimed that the income should be in right persons's hands. Though the Ld.DR vehemently opposed acceptance of this additional ground. The Ld. DR in argument stated that the issue was never taken up before any of the Revenue authorities. But respectfully considering the order of Hon'ble **Apex Court** in the case of **National Thermal Power Corporation Ltd vs CIT 229 ITR 383 (SC)**, the additional ground is duly accepted & adjudicated in favour of the assessee.

Ld. AR relied on the order in the case of **Nirmala A Mehta vs A Balasubramanyam, CIT** (supra). So there is no question of estoppels in the statute. By selling of original asset, both the assessee and his wife gained the capital gain and the income will be distributed in both the hands, but not in assessee's hand alone. The Ld.Assessing Officer has taken a view that the assessee's wife has no existence in case of ownership right. But it was taken from the different judicial pronouncement and as per the Transfer of Property Act, both the assessee and his wife has equal right on the ownership. So tax will be computed in specific hands. Now question will come - whether exemption under section 54F will be applicable or not if the assessee has invested in new property with his son. If we look back quickly in section 54F, the criteria should be fulfilled with the time limits for purchasing new property, the assessee should invest through selling the original property and assessee should be the owner of new property. Considering the factual matrix, we see that the amount assessee invested Rs.46 lakhs from the bank account where the assessee received the sale consideration of "original asset". The assessee is also the owner of flat No.508B. Considering this, we respectfully rely on the order of **Jennifer Bhide** (supra) and

the order of co-ordinate bench of ITAT in the case of **Jitendra V Farea** (supra). So addition of son is not affecting the claim of deduction under section 54F of the Act. Considering the additional ground of the assessee, the income should be taken 50% of Rs.1,30,00,000/- which works out to Rs.65 lakhs on assessee's hand. The assessee will be eligible for indexation of the property and the claim of deduction under section 54F of the Act, Rs.46 lakhs and the stamp duty value, i.e. Rs.2,12,600/-. The total amount works out to Rs.48,12,600/-. The income of the assessee only should be restricted on assessee's income considering the order of Hon'ble Apex Court in case of **CH Atchiaiah** (supra). Accordingly, the additional ground of the assessee is allowed.

In our considered view, we set aside the appeal order and the addition of capital gain amount to Rs.51,10,026/- is quashed. Accordingly, the grounds of the assessee are allowed.

In the result, appeal of the assessee **ITA No.4012/Mum/2023** is allowed.

Order pronounced in the open court on 07th day of May, 2024.

Sd/-

(GAGAN GOYAL)
ACCOUNTANT MEMBER
Mumbai, दिनांक/Dated: 07/05/2024
Pavanan

sd/-

(ANIKESH BANERJEE)
JUDICIAL MEMBER

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकरआयुक्त CIT
4. विभागीयप्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
5. गार्डफाइल/Guard file.

BY ORDER,

//True Copy//

(Asstt. Registrar), ITAT, Mumbai