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**IN THE INCOME TAX APPELLATE TRIBUNAL  
"D" Bench, Mumbai**

**Before Shri D.Manmohan (VP) and Shri Rajendra Singh(AM)**

ITA No.6661/M/2009  
Assessment Year 2006-07

Mr. Rajesh Keshav Pillai  
101, Rustomji Buena Vista  
St. Alexis Road, Bandra (W)  
Mumbai 400 050.

ITO Ward 19(3)(2), Mumbai  
M.K.Road, Aayakar Bhavan  
Mumbai 400 020.

PAN : AEIPP3670B

Appellant


Respondent

Assessee by : Shri S.E. Dastur & H.S. Raheja

Revenue by : Shri R.N. Jha

**ORDER**

PER RAJENDRA SINGH (AM)



This appeal by the assessee is directed against the order dated 30.10.2009 for the assessment year 2006-07. Though the assessee has raised several grounds in the memorandum of appeal, effectively there is only one issue which relates to claim of exemption under section 54 in respect of income from sale of two flats.

2. Briefly stated the facts of the case are that the assessee owned two flats being the Flat No.41 and 51 in Shikha Building, Pali Hill, Bandra (West). Both the flats had been purchased on 5.1.2001. The flat No.41 was sold by the assessee on 16.6.2005 for a sum of Rs.1,01,00,000/- and the Flat No.51 had been sold on 29.4.2005 for a sum of Rs.97,79,500/-. The assessee had thus earned income on account of long term capital gain from sale of two flats in

A.Y.2006-07. The indexed gain in respect of flat No.41 was Rs.88,55,558/- whereas the indexed gain in respect of the flat no.51 was Rs.85,55,508/-. The assessee invested the gain on sale of flats in two different flats i.e. Flat in Sai Dham at Govind Patil Road for Rs.81,57,624/- and flat at Girnar 55, Pali Hill for a sum of Rs.95,71,364/-. The total investment in two flats was Rs.1,77,28,988/- which was more than the total index gain on sale of two flats of Rs.1,74,17,617/-. The assessee therefore claimed the entire capital gain as exempt under the provisions of section 54. The said provisions are reproduced below as ready reference.

*"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*



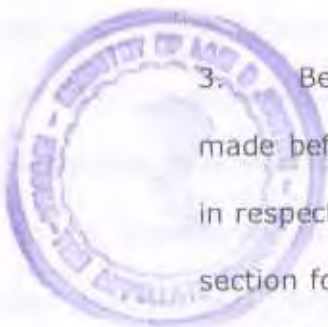
*for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be nil; or*

- (ii) *if the amount of the capital gain is equal to or less than the cost of the new asset, the capital gain shall not be charged under section 45; 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 reduced by the amount of the capital gain”.*

2.1 The AO observed that phrase used in section 54(1) was “capital gain arises from transfer of a long term capital gain” and that the use of the word ‘a’ showed that exemption was available only in respect of sale of one capital asset. Similarly the assessee could purchase or construct only one residential house as the phrase used in section 54(1) was a residential house. The AO referred to the decision of the special bench of the tribunal in case of ITO Vs Ms. Sushila M. Jhaveri (292 ITR (AT) 1) in which it was held that exemption under section 54 should be allowed only in respect of investment in one residential house. In the said case, it was pointed out, the tribunal had observed that wherever the legislature intended that investment could be made in more than one asset, the word used was ‘any’ as was the case in section 54B, 54D, 54E, 54EA and 54EB. For example, section 54E allowed exemption of capital gain if invested in any of the specified assets and therefore the word used was ‘any’ and not ‘a’. But in case of section 54 and 54F the word used was “a” and not “any” which shows that the legislature intended to allow expenditure only in respect of one residential house. The tribunal therefore



concluded that the investment has to be in only one residential house for getting exemption in respect of sale of an asset. The AO also observed that when a statutory provision was plain and unambiguous, literal interpretation has to be adopted. Reliance was placed on the judgment of Hon'ble Supreme Court in case of Polestar Electric Pvt.Ltd. (41 STC 409) and the judgment of Hon'ble Supreme Court in case of Prakash Nath Khanna (266 ITR 1) AO therefore held that the assessee was entitled to claim exemption under section 54 only in respect of sale of one flat and the corresponding investment in one flat. Exemption was thus allowed only in respect of indexed gain of Rs.88,55,558/- in respect of Flat No.41 with respect to the investment of Rs.95,71,364/- in Girnar flat. The investment being more than capital gain in respect of sale of flat No.41, the capital gain was exempted whereas the indexed gain of Rs.85,55,058/- in respect of Flat No.51 was held taxable. In appeal CIT(A) upheld the view taken by the AO aggrieved by which the assessee is in appeal before the Tribunal.



3. Before us the Learned AR for the assessee reiterated the submissions made before lower authorities that exemption under section 54 was allowable in respect of any number of flats sold as there was no restriction placed in the section for allowing exemption only in respect of sale of one flat. However he agreed that corresponding to each sale of flat there has to be investment in one residential property. It was pointed out that the decision of the special bench in case of ITO Vs Ms. Sushila M. Jhaveri (supra) was distinguishable as in that case the assessee had claimed exemption in relation to investment in two properties against the sale of one flat. In case of the assessee, the investments in two flats were corresponding to two different sale of flats. It was accordingly argued that the assessee should be allowed exemption fully as aggregate value



of investment in the two flats was more than the aggregate capital gain from sale of flats. Alternatively it was also submitted that in case exemption was considered in respect of each set of purchase and sale taking separately, then investment in Girnar flat should be considered against the gain in respect of flat No.41 which was fully exempt as the investment was more. As regards the sale of flat No.51 the indexed gain was Rs.85,55,058/- against which investment made was only Rs.81,57,624/- and therefore only a sum of Rs.3,97,434/- could be taxed.

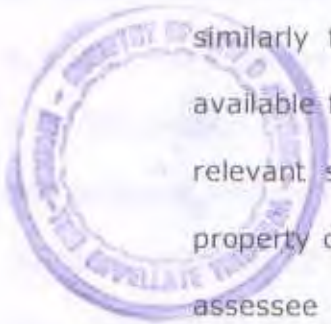
3.1 The Learned DR on the other hand strongly supported the orders of authorities below and placed reliance on the findings given in the respective orders.

4. We have perused the records and considered the rival contentions carefully. The dispute is regarding computation of exemption under section 54 which is available in case the long term capital gain arising from sale of a residential house is invested either by way of purchase and construction of a residential house within the prescribed period. In this case the assessee had sold two flats during the year being the flat No.41 and 51 in Shikha building, Pali Hill, Bandra (W) resulting into indexed gain of Rs.88,55,558/- and Rs.85,55,058/- respectively. The capital gain had been invested by the assessee in a flat at Sai Dham for Rs.81,57,624/- and a flat at Girnar for Rs.95,71,364/-. The case of the assessee is that exemption under section 54 is available in respect of sale of any number of flats with corresponding investment in a residential house whereas the view taken by the authorities below is that exemption can be allowed only in respect of sale of one residential property with corresponding investment in only one residential




house. There is no dispute either in the computation of capital gain or in respect of fulfillment of any other conditions prescribed in section 54 such as the investment being within the specified period etc.

4.1 A perusal of provisions of section 54(1) which has been reproduced at page 2 earlier shows that capital gain arising from transfer of a long term capital asset being a residential house the income of which is chargeable under the head "income from house property" is exempt if the capital gain is invested in a residential house in the manner prescribed in the said section. There is no restriction placed anywhere in the section 54 that exemption is available only in relation to sale of one residential house. Therefore in case the assessee has sold two residential houses, being long term assets, the capital gain arising from the second residential house is also capital gain arising from the transfer of a long term assets being a residential house. The provisions of section therefore will also be applicable to the sale of second residential house and similarly to a third residential house and so on. Whenever the exemption available is restricted to one asset, a suitable provision is incorporated in the relevant section itself. For instance section 23(2) exempts income from a property consisting of a house or a part of house which is in occupation of the assessee or which could not be occupied by the assessee because of his employment/ business/ profession being carried on at some other place. Based on such provisions contained in section 23(2), income from any number of properties being residential houses which are self occupied will have to be treated as exempt. But a restriction has been placed in section 23(4) which provides that where the property referred to in sub section (2) consists of more than one residential houses exemption would be available only in respect of one house and other self occupied residential houses will be treated as let out.



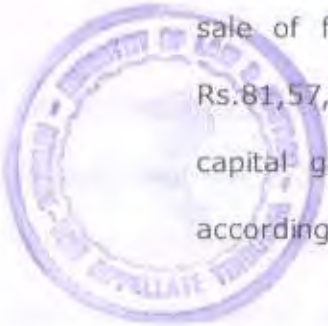


There is no such provision in section 54 to restrict the exemption of capital gain only to sale of one residential house. The authorities below have taken the view that whenever more than one option is given to the assessee the word used is "any". The reference has been made to the provisions of section 54E etc. We find from perusal of the said sections that the word "any" has been used because the assessee has option to invest in any of the assets mentioned therein. For instance, section 54E provides exemption in respect of capital gain arising from transfer of a long term capital asset if whole or any part of the net consideration is invested in any specified assets within six months from the date of transfer. Since the specified assets were more than one, the word "any" has been used because the exemption will be available if the investment is made in any of the specified assets. The situation in section 54 is different. Considering the language used in section 54(1), in our view exemption will be available in respect of transfer of any number of long term capital assets being residential houses if other conditions are fulfilled.



4.2 The revenue has placed reliance on the decision of special bench of the tribunal in case of ITO Vs. Sushila M. Jhaveri (supra) but the said case is distinguishable as in that case nowhere it was held that exemption will be available only in respect of sale of one residential house. In fact issue in that case was different. The issue was whether exemption was available in case the gain from sale of a house is invested in more than one residential houses. It was held by the special bench that exemption will be available only when the investment was made in only one residential house. We are in full agreement with the decision of the special bench that exemption in respect of sale of a residential house will be available only when there is corresponding investment in one residential house. But the exemption will be available in respect of sale

of any number of residential houses if there are corresponding investments in residential house and all other conditions are fulfilled. Thus in case there is sale of more than one residential house, the exemption will be available in relation to each set of sale and corresponding investment in the residential house. However we are unable to agree with the plea of the assessee that exemption has to be calculated considering the aggregate of capital gain and aggregate of investment in the residential houses. In case there are sales of more than one residential houses, in our view exemption has to be computed considering each set of sale of residential house and the corresponding investment in one residential house and the combination which is beneficial to the assessee has to be allowed. In this case the Learned AR has submitted that indexed gain of Rs.88,55,558/- in respect of sale of flat No.41 should be considered against the investment in flat at Girnar for Rs.95,71,364/- which is allowed and the investment being more entire indexed gain of Rs.88,55,558/- in respect of sale of flat No.41 will be exempt. The indexed gain of Rs.85,55,508/- in respect of sale of flat No.51 will have to be considered against the investment of Rs.81,57,624/- in the flat at Sai Dham. Since the investment is less than the capital gain difference of Rs.3,97,434/- will have to be taxed. We hold accordingly.



5. In the result appeal of the assessee is partly allowed in terms of the order above.
6. The order was pronounced in open court on 13.08.2010.

Sd/-  
( D. MANMOHAN )  
VICE PRESIDENT

Sd/-  
(RAJENDRA SINGH)  
ACCOUNTANT MEMBER

Date : 13.08.2010  
At : Mumbai

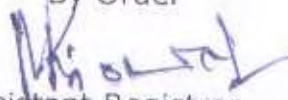


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1. ✓ The Appellant
2. The Respondent
3. The CIT(A), Mumbai concerned XIX
4. The CIT, Mumbai City concerned XIX
5. The DR "D" Bench, ITAT, Mumbai

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By Order

  
Assistant Registrar  
ITAT, Mumbai Benches, Mumbai

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**IN THE INCOME TAX APPELLATE TRIBUNAL  
“H” Bench, Mumbai**

**Before Shri Rajendra Singh(AM) and Shri V.D.Rao, (JM)**

ITA No.1239/M/2010  
Assessment Year 2006-07

Shri Humayun S.Rangila  
1003, 10<sup>th</sup> Floor, B Wing,  
Silver Arch, Oshiwara,  
Andheri (W), Mumbai 400 053.

The ITO 19(3)(2),  
Piramal Chambers,  
Mumbai

PAN : AACPR 2481 E

Appellant

Respondent

Assessee by : Shri Keshav Bhujale  
Revenue by : Shri Shravan Kumar

O R D E R

PER RAJENDRA SINGH (AM)

This appeal by the assessee is directed against the order dated 30.11.2009 of CIT(A) for the assessment year 2006-07. The only dispute raised by the assessee is regarding disallowance of claim under section 54 of the income-tax Act 1961.

2. Briefly stated the facts of the case are that the assessee during the year had sold three residential flats as per details given below :

- 1) Flat No. 25/501, MHADA, Oshiwara, Andheri, Mumbai
- 2) Flat No.302, Saqib Apartment, 24, Turner Road, Bandra (W), Mumbai
- 3) Flat No.303, Blue Bird, Sherly Rajan Road, Bandra (W), Mumbai



2.1 The capital gain arising from the sale of above three flats after considering the indexed cost of acquisition were Rs.8,92,781/-, Rs.36,08,400/- and Rs.4,70,194/- respectively. The total capital gain was Rs.49,71,375/-. The assessee invested the capital gain in purchase of three residential flats in the same building known as Silver Arc, Andheri (W), Mumbai being the flat Nos.1003, 1101 and 1201. The assessee claimed that flats No.1101 and 1201 were adjacent to each other and had been converted into one house for the purpose of residence. AO accepted the claim and treated the flat No.1101 and 1201 as one flat. The assessee took the view that exemption under section 54 in respect of capital gain was available to any flat sold and the corresponding investment in a residential flat. Therefore as per the assessee the capital gain arising in respect of all the three flats was exempt as the assessee had invested money in the three residential flats which was more than the capital gain earned. Relevant provisions of section 54 are reproduced below as a ready reference.

*"[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, -*

3. AO however observed that the phrase used in section 54 was "a long term capital asset" and not "any long term capital asset" and therefore the provisions of section 54 were applicable only in respect of sale of one residential flat. The AO also held that corresponding investment has also to be only in one flat and not more than one flat. Reliance was placed on the decision of the Special Bench of the tribunal in case of ITO Vs Miss Sushila M. Jhaveri (292 ITR (AT) 1) in which it was held that capital gain arising from sale of residential flat had to be invested only in one residential house for exemption under section 54. AO therefore allowed exemption only in respect of sale of one flat and the corresponding investment in one flat. Since the maximum capital gain had arisen from sale of flat No.302 amounting to Rs.36,08,400/- the AO allowed exemption in respect of flat No.302 and the corresponding investments in the flat No.1101 and 1201 which were treated by him as one residential unit. The total investment in the flats No.1101 and 1201 was Rs.42,12,500/- which was more than the capital gain earned in respect of flat No.302. AO therefore exempted the entire capital gain of Rs.36,08,400/-. The capital gain arising from Flat No.302 Blue Bird (Rs.4,70,194) and from the flat at MHADA (8,92,781) aggregating Rs.13,62,975/-was not considered by the AO for exemption and thus added to the total income. In appeal CIT(A) upheld the view taken by the AO and confirmed the addition made aggrieved by which the assessee is in appeal before the tribunal.



4. Before us the Learned AR for the assessee argued that under the provisions of section 54 capital gain exemption was available in respect of gain arising from transfer of a long term asset and therefore the provision will apply to transfer of any long term capital asset being a residential house. There was no restriction in the section that it will apply only to transfer of one residential house. He also referred to the circular F.No.207/24/76-IT(ii) dated 25.3.97 of CBDT in which it was clarified that if the assessee had retained more than one house for the purpose of his own or parents' own residence and not for any other purpose the capital gain arising on transfer of each such house would qualify for exemption under section 54 of the Income-tax Act if other conditions were fulfilled. As regards the decision of special bench of tribunal in case of ITO vs Miss Sushila M. Jhaveri (supra), was concerned, it was pointed out that the same was relevant for the proposition that capital gain arising from transfer of one residential house could not be invested in more than one residential house because the phrase used in section 54 was "purchased or constructed a residential house". However, there was no bar for investment of capital gain arising from transfer of two residential houses into one residential house. He placed reliance on the decision of the tribunal in case of Ravindra K. Mariwala Vs JCIT (86 ITR 35) in support of the said proposition. In the said case the assessee had earned long term capital gain in A.Y.1997-98 and had purchased a new house within a period of one year in the assessment year 1996-97. The investment in purchase of house was more than the capital gain earned. The entire capital gain was therefore exempt under section 54. The assessee had also long term capital gain from sale of a long term asset not being a residential house. Therefore under the provisions of section 54F the capital gain was exempt if the gain was invested in purchase of a residential house within a period of one year before or two years after the date in which the transfer took

place or in consideration of a residential house within a period of three years after that date. Since in this case the assessee had already purchased a residential house in assessment year 1996-97 within a period of one year it was held that the assessee was entitled to exemption under section 54F in respect of the balance investment in residential house which was not exhausted by section 54. Following the same analogy the Learned AR argued that exemption under section 54 can be allowed if capital gain arising from more than two residential houses is invested in one residential house.

5. The Learned DR on the other hand supported the orders of authorities below and placed reliance on the findings given in their orders.

6. We have perused the records and considered the rival contentions carefully. The dispute is regarding exemption of capital gain under section 54 arising from sale of more than one residential house. There is no dispute that the assessee owned three residential houses and all of them had been used for residential purposes. The sale consideration had been invested by the assessee in purchase of three residential flats two of which i.e flat No.1101 and 1201 had been treated as one residential unit which had also been accepted by the AO involving total cost of Rs. 42,12,500/-. The investment in third residential flat was Rs.14,96,744/-. The AO had treated the long term capital gain of Rs.36,08,400/- arising from sale of one flat i.e. the flat No.302 Saqib Apartment as fully exempt as corresponding investment in flat No.1101 and 1201 treated as one unit was more than the capital gain i.e. Rs.42,12,500/-. The issue is whether the capital gain of Rs.4,70,194/- and Rs.8,92,781/- arising from sale of other two residential houses could be exempted against the investment in one flat of Rs.14,96,744/-.



6.1 The first issue is whether the provisions of section 54 can be applied to capital gain arising from sale of more than one residential house. In our view the section 54 exempts capital gain arising from sale of a long term capital asset being a residential house and therefore it will apply to sale of any residential house provided other conditions are fulfilled. This position has also been clarified by CBDT vide circular F.No.207/24/76 IT(ii) dated 25.3.97 in which it has been clearly mentioned that capital gain arising on transfer of each house will qualify for exemption in case the assessee had sold more than one residential houses. The other issue is whether capital gain arising from sale of two flats can be exempted under section 54 if the gains are invested in one residential house. In our view this issue is also to be answered in favour of the assessee because the requirement of section 54 is that the capital gain arising from transfer of a residential house should be invested in a residential house. The requirement is that the investment should be in one residential house. There is no bar on investing the capital gain arising from sale of more one residential house in one residential house. Therefore in our view, the capital gains arising from sale of more than one residential house will be eligible for exemption under section 54 if gains from both the houses are invested in the same residential house. This view is also supported by the decision of tribunal in case of Rabindra K.Merchant Vs JCIT (supra) in which case exemption under section 54 and 54F both were found allowable in respect of investment in the same residential house. We therefore set aside the order of CIT(A) and allow the appeal of the assessee.

7. In the result appeal of the assessee is allowed.

8. The decision was pronounced in the open court on 23.02.2011.

Sd/-  
( V.D. RAO )  
JUDICIAL MEMBER

Sd/-  
(RAJENDRA SINGH)  
ACCOUNTANT MEMBER

Date : 23.02.2011

At :Mumbai

Copy to :

1. The Appellant
2. The Respondent
3. The CIT(A), Mumbai concerned
4. The CIT, Mumbai City concerned
5. The DR "H" Bench, ITAT, Mumbai

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By Order

Assistant Registrar  
ITAT, Mumbai Benches, Mumbai

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