IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G" MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
MS. KAVITHA RAJAGOPAL (JUDICIAL MEMBER)

ITA No. 545/MUM/2023
Assessment Year: 2016-17

Zainul Abedin Ghaswala, At 142/148, Ghaswala Estate S.V. Road, Jogeshwari (West), Mumbai-400102. **PAN No. AFNPG 7463 D** **Appellant**	***Vs.***	CIT(A), NFAC, PratyakshakarBhavan, C-13, Bandra Kurla Complex, Bandra East, Mumbai-400051. **Respondent**

Assessee by	**:**	Mr. Sunil M. Makhija– Advocate
Revenue by	**:**	Mr. A.N. Bhalekar, DR
Date of Hearing	**:**	04/05/2023
Date of pronouncement	**:**	22/05/2023

ORDER

PER OM PRAKASH KANT, AM

This appeal by the assessee has been preferred against order dated 10.01.2023 passed by the Ld. Commissioner of Income-tax (Appeals) – National Faceless Appeal Centre, Delhi [in short 'the Ld. CIT(A)'] for assessment year 2016-17, raising following grounds:

> *1. The Ld. AO has erred in disallowing exemption claimed u/s 54F of the I.T. Act amounting to Rs. 2,60,00,000/- without appreciating the facts of the case as well law.*

2. The Ld. CIT (A) has erred in not appreciating the fact that appellant was owner of one residential house only, and was not at all the co-owner of the other flats as has been alleged/ misinterpreted by the Ld. Assessing officer and Hon'ble CIT (A)

3. The Ld. CIT (A) has erred in observing that the appellant had failed to produce any documents / agreement so as to establish that he had purchased/ acquired only one flat, without appreciating the fact that since the property i.e. residential house owned by appellant (having inherited from his late father being self constructed there could not be any agreement.

4. The Ld. CIT (A) has erred in not considering/following the judicial pronouncements relied upon by the appellant including that of jurisdictional benches of Hon'ble ITAT without appreciating that the same were binding upon him.

5. The Ld. CIT (A) has erred in observing and also in relying upon the decision in the case of

M.J. Siwani W CIT (53 taxmann.com 318) considering the same to be the pronouncement of Hon'ble Apex Court, without appreciating that the same was merely dismissal of SLP filed against the decision of Hon'ble Karnataka High Court which does not attracts the doctrine of merger so as to stand substituted in place of order put in before it, nor would it be a declaration of law by the Supreme Court under Article 141 of the constitution, thereby misleading the facts of the case of M.J. Siwani vs CIT (Supra)

6. The Ld. CIT (A) has seriously erred in not following the various decisions relied upon by the appellant without discussing a single word in respect of the same &/or distinguishing the same.

7. The appellant craves leave to add, amend, alter and or vary any of the grounds at the time or before the hearing of this appeal.

8. The appellant therefore prays that the addition/ disallowance made by the Ld. assessing officer & upheld

by Hon'ble CIT (A) not being in accordance with the provisions of law deserves to be & may please be deleted.

2. Briefly stated, facts of the case are that the assessee is an individual and filed return of income for the year under consideration on 23.03.2017 declaring total income of Rs.11,84,37,909/-. The return of income filed by the assessee was selected for scrutiny and statutory notices under the Income-tax Act, 1961 (in short 'the Act') were issued and complied with. In the assessment completed u/s 143(3) of the Act on 31.12.2018, the Ld. Assessing Officer disallowed the claim of the assessee for deduction u/s 54F of the Act against the capital gain on transfer of long term capital asset, on the ground that the assessee owned interest in more than one residential properties and therefore, he was not entitled for deduction u/s 54F of the Act. The Ld. Assessing Officer relied on the decision of the **Hon'ble Karnataka High Court in the case of M.J. Siwani v. Commissioner of Income-tax [2015] 53 taxmann.com 318.** On further appeal, the Ld. CIT(A) upheld the finding of the Assessing Officer.

3. Aggrieved, the assessee is in appeal before the Tribunal by way of raising grounds as reproduced above.

4. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The issue in dispute before us is whether the co-ownership of the assessee in more than one residential properties could make assessee liable for

non-eligibility of deduction u/s 54F of the Act. The fact of the case as culled out from orders of lower authorities and submissions of the assessee are that the assessee's father late Shri Iqbal Ghaswala along with other five family members had inherited land being 142/148, Ghaswala Estate Jogeshwari (west), on which land, all the six members constructed 6 flats (i.e. one flat each on their own as per their requirements which were occupied by each owner namely Shri Mohd. Ali Suleman Ghaswalla (flat no. 201), Shri Sikander Suleman Ghaswalla (flat no. 202), Shri Abdul Rahim Ghaswalla (flat no. 301), Shri Munaf& Moinuddin Anwar Ghaswalla (legal heirs of late shri Anwar Ghaswalla) (flat no. 302), Shri Ilyas &ZainulGhaswalla (legal heirs of late Shri Iqbal Ghaswalla) (flat no. 401) and Shri Abdul Suttar Suleman Ghaswala (flat no. 402). According to assessee, all the members are owing/occupying one flat each for which they have been paying electricity bills. The assessee claimed to have filed those electricity bills before the Assessing officer coupled with confirmation letters from the owners of the other flats to the effect that none of them had any right/or interest of whatsoever nature in each other's flats. However, the Assessing Officer disregarded the submission of the assessee and held that since the assessee owned six residential house properties though jointly , therefore the conditions mentioned in section 54F of the Act are not fulfilled in this case hence, the assessee is not eligible for exemption u/s 54F of the Act. The Ld. Assessing Officer relied on the decision of the Hon'ble Karnataka High Court in the

case of M.J. Siwani (supra). The relevant facts of the case and the finding reproduced by the Assessing Officer is extracted as under:

> *"Further, the above issue is already a settled law in view of decision of Hon'ble Supreme Court of India in the case of M.J. Siwani vs. Commissioner of Income-tax [2015] 53 taxmann.com 318 wherein upholding the order of Hon'ble Karnataka High Court, Hon'ble Supreme Court of India held that:*
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> *"Where assessee on date of sale of long-term capital asset owns more than one residential house even jointly with another person, benefit under section*
>
> *54F in*
>
> *respect of capital gain arising from sale of asset was to be rejected. "*
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> *Facts of case M.J. Siwani vs. Commissioner of Income-tax (2015) were as under:*
>
> *1. During relevant assessment year, assessees sold their undivided interest in land. The assessee claimed deduction under sections 54 and 54F in respect of long-term capital gain arising from sale of land.*
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> *2 The revenue authorities finding that assessee had sold undivided share in land and not land plus residential house/apartments rejected assessee's claim for deduction under section 54.*
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> *3. As regards deduction under section 54F, revenue authorities having found that assessees were having two residential houses having one half share each therein on date of sale of land, rejected assessee's claim.*
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> *4. The Tribunal, however, allowed assessee's claim for deduction under section 54F*
>
> *holding that 'a residential house, on date of sale of long term asset as mentioned in said section meant complete*

residential house and would not include shared interest in residential house.

On revenue's appeal to Hon'ble Karnataka High Court it was held as under:

*"Section 54F provides that if the assessee has a residential house he cannot seek the benefit of long term capital gain. Under this provision, merely because, the words residential house are preceded by article 'a' would not exclude a house shared with any other person. Even if the residential house is shared by an assessee, his right and ownership in the house, to whatever extent, is exclusive and nobody can take away his right in the house without due process of law. In other words, co-owner is the owner of a house in which he has share and that his right, title and interest is exclusive to the extent of his share and that he is the owner of the entire undivided house till it is partitioned. The andlogy applied by the Tribunal based on the judgment of the Supreme Court in Banarsi Dass Gupta (supra), wherein, the Supreme Court considered the provisions contained in section 32 of the Act, would not apply to the faces of the present case. The right of a person, may be one half, in theresidential house cannot be taken away without due process of law or it continues till there is a partition of such residential house. Thus, the view expressed by the Tribunal on this issue cannot be accepted. Thus, the order passed by revenue authorities rejecting assessee's claim was to be restored. (Para 26]**

Thus, High Court held that in terms of provisions of section 54F, where assessee on date of sale of long term capital asset owns a residential house even jointly with another person, his claim for deduction of capital gain arising from sale of asset has to be rejected."

5. Before us, the Ld. Counsel of the assessee has relied on the following three decisions of the Tribunal, Mumbai Benchesto support that even if the assessee co-owner is more than one house, since the fractional ownership in a property does not amounts to

violating the conditions laid down u/s 54 of the Act, the assessee is entitled for deduction u/s 54 of the Act. :

1. **Ashok G Chauhan V/s ACIT (TAT Mumbai A Bench) ITA No 1309/Mum/2016**
2. **DCIT V/s Shri Dawood Abdulhussain Gandhi (ITAT "F' Bench Mumbai ITA No 3788/Mum/2016**
3. **Income Tax Officer V/s Rasiklal N Satra [TAT «A» Bench Mumbai (98 ITD 0335**

5.1 Further, the assessee also relied on the decision of the Hon'ble Madras High Court in the case of **Dr. P.K. Vasanthi Rangarajan v. CIT (2012) 252 CTR 0336.** The relevant finding of the Hon'ble Madras High Court is reproduced as under:

> *12. A reading of the provisions contained in Section 54F(1), as it stood at the relevant point of time, shows that exemption from payment of tax on the capital gains arising on the transfer of any long-term capital asset not being a residential house is available to an assessee being a Hindu Undivided Family or an individual, if the long-term capital gain is invested in purchasing a residential house or constructing the residential house within the time stipulated therein. Proviso to sub section (1) states that the exemption contemplated under sub section (1) would not be available where an assessee owns a residential house as on the date of the transfer and that the income from the residential house is chargeable under the head "income from house property". The Finance Act, 2001 amended the proviso with effect from 2001-02 to permit exemption under Section 54F, even if the asessee has owned one residential house as on the date of transfer, other than the new asset, or purchase in investments any residential house other than the new asset within a period of one year or three years as the case may be, but after the date of transfer of the original asset and the income from such*

residential house other than the one owned on the date of transfer of the original asset is chargeable under the head "income from house property".

13. As far as the present case is concerned, contrary to the contention of the assessee, the assessee as well as her husband had offered 50% share each in the clinic in the income tax assessment and had claimed depreciation thereon. So too 50% share in the property in the wealth tax proceedings is offered by the assessee and her husband. The note submitted to the Assistant Commissioner of Income Tax, City Circle 5(1), Madras, by the assessee discloses that the assessee owned 50% of the property in 828, Poonamallee High Road, Chennai, for use as residential property and 50% as clinic; so too for the property at Door No.828A, Poonamallee High Road, Chennai. The facts thus reveal that as joint owners of the property, the assessee and her husband had shown 50% share with reference to the clinic and the residential portion in their respective returns. Thus, it is clear that as on the date of the transfer, the assessee did not own a residential house in her name only, the income from which was chargeable under the head "income from house property", to bring into operation, the proviso to Section 54F. The rejection of the claim for exemption would arise if only the property stands in the name of the assessee, namely, individual or HUF. Given the fact that the assessee had not owned the property in her name only to the exclusion of anybody else including the husband, but in joint name with her husband, we agree with the submission of the learned senior counsel appearing for the assessee herein that unless and until there are materials to show that the assessee is the exclusive owner of the residential property, the harshness of the proviso cannot be applied to the facts herein. Apart from that, 50% ownership is with reference to the clinic situated in the ground floor. As such, the entire property is not an exclusive residential property. Hence, we are inclined to agree with the assessee's contention that the joint ownership of the property would not stand in the way of claiming exemption under Section 54F.

5.2 Before us, the Ld. Counsel of the assessee submitted that where there are different views of non-jurisdictional High Court , then one favourable to the assessee has to be followed. The Ld. Counsel of the assessee relied on the decision of the Hon'ble Supreme Court in the case of **CIT v. Vegetable Products Ltd. 88 ITR 0192.** Further, the Tribunal in the case of **ITO v. Upkar Retail Pvt. Ltd. ITAT 'B' Bench Ahmedabad ITA No. 2237/Ahd/2014** relying on the decision of the Hon'ble Supreme Court in the case of CIT v. Vegetable Products Ltd. (supra), which was followed by the Tribunal in the case of Tej International Pvt. Ltd. v. DCIT [(2000) 69 TTJ 650 (Del)], held that in case of conflict in the decision of the non-jurisdictional High Court, the view which is favourable to the assessee should be followed. The relevant finding of the Tribunal(supra) is reproduced as under:

> *"4. As to what should be the view to be taken in these circumstances, i.e. when there are conflicting decisions of Hon'ble Courts above and when we donot have the benefit of the guidance by Hon'ble jurisdictional High Court, we find guidance from the decision of a co-ordinate bench in the case of Tej International Pvt Ltd Vs DCIT [(2000) 69 TTJ 650 (Del)] wherein the coordinate bench has, inter alia, observed as follows:-*
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> > *6. We have considered the rival submissions and perused the records. It is not in dispute that two High Courts, namely, Gauhati High Court and Karnataka High Court, have expressed conflicting views regarding levy of interest under sections 234B and 234C on deemed income under section 115J. Hon'ble Gauhati High Court has opined that when legal fiction is to be created for an obvious purpose, full effect to it should be given. Quoting Lord Asquith who said, "the statute*

says that you must imagine a certain state of affairs, it does not say that having done so, you must cause or permit your imagination to boggle when it comes to inevitable corollaries of that state of affairs", Hon'ble Gauhati High Court has held that there is no statutory exception excluding the operations of section 115J of the Act. Hon'ble Karnataka High Court, on the other hand, has held that the words 'for the purposes of this section' in Explanation to section 115J(1A) are relevant and cannot be construed to extend beyond the computation of liability to tax. In the opinion of the Hon'ble Karnataka High Court, when a deeming fiction is brought under the statute, it is to be carried to its logical conclusions but without creating further deeming fiction so as to include other provisions of the Act which are not made specifically applicable. It is thus evident that views of these two High Courts are in direct conflict with each other. Clearly, therefore, there is no meeting ground between these two judgments and we are also usable to accept the suggestion that we can follow earlier decisions of this Tribunal, or such views, whichever seem more reasonable of one of these High Courts.

7. It may be mentioned that some Benches of the Tribunal have either taken independent view on the issue in this appeal or have later on followed Hon'ble Gauhati High Court, referred to above. However, with the latest judgment of Hon'ble Karnataka High Court in Kwality Biscuits Ltd.'s case (supra) the situation is materially different. In the hierarchical judicial system that we have, better wisdom of the Court below has to yield to higher wisdom of the Court above and, therefore, one a authority higher than this Tribunal has expressed an opinion on that issue, we are no longer at liberty to rely upon earlier decisions of this Tribunal even if we were a party to them. Such a High Court being a non- jurisdictional High Court does not alter the position as laid down by Hon'ble Bombay High Court in the matter of CIT v. Godavari Devi Saraf [1978] 113 ITR 589 (Bom.). Therefore, we do not consider it permissible to rely upon the earlier decisions of this Tribunal even if one of them is by a

Special Bench. It will be wholly inappropriate to choose views of one of the High Courts based on our perceptions about reasonableness of the respective viewpoints as such an exercise will de facto amount to sitting in judgment over the views of the High Courts something diametrically opposed to the very basic principles of hierarchical judicial system. We have to, with our highest respect of both the Hon'ble High Courts, adopt an objective criterion for deciding as to which of the Hon'ble High Court should be followed by us.

8. We find guidance from the judgment of Hon'ble Supreme Court in the matter of CIT v. Vegetable Products Ltd. [1973] CTR (SC) 177 : [1972] 88 ITR 192 (SC) Hon'ble Supreme Court has laid down a principle that "if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted. This principle has been consistently followed by the various authorities as also by the Hon'ble Supreme Court itself. In another Supreme Court judgment, Petron Engg. Construction (P.) Ltd. &Anr. v. CBDT &Ors. [1988] 75 CTR (SC) 20 : [1989] 175 ITR 523 (SC), it has been reiterated ITA No.2237/Ahd/2014 Assessment Year: 2011-12 that the above principle of law is well established and there is no adopt about that. Hon'ble Supreme Court had, however, some occasion to deviate from this general principle of interpretation of taking statute which can be construed as exception to this general rule. It has been held that the rule of resolving ambiguities in favour of tax payer does not apply to deductions, exemptions and exceptions which are allowable only when plainly authorised. This exception, laid down in Littman v. Barron 1952 (2) AIR 393 and followed by apex Court in Mangalore Chemicals & Fertilizers Ltd. v. Dy. Commr. of CCT [1992] Suppl. (1) SCC 21 and Novopa India Ltd. v. CCE & C 1994 (73) ELT 769 (SC), has been summed up in the words of Lord Lohen, "in case of ambiguity, a taxing statute should be construed in favour of a tax-payer does not apply to a provision giving tax-payer relied in certain cases from a section clearly imposing liability". This exception, in

> *the present case, has no application. The rule of resolving ambiguity in favour of the assessee does not also apply where the interpretation in favour of assessee will have to treat the provisions unconstitutional, as held in the matter of State of M.P. v. Dadabhoy's New ChirmiryPonri Hill Colliery Co. Ltd. AIR 1972 (SC) 614. Therefore, what follows is that in the peculiar circumstances of the case and looking to the nature of the provisions with which we are presently concerned, the view expressed by the Hon'ble Karnataka High Court in the case of Kwality Biscuits Ltd. case (supra), which is in favour of assessee, deserves to be followed by us. We, therefore, order the deletion of interest under sections 234B and 234C in this case.*
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> *5. In view of the above discussion, quite clearly, even when the decision of Hon'ble non-jurisdictional High Courts are in conflict with each other, the only objective criteria which followed by us is to take a view favourable to the assessee. Hon'ble Calcutta High Court's decision in the case of Asian Financial Services Ltd (supra), therefore, is required to be followed by us. Respectfully following the same, we uphold the conclusions arrived at by the learned CIT(A) and reject the grounds raised by the Revenue."*

5.3 In view of the binding precedents referred above, we find that decision of the Hon'ble Madras High Court is in favour of the assessee and not a single decision of the Jurisdictional High Court , which isadverse to the assessee, has been referred by the Ld. DR and therefore decision of the Madras High Court being favourable to the assessee, the claim of deduction u/s 54F of the Act need to allowed, as there is no material to show that assessee is exclusively owner of the other five residential properties/flats which are occupied by the other family members. The grounds of appeal of the assessee are accordingly allowed.

6. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on 22/05/2023.

Sd/-	**Sd/-**
(KAVITHA RAJAGOPAL)	**(OM PRAKASH KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai;
Dated: 22/05/2023
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai