

S.K. Luthra Vs. Ito

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Aug-30-2006

Judge : O Narayanan, R Yadav

Appellant : S.K. Luthra

Respondent : ito

Judgement :

1. This appeal is filed by the assessee. The relevant assessment year is 1994-95. The appeal is directed against the order of the Commissioner (Appeals)-XXI at Mumbai dated 30-3-2006 and arises out of the assessment completed under Section 143(3) read with Section 254 of the Income Tax Act, 1961.

2. The assessee in this case had owned premises in a building "Readymoney Terrace" at Worli. The said property was sold by the assessee during the previous year relevant to the assessment year under appeal to two parties, viz., Rakshat Investment Pvt. Ltd. and Rangoon Investment Ltd. and M/s. Hindustan Construction Co. Ltd. The sale resulted in capital gains. The assessee claimed before the assessing officer that he was not exigible to capital gain tax as the consideration has been used for purchasing a flat and, therefore, he is entitled for the exemption under Section. 54F. On enquiries the assessing officer found that the assessee had purchased the said flat, in Sheetal Building at Vile Parle for the purpose of conducting coaching classes. Thereafter the premises were let out to M/s. Aptech Ltd. Therefore, the assessing officer held that the premises acquired by the assessee could not be held as property used for residential purposes. He

accordingly denied the claim of deduction under Section 54F.3. In first appeal, the Commissioner (Appeals) held that the property purchased by the assessee was residential in nature. Therefore, he directed the assessing officer to give the relief under Section 54F.4. The above order of the Commissioner (Appeals) was taken in second appeal before ITAT, Mumbai Bench "C". The Tribunal heard the matter and disposed of the appeal through their order dated 17-9-2003 in ITA No.2345 /Mum./1998. As far as this issue is concerned, the Tribunal held as follows: "1 We have carefully considered the rival submissions. It appears that the premises were capable of being put to residential use as well as commercial use. In these circumstances what is material is the purpose and the manner in which the same was utilized by the assessee. There is considerable evidence to suggest that the assessee intended to use the premises commercially. He would not have taken the trouble of addressing a letter to the society on 15-7-1993 to obtain the no objection certificate for commercial use of the premises even before the purchase of the property on 4-8-1993. Therefore, the commercial use was very much on cards.

However, a letter from the society has been produced by the assessee that the assessee resided in the premises for about a year and only after that he started using the premises for conducting coaching and computer classes. The veracity of this certificate is therefore, of considerable importance. This certificate was not furnished before the assessing officer. Merely because the learned assessing officer was present does not fulfil the requirements in this respect. The fact of the matter is that the learned Commissioner (Appeals) did not himself examine the signatory of this letter from the society nor did he ask the assessing officer to do so. The letter from the society has been believed without inquiry. The assessing officer was not given an opportunity to do the same. We, therefore, consider it necessary to restore this case to the file of assessing officer for decision afresh after examining the records of the society and if possible the signatory of the letter dated 1-12-1997. He should allow the assessee reasonable opportunity of being heard in the matter and carry such further inquiry as may be necessary. He may thereafter pass a fresh order on this point in accordance with law." 5. The matter again came before the assessing officer in second innings. As directed by the Tribunal, the assessing officer put the matter for trial and sought to examine the

functionaries of the Co-operative Housing Society in which the assessee had purchased the residential flat. One Shri Suresh Ajmera, Chairman of the Co-operative Housing Society stated before the assessing officer that neither the assessee nor any of his family members ever stayed in the residential flat purchased by the assessee. Statement was also recorded from one Shri Jayakant Manilal Parekh ' residing in Sheetal Building Shri Parekh stated that a post office was functioning before the flat was purchased by Shri S.K. Luthra. He also stated that the assessee, Shri S.K. Luthra and his family never stayed in the flat. The assessing officer thereafter asked for the accounts of the Society to which the Secretary of the Society replied that all the files and correspondence kept in the office have been sidelined from the Society Office and he would not be able to produce the same before the assessing officer. In the light of the above circumstances the assessing officer came to the conclusion that the assessee never stayed in the said building. The assessing officer also examined the veracity of the certificate produced by the assessee before the Commissioner (Appeals) at the first round of proceedings. The assessee was asked to explain as to who signed the letter. In his reply, the assessee explained that the letter was signed by Shri Dinesh, Avlani on the letter head of the Society and also bore the stamp of the Society. When contacted, Shri Avlani stated before the assessing officer that he was never Secretary of the Society and he never issued any such letter or certificate. In the light of the above submission, the assessee was confronted. The assessee asked for cross-examining Shri Navin Avlani and his son Shri Dinesh Avlani. But in spite of notices, Avlanis did not appear. They could not be cross-examined. At that stage, the assessing officer concluded the proceedings and held that the assessee was not entitled for the benefit of deduction under Section 54F. The matter was taken in first appeal wherein the Commissioner (Appeals) confirmed the order of the assessing officer. That is why the assessee has come in second appeal before us.

"1. The learned Commissioner (Appeals) has, in view of the facts and circumstances of the case, erred in confirming the action of the assessing officer in not granting exemption under Section 54F of the Income Tax Act in respect of the amount invested by the appellant in acquiring a residential house.

2. During the course of the hearing of the appeal arising out of the original assessment the Hon'ble Tribunal noticed that a letter dated 1-12-1997 issued by the Emmanuel Co-operative Housing Society Ltd. relied upon by the appellant and produced in appeal before the C.I.T.(A) was not examined by the assessing officer. Accordingly the Hon'ble Tribunal by its order dated 17th September, 2003 restored the matter to the file of the assessing officer with a direction to examine the records of the Housing Society, signatory of the letter and pass a fresh order in accordance with law. The assessing officer has since recorded the statements of the signatory of the letter and the Treasurer of the society. Both the persons have confirmed the said letter and contents. It is thus established that the contents of the said letter are true. The learned Commissioner (Appeals) should have given a finding that the fact of the appellant having acquired the residential premises and having resided therein is proved and the appellant is entitled to the relief.

3. The learned C.I.T.(A) has further erred in placing reliance on the alleged statements of two persons namely Suresh Ajmera and Jayakant Manilal Parekh which were recorded by the assessing officer behind the back of the appellant and no opportunity has been given to the appellant to cross-examine the said witnesses. The copies of the statements recorded have not been supplied to the appellant and only the extracts thereof are given in the Assessment Order. Even at the Remand Stage full copies were not supplied nor did an opportunity given to the appellant to cross-examine these persons.

These statements are therefore a nullity.

4. In any case and without prejudice it is conclusively established with the evidence on record that at the time of purchase the premises acquired was residential and only after about a year that it was used for commercial purposes. Even if it is presumed for the sake of argument that the premises was not actually used by the appellant for his own residence it does remain a residential house at the time of purchase and immediately thereafter." 7. We heard Shri H.S. Khurana, the learned Counsel appearing for the assessee and Shri T. Shivkumar, the learned Counsel appearing for the assessee.

8. The assessing officer has proceeded on the ground that the residential flat purchased by the assessee was not put to residential use but it was put to commercial use. Therefore, he held that the assessee is not entitled for the benefit of Section 54F. The whole enquiry of the case was directed towards the question whether the assessee and his family had ever resided in the flat after the purchase of the flat. Even the issue highlighted before the Tribunal in the first round of proceedings was the question whether the assessee had stayed in the residential flat or not. The veracity of the certificate issued by the Secretary of the Society and all such other inquisitional matters arose from the above point of view. Even in the second round of assessment, it is not possible to hold factually that finding of the assessing authority is foolproof. The reason is that even Shri Suresh Ajmera, the Chairman of -the Society and Shri Jayakant Manilal Parekh a resident of the said building stated that the assessee has not stayed in the flat, when asked to produce the books of account, they could not produce the books of account correspondence file and other files before the assessing officer on & ground that they were destroyed or lost.

Therefore, it is to be seen that the adverse observation made by those witnesses against the assessee are not prima facie acceptable as they could not produce the supporting documentary evidences. Moreover, they were not cross-examined either.

Regarding the statements of Avlanis, they too, could not be crossexamined by the assessee as they did not appear before the assessing officer in spite of notice. Though they did not appear, the assessing officer did not proceed further to ensure their attendance even though remedies are available under the provisions of law.

Therefore, the enquiries made by the assessing officer are incomplete and inadequate to hold against the assessee on the facts itself.

9. Leave it apart, let us come to the provisions of law contained in Section 54F. Section 54F says that where in the case of an assessee being an individual, the capital gain arises from the transfer of any long-term capital asset, not being a residential house, 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 qualified as new asset, assessee shall be excluded from the levy of capital gains subject to other conditions specified in the section. The only condition laid down by Section 54F is that the assessee must either purchase a residential house or he must construct a residential house within the specified period. The law has not stated anything on the matters relating to which the property is put to use. A residential property purchased or constructed by the assessee in such circumstances may be kept unoccupied for a quite long time. In that case, the benefit cannot be denied on the ground that the assessee and his family did not stay in that property for a long time. Therefore, the insistence of the assessing officer that the assessee and his family did not stay in the new residential flat is not sufficient to decide the matter.

10. There is no doubt regarding the fact that the new asset purchased by the assessee was a residential flat. The residential flat in a housing cooperative society is apartment buildings. Under the provisions of the Maharashtra Housing Co-operative Societies, Act and the relevant rules, an apartment in a housing society is invariably identified as a residential flat. There is no condition that the assessee must stay there immediately. The only condition specified in Section 54F is that the consideration received on sale of the old asset is not diverted but used for acquiring or constructing a residential property. This legal aspect was not considered by the assessing officer either in the first proceedings or in the second proceedings. There may be a situation where the assessee has later on, after purchase of the property put the property for commercial use. That may be a violation of the rules governing Housing Co-operative Societies or the Apartment Rules. It has no direct bearing with the provisions of the Income Tax Act. Therefore, there is no sanctity in probing into the intention of the assessee in purchasing the residential property. They are all ifs and buts quite unwanted in interpreting the provisions of law contained in Section 54F. Nothing is permanent for that matter in this world. A residential property today may be a commercial property tomorrow and the commercial property of the present day may be a residential property tomorrow. It all depends upon the contemporaneous circumstances. What the law required under Section 54F is that the sale consideration of the old property must be used by the assessee to acquire or

construct, a new asset in the form of a residential property within the specified period. Take a hypothetical case. An assessee purchases a property within the prescribed time and after that the property gets destroyed. Is not the assessee entitled for the benefit of Section 5417? The crucial test to be applied is whether the assessee has applied the sales consideration for acquiring or purchasing the new asset in the form of residential property. The two conditions are important; application of fund and the new asset in the nature of residential property. Subsequent developments or future events are not crucial in deciding the matter. In the present case, the assessee has sold an old asset and realised the consideration and applied the consideration for acquiring a new asset. That new asset is in the nature of a residential flat comprised in a Cooperative Housing Society apartment building. Therefore, we find that the assessee has satisfied the provisions contained in Section 54F.11. We set aside the orders of the lower authorities on this point and direct the assessing authority to give the assessee the benefit of Section 54F.

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