

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "A"**
**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND
SHRI SANJAY GARG, JUDICIAL MEMBER**

I.T.A. No. 7512/Mum/2013
Assessment Year : 2010-11

Shri Hasmukh N. Gala, 7B, Jai Mahavir Apartment, Dhake Colony, JP Road, Andheri(W), Mumbai 400053 PAN :AABPG 6064F (Appellant)	_ Vs. ..	Income Tax Officer 20(1)(3), Mumbai. (Respondent)
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Appellant by

Dr. K. Shivram &

Shri Rahul R. Sarda

Respondent by :

Shri Jeetendra Kumar

Date of Hearing : 26.05.2015

Date of Pronouncement : 19/08/2015

ORDER

PER G.S. PANNU, A.M: :

The present appeal is preferred by the assessee and is directed against the impugned appellate order dated 21/11/2013 passed by Ld. CIT(A)-31, Mumbai pertaining to the assessment year 2010-11, with reference to the assessment order dated 03/01/2013, passed in terms of section 143(3) of the Income Tax Act, 1961(the Act).

2. In this appeal although assessee has raised multiple grounds of appeal, but essentially the grievance of the assessee is against the stand of the income-tax authorities in denying the claim of exemption under section 54 of the Act.

3. The relevant facts are that the assessee is an individual who is engaged in the business of trading in glass.. In the return of income filed for the assessment year under consideration, assessee had declared sale of a residential property vide sale agreement dated 8/12/2009 for a total consideration of Rs.1,02,55,000/-. After considering the indexed cost of acquisition of Rs.14,17,904/-, the long term capital gain was computed at Rs.88,37,096/-. The relevant capital gain was claimed as exempt under section 54 of the Act on the strength of having acquired a new residential house being Flat Nos. 1 & 2 on 4th Floor in C-Wing, Ramniwas Building, Malad (E). The investment in acquisition of the new residential house was claimed by the assessee based on an advance of Rs.1.00 crore given to the builder as booking advance through a cheque dated 6/2/2010. The assessee produced a copy of receipt of payment and allotment letter dated 15/10/2010 from the builder to justify acquisition of the new residential house.

4. The Assessing Officer examined assessee's claim under section 54 of the Act. According to the Assessing Officer, provisions of section 54 of the Act require the assessee to purchase a new residential house either within a period of one year before the date on which the transfer of original asset took place or two years after date on which such transfer take place. The Assessing Officer noted that in the instant case, even after two years of the date of transfer of old house the construction of the new property was not completed and that assessee had not gained possession of the new premises also. He, therefore, held that assessee did not comply with the requirements of section 54 of the Act in as much as it could not be said that assessee had purchased a new residential house within the period prescribed therein. The Assessing Officer was of the view that giving of advance could not be treated as equivalent to 'purchase' for the purpose of section 54 of the Act, because no agreement was executed and that the advance money could be returned at any time. For the said reasons, the Assessing Officer disallowed the exemption claimed under section 54 of the Act. The assessee unsuccessfully carried the matter in appeal before CIT(A), who also sustained the conclusion drawn

by the Assessing Officer. The CIT(A) concluded that for the purpose of section 54 of the Act the term 'purchase' cannot be equated to 'giving of advance'. Furthermore, CIT(A) observed that though assessee had parted with money, but he did not acquire possession or domain over the new residential house and, therefore, the denial of the claim of exemption under section 54 of the Act was affirmed.

5. In the above background, Ld. Representative for the assessee vehemently pointed out that the claim of the assessee has been unjustly denied by the lower authorities. It has been pointed out that assessee had duly invested the amount in acquisition of a new residential property and the delay in completion of construction by the builder was beyond the control of the assessee. It was pointed out that assessee had furnished the allotment letter in respect of the specific flat allotted by the builder and a copy of the same was also placed in the Paper Book at pages 7 to 10. It was emphasized that complete amount of consideration was paid to the builder and there was no requirement to produce an agreement when the letter of allotment alongwith proof of payment clearly established that assessee had invested towards acquisition of a new residential house. In the course of hearing, reliance has been placed on the following decisions:-

1. CIT vs. Mrs. Hilla J.B. Wadia , 216 ITR 376(Bom)
2. CIT vs. R.L.Sood, 245 ITR 727 (Del)
3. CIT vs. Kuldeep Singh, 270 CTR 561 (Del).

5.1 It was also contended that the Chandigarh Bench of the Tribunal in the case of Smt. Ranjeet Sandhu vs. DCIT, 49 SOT 7 (Chandigarh) held that completion of construction within the time limit prescribed in section 54 of the Act was not a condition for allowing of exemption and, therefore, on said parity of reasoning, assessee's claim for exemption under section 54 of the Act cannot be denied merely because the new residential house was not completed.

6. On the other hand, Ld. DR appearing for the Revenue has relied upon the conclusion drawn by the lower authorities by relying on the reasoning taken thereof. The reasons given by the Assessing Officer and CIT(A) to deny the claim have already been noted by us in the earlier para and the same are not being repeated for the sake of brevity.

7. We have carefully considered the rival submissions. The crux of the controversy before us relates to the understanding of the expression 'purchase' contained in section 54 of the Act. Notably, an assessee is entitled to the benefits of section 54 of the Act, if he has purchased the new property within a period of one year before the date of transfer of the old property or within two years from the date on which the transfer of old property took-place. The exemption under section 54 of the Act is also allowed in a situation where a new residential house is constructed within three years from the date of transfer of the old property. In the present case, the appellant has sold the old property on 8/12/2009 and according to the Assessing Officer, assessee was required to purchase the new property within a period of one year before 8/12/2009 or within two years from such date, which the assessee was found not to have complied with. The Assessing Officer also noted that assessee had not constructed a new residential house within a period of three years from 8/12/2009. On the other hand, the claim of the assessee is that it has fulfilled the requirements of section 54 of the Act because he has paid Rs.1.00 crore to the builder for acquisition of flat and the builder has issued an allotment letter in respect of the specific Flat being, Flat Nos. 1 & 2 on 4th Floor in C-Wing, Ramniwas Building, Malad (E).

7.1 The controversy is as to whether under these facts assessee can be said to have purchased the new property so as to entitle him for exemption in relation to the amount spent towards the new property under section 54 of the Act. It is not disputed by the Revenue that the sum of Rs.1.00 crore has been invested by the

assessee towards acquiring new property. Of course, the legal title in the said property has not passed or transferred to the assessee within the specified period and it is also quite apparent that the new property was still under construction. So however, the allotment letter by the builder mentions the flat number and gives specific details of the property.

7.2 In this context, the Hon'ble Delhi High Court in the case of Kuldeep Singh (supra) has explained the meaning of the expression 'purchased' in the context of section 54 of the Act in following words:-

"8.The word 'purchase' can be given both restrictive and wider meaning. A restrictive meaning would mean transactions by which legal title is finally transferred, like execution of the sale deed or any other document of title. 'Purchase' can also refer to payment of consideration or part consideration alongwith transfer of possession under Section 53A of the Transfer of Property Act, 1882. Supreme Court way back in 1979 in CIT v. T.N Aravinda Reddy [1979] 120 ITR 46/2 Taxman 541, however, gave it a wider meaning and it was held that the payment made for execution of release deed by the brother thereby joint ownership became separate ownership for price paid would be covered by the word 'purchase'. It was observed that the word 'purchase' used in Section 54 of the Act should be interpreted pragmatically. In a practical manner and legalism shall not be allowed to play and create confusion or linguistic distortion. The argument that 'purchase' primarily meant acquisition for money paid and not adjustment, was rejected observing that it need not be restricted to conveyance of land for a price consisting wholly or partly of money's worth. The word 'purchase', it was observed was of a plural semantic shades and would include buying for a price or equivalent of price by payment of kind or adjustment of old debt or other monetary considerations. It was observed that if you sell a house and make profit, pay Caesar (State) but if you buy a house or build another and thereby satisfy the conditions of Section 54, you were exempt. The purpose was plain; the symmetry was simple; the language was plain.

9. Recently Supreme Court in Civil Appeal Nos. 5899-5900/2014 titled Sanjeev Lal v. CIT [2014] 46 taxmann.com 300 again examined Section 54 in a case where the assessee had entered into an agreement to sell a house to a third party on 27th December, 2002 and had received RS.15 lacs by way of earnest money and subsequently received the balance sale consideration of Rs.1.17 crores (total being Rs.1.32 crores) when the sale deed was executed on 24th September, 2004. In the meanwhile, the assessee had purchased another house on 30th April, 2003. Benefit under Section 54 was denied] by the High Court observing that the new house had been purchased prior to execution of the sale and not within one year prior to sale of original asset i.e. new house has been purchased on 30th April, 2003 whereas the earlier asset was sold only on 24th September, 2004. The Supreme Court allowing the

appeal noticed that the agreement to sell was executed on 27th December, 2002 but the sale deed could not be executed because of inter-se litigation between the legal heirs, as one of them had challenged the will under which the assessee had inherited the property. The agreement to sell, it was held had given some rights to the vendor and reduced or extinguished rights of the assessee. This, it was observed was sufficient the purpose of Section 2(47), which defines the term transfer in relation to a capital asset. In the light of the factual matrix, it was observed that the intention behind Section 54 was to give relief to a person who had transferred his residential house and had purchased another residential house within two years of transfer or had purchased a residential house one year before transfer. It was only the excess amount not used for making purchase or construction of the property within the stipulated period, which was taxable as long term capital gain while on the amount spent, relief should be granted. Principle of purposive interpretation should be applied to subserve the object and more particularly when one was concerned with exemption from payment of tax. The assessee, therefore, succeeded. The observations made in the said decision are also relevant on the question whether the payments made by the assessee to the person with whom he had entered into an earlier agreement to sell should be allowed to be set off as expenses incurred in relation to the sale deed which was executed.”

The Hon'ble Delhi High Court further referred to the decision of Hon'ble Madhya Pradesh High Court in the case of Smt. Shashi Varma vs. CIT, 224 ITR 106(M.P) and that of the Hon'ble Calcutta High Court in the case of CIT vs. Smt. Bharati C. Kothari (Cal) 244 ITR 352 and opined that when substantial investment was made in the new property, it should be deemed that sufficient steps had been taken and it would satisfy the requirements of section 54 of the Act. As per the Hon'ble High Court, the basic purpose behind section 54 of the Act is to ensure that the assessee is not taxed on the capital gain, if he replaces his house and spend money earned on the capital gain within the stipulated period. The parity of reasoning explained by the Hon'ble Delhi High Court in the case of Kuldeep Singh (supra) squarely covers the controversy in the present case in favour of the assertions made by the assessee. Therefore, we are inclined to uphold the plea of the assessee for exemption under section 54 of the Act qua the impugned investment in acquisition of the new residential house.

7.3 The plea of the Revenue is that no purchase deed was executed by the builder and that there was only an allotment letter issued. As per the Revenue the advance could be returned at any time and, therefore, the assessee may lose the exemption under section 54 of the Act. In our considered opinion, the aforesaid does not militate against assessee's claim for exemption in the instant assessment year, as there is no evidence that the advance has been returned. In case, if it is found that the advance has been returned, it would certainly call for forfeiture of the assessee's claim under section 54 of the Act. In such a situation, the proviso below section 54(2) of the Act would apply whereby it is prescribed that such amount shall be charged under section 45 as income of the previous year, in which the period of three years from the date of the transfer of the original asset expires. The aforesaid provisions also does not justify the action of the Assessing Officer in denying the claim of exemption under section 54 in the instant assessment year.

7.4 In view of the aforesaid discussion and on the basis of material and evidence on record, we find that the assessee can be said to have complied with the requirement of section 54 of the Act; and, the exemption has been incorrectly denied by the lower authorities. As a matter of passing, we may also mention here the reliance placed by Ld. Representative of the assessee on the decision of our Co-ordinate Bench in the case of Shri Khemchand Fagwani vs. ITO, ITA No.7876/M/10 order dated 10/09/2014, wherein also claim of exemption under section 54 of the Act was allowed under similar circumstances. In the light of the precedent, we find no reason to deny the claim under section 54 of the Act. We direct accordingly.

8. At the time of hearing, Ld. Representative of the assessee has referred to an additional Ground of appeal relating to levy of interest under sections 234A, 234B & 234C of the Act. Since assessee has been allowed relief on account of exemption

under section 54 of the Act, the levy of interest under sections 234A, 234B & 234C of the Act is consequential in nature and no specific determination is called for.

9. In the result, appeal of the assessee is allowed as above.

Order pronounced in the open court on 19th August, 2015.

Sd/-

(SANJAY GARG)
JUDICIAL MEMBER

Mumbai, Dated

Sd/-

(G.S. PANNU)
ACCOUNTANT MEMBER

Vm.

I

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)- 21, Mumbai
4. CIT- 10, Mumbai
5. DR, ITAT, Mumbai A Bench
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai