

IN THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Amarjit Singh (JM)

I.T.A. No.7676/Mum/2019 (Assessment Year 2015-16)

ACIT-22(3) 305, 3 rd Floor Piramal Chambers, Lal Baug, Parel Mumbai-400 012	Vs.	Vinay Girish Bajpai B-09, Punjab CHS Tagore Road Santacruz(W) Mumbai-400 054 PAN : AABPB5914D
(Appellant)		(Respondent)

Assessee by	Satyaprakash Singh
Department by	S.N.Kabra
Date of Hearing	17.11.2021
Date of Pronouncement	01.02.2022

ORDER

Per Shamim Yahya (AM) :-

This appeal by the revenue is directed against the order of learned Commissioner of Income Tax (Appeals)-34 dated 19.09.2019 and pertains to assessment year 2015-16.

2. Grounds of appeal read as under:-

1. "On the facts and in the circumstances of the case and in law, the CIT(A) erred in interpreting the provisions of section 54 of the Income Tax Act 1961 thereby allowing the claim of the assessee made under section 54 of the Act.

2."On the facts and in the circumstances of the case and in law the Ld CIT (A) erred in interpreting the legislative intent behind the plain reading of the section implies that the assessee should have purchased or within three years from the year in which the capital gains arise as is was what the legislative intent would read".

3. "On the facts and in the circumstances of the case and in law, the CIT(A) erred in not following the legislative intent , which has to be read as it is and has to be applied as it is meant rather than liberally.

4. "On the facts and in the circumstances of the case and in law, the CIT(A) erred in appreciating the fact that the assessee has by his own admission vouched for the fact that he was not able to obtain gainful possession of the property for availing the deduction of section 54 of the Income Tax Act 1961 within the time limits prescribed by the instant section".

5. "On the facts and in the circumstances of the case and in law, the CIT(A) erred holding that the assessee has fulfilled all the statutory requirement for availing deduction under section 54 of the Act and as such, the disallowance of deduction is unjustified and unreasonable".

6. The appellant prays that the order of the CIT(A) on the above ground be reversed and that of the Assessing Officer be restored.

3. Brief facts of the case are as under:-

The appellant had e-filed his return of income on 26.08.2015 declaring total income at Rs.2,00,07390/-. During the year, the appellant had claimed deduction u/s.54 of the IT Act, 1961 amounting to Rs.3,42,58,350/-. Therefore, the appellant was requested to submit the detailed note on satisfaction of condition u/s.54 of the IT Act for claiming deduction alongwith supporting evidence. In response to the above, appellant had furnished details of the transactions of sale & purchase of property. From the submissions furnished by the appellant, AO had made the following observations:

- i. , The appellant had sold flat on 19.12.2014 for Rs.4,50,00,000/-
- ii. The capital gains received from the above sale was invested by the appellant in property vide agreement dated 01.12.2014.
- iii. The appellant got allotment letter on 01.12.2012.
- iv. New investment had been made by the appellant during the period from 28.10.2012 to 21.06.2016 i.e not exclusively after the date of transfer of old assessee.
- v. The eligible amount of capital gains claimed by the appellant showed period of investment from 24.12.2013 to 25.08.2015.
- vi. The appellant had not submitted any evidence of completion of the construction

and possession of the house property wherein the appellant had invested capital gains.

It was observed by the AO from the above that the appellant had not satisfied, the basic condition i.e. completion of house property within 3 years from the date of transfer for being eligible to claim deduction u/s.54 of the IT Act.

4. AO noted assessee explanation as under:-

a) Part and advance purchases consideration paid before the date of agreement of purchase of new assets date 19.12.2014 should be considered as made on 19.12.2014 being appropriation of advance.

b) The new asset (purchased under construction) is completed in June 2017 but demand of final payment on possession is not made by builder upon non receipt of occupation certificate, should be treated as sufficient compliance of provisions of section 54

c) Exemption provisions i.e. section 54 is beneficial in nature should be construed liberally.

5. The AO was not satisfied, he held as under:-

i. Even though the appellant had submitted a letter from Developer stating that the construction is complete, there is no specific date mentioned in the letter;

ii. The letter of the Developer is contradictory to the fact that the Developer itself has updated status on RERA site on 02.11.2017 as "On-going project and revised date of completion is mentioned as 31.08.2018;

iii The assessee is yet to make the final payment in respect of the investment transaction.

iv Occupation Certificate is not yet received.

v The assessee has not got possession of the property.

vi The circular no. 471 & 972 referred by the assessee were for specific schemes. Circular 471 is about reckoning of holding period. The Central Board of Direct Taxes (CBDT) issued a circular (No.471, dated 15th October, 1986), where it has clarified that for flats under self-financing schemes of the DDA; the holding period shall begin from date of the allotment letter.

During the assessment proceedings, the appellant had requested the AO to take liberal view with regard to deduction u/s.54. In this regard AO held that though liberal view can be taken while allowing deduction u/s.54 as it a beneficial section, however, the decisions cannot be applied mechanically.

Considering the facts of the case in light of the legal position, it was held by the AO that the appellant does not fit into the scheme of the things envisaged in section 54 of the IT Act and the claim of the appellant was not legally tenable. Accordingly, deduction of Rs,3,42,58,350/- claimed by the appellant u/s.54 of the IT Act was disallowed and added to the total income of the appellant. Aggrieved by the above addition, the appellant is in appeal.

6 Against the above order, assessee appealed before Id.CIT(A).

7. Ld.CIT(A) noted that assessee submission and placing reliance from certain case laws from Hon'ble Bombay High court allowed the appeal as under:-

During the course of appellate proceedings, the appellant has filed in his written submissions and relied upon various case laws which specify that the payment should be made within the time limit prescribed u/s 54 of the Income Tax Act, 1961 and possession of the House Property is not necessary. He further relied on the MOFA applicable to the year under consideration which states that the agreement should be entered before making the payment exceeding 20% of the Purchase Price. Accordingly the appellant mentioned that the agreement was entered into by the appellant within the period of 3 years from the date of sale of capital asset. In the agreement of purchase, the date of possession to be handed over was Sept 2017 i.e. within the period of 3 years. Therefore, appellant claims that delay in the project by the builder cannot deny the appellant from the exemption provided u/s 54 of the Income Tax Act, 1961.

4.5 During the course of appellate proceedings, appellant has relied on the following judgements having identical issues which are reproduced as under;

1. Girish L Ragma. Panaji vs Department Of Income Tax [ITA NO. 116/PNJ/2014 -Tax Appeal no.66 of 2015 Bombay High Court]

Section 54 of the Income-tax Act, 1961 - Capital gains - Profit on sale of property used for residence (Time period for Investment) - Assessee sold residential property - He entered into an agreement with a builder for purchase of a flat and invested sale proceeds in it within prescribed period of two years - He was required to get house and occupancy certificate within two years - After purchase of property, there was a civil suit filed by other parties and assessee could not complete construction and licence for constructing house was accordingly issued after 4 years - Whether since assessee had invested money within stipulated period and delay in obtaining occupancy certificate was beyond control of assessee, assessee would be entitled for deduction under section 54 - Held, yes [Para 3] [In favour of assessee].

Kishore H. Galaiyas V/s ITO f20121 24 taxmann.com 11 (Mum.l (Page... to page... of the paper book)

If the 'assessee -had made investment within period of three years, exemption under section 54 could not be denied for the reason that possession had not been taken-. There may be delay in taking of possession because of many factors not under control of assessee, merely because of this exemption could not be denied. "6.1.....In the present case, the assessee sold the old residential house on 7.3.2006 and the long term capital gain arising on this account was Rs. 9,98,411/-. The assessee had booked a new residential flat with the builder jointly with his wife for a sum of Rs,35,00,000/-. The assessee had paid booking amount of Rs.1,00,000/- to the builder before the due date of filing of the return of income u/s 139(1) for the assessment year 2006-07 and the balance amount had been paid in installments after the said date.

The total amount paid by the assessee to the builder was Rs.14,62,500/- till 16.2.2009. In the back drop of this factual position, it is required to be seen whether the assessee had fulfilled the conditions of section 54 of the Act so as to make him eligible for claim of exemption u/s 54 of the Act. The first condition is that the capital gain should have been invested in the purchase of new residential house within a period of two years from the date of transfer or for construction' of new residential house within a period of three year's from the date of-transfer. In the present case, the assessee had booked the new flat with the builder and as per agreement, the assessee was to make payment in installments and the builder was to handover the possession of the flat after construction. It has therefore to be considered as a case of construction of new residential house and not purchase of flat. This position has been clarified by the CBDT in circular No.472 dated 16.12.1993 in which it has been made clear that the earlier circular No. 471 dated 15.10.1986 in which it was stated that acquisition of flat through allotment by DDA has to be treated as a construction of flat would apply to cooperative societies and other institutions. The builder would fall in the category of other institutions as held by Mumbai Bench of Tribunal in the case Sm.t. Sunder Kaur Sujan Singh Gadh (supra) and therefore booking of the flat with the builder has to be treated as construction of flat by the assessee. Thus, in the present case, the period of three years would apply for construction of new house from the date of transfer of the old flat.

6.2 The old flat had been sold on 7.3.2006 and therefore the assessee was required to construct a new residential house by 6.3.2009. The purpose of section 54 is to allow exemption to the assessee of long term capital gain arising from sale of residential house if the capital gain is invested in construction of new residential house within a period of three years from the date of transfer and, therefore, in case, the assessee had invested the capital gains in construction of a new residential house within a period of three years, this should be treated as sufficient compliance of the provisions, of the flat. It is not necessary that the possession of the flat should also be taken within the period of three years. The taking of the possession may be delayed because of many factors not under the control of the assessee due to default on the part of the builder and therefore merely because the possession had not been taken within the period of

three years, the exemption cannot be denied. This aspect had also been considered by the Hon'ble High Court of Bombay in the case of Mrs. Hilla J.B.Wadia (supra) in which the Hon'ble High Court held that in case the assessee entered into an agreement with the society for purchase of flat and paid almost the entire consideration within a period of 2 years, the assessee would be entitled to exemption u/s 54 of the Act. The Hon'ble High Court also held that the material test was the domain over the property and the investment and, therefore, in case, the assessee had made substantial investment within the prescribed period which entitled the assessee to take possession of the flat, the claim of the exemption u/s 54 had to be admitted. In the present case, within the period of three years, the assessee had invested Rs.14,62,500/- which was more than the amount of capital gain in the construction of new residential house within the period of three years and the possession of the house had also been ultimately taken on 31 ,8.2009. Therefore, in our view, the claim of the exemption in this case cannot be denied on the ground that the possession of the flat had not been taken within, the period of three years."

3. Shri Hasmukh N. Gala vs. Income Tax Officer [I.T.A. No. 7512 /Mum/2013 \

"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 KhemchandFagwani 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 tin under section 54 of the Act. We direct accordingly."

4. Commissioner Of Income Tax vs Mrs. Hilla J.B. Wadia [Bombay High Court]

"For the reasons which we have set out above, in our view, the present case falls within the provisions of s. 54 in view of the fact that the assessee had acquired substantial domain over the flat in question under the agreement with the Society

coupled with the payment of almost the entire cost of construction within a-period of two years."

4.6 Further, the appellant has also relied on the decision of the Hon'ble ITAT, Mumbai dated 12.03.2019 (ITA No.6814/Mum/2016) in the case of Rajendra Pal Verma vs. ACIT 35(2), Mumbai wherein the relevant issues are decided in favour of the appellant.

4.7 In the instant case, I find that the assessing officer has applied section 54 of the Income Tax Act, 1961 in a mechanical manner. I find that appellant has made compliance, of all the conditions as per the section 54 and is eligible to claim the deduction. Therefore, in view of the facts and circumstances of the case and the ratio of various judicial pronouncements as mentioned above, the assessing officer is directed to delete disallowance of Rs. 3,42,58,350/- made u/s 54 of the Income Tax Act, 1961. This ground of appeal is allowed.

8. Against the above order, revenue is in appeal before us.

9. We have heard both the parties and perused the records. Ld. DR supported the order of the AO. On the other hand, Ld. Counsel of the assessee supported the order of Ld.CIT(A). He submitted that assessee has complied with all the requirements of claiming exemption/deduction under section 54 of the IT Act. He submitted that assessee has made the payment to the builder within the stipulated time. There was some issue of obtaining the completion certificate by the builder. Hence, there was some delay in handing over the possession. He submitted that this cannot be a reason to deny the exemption of section 54 on the touchstone of decision of Hon'ble Bombay High court in the case of Girish L. Raghav Panaji vs DCIT in income tax appeal no. 66 of 2015.

10. Furthermore, he submitted that assessee has made the necessary payments and on the touchstone of decision of Hon'ble Supreme Court in the case of Sanjeev Lal vs CIT in Civil Appeal Nos.5899-5900 of 2014 adverse inference against the assessee cannot be made in this regard.

11. Upon careful consideration, we find that assessee has complied with the condition mention under section 54 of the IT Act to claim the exemption. As pointed out by the Ld. Counsel of the assessee above, the handing over of the possession was delayed due to fault on the part of the builder and assessee has complied with the necessary condition of payment as required. There is a due agreement and part amount was paid. Accordingly, in such situation, the decision of Hon'ble Supreme court in the case of Sanjeev Lal (supra) provides that part payment will also suffice the ingredients of transfer for the purpose of section 54 of the IT Act.

12. In this view of the matter, in our considered opinion, Id.CIT(A) has passed a reasonable order duly relying upon the decision of Hon'ble Bombay High court. Hence, we do not find any infirmity in the order of Id.CIT(A).

13. Hence, this appeal by the revenue stands dismissed.

Pronounced in the open court on 01.02.2022.

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 01.02.2022
Thirumalesh, Sr.PS

Copy of the Order forwarded to :

The Appellant

1. The Respondent
2. The CIT(A)
3. CIT
4. DR, ITAT, Mumbai
5. Guard File.

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BY ORDER,

Assistant Registrar)