

IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, MUMBAI

[Coram: Pramod Kumar, (Vice President)
And Kuldip Singh, Judicial Member]

ITA No. 1557/Mum/2020
Assessment Year: 2015-16

Reji EasowAppellant
*Flat No. 203, Building No. 15,
Bankston Building, Plot A - Rodas Enclave,
Ghodbunder Road, Thane West, 400607
[PAN: AADPE4213G]*

Vs

**Income Tax Officer, Ward 3(5)
Thane**Respondent

Appearances:

Rajesh Athavle for the Appellant
Neha Thakur for the Respondent

Date of conclusion of hearing : 05.01.2022
Date of pronouncement of order : 08.03.2022

ORDER

Per Bench:-

1. By way of the present appeal the Appellant/ Assessee has challenged the order dated 20.01.2020 passed by the Commissioner of Income Tax (Appeals) under Section 250 of the Income Tax Act, 1961 in appeal (10423/2017-18). On the following grounds are as under:-

1. *The learned CIT(A) erred in confirming the disallowance of deduction claimed under Section 54 of the Income Tax Act.*
2. *The learned CIT(A) erred in not directing the learned AO to allow deduction under section 54 on the ground that the appellant has made investment in constructed residential house within three from the date of sale of original residential property.*

2. The facts, in brief, relevant to the issue under consideration are as follows. The assessee is a salaried employee and his return was picked up for scrutiny assessment. In the ensuing scrutiny assessment proceedings it was noticed that in May 2011 the Assessee along with his wife booked a residential flat (Flat No. 203) in an under construction building named 'Bankston' located at Rodas Enclave, Thane (W) from Roma Builders Pvt. Ltd [hereinafter

referred to as 'New Residential House'] for a consideration of 1,40,51,500/-. In December 2012, the Assessee made majority of payments to the builders by availing a mortgage/housing loan. Thereafter, on 21.05.2014, the Assessee and his wife, being co-owners holding 50% share, sold a residential flat [hereinafter referred to as 'Original Asset'] for INR 1,15,00,000/- and utilized the sale proceeds for making towards repayment of the existing mortgage/housing loan. In the income tax return for the Assessment Year 2015-16 relevant to the Financial Year 2014-15 during which the sale took place, the Assessee claimed deduction under Section 54 of the Act and offer to tax 'Nil' long term capital gains computed as under:

| | | | |
|-------------|---|---|--------------------------|
| | <i>Sale Consideration (21.05.2014)</i> | : | <i>INR 1,15,00,000/-</i> |
| <i>Less</i> | <i>Indexed Cost of Acquisition (03.06.2003)</i> | : | <i>INR 35,07,985/-</i> |
| | <i>Capital Gains</i> | | <i>INR 79,92,015/-</i> |
| <i>Less</i> | <i>Deduction claimed under Section 54</i> | | <i>INR 79,92,015/-</i> |
| | <i>LTCG offered to Tax in Return</i> | | <i>NIL</i> |

3. In the assessment proceedings the Assessing Officer denied benefit of deduction under Section 54 of the Act to the Assessee on the ground that the Assessee had not purchased New Residential House within period specified in Section 54 of the Act which is one year before or two years after the sale of the Existing Residential House. According to the Assessing Officer the New Residential House was purchased on 15.02.2012, i.e., the date on which the Agreement for Sale, dated 07.02.2012 was registered. Since this was 2 years and 3 months prior to the date of transfer/sale of the Original Asset (i.e. 21.05.2014), the Assessee could not be granted the benefit of Section 54 of the Act. The Assessing Officer was also of the view that the Assessee had utilized his regular income to repay the loan instalments and not the consideration received from the same of the property.

4. In the appeal filed by the Assessee against the assessment order, the CIT(A) moved on the premise that date of registration of Agreement for Sale (07.02.2012) is to be considered as date of purchase of New Residential House and decided the appeal against the Assessee holding that purchase of property was beyond the specified period of 2 years. The CIT(A) also rejected the alternative argument of the Assessee that since the property being purchased was under construction the benefit of Section 54 of the Act can be extended to the Assessee by treating the transaction as a case of 'construction' and not 'purchase' since the construction was completed and possession of the New Residential House was taken on 02.04.2016 which date is within a period of 3 years from the date of sale of Original Asset (21.05.2014). In the present appeal the Authorised Representative for the Assessee reiterated submission made before the Assessing Officer as well as CIT(A), and contended that the date of actual physical possession, 02.04.2016, should be taken as date of purchase of the New Residential House. In addition, it was contended that the case of the Assessee could be viewed as a case of 'construction'. The Ld. Authorised Representative for the Assessee vehemently argued that Assessee is entitled to benefit under Section 54 of the Act in either/both the cases and placed reliance on judicial precedents in the paper-books filed. Per Contra, the Ld. Departmental Representative relied upon the order of the Assessing Officer as well as CIT(A) to contend that 15.02.2011 being date of registration of Agreement for Sale

(15.02.2011) must be taken as date of purchase. Further, the Assessee has purchased the property and therefore, it cannot be contended that this is a case of 'construction'. Since the Assessee has not purchased the property within the specified period, the Assessing Officer was justified in disallowing deduction under Section 54 of the Act.

5. Having heard the parties and perused the records, it emerges that the undisputed facts are: (a) The Assessee booked the New Residential Property on 28.05.2011; (b) Allotment was made to the Assessee on 14.07.2011; (c) Agreement For Sale, dated 07.02.2011, was registered on 15.02.2011; (d) In December 2012, the Assessee made majority of payments by availing a mortgage/housing loan; (e) Original Asset was sold on 21.05.2014 and the sale proceeds were utilised towards repayment of the existing mortgage/housing loan; (f) Occupancy Certificate was issued on 17.02.2016; (g) Assessee took actual physical possession on 02.04.2016.

6. We have noted that the Assessing Officer and the CIT(A) have taken 15.02.2011 the date of registration of Agreement For Sell as the date of purchase and therefore, it would be appropriate to examine the nature of this agreement and its terms. The aforesaid agreement is not a sale/conveyance deed but only an agreement for sale entered into between the Roma Builders Pvt Ltd being the promoters and developers who have agreed to sell to the Assessee a flat in a multi-storey building. When the Agreement for Sale was registered the multi-storey building was not yet constructed and the obligation of the Assessee to make payment is linked to construction. The Agreement for Sale was required to be registered it was governed by the provisions of Maharashtra Ownership Flats Act, 1963 as per paragraph/clause 53 of the said agreement. The relevant extracts of paragraph/clause 53 of the Agreement for Sale and Section 4 of the Maharashtra Ownership Flats Act, 1963 are reproduced below:

Agreement for Sale - Para/ Clause 53

“53. This Agreement shall always be subject to the provisions contained in the Maharashtra Ownership Flats Act, 1963 and Maharashtra Ownership of Flat Rules 1964 and all provisions of laws applicable thereto subject to the mutually agreed and accepted contractual obligations which are mentioned herein.”

Maharashtra Ownership Flats Act, 1963 – Section 4(1)

“Section 4(1) Notwithstanding anything contained in any other law, a promoter who intends to construct or constructs a block or building of flats, all or some of which are to be taken or are taken on ownership basis, shall, before, he accepts any sum of money as advance payment or deposit, which shall not be more than 20 per cent. of the sale price enter into a written agreement for sale with each of such persons who are to take or have taken such flats, and the agreement shall be registered under the Registration Act, 1908 (hereinafter in this section referred to as "the Registration Act")] 1908 and such agreement shall be in the prescribed form.”

7. It would also be relevant to refer to the terms contained in paragraph/clause 3, 14 and 39 of the said Agreement for Sale relevant extracts of are reproduced herein under:

“3. On possession of the said premises being offered by the promoter to the purchaser(s) as licensee pending the execution of the Deed of Conveyance or Agreement in favour of the Registered Co-operative Society, Limited Company or Condominium of Apartments and upon execution of such Deed of Conveyance, and/or Deed of Assignment such personal license granted to enter upon the said premises in favour of the Purchasers shall automatically become absolute.....”

“14. The Promoters shall endeavour to give possession/personal license to use and occupy the said preemies on or before December 2015 provided the Promoters have received full purchase price of the said premises and all the other amounts/payments payable by the Purchasers to the Promoters under these present and”

“39. Nothing contained in these present shall be construed to confer upon the Purchasers any right, title or interest of any kind whatsoever into or cover the said premises or any part thereof, same to take place only upon the execution of the Conveyance, Lease or Assignment in favour of the said Organization as herein stated”

8. On perusal of the above it can be seen that that the purchaser/Assessee is put in possession only as a licensee and to that extent the purchaser/Assessee acquires interest in the premises/flat on entering into possession. Since by that date the purchaser/Assessee has already paid entire/majority of consideration for purchase, it can be said that the Assessee has, on the date of taking such possession, purchased the property for the purpose of Section 54 of the Act as has been held by the jurisdiction High Court in that the case of ***CIT vs. Smt. Beena K. Jain : 217 ITR 363***. While examining the issue in respect of Section 54F of the Act the Hon'ble High Court held that for the purpose of determining the date of purchase of new residential house the relevant date in the date when the petitioner paid the full consideration amount on the flat becoming ready for occupation and obtained possession of the flat. The relevant portion of the aforesaid judgment reads as under:

“2. Under section 54F in the case of an assesseeThe department contends that the assessee did not purchase the residential house either one year prior to or two years after the sale of the capital asset which resulted in long-term capital gains. According to the department, the agreement for purchase of the new flat was entered into more than one year prior to the sale. Hence, the petitioner is not entitled to the benefit under section 54F. In our view the Tribunal has rightly negated this contention and has held that the new residential house had been purchased by the assessee within two years after the sale of the capital asset which resulted in long-term capital gains. The Tribunal has held that the relevant date in this connection is 29-7-1988 when the petitioner paid the full consideration amount on the flat becoming ready for occupation and obtained possession of the flat. This has been taken by the Tribunal as the date of purchase. The Tribunal has looked at the substance of the transaction and came to the conclusion that purchase was substantially effected when the agreement of purchase was carried out or completed by payment of full consideration on 29-7-1988 and handing over of possession of the flat on the next day. (emphasis supplied)

9. In similar facts and circumstances a co-ordinate bench of the Tribunal in the case of *Bastimal K Jain Vs ITO*: [2016] 76 Taxmann.com 368 (Mumbai) [08-06-2016] has, following the above said judgment of the Hon'ble High Court, held that that date of handing over the possession should be considered as appropriate date for considering the applicability of provisions of Section 54 of the Act and observed that in such circumstances and in the given facts of the case and also the case law relied on by learned Counsel for assessee in the case of *V M Dujodwala* (supra) coordinate bench of this Tribunal and also of Hon'ble Bombay High Court in the case of *Smt. Beena KJain*, (supra), we are of the view that the assessee's claim of deduction u/s. 54 of the Act is to be reckoned from the date of handing over of the possession of the flat by the builder to the assessee i.e. 11.09.2009, and if we take that date, the assessee is entitled to deduction u/s. 54 of the Act because the assessee has sold his residential flat on 24.02.2010. We allow the assessee's claim and order accordingly."(Emphasis Supplied). In the case of *ITO v. Shiv Sunil Khanna [IT Appeal No. 5857 (Mum.) of 2016, Ayushi Patni v. Dy. CIT [2020] 117 taxmann.com 231 (Pune - Trib.)* and *Rajiv Madhok v. Assistant Commissioner of Income Tax, Circle-30(1), New Delhi: 0 ITR(T) 427 (Delhi - Trib.)* co-ordinate benches of the Tribunal have under similar set of facts had allowed the benefit of exemption u/s 54 to the Assessee taking the date of possession as the relevant date.

10. In view of the above we are of the considered view that on the facts of the present case the date on which possession is by the Assessee (i.e. 02.04.2016) should be taken as the date of purchase. The requirement of the Section 54 is that the Assessee should purchase a residential house within the specified period and source of funds is quite irrelevant. Nowhere, it has been mentioned that the funds received as consideration from sale of original asset must be utilized for the purchase of the new residential house [*ACIT vs. Dr. P.S. Pasricha : (2008) 20 SOT 468 (Mumbai) (11-01-2008)*]. Since the date of purchase falls within a period of 2 years from the sale of Original Asset (i.e. 21.05.2014), the Assessee is entitled to benefit under Section 54 of the Act. The alternate contention of the Assessee, that the benefit of Section 54 be granted to the Assessee by treating the transaction as a case of 'construction' in view of the judgment of Hon'ble High Bombay Court in the case of *Hilla J B Wadia : 216 ITR 376*, now being academic, does not require consideration.

11. In the result, this appeal is allowed in the terms indicated above. Pronounced in the open court today on the 08th day of March 2022.

Sd/-
Kuldip Singh
(Judicial Member)

Sd/-
Pramod Kumar
(Vice President)

Mumbai, dated the 08th day of March 2022.

Copies to:

*(1) The Appellant
(3) CIT
(5) DR*

*(2) The respondent
(4) CIT(A)
(6) Guard File*

By order

*Assistant Registrar/Sr.PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai*