

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "B", MUMBAI

Before Shri Mahavir Singh, Judicial Member
& Shri Rajesh Kumar, Accountant Member

ITA No.2896/Mum/2014
Assessment Year : 2010-11

Bastimal K Jain, 114 Diamond Plaza, 83/85 Mahavir Jewellers, Dhanaji Street, Mumbai- 400 003. PAN AEJPJ0937N	Vs.	ITO 15(1)(2), Mumbai
(Appellant)		Respondent)

Appellant By : Dr. K Shivaram

Respondent By : Shri Sachidanand Dube

Date of Hearing :30.05.2016	Date of Pronouncement : 08.06.2016
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ORDER

Per Mahavir Singh, Judicial Member

This appeal by assessee is arising out of the order of the CIT(A) – 26, Mumbai, in appeal No.CIT(A)-26/IT-64/ITO.15(1)(2)/12-13 dated 24.02.2014. The assessment was framed by the ITO 15(1)(2), Mumbai, for A.Y. 2010-11 vide his order dated 29.01.2013 u/s. 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. The only issue in this appeal of the assessee is against the order of the CIT(A) confirming the action of the AO in disallowing deduction on account of Long Term Capital Gains claimed by the assessee by observing that new residential house was not purchased within the time limit prescribed u/s 54 of the Act.

3. Briefly stated the facts of the case are that the assessee is engaged in the business of manufacturing of ornaments through his proprietary concern. During the year under consideration, the assessee claimed deduction u/s. 54 and 54EC of the Act of Long Term Capital Gains arising out of sale of house property and claimed consequential deductions. The assessee sold his flat for a consideration of Rs.55 lacs on 24.02.2010 resulting into Long term capital gain of Rs.50,94,568/- after taking indexed cost of acquisition at Rs.3,79,832/-. The assessee claimed that he has purchased a flat vide agreement dated 28.12.2007 for a consideration of Rs.42.71 lacs from one M/s. Sharpmind Developers and the same was registered on

28.12.2007. According to the AO, the assessee has claimed deduction u/s. 54 of the Act on the basis of this purchase, which was made one year before the date of sale of the property. Accordingly, he denied deduction u/s. 54 of the Act. Aggrieved the assessee preferred appeal before the CIT(A), who also confirmed the action of AO by observing as under:

“3.8. Therefore, applying the decision of the facts of the present case, it is hereby held that the assessee has become owner of the house on registration of the agreement i.e. on 28.02.2008, which is beyond a period of 12 months before the date of sale of the property.

3.9. Further, as per the Provisions of Section 54, the amount of Capital Gains needs to be appropriated for the purchase of a new house within a period of one year before the sale of Long Term Capital Asset. Appropriation of Capital Gain in this case is the commitment of the assessee to purchase a new house for a agreed sum. In this case, the assessee has agreed to purchase a new house on 28.12.2007 for Rs.42,71,000/-. Thus, the assessee has appropriated the sum of Rs.42,71,000/- on 28.12.2007. It is beyond one year before the date of sale of the old house. Hence, deduction u/s. 54 cannot be allowed for this reason also.

3.10. Further Madras High Court also by an order dated 26.11.2013 in the case of Late R Krishnaswamy ITA No.697 & 698 of 2013 has held that date of registration of sale deeds is material for the purpose of various deductions provided in the Act from Long Term Capital Gains. Therefore, applying the various decisions as above, and also the Provisions of Section 54, it is hereby held that assessee has not acquired the new house property within one year before the sale of the Long Term Capital Asset has also no appropriation of the Long Term Capital Gain was made towards acquisition of a new house within one year before the sale of Long Term Capital Asset. Therefore, it is not eligible for deduction u/s. 54. This ground is therefore, dismissed.”

Aggrieved, the assessee is in second round of appeal before the Tribunal.

4. We have heard the rival contentions and have gone through the facts and circumstances of the case. We find that the assessee has sold his flat for consideration of Rs.55 lacs on 24.02.2010 and this resulted into Long term capital gains of Rs.50,94,568/- after claiming indexation of cost of acquisition. The assessee claimed deduction u/s. 54 of the Act in respect to which he entered into an agreement for purchase of Flat with M/s. Sharpmind Developers on 28.12.2007. The relevant events relating to the transaction reads as under:

Date of Purchase Agreement of under construction flat	28.12.2007
Date of Registration	28.02.2008

<u>Date of Payment</u>	
Rs. 9.35 L	FY 07-08
Rs.10 L	FY 08-09
Rs.10.71 L	FY 09-10
Date of O/C	31.03.2009
Date of possession	11.09.2009

5. Before us the learned counsel for the assessee argued that the assessee entered into an agreement with M/s. Sharpmind Developers on 28.12.2007. The flat intended to be purchased by the assessee was not at all constructed on 28.12.2007 and though the agreement for purchase was entered into is just a right for purchase of flat in the proposed construction and eventually property's possession was given to the assessee by the builder only on 11.09.2009 because the flat got ready and occupancy certificate was received by the builder from the BMC only on 31.03.2009. In such facts, the learned counsel for the assessee stated that acquisition of property is to be considered as and when the possession of the flat was given to the assessee by the builder and that date falls as on 11.09.2009. According to the learned counsel for the assessee the vital conditions of section 54 of the Act are fulfilled when the property's possession was handed over to the assessee by the builder on 11.09.2009 i.e. within the time limit prescribed u/s. 54 of the Act for claiming deduction u/s 54 of the Act. We find from the arguments of the learned counsel for the assessee as well as the learned DR that these facts are undisputed. The assessee from the very beginning has been claiming that the possession of the flat was handed over to the assessee only on 11.09.2009 and that date should be reckoned for the purpose of computation of claim of deduction u/s. 54F of the Act. We find that the learned counsel for the assessee relied on the decision of this Tribunal in the case of V M Dujodwala vs. ITO 36 ITD 130 (Mum), wherein the Hon'ble Tribunal considered the facts of the case as under:

"He submitted that the builder being out of fund and for such other reason, went on delaying the construction. Just to help the builder to fasten the construction, the payments were made in instalments much earlier to the actual possession of the property. This is very common in transaction in flats. The construction was completed at a later date and on 24-11-79, the builder expressed his desire to offer the possession of the flat. That is the first date when the property, at best, can be said to be a purchase of residential property. He stressed that even after construction of the building, the flat is not immediately available for residence to the assessee unless it is cleared by the municipal/corporation authorities. Therefore, he submitted that only when the flat construction was completed and available for residence and was actually allotted by the builder to the buyer in compliance with the agreement of sale entered upon by the builder earlier, it could be taken as ready for occupation and that was the date material for the purpose of counting period of one year within the meaning of Section 54

of the IT Act, 1961. He finally submitted that 9-4-1980, on which date the builder agreed to give possession of the flat would be taken as the date on which the assessee has purchased the property for the purpose of residence within the meaning of Section 54 of the IT Act, 1961. Till such time, he had only the right to purchase house property, he added. He relied on the following decisions:-

- *(1) CWT v. K.B. Pradhan [1981] 130 ITR 393 (Ori.) (2) K.P. Varghese v. ITO [1981] 131 ITR 597 (SC) (3) CIT v. Mrs. Shahzada Begum [1988] 173 ITR 397/38 Taxman 31 (AP) (4) Purushottam Govind Bhat v. First ITO [1985] 13 ITD 939 (Bom.) (5) Damodar Raheja v. Eighth ITO [1984] 10 ITD 75 (Mad.).*

And finally Tribunal decided the issue that in case the assessee is allowed possession of the property, only from that date the ownership is to be considered for the purpose of deduction u/s. 54 of the Act. Tribunal held as under:

"6. We have carefully gone through the facts of the case and the rival contentions. The question before us, though it is simple, raises problems of importance in metropolitan cities where there exists lot of problems for meeting basic human needs 'house'. Just to encourage assessee, Section 54 is enacted to give relief of exemption from capital gains in the case of assessee selling existing residential units and acquiring any other residential unit. This has to be done within a period of one year either before or after the date of sale of the first house property. If that is done so, capital gains arising on transfer of the first house property will be exempt to the extent of investment in the second house property as stipulated in Section 54. The flat in cities is the most common and a peculiar feature. The builder has to take plans of construction in his own name and sometimes in the names of his vendors and start construction. He invites prospective customers, enters into agreement for sale of flats proposed to be constructed by him and at times, demands the payment of price in one or more instalment. He may sometimes to finance his own construction activity, gives discounts and accepts lesser payment. The price paid before construction is complete, will be different from the price demanded by the vendors after the flat is constructed. The buyers even after having the agreement for purchase of the flat cannot exercise any right of ownership or their right cannot be traced to any part of the construction till such time the builder actually gives the possession of a particular flat to the buyer. After the completion of structure, it has to be inspected and cleared by the municipal authorities. Then the flat is ready for occupation which the builder normally intimates to the buyer. The buyer will then take possession and actually enjoy the house property to the exclusion of others. In this flat business, at times, the builder goes financially bad and delays the construction. Against this background of flat transaction, we are now faced with the provisions of Section 54 for granting exemption to the assessee, who at one time, enters into purchase and at other times,

takes possession and starts actual enjoyment of the flat. At what point of time he became owner of the house property will decide the fate of his exemption.

7. In identical issue in Purushottam Govind Bhat's case (supra) the Tribunal held as under: The right the assessee has got is a peculiar type of right which certainly cannot be classified as ownership. To say, therefore, that the assessee has purchased the property would in law be erroneous. On the contrary, that the assessee has an interest in this flat as much as that of a full owner cannot be denied. The purpose of the assessee getting the flat allotted was to have the benefit of residential accommodation entirely in his control as if he was the full owner. Except, therefore, for a few technical requirements, the assessee can be said to be the full owner of the property. As a matter of fact, if not in law, therefore, it would be correct to say that the assessee has purchased a residential property.

....

8. Left with the relevant date to decide in the facts of the case, the decision of the Tribunal in Purushottam Govind Bhat's case (supra) really comes to favour the assessee. In the said case, the assessee joined the society in 1977. He was allotted a flat and occupied the same on 1-1-1980. The Tribunal held, joining the society and paying the amounts cannot really amount to purchase of a house. On the contrary, allotment of the flat would certainly give the assessee certain specific obligations and rights. The manner in which the amounts are paid and the period over which they are paid may not be of much relevance. Considering the peculiar circumstances of that case, it was held that the benefit of Section 54 should be extended by taking the date of allotment and occupation as the relevant date of purchase. Following the said decision, we are inclined to hold that in this case also, the assessee has, though, entered into agreement for purchase of flat on 22-10-77, paid the money during 1977 to 1979, but the relevant date to be taken for the purpose of applying of Section 54 should be the date on which the flat was ready for occupation by the assessee. Taking that date as the date of purchase, is within the period of one year and therefore the capital gains are clearly exempt from tax applying the provisions of Section 54."

6. The learned counsel for the assessee also relied on the decision of Hon'ble Bombay High Court in the case of CIT vs. Smt. Beena K Jain 217 ITR 363 (Bom), wherein the Hon'ble Bombay High Court has taken similar view by observing as under:

" 2. Under section 54F of the Income-tax Act, in the case of an assessee if any 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 a residential house, the capital gain shall be dealt with as provided in that section. As per the section certain exemption has to be allowed in respect of the capital gains to be calculated as set out therein. The 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 the 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 July 29, 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 come to the conclusion that the purchase was substantially effected when the agreement of purchase was carried out or completed by payment of full consideration on July 29, 1988, and handing over of possession of the flat on the next day. ”

7. On the other hand, the learned senior DR relied on the decision of Hon'ble Gujarat High Court in the case of CIV s. Jindas Panchand Gandhi [2005] 279 ITR 552 (Guj) wherein, the issue was regarding the claim of deduction u/s. 80T and also whether the asset is a Long term or Short term, not the claim of deduction u/s. 54 of the Act.

8. 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 K Jain, 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.

7. In the result, the assessee's appeal is allowed.

Order pronounced in the open court on this day of 8th June 2016.

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai, Dated: 8th June, 2016.

SA

Sd/-
(Mahavir Singh)
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT(A), Mumbai.
4. The CIT
5. The DR, 'B' Bench, ITAT, Mumbai

BY ORDER

//True Copy//

(Assistant Registrar)
Income Tax Appellate Tribunal, Mumbai