

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH : KOLKATA

[Before Hon'ble Sri A.T.Varkey, JM & Shri M.Balaganesh, AM]

I.T.A No.594/Kol/2017

Assessment Year : 2012-13

Sri Jagdish Rai Karnani
Kolkata
[PAN : AFAPK 1013 Q]
(Appellant)

-vs.-

I.T.O., Ward-35(2)
Kolkata
(Respondent)

For the Appellant : Shri B.C.Jain, FCA

For the Respondent : None

Date of Hearing : 15.06.2017.

Date of Pronouncement : 07.07.2017

ORDER

Per M.Balaganesh, AM

1. This appeal of the assessee arises out of the order of the Learned Commissioner of Income Tax (Appeals) -10 , Kolkata [in short the Id CIT(A)] in Appeal No. 51/CIT(A)-10/W-35(2)/2015-16/Kol dated 17.01.2017 against the order passed by the Income Tax Officer, Ward-35(2), Kolkata [in short the Id AO] under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act '] dated 30.03.2015 for the Asst Year 2012-13.
2. The only issue to be decided in this appeal is as to whether the Id CITA was justified in denying the benefit of deduction u/s 54 / 54F of the Act in the facts and circumstances of the case.
3. The brief facts of this issue is that the assessee is an individual, engaged in the business of trading in chemicals, filed his return of income for the Asst Year 2012-13 electronically showing total income of Rs 12,50,590/- which was processed u/s 143(1) of the Act and later on selected for scrutiny under CASS. The Id AO observed that the assessee had sold residential house property at Plot No. H 33, Sector 39, Noida, U.P. on

29.6.2011 for Rs 1,22,00,000/-. The assessee in his return claimed long term capital loss of Rs 13,48,434/- as computed below:-

Sale Consideration of old property at Noida Sector 39		1,22,00,000
Less: Purchase amount spent upto 31.3.11 as per Balance Sheet as at 31.3.11 for Property in Sector 39	18,40,917	
Less: Construction cost for new property at Noida Sector 44	1,06,27,317	
Less: Payment of final instalments to Noida in FY 2011-12 for Property in Sector 39	10,80,200	
	-----	1,35,48,434
Long Term Capital Loss (LTCL)		----- 13,48,434 -----

This LTCL was not claimed as set off with any other income in the return. The assessee admitted that the aforesaid computation was prepared in a novice manner with complete ignorance of provisions of the Act. Infact even the indexation benefit was not claimed in the aforesaid computation.

3.1. The ld AO observed that the total cost of property before transfer was as under:-

a) Cost of purchase of plot (paid from 21.12.93 to 24.6.11)	19,35,487
b) Cost of construction (paid from 17.3.09 to 30.6.09)	4,40,000
c) Transfer charges (paid on 14.6.11 to Noida Authority)	5,38,200
d) Other payments (paid to RWA, Sector 39 on 5.6.09)	7,350

	29,21,037

The completion certificate of the said residential house property was issued by the Noida Authority on 22.6.2009. The Id AO arrived at the Short Term Capital Gain on this house property at Rs 92,78,963/- (1,22,00,000 – 29,21,037).

3.2. The Id AO observed that the assessee had purchased a residential plot jointly with his son Sri Asish Karnani at Sector 44, Noida on 16.3.2011 for a sum of Rs 2,36,00,000/-. The details of the payment claimed in the computation was as below:-

March 2011	Rs 95,44,467	
September 2011	Rs 10,82,850	
	-----	Rs 1,06,27,317

3.3. The Id AO observed that the assessee was not eligible for any deduction u/s 54 or 54F of the Act from the aforesaid Short Term Capital Gains and hence he was directed to show cause as to why the Short Term Capital Gain (STCG) on sale of House Property at Plot H-33 , Sector 39, Noida for the sum of Rs 92,78,963/- should not be added to the total income for Asst Year 2012-13. The assessee had filed submission against the show cause and claimed that in respect of the receipt of consolidated sale price for sale of land and building – capital gain from land can be taxed as LTCG and on sale of residential building as STCG. Further, the assessee claimed that land cost also qualifies for exemption u/s 54 and 54F of the Act.

3.4. The assessee vide his application dated 23.3.2015 solicited direction u/s 144A of the Act from Id Joint Commissioner of Income Tax (Id JCIT) . The direction of the Id JCIT vide his order dated 27.3.2015 in brief is as under:-

(i) The document reveals that a plot was allotted to the assessee by the Noida Development Authority prior to the year 1993 and the cost of purchase of the plot was given in different instalment between 21.12.1993 to 24.06.2011. Thus, it is apparent that the assessee is holding the plot for a long period of time and it may be considered as long term capital asset on the principle that the date of

acquisition of rights in the property is the date on which the intended buyer has acquired the rights as soon as he has given the initial advance.

(ii) Following the interpretation of law by several High Courts, apportionment of the sales price is to be made between land and building. Land part of Plot No. H33, Sector 39, Noida is to be considered as Long Term Capital Asset and accordingly Long Term Capital Gain is to be determined . Simultaneously, Short Term Capital Gain on the building is also to be determined.

(iii) However the benefit of Section 54 cannot be attracted in this case since after bifurcation of capital asset into long term and short term, the property, mentioned ibid has lost its character of being qualified for the purpose of section 54 of the I.T.Act.

(iv) The Assessing Officer is free to give the assessee the benefit of section 54F in respect of the land portion which has to be considered as Long Term Capital Asset, subject to the fulfillment of other conditions mentioned in Section 54F.

3.5. The Id AO after taking into account the submissions of the assessee and the directions of Id JCIT u/s 144A of the Act , recomputed the LTCG on transfer of land and STCG on transfer of building as under:-

Long Term Capital gain on transfer of land :

Full value of consideration of Land (Rs.38,325 x 300) Rs.1,14,97,500/-

Less (i) Expenditure on transfer paid to Noida Authority

Dated 14.06.2011 : Rs.5,38,200/-

(ii) Indexed cost of acquisition:

(a) 21.12.1993:	40,000x785/244	Rs.1,28,688/-
(b) 05.10.1994:	84308x785/259	Rs.2,55,528/-
(c) 05.10.1994:	40095x785/259	Rs.1,21,523/-
(d) 05.01.1995:	91,602x785/259	Rs.2,77,635/-
(e) 05.07.1995:	40,320x785/281	Rs.1,12,637/-
(f) 31.01.1997:	1,25,900x785/305	Rs.3,24,037/-
(g) 09.04.1997:	25,470x785/331	Rs. 60,404/-

(h) 05.05.1998:	67,562x785/331	Rs.1,60,230/-
(i) 15.05.1998:	35x785/331`	Rs. 83/-
(j) 19.12.1998:	6,525x785/351	Rs. 14,592/-
(k) 21.01.2009:	5,52,380x785/582	Rs.7,45,048/-
(l) 24.01.2009:	3,19,290x785/582	Rs.4,30,657/-
(m) 24.06.2011:	5,42,000x785/785	<u>Rs.5,42,000/-</u> Rs.31,73,062/-

(iii) Indexed cost of improvement: Nil Rs.37,11,262/-

LONG TERM CAPITAL GAINS Rs.77,86,238/-

2.10. Short Term Capital Gain on Building :

Full value of consideration (building)(1,22,00,000-1,14,97,500) Rs.7,02,500/-

Less⊗(i) Exemption on transfer paid to RWA

Sector 39 for NOC on 05.06.2009 Rs. 7,350/-

(ii) Cost of acquisition Rs.4,40,000/-

(cost of construction)

17.03.2009: 1,75,000/-

03.04.2009: 1,00,000/-

25.04.2009: 65,000/-

30.06.2009: 50,000/-

30.06.2009: 50,000/-

(iii) Cost of Improvement Nil Rs.4,47,350/-

SHORT TERM CAPITAL GAIN : Rs.2,55,150/-“

3.6. The Id AO observed that the Id JCIT had categorically held that the assessee is not entitled for deduction u/s 54 of the Act as after bifurcation of sale consideration into land and building, the property lost its character of being qualified for the purpose of section 54 of the Act and accordingly relying on the same, the Id AO denied the said benefit to the assessee.

3.7. The assessee claimed deduction u/s 54F of the Act on account of construction of a new house at Plot No. 99 in Sector 44, Noida. The Id AO observed that the purchase of the land and the construction of the building had already been made before the transfer of the property at Plot 33, Sector 39, Noida on 29.6.2011. She observed that the deduction u/s 54F of the Act is available to the assessee when the net consideration on transfer of long term capital asset received is used in the construction of a new house after the date of transfer of original long term capital asset. In the instant case, the date of transfer of long term capital asset is 29.6.2011. The land related to new asset was purchased on 16.3.2011 and construction was completed before 24.5.2011 (date of inspection by Noida authority on the basis of which completion certificate was issued on 26.7.2011). Thus the construction of new property was not made after the date of transfer of long term capital asset. Accordingly, he held that the two conditions of deduction u/s 54F of the Act are violated in the instant case :-

a) The assessee owned three residential house properties on the date of transfer i.e. 29.6.2011 of long term capital asset, i.e Plot 33, Sector 39, Noida -

- i. Residential flat no. 1202 at Kausambi
- ii. Residential house at Plot No. 99, Sector 44, Noida and
- iii. Residential house at Plot 33, Sector 39, Noida, which was
Transferred resulting in Long /Short Term Capital Gain.

b) The assessee did not construct the new residential house property after the date of transfer i.e 29.6.2011 of long term capital asset but the new residential house property was already acquired before the date of transfer.

3.8. Accordingly, the Id AO held that assessee does not qualify in any way for deduction u/s 54 or 54F of the Act because the conditions stipulated therein are not fulfilled.

Hence he brought the LTCG on transfer of land for the sum of Rs 77,86,238/- and STCG on transfer of building for the sum of Rs 2,55,150/- to tax.

4. The assessee stated before the Id CITA that the date of transfer of old house at Sector 39 was held by the Id AO erroneously as 29.6.2011 instead of 26.5.2011. It was submitted that on 26.5.2011, the assessee lost his beneficial right, title and interest in the property and started receiving payments for the sale consideration. The details of receipt of sale consideration of property at Sector 39 are as below:-

26.5.2011 – Received by RTGS	-	21,00,000
22.6.2011 – Received by RTGS	-	21,00,000
25.6.2011 – Received vide Cheques Nos. 271823-827	-	21,00,000
28.6.2011 – Received by RTGS	-	34,00,000
29.6.2011 – Received by DD No. 338566	-	25,00,000

		1,22,00,000

4.1. It was submitted that the date of construction of new property at Sector 44 was held by the Id AO as 24.5.2011 (being the date of inspection by Noida Authorities). It was stated that such inspection was done for grant of sanction of plan and not for grant of completion certificate. Various amounts were due to Noida authorities which were cleared on 15.7.2011 as per the receipts enclosed and therefore the construction, by any stretch of imagination, could not be said to have been completed prior to 15.7.2011. Noida authorities granted completion certificate on 26.7.2011. This should be treated as date of completion. The relevant date of completion of construction should be taken as per completion certificate issued by Noida Authorities. It was stated that the additions of Rs 10,82,850/- were done in Financial Year 2011-12 on property at Sector 44 by making various payments on various dates as below:-

1.4.11 – SV Construction – Chq No. 645298	-	1,50,000
21.4.11 – SV Construction – Chq No. 645300	-	3,00,000

22.7.11 – SV Construction – Chq No. 763793	-	2,00,000
15.7.11 – Noida Authority – Lease Rent and Interest Cheque No. 645305	-	2,34,500
15.7.11 – Noida Authority – Due Interest – Cheque No. 763786	-	73,350
19.9.11 – SV Construction- Chq No. 763796	-	1,25,000

		10,82,850

It was submitted that the payments were made to SV Construction for construction of house at new purchased property at Plot No. F99, Sector 44, in instalments in 4 phases as above. Final payment was made on 19.9.2011 after completion of all finishing works including electrical, painting and furnishing work. Thus it was pleaded that the assessee had constructed the new house within the period of three years from the date of transfer.

4.2. .It was also submitted that the Id AO had misdirected herself that there are three properties held by the assessee. In addition to one residential house at Kausambi, at any point of time, the assessee was not holding three properties. Property at Sector 39 was disposed off by the assessee and in lieu of that another property at Sector 44 was acquired. Hence totally the assessee was holding only two residential properties including the newly acquired property, which is well within the requirement of section 54F of the Act.

4.3. It was also submitted before the Id CITA as under:-

a) The Id AO erred in holding that on bifurcation of gain on transfer of capital asset being the residential house as long term and short term on valuing the land and building separately, will change the character of asset as non –residential house.

b) On such bifurcation of gain, the Id JCIT directed that the gain should not be assessed as gain on sale of residential house for the purpose of section 54, but may be considered for allowing deduction u/s 54F.

4.4. The Id CITA however ignored all the submissions of the assessee and simply reiterated the findings of the Id AO and confirmed the action of the Id AO.

5. Aggrieved, the assessee is in appeal before us on the following grounds:-

“1. That in the facts and circumstances of the case, the Id Commissioner of Income Tax (Appeals)-10, Kolkata erred in not granting appropriate deduction under the Income Tax Act on Long Term Capital Gains of Rs.77,86,238/- arising on sale of residential house for Rs.1,22,00,000/- for Investments made in another residential house amounting to Rs.1,06,27,317/-.

2. That in the facts and circumstances of the case, the Id Commissioner of Income Tax (Appeals)-10, Kolkata erred in treating the date of sale of old residential house as 29.06.2011 whereas the date of sale need to be taken as 18.05.2011 being the date of first receipt for sales.

3. That in the facts and circumstances of the case, the appellant craves leave to add, alter, modify and/or submit further or more ground(s) of appeal either before or at any time during the hearing of the appeal.”

6. None appeared on behalf of the revenue when the case was called for hearing. The revenue had not even sought an adjournment before us on the date of hearing. Hence we proceed to dispose off this appeal after hearing the Id AR.

7. We have heard the Id AR and perused the materials available on record. The facts stated hereinabove are not reiterated herein for the sake of brevity. It is not in dispute that the property at Sector 39 was sold by the assessee was a residential house and that the sale consideration of Rs 1,22,00,000/- has been bifurcated into land portion and building portion separately. The gain arising from transfer of land would be construed as long term capital gain. The gain arising from transfer of building would be construed as short term capital gain. This bifurcation of sale consideration into long term and

short term would not in any way change the character of the asset. The character of the asset continues to remain as long term capital asset. Only for the purpose of computation of gains, the consideration has been bifurcated into long term and short term separately. Hence we hold that the lower authorities grossly erred in giving a finding that the character of asset gets changed into a non-residential house. Hence the assessee would be squarely entitled for deduction u/s 54 of the Act in respect of investment made in new property at Sector 44, Noida.

7.1. Now the short question is whether the Sector 44 property was constructed within the stipulated time as per section 54 of the Act. It is not in dispute that the assessee along with his son Shri Asish Karnani had acquired a plot of land at Sector 44 , Noida jointly and payments have been made in March 2011 and Sept 2011 for Rs 1,06,27,317/-. The construction on the said land had also been made through SV Construction commencing from 1.4.2011 onwards. The date of transfer of residential house at Sector 39 was 29.6.2011. The assessee in the instant case had purchased a land before the date of transfer and started the construction thereon commencing from 1.4.2011 and finished the construction thereon and Noida Authorities had given the completion certificate on 26.7.2011. These facts are not in dispute. The Id AR also claimed that he had final payment to SV Construction (builder) on 15.7.2011 towards electrical, painting and furnishing work to make the property habitable. Hence it could be safely concluded that the assessee had duly invested the net sale consideration towards construction of the house property at Sector 44, Noida.

7.2. We also hold that the reasoning given by the lower authorities for denying the benefit of section 54F of the Act that the assessee was having three residential properties is erroneous. The property at Sector 39, Noida was sold and capital gain has been computed by the Id AO only on that property. Hence the said property should be obviously excluded while determining the number of properties held by the assessee. If

the same is done, the assessee has one property at Kausambi and the new property at Sector 44, Noida. Hence the assessee would be duly eligible for benefit u/s 54F of the Act. Hence even if the property that is the subject matter of transfer ie Property at Sector 39 is considered as non-residential house (as done by the lower authorities), then, the assessee would be entitled for deduction u/s 54F of the Act as he had invested in new house property at Sector 44, Noida.

7.3. In view of the above reasoning, we hold that the assessee in the instant case had sold only a residential property at Sector 39 and had reinvested the sale consideration in Sector 44, Noida. Admittedly the construction of sector 44 property is a residential property and the construction thereon was completed on 26.7.2011 as per the completion certificate issued by Noida authorities. Hence the construction of new house was carried out within three years from the date of transfer of old house. It is well settled that the payments made for the new property prior to the date of sale of old property would be eligible for deduction u/s 54/54F of the Act. Reliance in this regard is placed on the decision of the *Hon'ble Allahabad High Court in the case of CIT vs H.K.Kapoor (Decd) reported in (1998) 234 ITR 753 (All)* wherein it was held as under:-

“7. The question for consideration is whether exemption on capital gains could be refused to the assessee simply on the ground that the construction of the Surya Nagar, Agra house, had begun before the sale of the" Golf Link house. Similar question came up for consideration before the Karnataka High Court in the case of CIT v. J.R. Subramanya Bhat [1987] 165 ITR 571. In the case before the Karnataka High Court, the date of the sale of the old building was February 9, 1977. The completion of the construction of the new building was in March, 1977, although the commencement of construction started in 1976. On these facts, the Karnataka High Court held that it was immaterial that the construction of the new building was started before the sale of the old building. We fully agree with the view taken by the Karnataka High Court. The Appellate Tribunal was right in holding that capital gains arising from the sale of the Golf Link house to the extent it got invested in the construction of the Surya Nagar house, will be exempted under Section 54 of the Act.”

Similar view was expressed by the *Hon'ble Delhi High Court in the case of CIT vs Bharti Mishra reported in (2014) 265 CTR 374 (Del)* wherein it was held as under:-

HELD

that section 54F(1) if read carefully states that assessee being an individual or HUF, who had earned capital gains from transfer of any long-term capital not being a residential house could claim benefit under the said section provided, anyone of the following three conditions were satisfied; (i) the assessee had within a period of one year before the sale, purchased a residential house; (ii) within two years after the r date of transfer of the original capital asset, purchased a residential house and (iii) within a period of three years after the date of sale of the original asset, constructed a residential house. For the satisfaction of third condition, it was not stipulated or indicated in the section that construction must begin after the date of sale of the original/ old asset. There was no condition or reason for ambiguity and confusion which requires moderation or reading the words of the said sub-section in a different manner. The apprehension of the Revenue that entire money collected or received on transfer of the original/ capital asset would not be utilised in the construction of the new capital asset, i.e., residential house, was ill-founded and misconceived. The requirement of sub-section (4) was that if consideration was not appropriated towards the purchase of new asset one year before date of transfer of the original asset or it was not utilised for purchase or construction of the new asset before the date of filing of return u/s 139, the balance amount shall be deposited in an authorized bank account under a scheme notified by the Central Government. Further, only the amount which was utilised in construction or purchase of the new asset within the specified time frame stand exempt and not the entire consideration received. Section 54F was a beneficial provision and was applicable to an assessee when the old capital asset was replaced by a new capital asset in form of a residential house. Once an assessee falls within the ambit of a beneficial provision, then the said provision should be liberally interpreted. In the result, appeal was answered in favour of assessee. “

7.4. In view of our aforesaid findings in the facts and circumstances of the ase and respectfully following the judicial precedents relied upon hereinabove, we hold that the assessee is duly entitled for deduction u/s 54 of the Act. Accordingly the ground no. 1 raised by the assessee is allowed.

7.5. In view of our finding in Ground No. 1 above, the adjudication of Ground No. 2 is of no relevance and hence treated as infructuous. Accordingly the same is dismissed as infructuous.

8. In the result, the appeal of the assessee is allowed.

Order pronounced in the Court on 07.07.2017

Sd/-
[A.T.Varkey]
Judicial Member

Sd/-
[M.Balaganesh]
Accountant Member

Dated : 07.07.2017

[RG PS]

Copy of the order forwarded to:

1. Sri Jagdish Rai Karnani, 33, Brabourne Road, 7th Floor, Kolkata-700001.
2. I.T.O., Ward-35(2), Kolkata.
3. C.I.T.(A)-10, Kolkata.
4. C.I.T.-12, Kolkata
- 5.. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches

