

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "J", MUMBAI**

BEFORE SHRI G.S. PANNU (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 4631/MUM/2016
Assessment Year: 2012-13**

Shri Sandeep Vijay Mittal, 5, Sunrise Building, 3 rd Pasta Lane, Colaba, Mumbai – 400005 PAN: AGDPM1694F	Vs.	The ACIT-17(3), Aayakar Bhavan, Mumbai - 400005
(Appellant)		(Respondent)

Assessee by : Shri V.C. Shah (AR)
Revenue by : Smt. Arju Garodia (DR)

Date of Hearing: 16/04/2018
Date of Pronouncement: 11/07/2018

ORDER

PER RAM LAL NEGI, JM

This appeal has been filed by the assessee against the order dated 10.05.2016 passed by the Ld. Commissioner of Income Tax (Appeals)-28, Mumbai, for the assessment year 2012-13, whereby the Ld. CIT (A) has dismissed the appeal filed by the assessee against assessment order passed u/s 143 (3) of the Income Tax Act, 1961 (for short 'the Act').

2. Brief facts of the case are that the assessee an individual deriving income from salary and other sources, filed its return of income for the assessment year under consideration declaring the total income of Rs. 33,28,022/-. The return was processed u/s 143 (1) of the Act. Since, the case was selected for scrutiny, notices u/s 143 (2) and 142 (1) were issued by the AO. In response to the said notices, the authorized representative of the assessee attended the proceedings and also filed the details called for. It was noticed that assessee had claimed exemption on sale of shares u/s 54F amounting to Rs.

79,25,152/- . Accordingly, assessee was asked to substantiate the claim of exemption u/s 54F and also asked to furnish agreement executive with the builder and other evidence to prove the subsequent payments. The AR submitted that assessee is entitled for exemption as he has acquired residential house on transfer of long term capital asset and paid Rs. 1,67,10,600/- before the date of filing return. The assessee also filed copy of allotment letter. The AO further noticed that Wadhwa Group Pvt. Ltd. had issued letter dated 04.02.2015. In Para 14 of the letter, it was written as under:

“The detail terms and conditions of allotment shall be incorporated in the formal Agreement for sale which will be executed between you and us in due course of time which shall be subject to provisions of Maharashtra ownership Flats Act, 1963 or the Maharashtra Apartment Ownership Act, 1970 and the rules made there under whichever may be adopted by us and you have agreed to execute the same upon being called upon to do so”.

3. It was further noticed that the payments were made on 27.06.2011, 28.06.2011 and 16.11.2011 as per the said letter date of allotment was 04.02.2015 and the date of sale of capital asset was 16.06.2011. The AO rejected the contention of the assessee holding that since the builder has not issued authority letter within three years from the date of sale of capital assets. The assessee is not entitled for claim u/s 54F.

4. The assessee challenged the assessment order before the Ld. CIT (A). The Ld. CIT (A) after hearing the assessee dismissed the appeal and confirmed the action of the AO in denying the deduction u/s 54F of the Act. The assessee is in appeal before the Tribunal against the impugned order passed by the Ld.CIT (A).

5. The assessee has preferred this appeal against the impugned order passed by the Ld. CIT (A) on the following effective grounds:-

1. *“On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in confirming that the exemption u/s 54F of the Income Tax Act was rightly not granted by the assessing officer in respect of long term capital gain of Rs. 79,25,152/- which was fully invested by your appellant in purchasing a property being a residential flat for the user by the appellant though your appellant had invested a sum of Rs. 1,67,10,600/- to purchase under construction flat though the builder had issued booking confirmation to your appellant.*
2. *On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in coming to the conclusion that as the letter of allotment was issued after completion of the specified period by the builder which was merely an act of confirmation of booking done by him containing further confirmation that advance was received earlier and further given details terms and conditions for the same flat booked earlier by the appellant and made payments which was within the time prescribed u/s 54F of the Income Tax Act.*

6. Before us, the Ld. counsel for the assessee submitted that the Ld. CIT(A) has wrongly confirmed the order passed by the AO. The assessee invested in an under construction Flat and paid a sum of Rs. 1,39,25,500/- in June, 2011 and made payment of Rs. 27,85,100/- up to January, 2012. The booking form was issued by Vijay Associates (Wadhwa) Construction Pvt. Ltd.), confirming booking of flat No 05 on 28th. floor in the building Imperial Heights ‘D’ Wing for a total consideration of Rs. 2,78,51,000/- and payment of Rs. 27,85,100/- was made by the assessee by cheque dated 28.06.2011. Further, payment of Rs. 1,11,40,400/- was made on the same day by issuing cheque dated 27.7.2011 thereby making payment of 40% of the Act at the time of booking as

per the terms and conditions of booking form. The Ld. counsel invited our attention to the copy of booking form/details of flat to be purchased, issued on behalf of Vijay Associates (Wadhwa) Construction Pvt. Ltd. Thus, the Ld. counsel contended that entire gain was invested by the assessee within the prescribed period. The Ld. counsel further submitted that letter of allotment dated 04.02.2015 issued by the builder establishes that the property was developed as per development agreement. The appellant had paid a total amount of Rs. 2,15,95,735/- before issuing allotment letter by the builder. An agreement was entered into between the assessee and the builder on 18.09.2017 in respect of the same flat. The competent authority has issued occupation certificate on 25.01.2018. The Ld. counsel submitted that in view of the aforesaid facts, the impugned order is erroneous and liable to be set aside. The Ld. counsel for the assessee relied on the decision of Chandigarh Bench of ITAT rendered in the case of *Seema Sabharwal Vs. ITO, ITA No. 272/CHD/2017*, decision of the ITAT Mumbai in the case of *Rajeev B Shah Vs. ITO 159 ITD 964 (Mum.Trib.)* The Judgment of Hon'ble Karnataka High Court delivered in *CIT vs. Sambandam Uday Kumar 345 ITR 389 (Karnataka)* in support of the claim of the assessee u/s 54F of the Act.

7. On the other hand, the Ld. Departmental Representative (DR) relying on the order passed by the Ld. CIT (A) submitted that the allotment letter was issued on 04.02.2015 as the builder got commence certificate endorsement for 28th Floor on 28.06.2011. Moreover, the findings of the Ld. CIT (A) are based on the judgments relied on by the AO. Since the assessee has got the possession of the flat after expiry of three years from the date on which the assessee received long term capital gain, the assessee is not entitled for exemption u/s 54F of the Act.

8. We have heard the rival submissions and also perused the material on record. The only grievance of the assessee is that the Ld. CIT (A) has wrongly confirmed the action of AO in denying its claim u/s 54F of the Act. The

undisputed facts of the case are that the assessee had earned long term capital gain of Rs. 79,25,152/- during the assessment year under consideration on sale of shares on 16.06.2011. The said amount was invested for purchasing a flat which was under construction. The Builder issued Booking Form and details of Flat on 28.06.2011 mentioning the details i.e. flat No. 05 on 28th. floor in the building Imperial Heights 'D' Wing for a total consideration of Rs. 2,78,51,000/-. The assessee made payment of Rs. 27,85,100/- and Rs. 5,00,000/- on 28.06.2011, Rs. 1,11,40,400/- on 27.06 2011 and Rs. 13,92,550/- on 16.11.2011, as per the terms and conditions stipulated in booking form. Allotment letter was issued on 04.02.2015. Sale agreement was registered on 18.09.2018 and the Municipal Corporation issued occupation certificate on 25.01.2018.

9. In the light of the aforesaid facts, the only question to be adjudicated in is that whether the assessee is entitled for exemption u/s 54F of the Act? The authorities below have denied the claim mainly on the ground that the allotment letter was issued in the year 2015 as the builder got commence certificate for 28th. floor only on 31.01.2015 and that the assessee did not get possession of the flat within three years as contemplated in section 54F of the Act. The Ld. CIT(A) has further observed that the documents on record including receipts filed by the assessee do not mention the complete details of the property and rights and liabilities of the assessee.

10. In the light of the rival contention, we have carefully examined the evidence on record to ascertain as to whether the assessee is entitled for exemption us/54 of the Act. We notice that the assessee has made investment of the entire capital gain from transfer of long term capital asset in purchasing of flat from Vijay Associates (Wadhwa) Constructions as per the terms and conditions mentioned the Booking Form and details of Flat dated 28.06.2011. The assessee has also submitted the receipts issued by the builder and other documents to prove the investment. Documents on record further establish

that the assessee had made payment of amount to the builder more than the amount of capital gain received from transferring the capital asset, during the assessment year under consideration. So far as the eligibility for exemption u/s 54F is concerned, as pointed out by the Ld. counsel, the Chandigarh Bench of the ITAT relying on the decision of the Hon'ble Punjab and Haryana High Court rendered in *Mrs. Madhu Kaul vs. CIT, ITA No. 89 of 1999* and the decision of the Hon'ble Calcutta High Court in *CIT vs. Bharati C. Kothari(2000)160 CTR 165* and various other decisions of the Tribunal, has held, in the case of *Seema Sabharwal vs. ITO, ITA No. 272/Chd/2017* that if the assessee invests the long term capital gain in purchase/ construction of building within the stipulated period and the construction is in progress, then the benefit of exemption cannot be denied to the assessee on the ground that construction was completed within three years from the date of transfer of original asset.

11. The coordinate Bench in the case of *Kishore H. Gaiaya vs. ITO, 137 ITD (Mum)/2012* has held that booking of flat with a builder is a case of construction for the purpose of claiming exemption under section 54F of the Act. If the construction is complete within three years exemption u/s 54F of the Act would be available even if possession was not taken within three years. The Hon'ble Karnataka High Court in the case of *CIT vs. Sambandam Uday Kumar 345 ITR 389(Kar)* has held that once it is demonstrated that consideration received on transfer of capital asset is invested in the residential property, the fact that the transaction involved in purchase or construction of such residential property are not completed in all respects would not disentitle the assessee from benefit of exemption under section 54F of the Act.

12. In the present case the Ld. CIT(A) has wrongly observed that the documents including receipts issued by the builder do not contain the details of the property to prove the investment of capital gain in residential property. The Booking Form along with details of property clearly mentions that the

assessee had made payments in question for purchasing Flat No 05 at 28th floor of the building Imperial Heights to be constructed by the builder. The assessee had invested more than the capital gain received on transfer of capital asset in the year 2011 in which the assessee had transferred his capital asset. Delay in construction was not on the part of the assessee, which is clear from the fact that the authorities concerned had to extend the commencement certificate so many times. As per the record the competent authority extended the commencement certificate last time on 31.01.2015. The said facts establish that delay in construction was attributable to the builder and not to the assessee.

13. Taking into consideration the entire facts of the case in the light of the cases discussed in the foregoing paras, we are of the considered view that the benefit of exemption u/s 54F of the Act cannot be denied to the assessee on the ground that the assessee did not get the possession of the residential property within three years from the date of sale of the original asset or that there was no allotment letter while making initial investment. Since, the assessee has made investment as per the terms of the Booking Form and ultimately got the same flat, details of which are mentioned in the Booking Form, from the builder, the Ld. CIT(A) has wrongly confirmed the action of the AO and denied the exemption. Hence, following the ratio laid down in the cases discussed above, we set aside the impugned order and direct the AO to allow the exemption u/s 54F of the Act as claimed by the assessee.

In the result, appeal filed by the assessee for assessment year 2012-2013 is allowed.

Order pronounced in the open court on 11th July, 2018.

Sd/-
(G.S. PANNU)

ACCOUNTANT MEMBER

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 11/07/2018

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/ Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**