

THE INCOME TAX APPELLATE TRIBUNAL
“G” Bench, Mumbai
Before Shri B.R. Baskaran (AM) & Shri Ramlal Negi (JM)

I.T.A. No. 265/Mum/2015 (Assessment Year 2009-10)

Amritlal B. Sahu C/o. M/s. Sahu & Sons 57/59-A, Matruchhaya Building, S.K. Bole Road Dadar West, Mumbai 400028. PAN : AADPS9212M (Appellant)	Vs.	ITO 18(1)(2) Mumbai (Respondent)
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I.T.A. No. 266/Mum/2015 (Assessment Year 2009-10)

Mohanlal B. Sahu C/o. M/s. Sahu & Sons 57/59-A, Matruchhaya Building, S.K. Bole Road Dadar West, Mumbai 400028. PAN : AACPS2203F (Appellant)	Vs.	ITO 18(1)(2) Mumbai (Respondent)
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I.T.A. No. 1189/Mum/2016 (Assessment Year 2009-10)

Omprakash B. Sahu C/o. M/s. Sahu & Sons 57/59-A, Matruchhaya Building, S.K. Bole Road Dadar West, Mumbai 400028. PAN : AACPS2204C (Appellant)	Vs.	ITO 18(1)(2) Mumbai (Respondent)
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Assessee by	Shri K. Gopal & Ms. Neha Paranjpe
Department by	Shri V. Vidhyadhar
Date of Hearing	19.7.2018
Date of Pronouncement	31.8.2018

ORDER

Per B.R. Baskaran (AM) :

All these three appeals filed by the respective assessees are directed against the Ld CIT(A) in their hands rejecting the claim for deduction u/s 54 of the Act for assessment year 2009-10. As the facts relating to the issue are identical in these cases, they were heard together and are being disposed of by this common order, for the sake of convenience.

2. The facts relating to the issue are stated in brief. Shri Amritlal B Sahu and Shri Mohanlal B Sahu jointly held a flat, i.e., Flat No.12 in “Sheetal Chhaya” Apartments. They sold the same for Rs.80.00 lakhs on 07.07.2008. Shri Omprakash B Sahu held a Flat No.12A in the above said apartment and he sold the same for Rs.56.00 lakhs on 07.07.2008. Thus, all the three persons have sold the flat on 07-07-2008.

3. All the three persons were holding tenancy rights in a property, which was proposed to be developed under the name “Matruchhya” Apartments. All the three persons entered agreement for purchase of additional areas over and above the area to which they are entitled towards their tenancy rights. The said agreement was entered on 25-03-2003. Shri Amritlal B Sahu purchased Flat No.401. Shri Mohanlal B Sahu purchased Flat No.501 and Shri Omprakash B Sahu purchased Flat No.601. It is pertinent to note that the developer was father of the assessee only. The above said agreements were not adequately stamped and hence they were not registered with the Sub-registrar. When the Maharashtra State Government announced Amnesty Scheme known as “Abhay-2008”, all these three agreements dated 25-03-2003 were regularised by paying additional amount of stamp duty along with fine on 06-01-2009. Thereafter, these assessees executed a “Deed of declaration” on 23.3.2009. All these assessees took the date of purchase of new flat as 23.03.2009 and accordingly the amount paid for purchase of additional areas was claimed as deduction u/s 54 of the Act against the capital gains arising on sale of “Sheetal Chhaya” flats.

4. There is one more development that took place in between. We have noted earlier that the father of these assesseees was the developer. He died on 07-07-2007 before completion of construction of Apartment. Hence these assesseees took the responsibility to complete the project. Accordingly they collected money in installments from various flat buyers and completed the project. These assesseees also, in their capacity as buyers of flats, paid the installments. The details of last installment paid and the date of taking over possession of flats are given below:-

Name of Assessee	Date of Last Installment	Possession date
Amritlal B Sahu	24.10.2008	March, 2009
Mohanlal B Sahu	24.10.2008	March, 2009
Omprakash B Sahu	24.07.2008	March, 2009

5. The Assessing officer took the view that these persons have purchased the new flat only on 25.03.2003 and not 23.03.2009 as claimed by the assesseees. The AO took the view that the Deed of declaration executed on 23-03-2009 only regularises the shortfall in payment of stamp duty and hence for all practical purposes, the purchase agreement dated 25.3.2003 is only relevant. Under section 54 of the Act, the new residential property should be purchased within one year before and two years after the date of transfer of old residential property. In these cases, the assesseees have sold the flat on 07-07-2008 and the new flats have been purchased on 25.03.2003. Accordingly, the AO took the view that the conditions prescribed in sec.54 are not fulfilled. Accordingly the AO rejected the claim for deduction u/s 54 of the Act in all the three cases.

6. The Ld CIT(A) also confirmed the orders passed by the AO in all the three cases. Hence the assesseees have filed this appeal.

7. We heard the parties and perused the record. We notice that the tax authorities have considered the purchase of new flat as a case of "purchase of new residential property" as contemplated u/s 54 of the Act. However, the Hon'ble Bombay High Court has held in the case of CIT vs. Mrs. Hilla J B

Wadia (1995)(216 ITR 376) that booking of flat in an apartment under construction must also be viewed as a method of constructing residential tenements. In these cases, the assessee herein have booked flats (additional areas) in an apartment under construction and hence as per the decision rendered by Hon'ble Bombay High Court, the case of the assessee should be taken as a case of "Construction" and not a case of "Purchase".

8. As per the provisions of sec.54 of the Act, construction of new residential property should be completed within 3 years after the date of sale of old residential property. In the instant cases, the assessee herein have entered into agreement for purchase of flat on 25.03.2003. The date of transfer of old flat is 07.07.2008. There is no dispute that the final payments for new flats were given after 07.07.2008 and the possession was taken by the assessee in the month of March, 2009, i.e., after the date of transfer of old flat. In the case of CIT vs. J.R Subramanya Bhatt (1987)(165 ITR 571), the Hon'ble Karnataka High Court has held that the date of commencement of construction is not relevant for the purposes of sec.54 of the Act, i.e., the completion of construction of new residential house will only be relevant. In the instant cases, the final payment and the possession of new flats have taken place after the date of transfer of old flat. Hence, construction of new flats has been completed within 3 years from the date of transfer of old flat. Hence, in our view, the conditions prescribed u/s 54 of the Act has been completed by these assessee and hence they are entitled for deduction u/s 54 of the Act for the payments made for acquisition of additional areas.

9. We notice that an identical issue was considered by the co-ordinate bench in the case of Mustansir I Tehsildar vs. ITO (2018)(168 ITD 523)(Mum). For the sake of convenience, we extract below the operative portion of the above said order:-

"5. We heard the parties on this issue and perused the record. We have earlier noticed that the assessee has booked a flat, which was under construction, and made payments over the year. The final payments

were Mr. Mustansir I. Tehsildar made subsequent to the date of sale of old flat. The Ld A.R submitted that the final payment was made on 22-10-2014 and possession of new flat was obtained on 11-12-2014.

6. The Ld A.R submitted that the tax authorities have taken the acquisition of flat as a case of "Purchase". He submitted that the booking of flat in an apartment under construction is a case of "construction" and not a case of purchase. In this regard, he placed reliance on the decision rendered by the co-ordinate bench in the case of Asst. CIT Vs. Sagar Nitin Parikh (ITA No.6399/Mum/2011 dated 03-06-2015). He submitted that the co-ordinate bench had placed reliance on the decision rendered by the jurisdictional Bombay High Court in the case of Mrs. Hilla J B Wadia (216 ITR 376).

7. We heard Ld D.R on this issue. We notice that the Hon'ble Bombay High Court has held in the case of Mrs. Hilla J B Wadia (supra) has held that booking of flat in an apartment under construction must also be viewed as a method of constructing residential tenements. Accordingly, the co-ordinate bench has taken the view in the case of Sagar Nitin Parikh (supra) that booking of flat in an apartment under construction is a case of "Construction". In view of the above said decision of the Hon'ble Bombay High Court and Tribunal, the acquisition of new flat in an apartment under construction should be considered as a case of "Construction" and not "Purchase". Accordingly we set aside the view taken by the tax authorities and hold that the assessee has constructed a flat and the provisions of sec. 54 should be applied accordingly.

8. The Ld A.R submitted that the commencement of construction is not relevant for the purpose of sec. 54 of the Act. He submitted that the provisions of sec.54 only stipulate that the construction should be completed Mr. Mustansir I. Tehsildar within 3 years from the date of transfer. Accordingly he submitted that the construction may have commenced prior to the date of old asset, but the same should be completed within three years from the date of sale. In support of this proposition, the Ld A.R placed reliance on the decision rendered by Hon'ble Karnataka High Court in the case of CIT Vs. J.R.Subramanya Bhat (1987)(165 ITR 571), which was followed in the case of Asst. CIT Vs. Subhash Sevaram Bhavnani (2012)(23 taxmann.com 94)(Ahd. Trib.). The Ld A.R submitted that the assessee has completed the construction of new flat within three years from the date of transfer of old asset and accordingly he submitted that the assessee has complied with the conditions of sec.54. He further submitted that the payments made towards acquisition of new flat before the due date for filing return of income was more than the amount of capital gains. He further submitted that there is no requirement that the sale proceeds realised on sale of old asset alone should be used for acquiring new asset and for this

proposition, he placed reliance on the decision rendered by Hon'ble Kerala High Court in the case of ITO Vs. K.C.Gopalan (2000)(162 CTR 0566).

9. The Ld D.R, on the contrary, strongly placed reliance on the order passed by Ld CIT(A).

10. Section 54 of the Act provides the condition that the construction of new residential house should be completed within 3 years from the date of transfer of old residential house. According to Ld A.R, section 54 is silent about commencement of construction and hence commencement of construction can precede the date of sale of old asset. In the instant case, the assessee had booked the flat much prior to the date of old flat. We notice that the Hon'ble Karnataka High Court has held in the case of CIT Vs. J.R.Subramanya Bhat (supra) that commencement of construction is not relevant for the purpose of sec. 54 and it is only the completion of Mr. Mustansir I. Tehsildar construction. The above said ratio was followed in the case of Asst. CIT Vs. Subhash Sevaram Bhavnani (2012)(23 taxmann.com 94)(Ahd. Trib.). Both these cases support the contentions of the assessee. Accordingly, for the purpose of sec. 54 of the Act, we have to see whether the assessee has completed the construction within three years from the date of transfer of old asset. In the instant case, there is no dispute that the assessee took possession of the new flat within three years from the date of sale of old residential flat. Accordingly, we are of the view that the assessee has complied with the time limit prescribed u/s 54 of the Act. Since the amount invested in the new flat prior to the due date for furnishing return of income was more than the amount of capital gain, the requirements of depositing any money under capital gains account scheme does not arise in the instant case. Further, the Hon'ble High Court has held in the case of K.C.Gopalan that there is no requirement that the sale proceeds realised on sale of old residential house alone should be utilised.

11. In view of the above, we are of the opinion that the assessee is entitled for deduction of full amount of capital gains u/s 54 of the Act, as he has complied with the conditions prescribed in that section. Accordingly, we set aside the order passed by Ld CIT(A) and direct the AO to allow the deduction u/s 54 of the Act as claimed by the assessee.”

10. Accordingly, we set aside the orders passed by Ld CIT(A) on the impugned issue and direct the AO to allow deduction u/s 54 of the Act as claimed by the assesseees.

11. In the result, all the appeals of the assesseees are allowed.
Order has been pronounced in the Court on 31.8.2018.

Sd/-
(RAMLAL NEGI)
JUDICIAL MEMBER

Sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 31/8/2018

Copy of the Order forwarded to :

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

//True Copy//

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BY ORDER,

(Senior Private Secretary)
ITAT, Mumbai