

IN THE INCOME TAX APPELLATE TRIBUNAL "F" BENCH, MUMBAI
BEFORE SHRI G.S. PANNU, AM AND SHRI PAWAN SINGH, JM
ITA No.1026/Mum/2017 Assessment Year 2011-12

Income tax Officer Ward-25 (1)(5) C-10, R.No.406, 6 th Floor, Pratyakshakar Bhavan, Bandra Kurla Complex, Bandra Mumbai-400 051.	Vs.	Shri Uttamchand B. Jain 701, Vraj Apts., Plot No.4A-4B Kalyangram Society, V.P. Road, Andheri (W), Mumbai-400 058.
PAN :AAOPJ 2700 L		
(Appellant)	..	(Respondent)
Appellant by	Shri Rajeev Gobgotra	
Respondent by	Ms. Aasifa Khan-AR	
Date of Hearing	10/10/2018	
Date of Pronouncement	15/10/2018	

ORDER

Per Pawan Singh , Judicial Member:

1. This appeal by the revenue is directed against the order of Id. Commissioner of Income-tax(Appeals)-39, Mumbai [Id. CIT(A)] dated 04/11/2016 for Assessment Year 2011-12, which arises from assessment order passed u/s. 143(3) dated 21/02/2014 . The revenue has raised the following Grounds of appeal which read under :-.

1. *On the facts and in the circumstances of the case and in Law, the Ld. CIT(A) has erred in allowing the assessee's claim of deduction u/s. 54 of I.T. Act amounting to Rs.1,85,30,0047- ignoring the fact that for claiming u/s.54 of the I.T. Act not only the gain from the transfer of the capital asset has to be invested towards purchase/construction of a residential property, but also that residential property has to be purchased/constructed within the stipulated period mandated in the Act.*
2. *On the facts and in the circumstances of the case and in Law, the Ld.CIT(A) has erred in directing to allow deduction u/s.54 by not considering the fact that neither*

the construction of the said property was completed nor its possession was received by the assessee within the stipulated period mandated in the Act.

3. The appellant prays that the order of Ld. CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored.

4. The appellant craves leave to amend or to alter any ground or add a new ground, which may be necessary.

2. Brief facts of the case are that in the return of income for assessment year 2011-12, the assessee claimed exemption under section 54 on account Capital Gain earned on sale of residential house on 23/07/2010. The assessee claimed exemption under section 54 on the ground that he has purchased a property vide sale deed dated 12/08/1993 and it was sold on 23/07/2010 and purchased new residential property vide agreement dated 27.11.2011. The Assessing Officer (A.O) asked the assessee to provide the details of Capital Gain calculated and in case consideration is invested provide details of purchase agreement. The assessee filed his reply vide reply dated 07/10/2013. In the reply the assessee contended that the assessee sold a flat on 24/07/2010 for sale consideration of Rs. 3.31 Crore and invested in purchase of flat for Rs. 3.81 Crore. The assessee also filed copy agreement dated 12/08/1993 in respect of flat sold and unregistered agreement dated 27/11/2011 with regard to purchase of flat. The assessee also provided the working of Capital Gain. In the working of the Capital Gain the assessee adopted the cost of acquisition at Rs. 50,48,111/- (consisting of Rs. 50,00,111/- purchase

consideration + Rs. 47,600/- stamp duty + Rs. 400/- other charges).

The assessing officer not allowed to include Rs.400/- in the cost of acquisition in absence of evidence. The assessing officer disallowed the claim of exemption under section 54 holding that the agreement dated 27/11/2011 for acquisition of property is unregistered agreement. Therefore, the entire Long Term Capital Gain was brought to tax. On appeal before the CIT(A) the action of the A.O was reversed and the assessee was allowed exemption under section 54 of the Act. Hence, aggrieved by the order of the CIT(A) the revenue is in appeal before us.

3. We have considered the submission of the Id. Departmental Representative (DR) for the revenue and the Id. Authorized Representative (AR) for the assessee and perused the material available on record. The Id. DR for the Revenue supported the order of the assessing officer. He further submitted that the assessee had furnished unregistered agreement dated 27/11/2011 for acquisition of flat which was proposed to be constructed. The documents cannot be recorded as proof of purchase of new property and the assessee has necessarily to purchase a property within two years from the sale of old property.
4. On the other hand the AR submits that the assessee earned Capital Gain on sale of house property which was acquired by the assessee in 1993. The old property was sold by the assessee on 23/07/2010 for a total

consideration of Rs.3.31 crores. The assessee entered into agreement for purchase of another (new) house developed in JVPD scheme. The developer issued an allotment letter to the assessee on 17/06/2010. However, the agreement could not be registered in the name of the assessee within two years of sale of old property. Therefore, the Assessing Officer disallowed the claim of the assessee. There is no dispute with regard to sale of property due to the reason that the commencement certificate was not issued to the developer due to the dispute between the flat owners of JVPD Scheme and MCGM, Mumbai. The construction of the project was delayed by the dispute between plot owner and developer. The developer issue a confirmation letter dated 07/04/2014 confirming the sale of flat to the assessee and receipt of consideration of Rs.3.26 Crores. The Authorized Representative of the assessee submits that she has filed copy of allotment letter of new property/ flat from the developer on 17/06/2010. In the allotment letter the builder/developer has clearly mentioned the payment made by the assessee against the acquisition of flat, copy of agreement dated 17/11/2011, and copy of guidelines of registration of sale deed by Govt. of Maharashtra. The Ld. AR for the assessee further submits that on execution of agreement of sale on 17/11/2011 the assessee has paid 85% of total cost of new property/flat.

5. In support of the submission the AR of the assessee relied upon the decision of Hon'ble Karnataka High Court in the case of CIT vs. Mrs. Shakuntala Devi (389 ITR 366), decision of the Tribunal in the case of Bhavna Cuccria vs. ITO (165 ITD 124)(Chd.-Trib.) ACIT vs. M. Raghuraman (169 ITD 315)(Chennai-Trib.) Mrs. Seema Sabharwal vs. ITO (169 ITO 319) (Chd.-Trib.), Gautam Jhunjhunwala vs. ITO (ITA No.1356/Kol/2017 dated 7th Sept. 2018)
6. We have considered the rival submissions and perused the material available and have gone through the orders of authorities below. The AO /revenue has challenged the order of Id. CIT(A) in allowing the exemption u/s. 54 on the ground that the construction of property was not complete nor its possession was received by the assessee within the mandatory period prescribed under the Act. We have noted that there is no dispute with regard to the date of sale of old property. The only objection of the A.O was that the agreement for acquisition of new property dated 27/11/2011 is merely an unregistered agreement to purchase a property proposed to be constructed and that the said agreement cannot be constituted as a proof of purchase of property for claim of deduction u/s. 54 of the Act. There is no agreement entered by the assessee with the developer before due date of filing of return. However, the Id. CIT(A) after considering the submission and evidences

concluded that on the date of agreement of sale on 17/11/2011, the assessee has paid 85% of total cost of the said flat. The agreement could not be registered by appropriate authority as commencement certificate was not issued to the builder/developer. The developer vide its confirmation dated 07.12.2014 confirmed this receipt of consideration of Rs.3.26 crores. The ld. CIT(A) relying on the decision of Chandigarh Tribunal in the case of Smt. Ranjit Sandhu vs. DCIT (49 SOT 7) held that completion of construction within time limit prescribed u/s. 54 is not a condition for allowing exemption.

7. The Hon'ble Karnataka High Court in CIT vs. Shakuntala Devi (389 ITR 366) held that utilization of Capital Gain in construction of residential house within a period of two years would suffice to claim exemption u/s. 54 irrespective of fact that neither sale transaction was concluded, nor registration had taken place within two years. The coordinate bench of Chandigarh Tribunal in the case of Bhavna Cuccria vs. ITO (165 ITD 124)(Chd.-Trib.) held that wherein substantial amount of Capital Gain has been invested by the assessee for purpose of purchasing a new house, deduction u/s. 54 cannot be denied for the reason that construction was not completed within three years or house was not purchased within two years.

8. Further in *ACIT vs. M. Raghuraman (169 ITD 315)(Chennai-Trib.)* it was held that even where new flat in which assessee had invested entire capital gains was not completed and possession was not given, assessee could not be denied exemption u/s. 54. In *Mrs. Seema Sabharwal vs. ITO (169 ITO 319) (Chd.-Trib.)* the coordinate bench held that the assessee at the time of assessment proves that she has already invested capital gains to purchase/construct new residential house within stipulated period, exemption under section 54 cannot be denied to the assessee even if amount was not deposited in Capital Gain account scheme before filing of income tax return as required by section 54(2).
9. Recently Calcutta Tribunal in *Gautam Jhunjhunwala vs. ITO (ITA No.1356/Kol/2017 dated 7th Sept. 2018* held that when the entire payment is given and the property is not registered due to non completion of project by builder, the assessee cannot be denied exemption. Wherein the Tribunal held that once the agreement to sale is executed in favour of vendee, the assessee gets right to get the property transferred in his favour by filing a suit under Specific Performance Act. Therefore, right in respect of property have been created in favour of the assessee. In *ITO vs. Saroja Naidu (53 ITR (Trib.) (250) Chennai Tribunal* held that the assessee had made the investment for construction of flat by making payment to builder. The builder had defaulted due to

which delay had occurred in construction of the flat within the time limit prescribed under the Act. The fault of the builder is beyond the control of the assessee whose intention was only bonafide to comply with the provisions of the Act for entitling the benefit of deduction under section 54 of the Act.

10.Considering the above referred legal position, on the basis of factual discretion we affirm the order passed by Id CIT(A).

In the result, appeal of revenue is dismissed.

Order pronounced in the open court on 15.10.2018.

Sd/-
(G.S. PANNU)
ACCOUNTANT MEMBER
Mumbai; Dated: 15/10/2018

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Jv.Sr.PS.

Copy of the Order forwarded to :

- 1.Appellant /अपीलार्थी
2. Respondent /प्रत्यर्थी
- 3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त,
- 4.The concerned CIT /संबद्ध आयकर आयुक्त
- 5.DR "F" Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अ.न्याया.मुंबई
- 6.Guard File/गार्ड फाईल

आदेशानुसार/ **BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.