

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH “B”, MUMBAI**

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

**ITA No.443/M/2023
Assessment Year: 2016-17**

Dy. Commissioner of Income Tax-17(1), 1 st Floor, Room No.117, Kautilya Bhavan, G-Block, Bandra Kurla Complex, Bandra (East), Mumbai – 400 051	Vs.	Ms. Nafisa Asgar Mun, 1204, Sagar Classic Clare Road, Byculla-400 008 PAN: AAFPM9597D
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Himanshu Gandhi, A.R.
Revenue by : Shri Chetan M. Kacha, Sr. A.R.

Date of Hearing : 24 . 05 . 2023

Date of Pronouncement : 28 . 06 . 2023

O R D E R

Per : Kuldip Singh, Judicial Member:

The appellant, Dy. Commissioner of Income Tax-17(1), Mumbai (hereinafter referred to as ‘the Revenue’) by filing the present appeal, sought to set aside the impugned order dated 17.12.2022 passed by the National Faceless Appeal Centre (NFAC) [Commissioner of Income Tax (Appeals), Delhi] (hereinafter referred to as CIT(A)] qua the assessment year 2016-17 on the grounds inter-alia that :-

“1. Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) was justified in directing the Assessing Officer to allow the deduction u/s 54 of the Income Tax Act holding that the assessee took possession of the flat within 3 years after the sale of the original asset, without appreciating the fact that the said provision is applicable in the case of assessee constructing a new residential property whereas in this case, the assessee has not constructed a house but merely purchased a flat from builder.

2 Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) was justified in allowing the deduction u/s 54 of the Income Tax Act without appreciating the provisions of the Section 54 of the Income Tax Act, which clearly specifies that the assessee has to purchase the residential house within a period of one year before or two years after the date on which the transfer of original asset took place.

3. Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) was justified in allowing the deduction u/s 54 of the Income Tax Act without appreciating the fact that the assessee has not constructed a new residential house but merely purchased a flat from the builder and the said purchase was made outside the time period as specified in Section 54 of the Income Tax Act.

4. Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) was justified in not considering that the capital gain arising on sale of property was not deposited in the capital gain account scheme before the due date for filing the Income tax return as specified in Sec. 139(1) of the Act?

5. The appellant craves leave to amend or alter or add a new ground which may be necessary.”

2. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : assessee's return of income declaring total income at Rs.1,35,79,180/- when subjected to scrutiny, it was noticed that the assessee has received Long Term Capital Gain (LTCG) of Rs.3,52,44,081/- and claimed deduction under section 54 on account of purchase of flat for a sale consideration of Rs.12,43,35,262/- pursuant to the explanation called by the Assessing Officer (AO), necessary papers were submitted by the assessee including purchase deed and payment details. The assessee got the document registered on 26.07.2018.

Further detail was called by the AO. Declining the contentions raised by the assessee, the AO proceeded to disallow the deduction claimed by the assessee to the tune of Rs.4,34,43,045/- under section 54 of the Income Tax Act, 1961 (for short 'the Act') on the ground that the assessee was required to construct the house within a period of three years after the date of original transfer whereas in the present case the assessee himself has not constructed a house within the meaning of section 54 of the Act and thereby framed the assessment under section 143(3) of the Act.

3. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has deleted the disallowance made by the AO by allowing the appeal. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the Revenue has come up before the Tribunal by way of filing present appeal.

4. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

5. Undisputedly the assessee had sold her immovable property at Sagar Classic Building for a sale consideration of Rs.5,97,00,000/- and thereby earned LTCG of Rs.4,34,43,045/-. It is also not in dispute that the assessee has claimed exemption under section 54 of the Act against the investment made in flat No.2401 internally connected with flat No.2501 at Viverea project. It is also not in dispute that new flat agreement was registered on 26.07.2018

and possession of the new flat was taken by the assessee on 04.09.2018.

6. In the backdrop of the aforesaid undisputed facts the AO denied the exemption under section 54 of the Act on the grounds inter-alia that the assessee has acquired/purchased the flat from a builder and not constructed the same on his own; that the first payment was made by the assessee on 28.07.2014 and possession was received on 04.09.2018 and as such both the dates are beyond the prescribed time limit of one year before and two years after the transfer of the original assets; that the sale consideration was also not deposited in the capital gain account scheme; and that even if the flat acquired from the builder termed as construction then also first payment is made before the sale of original assets.

7. However, the Ld. CIT(A) has allowed the claim of exemption made by the assessee under section 54 of the Act by thrashing the facts in the light of the decision rendered by the Hon'ble High Court of Bombay, Hon'ble High Court of Delhi and Tribunal by returning following findings:

"6.2 In the grounds of appeal, the appellant contested that "Assessee has earned Long Term Capital Gain of Rs. 4,34,43,045/- and claimed deduction u/s.54 on account of purchase of under-construction property within period of 3 years from date of transfer whereas as per Ld. A.O. is of the opinion that to claim deduction u/s,54 assessee himself has to construct the same which has been wrongly assumed by the Ld. A.O. and secondly as per Ld. A.O., the assessee has failed to deposit the Capital amount into Capital Gain Scheme Account which is not required in assessee's case because investment into under-construction property has been already made prior to date of transfer. On the facts and Circumstances of the case, assessee is entitled to claim such exemption U/S 54.

6.3 In the written submission, the appellant stated that the AO's contention to reject the exemption u/s.54 is not correct based on the following case laws (i) CIT v. J.R. Subramanya Bhat [1987] 165 ITR

571 [1986] 28 *Taxman* 578 (ii) *Mustans ir VS ITO-* [2017] 88 *taxmann.com* 275 (Mumbai - Trib.) (iii) *CIT v. Mrs. Hilla J B Wadia* [1995] 216 *ITR* 376 (iv) *Asstt. CIT v. Sagar Nitin Parikh* [IT Appeal No. 6399 (Mum.) of 2011, dated 3-6-2015] (v) *CIT VS Bharti Mishra-* [2014] 41 *taxmann.com* 50 (Delhi HC) (vi) *DCIT Vs Dr.Chalasani Mallikarjuna Rao-* [2016] 75 *taxmann.com* 270 (Visakhapatnam Trib.)

The appellant further stated that depositing the amount of Capital Gain in CGAS A/c was not required as assessee had already invested into property and sales proceeds are also invested in property purchase.

6.4 In [2017] 88 *taxmann.com* 275 (Mumbai Trib.) *Mustansir 1 Tehsildar vs ITO- 21(2)(3), Mumbai - Assessee sold 1/3rd share in flat of an apartment on 5-12-2012 for a consideration of Rs.126.83 lakhs and consequent thereto, the long term capital gain was computed at Rs.78.36 lakhs. The assessee had earlier booked a flat at Elegant Tower, which was under construction; vide agreement dated 5-2-2010. The assessee had made payments to the builder much earlier to the date of transfer of old flat Assessing Officer held that (i) the payments aggregating to Rs 86.38 lakhs made between 12-4-2007 to 3-11-2009 falls outside the period mentioned above and hence not eligible for deduction under section 54. (a) the capital gains not utilised for purchase of new asset before the due date for filing return of income should have been deposited in capital gains account scheme as per the provisions of section 54 However, since the assessee did not deposit them in capital gains account scheme. the payments were not eligible for deduction under section 54 (i) only payment of Rs.7.29 lakhs made on 21-4-2012 was within the range of period mentioned by him Accordingly he allowed deduction under section 54 to the extent of Rs.7.29 lakhs and the Assessing Officer computed the long-term capital gain at Rs.71.08 lakhs and assessed the same.*

The Hon'ble ITAT Mumbai Bench B held The Bombay High Court in the case of CIT v. Mrs. Hilla JB Wadia [1995] 216 ITR 376 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 Asstt. CIT v Sagar Nitin Parikh (IT Appeal No. 6399 (Mum) of 2011, dated 3- 6-2015] that booking of flat in an apartment under construction is a case of 'construction. In view of the above said decision of the 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 the view taken by the tax authorities is set aside and it is held that the assessee has constructed a fat and the provisions of section 54 should be applied accordingly. [Para 7]

Section 54 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 assessee, 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. It is noticed that the Karnataka High Court has held in the case of CIT v. J.R. Subramanya Bhat [1987] 165 ITR 571/[1986] 28 Taxman 578 that commencement of construction is not relevant for the purpose of section 54 and it is only the completion of construction. The above said ratio was followed in the case of Asst. CIT v. Subhash Sevaram Bhavnani (2012) 23 taxmann.com 94 (Ahd. - Trib.). Both these cases support the contentions of the assessee. Accordingly, for the purpose of section 54 it is to be seen 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, it is viewed that the assessee has complied with the time limit prescribed under section 54. 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 High Court has held in the case of ITO v. K.C. Gopalan [1999] 107 Taxman 591 (Ker.) that there is no requirement that the sale proceeds realised on sale of old residential house alone should be utilised. [Para 10]

In view of the above, the assessee is entitled for deduction of full amount of capital gains under section 54, as he has complied with the conditions prescribed in that section. Accordingly, the order passed by the Commissioner (Appeals) is set aside and the Assessing Officer is directed to allow the deduction under section 54 as claimed by the assessee. [Para 11]

6.5 In the present case also the assessee made first instalment of payment for purchase of under-construction apartment on 28.07.2014 i.e. more than one year prior of sale of original asset on 25.09.2015 and the assessee received the possession of the flat on 4-09-2018 i.e. within three years from the date of transfer of the original asset.”

8. The Ld. D.R. for the Revenue challenging the impugned order passed by the Ld. CIT(A) contended that the first installment of payment for purchase of under construction apartment by the assessee was made on 28.07.2014 i.e. more than one year prior to the sale of assets on 25.09.2015 on which the assessee earned LTCG and as such rightly not given the exemption by the AO.

9. This issue has already been decided by the Hon'ble Karnataka High Court in case of CIT vs. J.R. Subramanya Bhat, ([1987] 165 ITR 571/[1986] 28 Taxman 578 which decision was further followed by the Tribunal in case of CIT vs. Subhash Sevaram Bhavnani (2012) 23 taxmann.com 94 (Ahd. - Trib.). In view of what has been discussed above, we are of the considered view that the matter, the relevant factor for grant of exemption under section 54 is completion of the construction. So this issue has been rightly decided by the Ld. CIT(A) in favour of the assessee. Because it is not in dispute that the assessee has taken/completed the construction of the residential house within a period of three years from the sale of transfer of old residential house.

10. Next ground raised by the Ld. D.R. for the Revenue that the assessee has not constructed the house rather purchased the same from builder and as such is not entitled for exemption is concerned. Again it is a settled principle of law that when the flat is purchased at the stage of under construction the same will be treated as constructed and not purchased. This principle has been accepted by the Hon'ble Bombay High Court in case of CIT v. Mrs. Hilla J B Wadia [1995] 216 ITR 376 (Bombay HC) and has been successfully followed by various judicial authorities. The Ld. D.R. for the Revenue has not brought on record any decision contrary to the one rendered by the Hon'ble Bombay High Court in case of Mrs. Hilla J B Wadia (supra).

11. So far as next reason given by the AO for not depositing the LTCG in the capital gain account scheme is concerned, when the

investment made by the assessee in purchase of new property till filing of the return was to the tune of Rs.11,98,89,750/- which is more than the LTCG of Rs.4,34,43,045/- the assessee was not required to deposit the LTCG in LTCG account. This issue is already settled by Hon'ble Madras High Court in case of C. Aryama Sundaram vs. CIT (2018) 97 taxmann.com 74. So in view of what has been discussed above, we find no infirmity or perversity in the impugned findings returned by the Ld. CIT(A), hence appeal filed by the Revenue is hereby dismissed.

Order pronounced in the open court on 28.06.2023.

**Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER**

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Mumbai, Dated: 28.06.2023.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.