

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "D", MUMBAI  
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER AND  
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER  
**ITA No. 1612/Mum/2022 (A.Y.2013-14)**

**DCIT Cen. Circle – 6(4),**

R. No. 1925, 19<sup>th</sup> floor,

Air India Building,

Nariman Point,

Mumbai-400 021

..... Appellant

Vs.

**Smt. Divya Sameer Gehlaut**

17<sup>th</sup> floor, Tower-1,

India Bulls finance Centre,

Senapati Bapat Marg,

Elphinstone Road,

Mumbai-400 013

PAN – AJBPG2722R

..... Respondent

Appellant by : Shri K. Gopal & Om Kandalgaokar, Ld. AR  
Respondent by : Smt. Riddhi Mishra, Ld. CIT-DR.

Date of hearing : 21/06/2023  
Date of pronouncement : 27/07/2023

**ORDER**

**PER GAGAN GOYAL, A.M:**

This appeal by revenue is directed against the order of Ld. CIT (A)-54, Mumbai dated 03.03.2022 u/s. 250 of the Income Tax Act, 1961 (in short 'the Act') for A.Y. 2013-14. The revenue has raised the following grounds of appeal:-

(1) *"On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in allowing the deduction claimed u/s. 54 of the Income tax Act, 1961 of Rs. 13,84,87,515/- without appreciating the fact that the approval for construction of the property, which was bought by the assessee against which the said deduction was claimed, did not even receive the approval for construction by the competent authority, even two years after the sale of the original property."*

(2) *"On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in allowing the deduction claimed u/s.54 of the Income tax Act, 1961 of Rs. 13,84,87,515/- without appreciating the fact that the vital condition of "one year before or two years after" of Section 54 of the Income tax Act, 1961, was not satisfied by the assessee as the flat at 'Raheja Legend, Worli' was sold on 04.02.2013 and the resulting long term capital gains was claimed as deduction u/s.54 the Income tax Act, 1964 for booking another flat at 52nd floor of 'India bulls BLU, Worli', which till 25.08.2015 did not even receive approval for commencement of work."*

(3) *"On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in allowing the deduction claimed u/s.54 of the Income tax Act, 1961 of Rs.13,84,87,515/- without appreciating the fact that the Commencement Certificate till 47 of 'C-Wing' of the project 'India bulls BLU, Worli' was given by Municipal Corporation of Greater Mumbai only on 25.08.2015, thus even till that date the builder/developer did not even had the approval for commencement of work up to the 52nd floor."*

(4) *"On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in allowing the deduction claimed u/s.54 of the Income tax Act, 1961 of Rs.13,84,87,515/- without appreciating that the builder/developer Le., India bulls Infraestate Limited, received NOC from the IDBI Trusteeship Services Limited on 11.01.2018, for sale of the said flat, thus since the said flat was mortgaged with the IDBI Trusteeship Services Limited, it cannot be said to have been sold or allotted to the assessee before FY 2017-18."*

*(5) "On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in allowing the deduction claimed u/s. 54 of the Income tax Act, 1961 of Rs. 13, 84, 87,515/- without appreciating that a simple Allotment Letter, without a registration deed of the said property, does not fulfil the condition precedent for claiming deduction u/s. 54 of the Income tax Act, 1961.*

*(6) "Whether, on the facts and in the circumstances of the case and in law, the learned CIT(A) erred in allowing the assessee's claim of deduction u/s 54 of the Act (mentioned as u/s 54F in the order of the Ld CIT(A)) without waiting for the remand report called for from the assessing officer seeking further comments on additional evidences submitted during the appellate proceedings, which is not in accordance with the provisions of Rule 46A (3) of the IT. Rules, 1962."*

*(7) "Whether, on the facts and in the circumstances of the case and in law, the learned CIT(A) erred in allowing the assessee's claim of deduction u/s 54 of the Act (mentioned as u/s 54F in the order of the Ld CIT(A)) based on CBDT Circular No 471 dated 15.10.1986 and Circular No 672 dated 16.12.1993, without appreciating the fact that, unlike purchasing a residential house to be constructed by Delhi Development Authority (D.D.A.), in the instant case, the assessee has paid to book a house in the upcoming project in a family concern, thereby money so paid by the assessee has gone only from one hand to another in the Group and not parted to an independent builder ?"*

*(8) The appellant craves to leave, to add, to amend and / or to alter any of the ground of appeal, if need be*

2. The revenue has also raised the additional grounds, which are as under:-

*(i) "Whether on the facts and in circumstances of the case, the Ld CIT(A) erred in relying on the new evidence being sale agreement dated 23.01.2018 which could not*

*have been produced before the AO as the assessment order was passed on 28.03.2016, which is in contravention of the Rule 46A of the I.T. Rules, 1962. "*

***(ii) "Whether on the facts and in circumstances of the case, the Ld CIT (A) erred in holding that the entire capital gain amount of Rs. 16, 68, 68,535/- was reinvested within the stipulated period whereas the clause (v) of the agreement for sale dated 23.01.2018 reflects part payment of Rs. 3, 20, 49,636/- only, thereby the assessee is not entitled for deduction u/s 54F."***

3. The brief facts of the case are that assessee filed a return of income on 31-07-2013, declaring total income at Rs. 26,64,690/-. The case of the assessee was selected for scrutiny under the CASS and assessment was completed u/s. 143(3). During the course of assessment proceedings, claim of the assessee u/s. 54 was examined and the same was denied. Consequently, an addition of Rs. 13, 84, 87,515/- was added back to the income of the assessee. Assessee being aggrieved with this order of AO preferred an appeal before the Ld.CIT (A) Mumbai. Appeal of the assessee was allowed by the Ld.CIT (A). Now revenue being aggrieved with the appeal order preferred the present appeal before us.

4. We have gone through the order of AO, order of the Ld.CIT (A) and submissions of the assessee. Assessee individual, deriving income mainly from salary and capital gains. During the year under consideration the assessee had earned long term capital gain amounting to Rs. 13, 84, 87,515/- on transfer of a residential property on which she claimed benefit u/s. 54 of the Act. The property sold by the assessee was long term in nature and this fact is not under challenge. Now to claim deduction u/s. 54, assessee has to acquire another residential house within a period of one year before or 2

years after or has to construct another house within a period of three years from the date of transfer of old house.

5. In this case it is observed that assessee submitted additional evidence in the form of commencement certificate before the Ld.CIT (A) confirming approval for commencement of the floor by the government on which the flat was allotted w.e.f. 25.08.2015. it is pertinent to mention that transaction took place during the F.Y. 2012-13 and assessee was supposed to comply with the requirements of sec. 54 within two years from the date of transfer of the old property i.e., maximum by 03-02-2015, as the assessee claiming benefit under the head purchase of property.

6. After going through the submissions of the assessee along with the orders of authorities below following are the important observations we made as under:

- Assessee is an individual entitled for the benefits of sec. 54
- The original property sold was eligible to claim benefit u/s. 54 as long term in nature.
- Allotment letter by the builder issued on 03-10-2012. Developer/builder issued allotment letter in absence of any approval from the government and even a minute existence of the floor in which assessee invested i.e. flat no. C-5101 as the builder has got approval w.e.f. 25.08.2015 only

7. In the light of above observations, it can be safely concluded that the whole case is roaming around the allotment letter issued by the builder and ultimately agreement of sale entered into. It is true that sec. 54 being a beneficial section has to be construed liberally, but it doesn't mean that only

on the basis of an allotment letter assessee will be entitled for the benefits of sec. 54. This observation will be further elaborated in coming paras of this order.

8. Judicial pronouncement relied upon by the revenue is as under:

**[2018] 100 taxmann.com 79 (Jai. - Trib.) Jagdish Wadhvani v. ITO, Ward 3(2), Jaipur**

*There is no quarrel that if the assessee has made an investment for acquisition of the new residential house within the prescribed period as per section 54, then if there is a delay in the actual possession to be handed over to the assessee and the said delay is not attributable to the assessee then having regard to the satisfaction of the substantial and primary condition of investment the deduction under section 54 cannot be disallowed. However, in the case in hand, the assessee had given an advance and that too prior to the sale of existing immovable property. It is not the case of the assessee that at the time of making the investment, the assessee had a bona fide belief that he would acquire the said flat within the period of 2 years or 3 years from the date of sale of the existing asset. Rather, the project in which the assessee has booked the flat was neither on the site nor the plan was in existence. The builder in response to the notice issued under section 133(6) has stated that the site plan of the said project was presented before the Government authorities only in the month of October, 2013 and was expected to be approved by the authorities by the month of May, 2014. The Assessing Officer has reproduced the letter of the builder in the assessment order. The builder has also expressed the possibility of refunding of the amount due to the delay in launching of the project. It is clear that neither on the date of payment of advance nor till the expiry of time period prescribed under section 54 the alleged asset being residential house was in existence and at the most the assessee acquired a right to purchase a flat in the upcoming project to be developed in future. Therefore, that the said investment made by the assessee was not in accordance with the scheme of the provisions of section 54 which is an incentive provided for acquisition or construction of new residential house for assessee's own residential needs. It appears that this investment was not made by the assessee for acquiring the residential house for the assessee's own immediate need and, therefore, the decisions relied upon by the assessee would not help the case of the assessee once the assessee has clearly failed to satisfy the substantial and primary condition of acquiring the residential house*

*within the prescribed period under section 54. As regards charging the capital gain in subsequent year as per the proviso to section 54(2) which refers to the situation where the assessee has made a deposit in the Capital Gain Account Scheme as notified by the Government before the due date of filing of the return of income under section 139(1) and further if the assessee not utilized wholly or partly the said amount deposited in the capital gain account for purchase or construction of new asset within the period specified under section 54(1), then the amount not so utilized shall be charged to capital gain tax in the previous year in which the period of 3 years from the date of transfer of original asset expires. Therefore, once the assessee satisfies the condition of depositing the amount in the capital gain account scheme, only then the proviso to section 54(2) can be pressed into service. In case the assessee has not deposited the amount in the capital gain account scheme, then the investment is required to be made prior to the due date of filing of return under section 139. Hence, when the new residential house was neither acquired or constructed within the time period prescribed under section 54(1), then the assessee is not eligible for deduction under section 54 and shifting of the assessment year for making the addition on this account would not achieve any purpose rather it will defeat the purpose of provisions of section 54. The facts recorded by the authorities below are not in dispute, therefore, there is no any reason to interfere with the orders of the authorities below, qua this issue. [Para 9]*

10. It is observed that at the time of entering the transaction, builder has no clear permission for construction, but assessee chosen flat no. 5101 situated at C-Block which is beyond anybody's understanding as assessee can book a flat with all the clearances and construction in progress at any floor. Mentioning of this fact became crucial in the light of the fact that she is buying property from the company under substantial control of her husband. We have compared allotment letter vide page 3 of the paper book which confirms booking of flat no. C- 5101 vis-a-vis agreement of sale executed on 23<sup>rd</sup> Jan, 2018 vide page no. 19 to 77 of the paper book which confirms flat no. C- 5701. On this issue, there is no clarification put forward by the assessee. In the light of these facts, it can be safely concluded that the whole

transaction in the guise of claiming benefit u/s. 54 of the Act is more of parking the money with a related party and simultaneously tried to take advantage of section 54 of the Act. It is further noted that documents mentioned at serial no. 5 & 6 of the paper book were not furnished to the AO, but were submitted first time before the Ld. CIT (A) and there is no specific finding on these documents by the Ld. CIT (A).

11. We have further referred Clause V page 27 of agreement to sale entered into on 23<sup>rd</sup> of January 2018 which mentions a payment of Rs. 3, 20, 49,636/- only being part payment of the sale consideration of the apartment agreed to be sold by the builder to the purchase as advance payment and the purchaser has agreed to pay the builder the balance of the sale consideration in the manner specified thereafter. There is no claim put forward by the assessee which confirms her stand that the earlier allotment letter dated 30.10.2012 is converted into this present agreement to sale. As in the initial allotment letter based on which assessee filed her claim for benefit u/s. 54 was talking about flat no. C-5101, whereas the reference of property in agreement to sell is C-5701. Further in this agreement to sale vide page no. 11 to 124 of the paper book as mentioned (supra), assessee paid only Rs. 3,20,49,636/- means no substantial payment or full amount of capital gain was invested till 23.01.2018 i.e. the date of agreement for sale. It is clearly mentioned on page no. 77 that balance amount of Rs. 28, 99, 03,532/- was paid only on 23.01.2018.

12. With the facts observed (supra), it can be clearly hold that the allotment letter initially submitted by the assessee before the AO is no more

in existence and acted upon. Rather assessee entered into in altogether in new transaction which is nowhere related with the claim of the assessee with reference to section 54 of the Act. It is a clear case where assessee claimed benefit u/s 54 on a different document, whereas ultimately the transaction completed on altogether a different set of conditions and property, which is not permissible to claim benefit u/s. 54 of the Act. In the light of above, additional ground no. 2(II) raised by revenue is allowed and rest of the grounds raised by revenue are dismissed.

13. With the above observations, it is crystal clear that throughout the actions and intentions of the assessee were not very clear. It is also observed that assessee was never in a position to confirm the conditions lay down in section 54, despite of the fact that a liberal view may be taken in this case. None of the case laws relied upon by the assessee match with the facts of the case. In the given situation, we do not agree with the view taken by the Ld. CIT (A); hence the impugned order is set aside and the addition made by AO is confirmed.

14. **In the result, appeal of the revenue is PARTLY ALLOWED.**

Order pronounced in the open court on 27<sup>th</sup> day of July, 2023.

Sd/-

(VIKAS AWASTHY)  
JUDICIAL MEMBER

Mumbai, दिनांक/Dated: 27/07/2023

*Sr. PS (Dhananjay)*

Sd/-

(GAGAN GOYAL)  
ACCOUNTANT MEMBER

**Copy of the Order forwarded to:**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

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BY ORDER,

(Asstt. Registrar)  
**ITAT, Mumbai**