

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

**BEFORE PRASHANT MAHARISHI, AM
AND
SHRI RAJ KUMAR CHAUHAN, JM**

**ITA No. 4069/MUM/2023
(Assessment Year: 2011-12)**

Sunil Amritlal Shah
C/o Vimal Punimiya &
CO.,501,
Niranjan,
99, Marine Drive,
Mumbai 400002

(Appellant)

PAN No. HVNPS5321F

Vs.

The Income Tax Officer(IT)
4(2)(1)
Room no. 1708,
17th Floor,
Air India Building,
Nariman point,
Mumbai 400021

(Respondent)

**ITA No. 4070/MUM/2023
(Assessment Year: 2011-12)**

Rita Sunil Shah
C/o Vimal Punimiya &
CO.,501,
Niranjan,
99, Marine Drive,
Mumbai 400002

(Appellant)

PAN No. DJGPS8073B

Vs.

The Income Tax Officer(IT)
4(2)(1)
Room no. 1708,
17th Floor,
Air India Building,
Nariman point,
Mumbai 400021

(Respondent)

Assessee by : Shri Vimal Punmiya, CA
Revenue by : Shri Soumendu Kumar Dash–
Sr. DR

Date of hearing: 16 .04.2024
Date of pronouncement : 13.05.2024

ORDER

PER PRASHANT MAHARISHI, AM:

01. These are the two appeals of spouses involving similar issues of claim of exemption under section 54 of The Income Tax Act, [the Act] it was claimed that both the assessment orders and appellate orders are identical, argument of the parties are also same, therefore, are disposed of by this common order.
02. ITA number 4069/M/2023 is filed by Mr. Sunil A shah for assessment year 2011 – 12 against the assessment order passed under section 144C (13) read with section 147 read with section 254 of The Income Tax Act 1961 [the Act] passed on 3/10/2023 in case of non-resident assessee determining total income at ₹ 3,597,395 denying claim of deduction under section 54 of the act.
03. ITA number 4070/M/2023 is filed by Mrs. Rita Sunil Shah or assessment year 2011 – 12 against the assessment order passed under section 144C (13) read with section 147 read with section 254 of income tax act, 1961 dated 3/10/2023 wherein the total income of the assessee is determined at ₹ 3,597,395 denying claim of deduction under section 54 of the act.
04. Grounds in ITA No.4069/MUM/2023

”1. The Ld. AO erred in disallowing the claim of the deduction u/s 54 of the long term capital gain of Rs.34,25,243/- earned on the sale of property dated

10.02.2011 on the grounds that the purchase agreement dated 25.07.2009 for the reinvestment exceeds the prescribed period of 1 year before thereby disregarding the merits that for the claim of deduction u/s 54 the date of possession which is 10.02.2011 should be considered and not the date of agreement which was 25.07.2009.

2. The Ld. AD erred in initiating penalty proceedings under section 271(1)(c) of the act on account of the disallowance of the claim of the deduction u/s 54 of the act thereby treating the same as concealment/furnishing of inappropriate particulars of income.

3. Ld. AO erred in initiating penalty proceedings under section 271(1)(c) on the grounds of the variance in the calculation of indexed cost of acquisition of Rs.76,19,860/- by the assessee against the value of Rs. 68,50,486/- which was arrived at by the assessing officer thereby treating this variance as concealment/furnishing of inappropriate particulars of income.

4. The assessee carves leave to add further grounds or to amend or alter the existing grounds of appeal on or before the date of hearing.”

05. Identical grounds of appeal are raised in ITA number 4070/M/2023 in the case of Mrs. Rita Sunil shah.
06. Brief facts of the case show that the assessee is a non-resident individual. Information was received from The Assistant Commissioner of Income Tax 18 (2), Mumbai that the assessee has sold flat number 1802 in FIONA , Hiranandani estate, Ghodbunder

Road, Thane jointly owned along with his wife Mrs. Rita Shah for a consideration of ₹ 138 lakhs on 10/2/2011. Therefore, notice under section 148 of the act was issued on 31/3/2018. Assessee did not comply with the notices and therefore the assessment was completed under section 144 (1) of the act on 28/12/2018 treating the gain of ₹ 4,567,000/- as the assessee share of 50% on sale of property as short-term capital gain and added to the total income of the assessee. The learned CIT confirmed this addition – A which was challenged by the assessee before the coordinate bench in ITA number 7705/M/2019. The coordinate bench passed an order on 1/6/2021 setting aside the matter to the file of the assessing officer for de novo adjudication. Therefore, notice under section 142 (1) of the act was issued to the assessee on 12/9/2022.

07. During the course of assessment proceedings, it was explained to the learned assessing officer that the assessee purchased the above property on 31/1/2006 as per allotment/ reservation letter issued by the builder on payment of money of ₹ 1 lakh. The assessee submitted the provisional allotment letter dated 31/1/2006 issued by the builder allotting flat number 1802. Therefore, the learned assessing officer was requested to consider the date of allotment as the date of acquisition of property and compute the capital gain as a long-term capital gain as the holding period of the property by the assessee in that case is more than 36 months. This was submitted in response that in the original assessment order the learned AO considered it as short-term capital gain.
08. The learned assessing officer found that the flat which has been sold by the assessee was purchased by the assessee jointly with his wife is for purchase agreement dated 16/7/2009 for a purchase value of ₹

4,941,000/-. Since the date of the allotment of said flat is 31/1/2006 the assessee has declared the gain as a long-term capital gain considering the date of purchase of flat as 31/1/2006. As the assessee has made the substantial payments from the date of allotment in the date of registration therefore the learned assessing officer agreed with the contention of the assessee that the date of allotment should be taken as the date for computing the holding period for the purpose of computation of capital gain. Therefore, the gain arising from the sale of flat number 1802 was accepted as long-term capital gain. While computing the capital gain the assessee has taken indexed cost of acquisition at ₹ 7,619,860/- however the computation made by the learned assessing officer of the indexed cost of acquisition was arrived at ₹ 6,850,486/- . Up to this stage of computation there has been no dispute in these appeals. Thus, the reason for which case of assesses were reopened is satisfied as undisputedly, computation of capital gain on sale of that property was arrived at.

09. In the computation of income furnished by the assessee, Assessee has claimed deduction under section 54 of The Income Tax Act on the entire long-term gain. The claim of the assessee is that the assessee purchased a new residential flat number 1501, Tower number 7, Orchard residency, LBS Marg, Ghatkopar (W) Mumbai. For this property assessee entered into an agreement for sale with Builder Runwal CapitaLand India Private Limited on 25-07-2009 for consideration of Rs 73,06,530/- . On 2/2/2011, the assessee was granted possession of the flat by the builder after receipt of occupancy certificate and when the building was inhabitable. Assessee claimed the deduction u/s 54 of the Act of capital gain

earned on sale of old flat. Assessee considered the date of possession i.e., 02/02/2011 as the date of acquisition of property. The ld. AO held that date of acquisition of property is 25/07/2009.

010. As per provisions of section 54 of the Act , if assessee has within a period of one year before or two years after the date on which the transfer took place purchased, or has within a period of three years after that date constructed, one residential house in India , then instead of the capital gain being charged to income-tax as income of the previous year in which the transfer took place, in this case it would be exempt. Thus, assessee has sold property subject to capital gain on 10/02/2011 , assessee could have purchased house property from 11/02/2010 till 09/02/2013.
011. As assessee purchased new house property on 02/02/2011 claimed deduction of long term capital gain in terms of provisions of section 54 of the act.The learned assessing officer took date of purchase agreement 25/7/2009 as date purchase of property , the deduction under section 54 of the act was not allowed.
012. Thus, draft assessment order under section 144C (1) of the act was passed on 30/12/2022 determining total income of the assessee at ₹ 3,597,395/-.The assessee approached the dispute resolution panel which rejected the objections of the assessee as per direction dated 26/9/2023.Thus, the final order under section 144C (13) read with section 147 lead with section 254 of the income tax act was passed on 3/10/2023 at the total income of ₹ 3,597,395/-. This order is under challenge before us.
013. The only dispute in this appeal is that from capital gain arising on sale of flat number 1802 as per agreement dated 10/2/2011, the

assessee is eligible for deduction under section 54 of the act for purchase of new residential flat where the date of agreement to sale of the new property is 25 July 2009 but date of granting of possession is 02/2/2011.

014. The claim of the assessing officer is that the date of purchase of the new property is 25 July 2009. The window available for the assessee being one year prior the date of sale of the property i.e., 10/2/2011. As the assessee purchased the property on 25 July 2009 the assessee cannot be given a deduction under section 54 of the act.
015. The claim of the assessee is that assessee got possession of the property on 2/2/2011 therefore, the date of purchase of the property should be considered the date of possession of the property on 2/2/2011 which falls within one year prior to the date of 10/2/2011 and therefore the assessee is eligible for deduction under section 54 of the act.
016. The learned authorized representative submitted by way of a 21 page written submission, 115 pages paper book and relied upon several judicial precedents. He submits that the issue in this case is squarely covered by the decision of the honourable Bombay High Court in case of CIT versus been RK Jain in ITA number 260 of 1993 (1994) [75 taxman 145] wherein the honourable High Court held that that the date of possession of the new residential premises instead of the date of sale agreement should be considered for exemption under section 54F of the act. He submits that there is no difference in the eligibility for deduction under section 54F and 54 of the act. Therefore, the issue is squarely covered in favour of the assessee by the honourable jurisdictional High Court. He further submits that the

coordinate bench in 148 taxmann.com 34 has also held so following the above decision of the honourable High Court. He further relied upon following decisions :-

- i. Sanjay vasant Jumde V ITO [ITA 466 /Pun/2022
- ii. Yogesh Jinghan V DCIT [ITSS 100/Indore/2017]
- iii. ITO V Sunil Khanna [ITA 5877/M/2016]
- iv. CIT V Beena Jain [ITA 260 /1993]
- v. K S hanumantha rao V PCIT [ITA 31/ Bgr/ 2021]
- vi. M George Joseph V DCIT ITA no 238 of 2015
- vii. Hemanth Sridhar Pathak V ACIT ITA 267 /M /2023
- viii. CIT V Hilla J B Wadia dated 2/3/1993 [Bom]
- ix. CIT V J B Subramaniam IT 4 of 1993 [Kar]

017. The learned departmental representative vehemently supported the order of the learned assessing officer submitting that assessee has acquired the right to purchase the above flat on the date of purchase agreement which is 25/7/2009. The date of possession of the property i.e., 2/2/2011 is irrelevant.

018. We have carefully considered the rival contention and perused the orders of the lower authorities. We have also carefully considered the judicial precedents cited before us. The only dispute is that deduction u/s 54 of the Act claimed by the assessee is allowable if assessee has entered into agreement to sale on 25/07/2009

considering that as purchase of property or the date of possession of property on 02/02/2011.

019. Section 54 of the Act provides as under :-

Profit on sale of property used for residence.

⁴⁴ 54. ⁴⁵[(1)] ⁴⁶ [⁴⁷ [Subject to the provisions of sub-section (2), where, in the case of an assessee⁴⁸ being an individual or a Hindu undivided family], the capital gain arises from the transfer of a long-term capital asset⁴⁹ [***], being buildings or ⁵⁰lands appurtenant thereto, and being a residential house⁵⁰, the income of which is chargeable under the head "Income from house property" (hereafter in this section referred to as the original asset), and the assessee has within a period of ⁵¹[one year before or two years after the date on which the transfer took place purchased⁵²], or has within a period of three years after that date ⁵³[constructed, one residential house in India], ⁵²then], instead of the capital gain being charged to income-tax as income of the previous year in which the transfer took place, it shall be dealt with in accordance with the following provisions of this section, that is to say,—

(i)	if the amount of the capital gain ⁵⁴ [is greater than the cost of ⁵⁵ [the residential house] so purchased or constructed (hereafter in this section referred to as the new asset)], the difference between the amount of the capital gain and the cost of the new asset shall be charged under <u>section 45</u> as the
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(ii)	income of the previous year; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be <i>nil</i> ; or if the amount of the capital gain is equal to or less than the cost of the new asset, the capital gain shall not be charged under <u>section 45</u> ; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be reduced by the amount of the capital gain:
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⁵⁶[**Provided** that where the amount of the capital gain does not exceed two crore rupees, the assessee may, at his option, purchase or construct two residential houses in India, and where such option has been exercised,—

(a)	the provisions of this sub-section shall have effect as if for the words "one residential house in India", the words "two residential houses in India" had been substituted;
(b)	any reference in this sub-section and sub-section (2) to "new asset" shall be construed as a reference to the two residential houses in India:

Provided further that where during any assessment year, the assessee has exercised the option referred to in the first proviso, he shall not be subsequently entitled to exercise the option for the same or any other assessment year.]

Following third proviso shall be inserted after the second proviso to sub-section (1) of section 54 by the Finance Act, 2023, w.e.f. 1-4-2024 :

Provided also that where the cost of new asset exceeds ten crore rupees, the amount exceeding ten crore rupees shall not be taken into account for the purposes of this sub-section.

⁵⁷[***]

⁵⁸[(2) The amount of the capital gain which is not appropriated by the assessee towards the purchase of the new asset made within one year before the date on which the transfer of the original asset took place, or which is not utilised⁵⁹ by him for the purchase or construction of the new asset before the date of furnishing the return of income under section 139, shall be deposited by him before furnishing such return [such deposit being made in any case not later than the due date applicable in the case of the assessee for furnishing the return of income under sub-section (1) of section 139] in an account in any such bank or institution as may be specified in, and utilised in accordance with, any scheme⁶⁰ which the Central Government may, by notification in the Official Gazette, frame in this behalf and such return shall be accompanied by proof of such deposit;

and, for the purposes of sub-section (1), the amount, if any, already utilised by the assessee for the purchase or construction of the new asset together with the amount so deposited shall ^{60a}[, *subject to the third proviso to sub-section (1)*] be deemed to be the cost of the new asset :

Provided that if the amount deposited under this sub-section is not utilised wholly or partly for the purchase or construction of the new asset within the period specified in sub-section (1), then,—

(i)	the amount not so utilised shall be charged under <u>section 45</u> as the income of the previous year in which the period of three years from the date of the transfer of the original asset expires; and
(ii)	the assessee shall be entitled to withdraw such amount in accordance with the scheme aforesaid.

Following second proviso shall be inserted after the existing proviso to sub-section (2) of section 54 by the Finance Act, 2023, w.e.f. 1-4-2024 :

Provided further that the capital gains in excess of ten crore rupees shall not be taken into account for the purposes of this sub-section.

020. According to section 54 deduction is allowable if assessee purchases the property. In this case by agreement dated 25/07/2009, assessee 'acquired right to purchase' a house which was under construction,

on 2/2/2011, when house was handed over to the assessee, when it was inhabitable, assessee purchased house.

021. In principal commissioner of income tax & ors. Vs. Akshay sobti & ors. (2020) 423 ITR 0321 (Delhi) honourable Delhi high court held that the provision in question is a beneficial provision for assesseees, who replace the original long-term capital asset with a new one. It was further held that booking of bare shell of a flat is a construction of house property and not purchase, therefore, the date of completion of construction is to be looked into which is as per provision of section 54 of the LT. Act. In this case also assessee has booked an under construction flat and same was handed over to the assessee on completion of construction.
022. Honourable Bombay high court in case of Beena K Jain [**217 ITR 363 (Bombay)**] has held [in question of section 54 F which is PariMateria identical except computation] that :-

“2. Under section 54F in the case of an assessee if any capital gain arises from the transfer of any long-term capital asset, not being a residential house and the assessee has, within a period of one year before or two years after the date of which the transfer took place purchased a residential house, the capital gain shall be dealt with as provided in that section. As per the section certain exemption has to be allowed in respect of the capital gains to be calculated as set out therein. The department contends that the assessee did not purchase the residential house either one year prior to or two years after the sale of the capital asset which resulted in long-term capital gains. According to the department, the agreement for purchase of the new flat was entered into more

than one year prior to the sale. Hence, the petitioner is not entitled to the benefit under section 54F. In our view the Tribunal has rightly negated this contention and has held that the new residential house had been purchased by the assessee within two years after the sale of the capital asset which resulted in long-term capital gains. The Tribunal has held that the relevant date in this connection is 29-7-1988 when the petitioner paid the full consideration amount on the flat becoming ready for occupation and obtained possession of the flat. This has been taken by the Tribunal as the date of purchase. The Tribunal has looked at the substance of the transaction and came to the conclusion that purchase was substantially effected when the agreement of purchase was carried out or completed by payment of full consideration on 29-7-1988 and handing over of possession of the flat on the next day.”

023. Further Coordinate bench in **Bastimal K jain V ITO [2016] 76 taxmann.com 368 (Mumbai)** has also held that he assessee's claim of deduction under section 54 was to be reckoned from the date of handing over of the possession of the flat by the builder to the assessee *i.e.* 11-9-2009, and if one took that date, the assessee was entitled to deduction under section 54 because the assessee had sold his residential flat on 24-2-2010.
024. All other decisions relied on by the assessee also held that date of possession of new property should be considered as the date of acquisition of the property.
025. In the assessee's own case while computing capital gain ld. AO has taken date of allotment as the date of acquisition of the property.



026. Hence, we hold that assessee is entitled to deduction u/s 54 of the act on purchase of new property considering the date of possession, when it is completed, as the date of purchase of property as agreement to purchase the property was for under construction property. By entering into an Agreement to purchase assessee has acquired right to purchase the property and did not purchase the property as same was under construction. Section requires "Purchase" of property.
027. In view of above facts and judicial precedents, we allow ground no 1 of both the appeals.
028. Ground no 2 and 3 are premature hence dismissed of both the appeals.
029. Accordingly, both the appeals are partly allowed.

Order pronounced in the open court on 13.05.2024.

Sd/-
(RAJ KUMAR CHAUHAN)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 13.05.2024

Sudip Sarkar, Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

True Copy//



Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai