

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

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER

&

SMT. RENU JAUHRI, ACCOUNTANT MEMBER

ITA No.67/Mum/2024

(A.Y. 2016-17)

Prateek Rajendra Kapadia Belvedere 2202, Lodha Aurum Grande, Near Kanjurmarg Station, Kanjurmarg East, Maharashtra-400042	Vs.	ITO Ward 1(3) Ayakar Bhavan, Mumbai-400042
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AJKPK5770E		
Appellant	..	Respondent

Appellant by :	Shri. Sukhsagar Sayal
Respondent by :	Shri. H. N. Bhatt

Date of Hearing	02.05.2024
Date of Pronouncement	10.06.2024

आदेश / O R D E R

PER RENU JAUHRI [A.M.] :-

This appeal is filed by the assessee against the order of the Learned Commissioner of Income-tax (Appeals), Mumbai-2/National Faceless Appeal Centre, Delhi [hereinafter referred to as “CIT(A)”] dated 06.11.2023 passed u/s. 250 of the Income-tax Act, 1961 [hereinafter referred to as “Act”] for Assessment Year [A.Y.] 2016-17

2. The grounds of appeal raised by the assessee are as under:

1. *“The order of the learned Commissioner of Income Tax (Appeals) is against equity, facts and justice of the case.*
2. *The learned Commissioner of Income Tax (Appeals) has erred in confirming the disallowance of the deduction claimed u/S. 54 of the Income Tax Act 1961 by your appellant stating that registration of the new property was done one year prior to the date of registration of the old property sold.*
3. *The learned Commissioner of Income Tax (Appeals) has erred in holding that date of possession of the new property is not relevant and only the date of actual registration of the property is relevant for claiming deduction w/S.54 of the Income Tax Act 1961.*
4. *The learned Commissioner of Income Tax (Appeals) ought to have noted that though the registration of the new property was done (registration done on 21.6.2014) beyond one year from the date of sale of the old property (date of sale of old property- 22.7.2015), the construction of the new property was completed on 10.7.2015 and actual possession was handed over to your appellant only on 16.11.2015. The possession was handed over within 4 months from the sale of the old property.*
5. *The learned Commissioner of Income Tax (Appeals) has failed to appreciate that provisions of Section 54 is a beneficial provision which has been interpreted in the most lenient manner in favour*

of the assesses by various Tribunals and Courts in India. The learned Commissioner of Income tax (Appeals) has disregarded the various judicial decisions including that of jurisdictional Tribunal in favour of your appellant. A gist of the legal decisions in favour of your appellant are attached as Annexure 1.

6. The order passed by the learned Commissioner of Income Tax (Appeals) is void on the ground that the proceedings have been completed without affording an opportunity of personal hearing to your appellant though a request for personal hearing was sought in the written submission filed on 22.9.2023 in response to the notice dt. 16.9.2023.”

3. Only issue in this appeal is pertaining to the assessee’s claim of exemption u/s 54 of the Act. The brief facts of the case are as under:

The assessee filed return of income on 31.07.2016 declaring total income of Rs. 82,38,850/-. In the return, the assessee claimed deduction u/s 54 of the Act of Rs. 2,69,38,332/-. The AO observed that the new asset was neither purchased within one year before the date of transfer of original asset nor constructed within three years from the date of transfer of original asset as required u/s 54 of the Act. It was, therefore, held that assessee was not eligible for deduction u/s 54 of the Act and the same was denied by the AO. In this regard, it is noted that while agreement to purchase the new asset was entered into on 21.06.2014 whereas the agreement

of sale of the original asset was made on 22.07.2005 i.e. more than 1 year prior to sale of the original asset. However, the possession of new asset was handed over on 16.11.2015 and also the completion of certificate was obtained by the developer M/s. Lodha Developer Pvt. Ltd. on 10.07.2015. The AO and the Ld. CIT(A) held that the assessee is not eligible for deduction u/s 54 of the Act.

4. Aggrieved with the order of the Ld. CIT(A), the assessee is before us. During the course of hearing, following arguments have been submitted by the Ld. AR:

“2. The relevant dates with respect to the aforesaid transactions are tabulated hereunder:

<i>Particulars</i>	<i>Date</i>
<i>Agreement to purchase the new asset (pg. 45 of PB)</i>	<i>21st June, 2014</i>
<i>Agreement to sell the original asset (pg. 108 of PB)</i>	<i>22nd July, 2015</i>
<i>Occupancy Certificate for the new asset received by the builder (pg. 139 of PB)</i>	<i>16th September, 2015</i>
<i>Final instalment of Rs. 22,43,833 paid to the builder for purchase of the new asset.</i>	<i>3rd November, 2015</i>
<i>Possession of the new asset given to the Appellant (pg. 143 of PB)</i>	<i>16th November, 2015</i>

Finding of the lower authorities.

3. *It was the case of the lower authorities that as the agreement to purchase the new asset was entered into on 21st*

June, 2014, the Appellant was not entitled to claim exemption u/s. 54 of the Act inasmuch as the section requires an assessee to purchase a new asset either within one year prior or two years after the date of sale, which took place on 22nd July, 2015. Further, even if this was considered a case of construction, the Appellant would still not be eligible as the same had to be done within a period of three years after the date of sale, whereas in the case of the Appellant, the construction had started prior to the date of sale. Reliance was placed on Circular no. 471/1986, judgement of the Hon'ble Bombay High Court in the case of Rasiklal Parikh vs. ACIT (2017) (393 ITR 536) and the judgement of the Hon'ble Supreme Court in the case of Sanjeev Lal (2014) (365 ITR 389).

Submissions of the Appellant-

4. At the outset, the relevant provisions of section 54 are reproduced-

"54. (1) Subject to the provisions of sub-section (2), where, in the case of an assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of a long-term capital asset, being buildings or lands appurtenant thereto, and being a residential house, 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 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..."

5. It is clear from the above provision that what the section mandates is that an assessee must **either purchase or construct a residential house in India** (emphasis supplied) within the permissible period (i.e., one year prior or two

years/three years after the date of sale, as the case may be). In the instant case, when the agreement to purchase the new asset was entered into on 21st June, 2014, the said asset was still under construction. On such date, the asset could not have been characterized as 'a residential house in India'. Therefore, the argument of the lower authorities that the purchase of the residential house for the purpose of section 54 had taken place on 21st June, 2014 is untenable. The Occupancy certificate was received only on 16th September, 2015 and the possession was granted on 16th November, 2015. Both dates fall within the permissible period under section 54. It is submitted that what is relevant for the purpose of the section is the date on which the assessee dominion over the new residential house (emphasis supplied), which can in no event happen prior to the builder obtaining the Occupancy Certificate. This specific line of reasoning was adopted by the Hon'ble Pune Tribunal in the case of Ayushi Patni vs. DCIT (2019) (ITA 1424/Pun/16) wherein it was held that 'It is an un-rebutted fact that at the time of execution of agreement, the residential property was not in existence. Therefore, taking into consideration facts of the case, the date of possession of flat is the date of actual purchase for the purpose of claiming exemption u/s 54F of the Act.'

6. It is submitted that in any event, the issue as to what date is to be considered for the purpose of section 54 when an assessee enters into an agreement to purchase an under construction residential house is no longer res integra. The Appellant seeks to place reliance on the following judgements in this regard-

I. CIT vs. Smt. Beena K. Jain (1996) (217 ITR 363) (Bom)-

In this case, the assessee sold the original asset on 23rd July, 1987. Her agreement to purchase an under construction property was registered on 27th October,

1985 (i.e., outside the permissible period), however, the possession was given on 30th July, 1988 (i.e., within the permissible period) after consideration was paid on 29th July, 1988. It was held by the Tribunal that as the date of grant of possession was within the permissible period, the assessee would be entitled to exemption u/s. 54F, even though the agreement to purchase the new asset was outside the permissible period. Upholding the decision of the Tribunal, the HC held as under-

"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."

As held by the Hon'ble High Court, the relevant date is the date when the assessee pays the full consideration and obtains possession of the flat. Both these events, in the Appellant's case, have occurred in the permissible period, i.e., on 3rd November, 2015 and 16th November, 2015 respectively.

II. Sanjay Vasant Jumde vs. ITO (2023) (200 ITD 285) (Pune)

In this case also, the assessee sold the original asset on 23rd October, 2018, entered into an agreement for purchase of an under construction asset on 21st December, 2016 and eventually got the possession on 24th December, 2018. The Tribunal held that as the possession was received within the permissible period, the assessee was entitled to exemption u/s. 54 of the Act. The relevant extract of the decision is reproduced-

"The principle therefore, emerges from the aforesaid decision is that the new property shall be deemed to have been acquired only when it is ready, full consideration has been paid and the possession is received by the assessee. The ld. D.R.P had tried to distinguish this binding judgment and refusing the claim of the assessee only on the ground as to when the substantial payment was made and it had not considered the essential element of possession of the new flat, which the assessee acquired on 24-12-2018 and which was within the time limit of two years from the date of transfer of the bungalow along with the plot which was on 23-10-2018. In the said decision of the Hon'ble Bombay High Court (supra) it was appreciated about the substance of the transaction involving section 54 of the Act. The question was whether the relevant date was the date of sale agreement or the substantive element of the transaction had to be considered. The Hon'ble Bombay High Court held that the substance of the transaction signifies when the new property is ready for possession, when the substantial or full payment had been made and when the actual possession was acquired by the assessee. These

substantial necessities are crucial for determining the issue for claim of deduction u/s 54 of the Act. Admittedly, in this case what the department is harping upon is merely the agreement dated 21-12-2016 when the building itself was not constructed and the assessee has only acquired his right to get a flat in the said building. When actually therefore, can it be said that the new property was purchased? It is only when the assessee received the possession through letter of possession on 24-12-2018. This is when all the three ingredients as enumerated in the decision of Hon'ble Jurisdictional High Court for claiming deduction u/s 54 had been complied with by the assessee."

To the same effect are the following decisions-

- *Reji Easow vs. ITO (2022) (194 ITD 384) (Mum)*
- *ITO vs. Shiv Sunil Khanna (2018) (ITA 5857/Mum/2016) (Mum)*
- *Ayushi Patni vs. DCIT (supra)*

7. It is submitted that in case it is held that the subject transaction is not one of purchase of a residential house, but construction of a residential house, in that event as well, all the relevant events, i.e., payment of the final installment, obtaining the occupation certification and grant of possession have happened within a period of three years from the date of sale of the original asset. Accordingly, even in that scenario, the Appellant ought to be granted the benefit of exemption u/s. 54 of the Act.

8. As regards the AO's argument that since the construction of the new asset had begun prior to the date of sale of the original asset, the Appellant is not entitled to the benefits of section 54, it is submitted that the said argument is not tenable in view of the clear language of the section which prescribes no time limit for

initiating the construction of the new asset. This position has also been clarified in the following judgements, wherein it has been held that the fact that the construction of the new asset had begun prior to the date of sale of the original asset will not take away from the claim of deduction u/s. 54 of the Act-

- *CIT Vs. HK Kapoor (1998) (234 ITR 753) (All)*
- *Mustansir 1 Tehsildar vs. ITO (2018) (168 ITD 523) (Mum)*

9. *As regards the AO's reliance on Circular no. 471 of 1986, it is submitted that the same only dealt with allotment of flats under the Self-Financing Scheme of Delhi Development Authority (DDA) and did not represent a general understanding of the CBDT's position on all cases of construction for the purpose of section 54. Subsequently, in Circular no. 672 of 1993, scope of the earlier circular was considered and it was clarified that the observations therein would apply even in respect of allotment of flats/houses by co-operative societies and other institutions, whose schemes of allotment and construction are similar to those of Delhi Development Authority. It is submitted that the present case is one of purchase of a flat from a builder and not allotment pursuant to a scheme floated by any institution. Accordingly, the circulars issued by the Board will not apply to the facts of the Appellant's case. In this regard, reliance is also placed on the judgement of the Hon'ble Bombay High Court in the case of *Rasiklal M Parikh vs. ACIT (2017) (393 ITR 536)* wherein the said position has been clarified and it has been held that the two circulars will not apply to cases where an under-construction property is purchased from a developer. In any event, the circulars issued by the Board only represent their interpretation of the law, and they do not bind the Tribunal.*

10. In so far as the AO's reliance on the judgement of *Rasiklal (supra)* is concerned, it is submitted that the facts in that case were at complete variance with the facts of the Appellant's case. In that case the original asset was transferred on 13th September, 2005. The agreement for the purchase of the new asset was signed on 24th November, 2008 and the approval for construction was received by the builder on 7th September, 2010. Since both the events were outside the permissible period specified under section 54, it was held that the assessee was not entitled to the benefit of that section. It was specifically noted in para 34 of the judgement that *Thus, according to us there is no question of assessee establishing the title over the property which was not been approved for construction at the material time'. It was further held in para 35 'that we are of the view that the issue pertaining to incomplete construction and that of contiguity of flats need not be gone at this stage since on very first issue we are not satisfied with the eligibility of the Appellant assessee to claim exemption under section 54F. Therefore, the facts of Rasiklal (supra) are completely different from that of the Appellant's case inasmuch as in the facts of that case, even the approval for construction had not been received within the prescribed period, whereas, in the Appellant's case, even the occupation certificate as also the possession letter have been granted in the prescribed period.*

11. Lastly, the CIT(A) has relied on the judgement of the Hon'ble Supreme Court in the case of *Sanjeev Lal (supra)*. It is submitted that the Supreme Court was dealing with a different question altogether. In that case, the agreement to sell the original asset was signed on 27th December 2002, and the same was executed on 24th September 2004. The agreement for the purchase of the new asset was signed on 30th April 2003. The question before the

Hon'ble Supreme Court was regarding the date of sale of the original asset, i.e., whether the asset can be set to have been sold on 27th December 2002 or on 24th September 2004. If it is the former, then the purchase of the new asset on 30th April 2003 is within the prescribed period. On the other hand, if the sale is said to have taken place on 24th September 2004, the purchase of the new asset would be outside the prescribed period. It was held by the Court, that ordinarily one would have to consider the date of registration of the sale agreement as the date of sale of the original asset, however in the facts of that case, the parties were unable to register the agreement to sell in view of a stay granted by the Court. In such circumstances, it was held that the date of entering into the agreement to sell would be construed as the date of sale for the purpose of section 54 of the Act. At the outset, it is submitted the ratio of this case has nothing to do with the facts of the Appellant's case as what was in dispute in that case was the date of sale of the original asset, whereas, what is in dispute in the present case is the date of purchase /construction of the new residential house. Therefore, the question being dealt with by the Hon'ble Supreme Court was entirely different. Furthermore, the decision was given in peculiar circumstances where parties were restrained from executing the agreement by virtue of an operating stay of the Court. Therefore, it is submitted that the judgement of the Hon'ble Supreme Court has no bearing on the facts of the Appellant's case.

12. In view of the aforesaid, it is submitted that the Appellant is entitled to exemption under section 54 of the Act on the long term capital gains of Rs. 1,23,47,955 earned by him.

5. Ld. DR, on the other hand, relied on the orders of lower authorities. He also placed reliance on the decision of the **Hon'ble Bombay High**

Court in the case of Rasiklal M Parikh Vs ACIT-19(2) (2017)

393 ITR 536 wherein it was held that *where the assessee invested consideration received on surrender of tenancy rights towards construction cost of new flats, but construction of new flats have not been completed so could not obtain allotment letter from developer within period of 3 years. He was not entitled to exemption u/s 54F.*

6. We have heard both the parties, and after carefully consideration of facts of this case, following conclusion can be arrived at:

- a. It is an admitted fact that the agreement to purchase the new asset was made on 21.06.2014 i.e. more than 1 year before the date of agreement to sell the original asset i.e. 22.07.2015. It is on this ground that the AO has denied the deduction u/s 54 to the assessee as the date of agreement to purchase is beyond the prescribed time period of 'one year prior and 2 years after the sale of original asset'. It is the contention of the assessee that even though the new asset had been booked and the agreement to purchase was entered on 21.07.2014, the said asset was under construction and the occupancy certificate was received by the developer/builder only on 16.09.2015. The possession was given to the assessee on 16.11.2015 and both these dates fall within the prescribed period as above.

- b. Hon'ble Bombay High Court in the case of **CIT v/s Smt. Beena K. Jain (1996) 217 ITR 363 (Bom.)** has dealt with this issue. The facts of the case of Smt. Beena Jain are similar to the assessee's case and the Hon'ble Bombay High Court case has upheld the ITAT's order by holding that the relevant date of purchase for computation of deduction u/s 54 was the date when the assessee obtained possession of the flat.
- c. Looking at the totality of the transaction, it is clear that on the date of agreement to purchase i.e. 21.06.2014, there was no asset in existence which could be called a residential house. As the occupancy certificate was received by the Developer on 16.09.2015 and subsequently the possession was given to the assessee on 15.11.2015, the date of possession of the property should be regarded as date of actual purchase for the purpose of claiming exemption u/s 54F of the Act. On this specific issue, the Ld. AR has also relied on the decision dated 17.01.2019 of the coordinate Bench of Pune Tribunal in the case of Ayushi Patni v/s DCIT in ITA No. 1424/Pun/2016. In this case it has been observed as under:

“It is an un-rebutted fact that at the time of execution of agreement, the residential property was not in existence. Therefore, taking into consideration facts of the case, the date

of possession of flat is the date of actual purchase for the purpose of claiming exemption u/s 54F of the Act.”

- d. Considering the totality of the facts and circumstances of the case and in the light of the decision of the Jurisdictional High Court as well as of the co-ordinate Bench discussed hereinbefore, it is held that the relevant date for grant of deduction u/s 54 in this case would be the date of possession i.e. 16.11.2015, which is well within the period of two years from the date of agreement to sell the original asset i.e. 22.07.2015. As such, the claim of the assessee for exemption u/s 54 of the Act is allowed.
- e. In the result, the appeal filed by the assessee is allowed.

Order Pronounced in Open Court on 10.06.2024

Sd/-

(AMIT SHUKLA)
JUDICIAL MEMBER

Sd/-

(RENU JAUHRI)
ACCOUNTANT MEMBER

Place: Mumbai

Date 10.06.2024

ANIKET SINGH RAJPUT/STENO

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT,
Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

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आयकर अपीलीय अधिकरण/ ITAT, Bench,
Mumbai.