

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

Before Shri Waseem Ahmed, Accountant Member and
Shri Soundararajan K., Judicial Member

ITA No. 461/Coch/2024
(Assessment Year: 2017-18)

Kumar Madhavanpillai S. Chandra Press & Book Depot Manjalikulam Road Thampanoor Thiruvananthapuram 695001 [PAN: AJXPS9299P]	vs.	Income Tax Officer -1(4) Aayakar Bhavan, Kowdiar P.O. Thiruvananthapuram 695003
(Appellant)		(Respondent)

Appellant by:	Shri Anil Krishnan, Advocate
Respondent by:	Smt. Girly Albert, Sr. D.R.

Date of Hearing:	01.10.2024
Date of Pronouncement:	03.10.2024

ORDER

Per Bench

This appeal filed by the assessee is directed against the order of the National Faceless Appeal Centre, Delhi [CIT(A)] dated 28.03.2024 for Assessment Year (AY) 2017-18.

2. The interconnected issue raised by the assessee is that the learned CIT(A) erred in confirming the addition Rs. 1,45,22,651/- under the head capital gain by disallowing exemption under section 54/54F of the Act and without giving the benefit of the cost of improvement.

3. The facts in brief are that the assessee is an individual who during the year under consideration sold immovable property being land & building vide deed dated 6th April 2016 for consideration of Rs. 1.75 crore. The assessee

further purchased immovable property vide deed dated 11th July 2016 for Rs. 1.5 crore. The assessee claimed that the property sold during the year was purchased in the year 1996 as on 18th April 1996 for an amount of Rs. 2 lakhs plus and registered expenses of Rs. 50,000.00 only. The assessee further claimed that he incurred construction expenses in the year 2003-04 for Rs. 12.5 lakh on the construction of shop etc. which was claimed as the cost of improvement. Thus, the assessee after claiming indexed cost of acquisition and indexed cost of improvement and deduction u/s 54/54F of the Act on account of purchase of new property declared long term capital gain at NIL.

4. The AO found that the assessee in the year 1996 purchased property being TC No. 25/1684/(1), (2) & (3) for Rs. 2 lakh which includes land cost of Rs. 1.5 Lakh and building cost of Rs. 50,000.00 only. The assessee in the year 2003-04 made certain construction on the property by availing loan from bank for Rs. 7.36 lakh and new number allotted being TC No. 25/1684/(2),(3),(4)&(5). During the year, the assessee sold property being TC No. 25/1684/(2),(3), (4) & (5) for a consideration of Rs. 1.75 crore which includes land value at Rs. 1.25 crore and building value of Rs. 50 Lakh. Thereafter the AO found, as per the municipal property tax receipt, out of 4 TC number only property being TC No. 25/1684/(4) was residential property and remaining were commercial properties. The AO also found that the buildings were shown as business assets in balance sheet for which depreciation was claimed, thus the same qualifies for short term capital gain.

5. The AO further found that the new property purchased by the assessee consists of property being TC Nos. 25/1726, 25/1727, 25/1728 & 25/1729 for total area of 362.32 sq. mts out of which only property being TC No. 25/1729 having area of 70 sq. mts. is residential property.

6. Based on the above observation, the AO treated the land value and value of one of property as long term capital assets and accordingly long-term capital gain was computed on the same after index cost of acquisition and further provided exemption under section 54 of the Act on account of investment in residential property i.e. only for TC No. 25/1729. Thus, the net long term capital gain was worked out at Rs. 1,19,46,720/-only chargeable to tax.

7. Likewise, the AO treated the other three property as short term capital assets and accordingly worked out short term capital gain after deducting WDV from proportionate sales consideration at Rs. 25,75,931/- only. Thus, the AO in view of the above made the addition of Rs. 1,45,22,651/- on account of long term and short-term capital gain.

8. On appeal by the assessee, the learned CIT(A) also confirmed the addition made by the AO.

9. Being aggrieved by the order of the learned CIT(A) the assessee is in appeal before us.

10. The learned AR before us filed a paper book running from pages 1 to 66 and contended that the investment was made by the assessee in the residential property. Therefore, the same is eligible for deduction under section 50/54F of the Act. It was also contended by the learned AR that the depreciable assets, if the period of holding exceeds 36 months, are also eligible for such deduction under section 50/54F of the Act. The ld. AR also contended that cost of improvement was incurred by the assessee at Rs. 12.52 lakhs which should be considered for the purpose of calculating the capital gain.

11. On the other hand, the learned Sr. DR before us vehemently supported the order of the authorities below.

12. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, the issues which require our consideration are detailed as under:

- i. Whether the benefit of cost of improvement claimed by the assessee for Rs. 12.52 lakhs is eligible for deduction in calculating the amount of capital gain.
- ii. Whether the short-term capital gain is eligible for exemption under section 54/54F of the Act.
- iii. Whether the investment was made by the assessee in the residential property/qualify so as to qualify the benefit of exemption under section 54/54F of the act.

13. Regarding the issue relating to the cost of improvement of Rs. 12.52 lakhs, we note that admittedly the assessee has taken loan for the construction of the building amounting to Rs. 7.36 lakhs which was also accepted by the AO. It is a prevailing practice in the market that the banks do not give hundred percent loan to the parties for any project. As such, the banks advance loans to the parties to the tune of 70 to 80% of the total cost of the project depending upon the profile of the party. In other words, in the given case the loan given by the bank stood at Rs. 7.36 lakhs and therefore it is implied that it shall be within the range of 70 to 80% of the total cost of the project. Accordingly, an inference can be drawn that the assessee must have also incurred the expenses for the construction of the house in the year 2003 to the tune of Rs. 20 to 30% of the total project cost. Thus, in the present facts and circumstances, we are of the view that the assessee should have also incurred the expenses to the tune of Rs. 5.16 lakhs approximately as claimed by him and accordingly we hold that the expenses claimed by the assessee for

Rs. 12.52 lakhs towards the cost of construction of the building is eligible for deduction while calculating the capital gain long term capital gain with indexation.

14. The other aspect relating to the cost of construction of Rs. 12.52 lakhs arises whether 2/4th of such expenses have been claimed by the assessee relating to the depreciable assets and the balance relates to the residential properties. From the preceding discussion, we note that the assessee has attached the receipt of the property tax demonstrating that 2 units of the impugned property were used for residential purposes. The copies of the receipt of the property tax are placed on pages 27 and 28 of the paper books, which were not disputed by the revenue authorities. Accordingly, we hold that the 50% cost of the improvement is eligible for indexation cost while calculating the capital gain.

15. The next controversy arises whether the gain arising on the sale of depreciable assessed is eligible for exemption under section 54/54F of the Act. It is a fact on record that the depreciable assets are subject to short-term capital gain in pursuance to the provisions of section 50 of the Act irrespective of the period of holding. However, there is no such distinction made under the provisions of section 54/ 54F of the Act and in the definition of long-term capital asset provided under section 2(29AA)/ 2(42A) of the Act. In other words, the gain arising from the depreciable asset shall be eligible for the exemption under section 54/ 54F of the Act if the period of holding exceeds 36 months as provided under the provisions of law. Accordingly, we hold that the assessee cannot be denied the benefit of exemption under section 54/ 54F of the Act with respect to the short-term capital gain arising from the sale of depreciable assets.

16. The next controversy arises whether the investment made by the assessee in the new property is partly commercially in nature and partly residential in nature. In this regard, we note that assessee admittedly has been using the property for the residential purposes. Apart of such property indeed has been notified as commercially in nature but what we find from the facts on record is that the property primarily as a whole was used for the purpose of residence alone. The property marked as commercially in nature was never used for any commercial activity. As such, it was submitted by the learned AR of the assessee that such property has been used for the storage of the household items. Likewise, the property was also not rented out to any 3rd party for the commercial purposes. We also note that Delhi Tribunal in the case of Shri Amit Gupta Vs. DCIT reported in 6 SOT 403 has decided the identical issue in favour of the assessee by observing as under:

7. The requirement of law is that the property should be a residential house. The expression residential house has not been defined in the Act. The popular meaning of the word is a place or building used for habitation of people. It is used in contradistinction to a place which is used for the purpose of business, office, shop, etc., It is not necessary that a person should reside in the house to call it a residential house. If it is capable of being used for the purpose of residence than the requirement of section is satisfied. We do not find any direct support from various case laws which have been relied upon by the learned counsel for the assessee as well as the learned DR except for the decision in the case of Sham Sunder Mukhija(supra). The decision in the case of Vidya Prakash Talwar (supra) dealt with a different aspect altogether. The court has held that the expression house property takes into account an independent residential unit. To this extent, the said decision is of some assistance to the case pleaded by the assessee. The decision in the case of Pushpalata Kanodia (supra) is in the context in the provisions of Wealth Tax Act and in the context of the definition of a 'house' under the said Act and they are therefore, are not of much of use to the case pleaded by the assessee. In the case of Purshottam Das (supra) in the context of the provisions of section 23(i)(b)(ii) of the Act, the court held that to determine as to whether a property is residential or not the intention at the time construction intended user, actual user, potentiality for a different user and several other related factual aspects have to be considered. The court held that the actual user is only one of the factors but not conclusive factor to determine whether a particular unit is residential house. The court held that a temporary use for office purpose did not render the property as non-residential unit. The case relied upon by the learned DR namely Dr. A.S. Atwal's case (supra) is again of no assistance to the case of the revenue. It was a case under section 54 of the Act where the user of the premises as a residence was a condition, whereas under section 54F the user as a residential house is not the requirement. The decision of the Hon'ble High Court in the case of Poonen (supra) was a case where residence at a particular place to decide jurisdiction of Court in matrimonial proceeding under the Indian Divorce Act, 1869. The consideration are different in such cases. The decision of the Hon'ble Mysore High Court in the case of Globe Theatres Ltd. (supra) is in the context of 'Residence' under the Rent Control Legislation where again the considerations are different. Apart from the above, we have already held that the property should be capable of being used as a residential house and need not be actually used as a residence. In view of the above conclusion, the above case laws are not of much relevance to decide the controversy in the present case. In the decision in the case of Sham Sunder Mukhija (supra), the Tribunal has taken a view that a farm house is also a residential house as it was capable of being used as a residence. Taking into consideration all these aspects, we are of the view that in the facts and circumstances of the present case the basement was capable of being used as residence. The fact that the assessee did not actually use the same for his residence will not disentitle him to the claim of exemption under section 54F of the Act. On the facts and

the circumstances of the case, we are of the view that the exemption under section 54F deserves to be allowed. Accordingly, we direct that the same should be allowed. The appeal of the assessee is allowed.

17. It is not out of the place to mention that the assessee in the written submission on page 62 of the paper book has accepted part of such property as commercial in nature and accordingly submitted that such part of the property can be excluded from the amount of deduction under section 50/ 54F of the Act. However, at the time of hearing before us the Id.AR requested not to exclude such investment as alleged commercial in nature by the revenue on the reasoning that such property was predominantly used for the residential purposes. Considering the facts discussed above and taking a holistic view, we are inclined to hold that the assessee has made investment in the residential property and therefore the same is eligible for deduction under section 50/ 54F of the Act. Hence the ground of appeal of the assessee is hereby allowed.

18. In the result, the appeal of the assessee is hereby allowed.

Order pronounced on 03rd October, 2024 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963.

Sd/-
(Soundararajan K.)
JudicialMember

Sd/-
(Waseem Ahmed)
AccountantMember

Cochin, Dated: 03rd October, 2024

n.p.

Copy to:

1. The Appellant
2. The Respondent
3. The Pr. CIT concerned
4. The Sr. DR, ITAT, Cochin
5. Guard File

Assistant Registrar
ITAT, Cochin