

आयकर अपीलिय अधिकरण "सी" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI

श्री शैलेंद्र कुमार यादव, न्यायिक सदस्य एवं श्री रमित कोचर, लेखा सदस्य के समक्ष।
BEFORE SHRI SHAILENDRA KUMAR YADAV, JM
AND SHRI RAMIT KOCHAR, AM

आयकर अपील सं./ITA No. 885/Mum/2014
(निर्धारण वर्ष/Assessment Year: 2006-07)

ACIT, Central Circle-46
Room No. 659, 6th Floor
Àayakar Bhavan, M.K. Road
Mumbai 400020

Shri Prannath Talwar
बनाम/ 16B, IL Palazzo
Vs. Malabar Hill
Mumbai 400002

स्थायी लेखा सं./PAN - AAAPT3992J

अपीलार्थी/APPELLANT

प्रत्यर्थी/ RESPONDENT

अपीलार्थी की ओर से / Appellant by: Shri Daya Sagar
प्रत्यर्थी की ओर से/ Respondent by: Shri Vimal Punmiya

सुनवाई की तारीख /Date of Hearing : 15.10.2015
घोषणा की तारीख/Date of Pronouncement : 30.10.2015

आदेश / O R D E R

PER SHAILENDRA KUMAR YADAV, JM

This appeal has been filed by the Revenue against the order dated 27.11.2013 passed by CIT(A)-38, Mumbai and it pertains to A.Y. 2006-07 on following grounds: -

1. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in deleting the addition made in respect of 'Long Term capital gains' without appreciating the fact that the assessee is not entitled to get benefit of exemption u/s. 54 of the Act since the property at Mumbai was not purchased within a period of 2 years from the date of transfer of property situated at Defence Colony, New Delhi.
2. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in deleting the addition made in

respect of 'Long Term capital gains' without appreciating the fact that the assessee is not entitled to get benefit of exemption u/s. 54 of the Act since the property at Mumbai was not constructed within a period of 3 years from the date of transfer of property situated at Defence Colony, New Delhi."

2. Facts of the case are that a search and seizure under section 132(1) of the Act was carried out at the business and residential premises of Nitco Group of Companies and other on 03.08.2009. Assessee was also covered under the search action under section 132(1) of the Act. Consequent to the search action, notice under section 153A of the Act was issued to the assessee. In response to the same assessee filed return of income on 07.12.2009 declaring total income of ₹27,63,070/-. The original return of income under section 139(1) of the Act was also filed by the assessee on 29.07.2006 declaring total income at ₹27,63,070/-. Assessment under section 153A r/w.s. 143(3) of the Act was completed determining total income at ₹1,71,25,500/- by disallowing the exemption under section 54 of the Act claimed by the assessee amounting to ₹1,43,62,421/-. The Assessing Officer observed that the assessee sold the property situated at Defence Colony, New Delhi vide sale agreement dated 08.08.2005 for a consideration of ₹1,70,00,000/-. Out of the consideration of ₹1,70,00,000/- an amount of ₹50,00,000/- was claimed as advance made to M/s. Saumya Builders P. Ltd. and ₹94,00,000/- was invested in the Capital Gin Taxes Scheme with State Bank of India, Nariman Point Branch, Mumbai on 11.05.2006. The entire capital gain amounting to ₹1,43,62,241/- arising out of the sale of property at New Delhi was claimed as exempt under section 54 of the Act. The Assessing Officer noted that the assessee purchased a new flat situated at Lake

Homes, Powai, Mumbai on 15.04.2008 from M/s. Ekta Supreme Housing after a period of two years from the date of transfer of the old property situated at New Delhi and therefore, held that the assessee was not entitled to claim exemption under section 54 of the Act. In fact, during the assessment proceedings assessee submitted that he deposited a sum of ₹50,00,000/- with M/s. Saumya Buildcon P. Ltd. for the purpose of acquiring a flat in the building to be constructed within three years for availing the benefit of section 54 of the Act. It was further submitted that later on, the assessee in order to safeguard his claim of exemption u/s.54 of the Act had written a letter dated 05.01 .2007 to Saumya Buildcon Pvt. Ltd. to provide the flat in August, 2008, in response to which, the builder stated that they cannot complete the project before August, 2008 due to unavoidable circumstances and accordingly agreed to compensate the inconvenience by repaying the amount of advance paid by the assessee directly to M/s.Ekta Supreme Housing in favour of the assessee vide cheque dated 14.11.2007. It was further submitted that the assessee applied for withdrawal of deposit amount to the SBI and the SBI directly issued a cheque of Rs.99,58,637/- in favour of M/s. Ekta Supreme Housing on 02.07.2007 from whom the assessee purchased the property in Mumbai and the agreement for purchase of new residential property from M/s. Ekta Supreme Housing was executed and registered on 14.05.2008, therefore, the assessee complied with the provision of section 54 of the Act i.e. construction of flat within three years. The Assessing Officer did not accept the contentions of the assessee on the ground that the period of three years is allowable for the construction of houses within the meaning of section 54 of the Act and in the case of the assessee, it had not constructed the house on his own and the assessee purchased a

residential flat constructed by some other builder. The Assessing Officer held that the time stipulated under section 54 of the Act i.e. two years for purchase of new property had lapsed and therefore, the assessee was not entitled to claim exemption under section 54 of the Act for an amount of Rs.1 43,62,241/-. Accordingly, the Assessing Officer disallowed the claim of exemption under section 54 of the Act and brought to tax the entire long term capital gain of Rs.1,43,62,241/-.

2.1 The matter was carried before the first Appellate Authority. Various contentions were raised on behalf of the assessee and having considered the same the CIT(A) allowed relief to the assessee. The same has been opposed before us by the Revenue. Revenue, inter alia, submitted that under the facts and circumstances of the case the CIT(A) erred in deleting the addition made in respect of long term capital gain without appreciating the fact that assessee is not entitled to get the benefit of exemption under section 54 of the Act since the property at Mumbai was not purchased within a period of 2 years from date of transfer of the property situated at Defence Colony, New Delhi. Accordingly the CIT(A) erred in deleting the addition made in respect of long term capital gains without appreciating the fact that the assessee is not entitled to get the benefit of exemption under section 54 of the Act since the property at Mumbai was not constructed within a period of three years from the date of transfer of the property situated at Defence Colony, New Delhi. Accordingly the order of the CIT(A) be set aside and that of the Assessing Officer be restored. On the other hand the learned A.R. for the assessee supported the order of the CIT(A).

2.2 After going through the rival submissions and material on record we find that the main contention of the Assessing Officer in rejecting the claim of exemption under section 54 of the Act is that the assessee has not constructed the house on his own and since he has not purchased a flat from a builder within a period of two years, he is not entitled for exemption under section 54 of the Act. The issue is whether the assessee is required to construct house himself or got it constructed by other, including builders. In this regard the stand of the assessee has been that the house property need not be constructed by the assessee himself and if construction is carried out by a builder on behalf of the assessee he will be entitled for exemption under section 54 of the Act.

2.2.1 We find that in the case of CIT vs. Bharat C. Kothari (117 Taxman 538) the Calcutta High Court held as under: -

"The purpose behind the exemption under section 54(1) is that if any assessee sells his residential house and purchases a new house against those sale considerations, then capital gain tax arising out of the sale of the earlier house should not be taxed. Whether assessee himself constructs the house or he gets it constructed by a contractor or third party that does not make any difference. The basic requirement for purpose of relief under section 54(1) is that the assessee should invest the sale proceeds in the construction of residential house, which has been constructed for assessee."

2.2.2 We find that in the case of Kishore H. Galaiya vs. ITO (24 taxman.com 11) the ITAT Mumbai Bench held as under: -

"the assessee sold the old residential house on 7.3. 1996 and the long term capital gain arising on this account was Ps. 9,98,411/-. The assessee had booked a new residential flat with the builder jointly with his wife for a sum of Rs.35,00,0001-. The assessee had paid booking amount of Ps. 1,00,000/- to the builder before the due date of filing of the return of income u/s 139(1) for the assessment year 2006-07 and the balance

amount had been paid in installments after the said date. The total amount paid by the assessee to the builder was Rs. 14,62,5001- till 16.2.2009. In the back drop of this factual position, it is required to be seen whether the assessee had fulfilled the conditions of section 54 of the Act so as to make him eligible for claim of exempt/on u/s 54 of the Act. The first condition is that the capital gain should have been invested in the purchase of new residential house within a period of two years from the date of transfer or for construction of new residential house within a period of three years from the date of transfer. In the present case, the assessee had booked the new flat with the builder and as per agreement, the assessee was to make payment in installments and the builder was to handover the possession of the flat after construction. It has therefore to be considered as a case of construction of new residential house and not purchase of flat. This position has been clarified by the CBDT in circular No.472 (circular No. is 672 but mistakenly reported as 472) dated 16.12.1993 in which it has been made clear that the earlier circular No. 471 dated 15. 10. 1986 in which it was stated that acquisition of flat through allotment by DDA has to be treated as a construction of flat would apply to co-operative societies and other institutions. The builder would fall in the category of other institutions as held by Mumbai Bench of Tribunal in the case Sint. Sunder Kaur Sujan Singh Gadh and therefore booking of the flat with the builder has to be treated as construction of flat by the assessee. Thus, in the present case, the period of three years would apply for construction of new house from the date of transfer of the old flat."

Similar view is claimed to be taken by Hon'ble ITAT, Mumbai in the case of Mukesh G. Desai vs. ITO 24 SOT 312.

2.2.3 Having discussed the legal preposition of the issue let us apply the same to the facts of assessee's case. It is undisputed fact that a property in Defence Colony, New Delhi was sold vide sale agreement dated 08.08.2005 and a new flat which was under construction by developer "Ekta Supreme Housing" was purchased by the assessee vide agreement dated 14.05.2008 and the entire purchase price of ₹1,49,14,180/- was paid by the assessee and the possession of the flat was supposed to be given by builder on or before 30.06.2008. Since assessee has purchased a flat under construction from the developer within a period of three years and also considering that the

flat will be handed over within a period of three years the assessee will qualify as per the provisions for construction under section 54 of the Act. The Hon'ble Bombay High court in the case of Mrs. Hilla J. B. Wadia vs. CIT 216 ITR 376 it was held that delivery of possession is only a formality. More precisely, it was held as under: -

"Under the terms of the agreement of the assessee with the society, the assessee obtained a right to take possession of a specific flat of the society. The assessee had no right to cancel the agreement or claim any damages. Thus, the assessee acquired a substantial domain or control over the flat by virtue of making almost the entire payment relating to the cost of construction of this flat to the society, within a period of two years from the date when the assessee and her husband conveyed the original property. The Board in Circular No.471 dated 15.10.1986 which dealt with the investment in flats under the Self-Financing Scheme of the DDA has stated in the circular that when an allotment letter is issued to an allottee under this scheme on payment of the first installment of the cost of construction, the allotment is final unless it is cancelled. The allottee, thereupon, gets title to the property on the issuance of the allotment letter and the payment of installments is only a follow-up action and taking delivery of possession is only a formality. Such an allotment of flat under this Scheme should be treated as cost of construction for the purpose of capital gains. The present case is on a much stronger footing because there is not merely an allotment of the flat but even almost the entire cost of construction is paid by the assessee within a period of two years."

2.3 In view of our legal discussion, the purchase of flat under construction by the developer by paying the entire sum within a period of three years has to be treated as construction and accordingly assessee was rightly held to be eligible for exemption under section 54 of the Act. This reasoned factual findings of the CIT(A) does not require any interference from our side. We uphold the same.

3. In the result, appeal filed by the Revenue is dismissed.
परिणामतः राजस्व की अपील खारिज की जाती है।

Order pronounced in the open court on 30th October, 2015.
आदेश की घोषणा खुले न्यायालय में दिनांक: 30.10.2015 को की गई।

Sd/- (RAMIT KOCHAR) लेखा सदस्य/ACCOUNTANT MEMBER	Sd/- (SHAIENDRA KUMAR YADAV) न्यायिक सदस्य/JUDICIAL MEMBER
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मुंबई Mumbai, दिनांक Dated 30th October, 2015

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A) - 38, Mumbai
4. आयकर आयुक्त / The CIT, Central-IV, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, "C" Bench ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ By Order

सत्यापित प्रति //True Copy//

सहायक पंजीकार /Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई/ITAT, Mumbai