

**IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH “B”, MUMBAI
BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND
SHRI PAWAN SINGH, JUDICIAL MEMBER
ITA No.1399/Mum/2017 (Assessment Year- 2013-14)**

Nitin Radheshyam Agarwal, Royal I Estate, Unit No.B-34, 4 th Floor, Naigaon Cross Road, Wadala, Mumbai-400031. PAN: AACPA5030G	Vs.	ACIT -21(2), Room No. 115, first Floor, Piramal Chamber, Lalbaug, Mumbai-400012.
(Appellant)		(Respondent)

Assessee by : Dr. K. Shivaram Sr.
: Advocate with Sh. Rahul
Hakkani.

Revenue by : Shri Suman Kumar (DR)

Date of hearing : 12.04.2017

Date of Pronouncement : 28.04.2017

Order Under Section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by assessee u/s 253 of the Income-tax Act ('the Act') is directed against the order of Id. CIT(A)-33, Mumbai dated 09.01.2017 for Assessment Year (AY)-2013-14. The assessee has raised the following grounds of appeal:
 1. Disallowance of deduction claimed u/s. 54 of the Act (Ground No. 1 to 3).
 2. Charging of interest u/s 234B of the Act (Ground No. 1 & 2).
2. Brief facts of the case are that the assessee filed return of income for relevant AY on 27.01.2014 declaring total income of Rs. 4,08,020/- after set off of current year losses. The assessment was completed on 19.02.2016 u/s 143(3) of the Act. In the return of income the assessee claimed the benefit of LTCG u/s 54 of the Act and claimed the deduction of section 54 amounting to Rs. 1,98,14,275/-. The AO disallowed the same. On appeal before the Id. CIT(A), the disallowance was

sustained. Thus, further aggrieved by the order of Id. CIT(A), the assessee has filed the present appeal before us.

3. We have heard the Id. Authorized Representative (AR) of assessee and Id. Departmental Representative (DR) for Revenue and perused the material available on record. Ld. AR of the assessee argued that in the return of income, assessee claimed deduction u/s 54 of the Act of Rs. 1,98,14,275/-. During the assessment, the AO asked the assessee to furnish the details and the copy of sale-deed in support of various claims made in the computation of income. The assessee furnished the details required by AO. The Id. AR for assessee further argued that the assessee along with his wife entered into agreement to sale on 23.05.2008 with Bombay Dyeing Manufacturing Co. Ltd. for purchase of residential flat for a consideration of Rs. 4,20,56,656/-. As per sale agreement, the assessee is having 2/3 share in the said property. The assessee paid the consideration in installment as per the terms of agreement. The possession of the flat was handed over to the assessee on 28.01.2012. During the assessment year, the assessee sold a residential house by way of agreement to sale dated 07.05.2012 for a consideration of Rs. 3.61 Lakhs. The assessee computed Capital Gain on sale of old flat amounting to Rs. 1,98,14,275/-. The assessee claimed exemption u/s 54 of the Act for his share of consideration paid for purchase of new flat against the capital gain, so earned. It was further argued that the exemption u/s 54 of the Act was claimed as new flat can be said to have been transferred to the assessee only on the date of transfer of possession of property on 28.01.2012 which falls within the prescribed time limit in the section 54. The assessee made the installment of new residential house of Rs. 29,30,458/- between 07.05.2011 and 20.10.2011 within one year of the sale of the earlier house. The claim of assessee was qualified as assessee purchased a new residential house within one year before the date of transfer of the old flat which was sold on 07.05.2012. The Ld. AR of the assessee argued that date of possession is to be considered as the date on which the assessee paid full consideration of flat being ready for occupation and obtained the possession. In support of his submission, the Id. AR of the assessee

relied upon the decision of CIT vs. Smt. Beena K. Jain 217 ITR 363 (Bom. High Court), V.M. Dujodwala vs. ITO 36 ITD 130 (Bom.), Purushootam Govind Bhatt vs. FITO 13 ITD 393 (Bom.), Bastimal K. Jain vs. ITO (ITA No. 2896/M/2014 dated 08.06.2016), Sandeep N. Panchamia vs. ITO (ITA No. 5281/M/2013 dated 17.12.2014), Sunil Datwani vs. ITO (ITA No. 1775/M/2008 dated 22.09.2010), ITO vs. Zebun A. Rangawala (ITA No. 2090/M/2013 dated 21.11.2014) & ITO vs. Sri. Rajiv Bholanath Gupta (ITA No. 1698/M/2013). On the other hand, Id. DR for the Revenue supported the order of authorities below. Ld. DR for the Revenue further argued that the AO correctly distinguished the fact of case relied by assessee in CIT Vs. Smt. Beena K. Jain (supra).

4. We have considered the rival contention of the parties and have gone through the order of authorities below and the various decision and orders of authorities below including the Paper Book placed on record and the relevant decision relied by respective parties. The facts which are in dispute are that the assessee sold his residential flat by agreement dated 07.05.2012 and possession was handed over on the same date. The assessee entered into agreement to sale on 23.05.2008 with Bombay Dyeing Manufacturing Co. Ltd. As per the terms and condition of the agreement with M/s Bombay Dyeing Manufacturing Co. Ltd. in regular installment and possession of new flat was handed over to the assessee on 28.01.2012. The possession of new flat by assessee on 28.01.2012 is not in dispute according to AO. According to the AO till 20.10.2011, assessee had made the payment of Rs. 3,62,76,585/-. According to the assessee, the assessee entered into the transaction which is in the nature of purchase and the actual date of possession is to be taken as date of purchase for the purpose of determining eligibility of exemption u/s 54 of the Act. However, the AO concluded that the assessee entered into agreement to sale with Bombay Dyeing Manufacturing Co. Ltd. and the payment schedule was passed on completion of certain slabs (floors). Thus, the case of assessee is of construction and not of purchase. The assessee relied upon the decision of Hon'ble Bombay High Court in CIT Vs. Beena K. Jain reported in 271 ITR 363. The AO concluded that the said judgment is for the

purchase of flat. However, the case of assessee is of construction. The Id. CIT(A) observed that as soon as the assessee entered into agreement with developer, the assessee gets valuable right in the flats under consideration all these rights are irrecoverable until conditions are not violated. The assessee entered into agreement with Bombay Dyeing Manufacturing Co. Ltd. on 23.05.2008. The Id. CIT(A) also tried to distinguish the facts of Id. CIT(A) vs. Beena K. Jain (supra) and held that the decision of ratio is not applicable on the facts of assessee's case.

5. We have gone through the decision of Beena K. Jain (supra). As per our view the principle laid down in the said decision are squarely applicable on the facts of the present case. We may also refer certain fact of that case wherein the assessee's office premises on 23.07.1987 which resulted into LTCG. Prior to the sale, the assessee entered into agreement for purpose of residential flat vide agreement dated 04.09.1985 on the date of agreement to sale shall paid some amount on account of earnest money. The agreement was registered on 27th October 1985, the construction of flat was finally completed in July 1988 and the possession of flat was given on 30th July 1988. Accordingly, she was granted exemption u/s 54 of the Act. The Tribunal held that the relevant date is 29th July 1988 when the assessee paid full value of consideration, when flat was ready for occupation. This date was taken by Tribunal as date of purchase. Thus, the department appeal raised on the ground that for claiming benefit u/s 54F, the date of possession of new residential premises was taken instead of date of agreement to sale and date of registration. Thus, as per our view the ratio of decision of Hon'ble jurisdictional High Court is in favour of assessee. Further, the Hon'ble jurisdictional High Court in CIT vs. Mrs. Hilla J. B. Wadia held that when substantial installment of new property and domain over it within the prescribed period, the sale of property as used for residence almost entire cost of construction was paid within the sale of original property, the assessee is entitled to the exemption u/s 54 of the Act. In a recent decision in ITO vs. Shri Narshivha Amrutrao Dhere (ITA No.1944/PN/2013) dated 18.03.2015 the coordinate bench of Pune Tribunal held that date of occupation is to be considered on which

assessee occupied the property and not the date of which assessee has entered into agreement to purchase the property, when the assessee received the possession of property within a year of sale of asset and thus the assessee fulfilled the condition laid down u/s 54F of the Act.

6. In view of the above legal discussion, we held that assessee is qualified for exemption u/s 54F of the Act. Thus, the ground no.1 of appeal raised by assessee is allowed. Ground No. 2 is consequential and needs no adjudication.

In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 28th day of April 2017.

Sd/-

(G.S. PANNU)

ACCOUNTANT MEMBER

Mumbai; Dated 28/04/2017

S.K.PS

Copy of the Order forwarded to :

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

Sd/-

(PAWAN SINGH)

JUDICIAL MEMBER

BY ORDER,

(Asstt.Registrar)
ITAT, Mumbai