

आयकर अपीलिय अधिकरण, 'बी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'B' BENCH, CHENNAI

श्री चंद्र पूजारी, लेखा सदस्य एवं
श्री जी. पवन कुमार, न्यायिक सदस्य के समक्ष

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER AND
SHRI G. PAVAN KUMAR, JUDICIAL MEMBER**

आयकर अपील सं./ITA No.: 2932/Mds/2016

निर्धारण वर्ष / Assessment Years: 2012-13

Mr. Kannan Chandrasekar,
A1/A, Sandeep Kala
Apartments, Sandeep Road,
Neelankarai,
Chennai – 600 041.

v. The Income Tax Officer,
Corporate Ward – 16(2),
Chennai

PAN: AGWPK8322K

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by

: Shri S. Deepa, CA

प्रत्यर्थी की ओर से/Respondent by

: Shri Supriyo Pal, JCIT

सुनवाई की तारीख/Date of Hearing

: 12.04.2017

घोषणा की तारीख/Date of Pronouncement

: 11.05.2017

आदेश / O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

This appeal of the assessee is directed against the order of the Commissioner of Income-tax (Appeals)-4, Chennai dated 19.08.2016 pertaining to assessment year 2012-13.

2. The only grievance in this appeal of assessee is non-granting of exemption u/s.54 of the Act in respect of sale of the residential property.

3. The Id.A.R submitted before us that the assessee claimed capital gains u/s.54 of the Act. Further, Id.A.R submitted the following points for our consideration.

(i) The Appellant has claimed Capital Gains exemption under Section 54 of the Income Tax Act,1961 in respect of the sale of the residential property situated at Flat No. 4D, 4th Floor, "City Lights Kings Mead", No: 14/3, South Mada Street, Sri Nagar Colony, Saidapet, Chennai — 600 015, by investing in new residential property situated at Unit No: 3, "HE VILLAGE",Kalavakkam, Chenglepet Taluk, Kancheepuram District.

(ii) The Appellant sold the property on 22-6-2011 for a consideration of ₹1,15,00,000/- and the consideration amount was credited in his Punjab National Bank savings bank account.

(iii) The Capital gains arising out of the sale was ₹74,20,062/- and the Appellant claimed exemption of the entire capital gains u/s 54 since he invested in the new residential property. The Appellant paid ₹50,00,000/- to the Builder M/S. Phoenix Hodu Developers Pvt Ltd vide two payments, first payment for ₹8,00,000/- on 08-12-2011 and the second one for ₹42,00,000/- on 21-12-2011 for which the Builder has issued receipts. The Appellant availed home loan from M/s. India Bulls Housing Finance Limited for an amount of ₹46,12,572/- and the Company paid an amount of ₹40,00,000/- to the Builder on 11-01- 2012 which is also acknowledged by the Builder and this loan amount also is construed as appropriation towards purchase of new house property qualifying for exemption under Sec.54.

(iv) The Appellant has thus invested a total amount of ₹1,04,02,567/- in the new property and has fully utilized capital gains amount. However the construction of the building property could not be completed and the possession handed over within the stipulated time of 3 years from the date of sale of the property. The date of

sale of the property was 22-6-2011 and the possession was handed over to the Appellant on 05-11-2015.

(v) The Assessing officer has in his order denied exemption U/s.54 of Income Tax Act 1961 by prescribing "as per section 54 of the act, construction of the property should have been completed by 22.06.2014. Since the construction as stipulated in section 54 is not completed within three years from the date of sale of house property, the exemption claimed U/s.54 by the Assessee at ₹74,20,062/- is not allowed"

(vi) The Id.A.R stated that the intention of the legislature was to encourage investments in the acquisition of a residential house and completion of construction or occupation is not the requirement of law. The words used in the section are "Purchased or Constructed". The condition precedent for claiming benefit under section 54 is that the capital gain should be parted by the appellant and invested either in purchasing a residential house or in constructing a residential house. If the construction is not completed and it is not in a fit

condition to be occupied, it does not disentitle the Appellant to claim section 54 relief.

(vii) Further there is no dispute the fact that the Appellant had invested large sums of money in the construction of the house. The requirement of the provision is that the Appellant within a period of three years after the date of transfer has to construct a residential house in order to become eligible for exemption. The Appellant relies on the ratio of the following decisions:

- a) Commissioner of Income Tax Vs. Shri. Sardarmal Kothari (Madras High Court) reported in 302 ITR 286.
- b) Commissioner of Income Tax Vs. Sambandam Udayakumar (Karnataka High Court) reported in 345 ITR 389.

(viii) Further, the appellant submits that as substantial payments have been made, the Appellant is entitled to deduction U/s. 54 of the Act. The appellant relies on the ratio of the below decisions in support of its claim:

- Andhra Pradesh High Court in CIT Vs Mrs.Shahzada Begum (173 ITR 397)
- Bombay High Court in CIT v. Laxmichand Narpal Nagda (211 ITR 804)
- Delhi High Court in CIT v. R.L. Sood (242 ITR 727)
- ITAT, Hyderabad in Sri Pradeep Kumar Chowdry Vs DCIT ITA 1520/Hyd/2013)

(ix) The Appellant paid ₹50 lakhs towards purchase of new property out of the sale proceeds received from the sale of his property. The Appellant paid an amount of ₹14.99 lakhs towards the closure of home loan taken from Punjab National Bank in respect of the property sold by him. Also he paid an amount of ₹17.69 lakhs to his Father in law towards his medical expenses who had to undergo a major heart surgery. The Appellant had funds shortage towards payment of new property and for this reason only, he had to avail home loan from India Bulls Housing Finance Limited.

(x) The Id.A.R submitted that in order to claim exemption u/s 54, there need not be nexus between the funds to be invested in new property and the utilization of capital gains exemption amount. The only pre-requisite / condition is that in order to claim exemption u/s 54, the Assessee should invest in purchase of new residential property either within one year prior to the date of sale or purchase within two years after the date of sale or construct within three years from the date of sale. The Appellant has fulfilled the condition that he has invested in construction of the

new residential property within three years and he got the possession of the property on 05-11-2015. The Appellant relies on the following Case laws related to his claim for deduction under section 54(1) of the Act:

- a) Ishar Singh chawla Vs. Dy.Commissioner of Income Tax (ITAT) (ITA No.608/Kol/2010)
- b) J.V.Krishna Rao Vs. Dy.Commissioner of Income Tax (ITAT) (ITA No.1866/Hyd/2011) and
- c) Meera Devi Jam Vs. Income tax officer (ITA No.505/KOL/2010)

3.1 Based on the facts of this case and the various orders of the Tribunal, the Id.A.R pleads for relief from the addition made by the Revenue and requests for deletion of addition made amounting to ₹74,20,062/- in respect of capital gains exemption claimed by the Appellant.

4. On the other hand, Id.D.R submitted that the relevant provisions of section 54 (1) stipulates that for claiming the benefit of capital gains tax exemption 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 a residential house. The words used in the section are purchased' or constructed". Now the question arises as to

whether booking of a flat by investing the entire capital gains within the stipulated period of three years from the date of sale of the original property, although the construction was never completed before the end of the three years, can be construed as the new property 'constructed' or purchased' making the assessee eligible for exemption under section 54 of the Act. According to D.R, for claiming the benefit of section 54, the assessee should have completed the construction of the new house/property within the period of three years from the end of the date on which the old property was transferred.

4.1 The Id.D.R relied on the following case laws.

a) Farida A. Dungerpurwala(2014) 52 tax mann.com 527, wherein held that booking of a flat which was going to be constructed by a builder has to be considered a case of construction of flat" and not purchase of flat for the purposes of section 54. Moreover, it was also held that deduction under section 54 is available only if the assessee has constructed a new house within three years after the date of transfer of the original property.

b) Jagwinder Singh vs CIT(A),(2104) 50, TAXMANN.COM 145, the High Court of Punjab & Haryana wherein held that the benefit of

section 54F cannot be granted in the absence of any evidence establishing construction of new residential house.

c) Anu Aggarwal vs ITO (2012) 28 TAXMANN.COM 286 as per which the assessee is disentitled from claiming deduction under section 54F on her failure to construct new residential property within specified period on the plot purchased by her out of sale proceeds of her old property.

d) Rasikala M. Parikh vs ACIT(2012) 28 taxmann.com 195 wherein held that the allotment letter of a flat issued by builder could not become a basis for the claim of deduction under section 54F.

e) Yoshovardhan Sinha vs ITO(2016). 65 taxmann.com 31 as per this judgement the assessee would not be entitled to exemption under section 54 where the construction of new residential flat was not completed by end of three years from transfer of the old property.

f) In the case of Smt. Sessa Jaggaiah vs ITO (2012) 20 taxmann.com 521, wherein held that assessee's claim for deduction under section 54 was denied by the AO on the grounds that the construction of the property was completed beyond the period prescribed by the provisions of section 54.

4.2 The Id.D.R further submitted that going through the above case laws, it is evident that the facts of the present case are similar to those discussed above. The judgments referred to by the appellant get differentiated by the case laws relied upon by the Revenue authorities. In the present case, the old property was sold on 22/06/2011 and the period of three years expired on 22/06/2014. The appellant accepted that the new property was not completed by the end of 26/06/2014. This clearly shows that the construction of the property was completed only after the expiry of the period of three years. Further, Id.D.R submitted that the possession of the new property was handed over to the appellant only on 05/11/2015 although no such documentary evidence was ever filed during the appellate proceeding to substantiate that the possession was handed over to the appellant on 05/11/2015. Hence, in view of the above facts of the case, the assessee is not entitled for benefit u/s.54 of the Act. Therefore, Id.D.R pleaded that the action of the AO may be upheld.

5. We have heard both the parties and perused the material on record. The assessee in this case transferred the residential

property on 22.06.2011 for consideration of ₹115 lakhs. The assessee earned capital gains at ₹74,20,062/- and claimed exemption u/s.54 of the Act for the same amount. The assessee paid towards purchase of the new residential property as follows:-

| Amount – (₹) | Date of payment | Payment to |
|--------------|-----------------|--------------------------------------|
| 8 lakhs | 08.12.2011 | M/s.Phoenix Hodu Developers Pvt Ltd. |
| 42 alkhs | 21.02.2011 | M/s.Phoenix Hodu Developers Pvt Ltd. |

The assessee availed home loan from M/s.India Bulls Housing Finance Ltd. for an amount of ₹46,12,572/- and the company has paid ₹40 lakhs to builder M/s.Phoenix Hodu Developers Pvt Ltd. on 11.01.2012, which laws duly acknowledged by the developer. On the whole amount, the assessee claimed exemption u/s.54 of the Act subject to capital gains of ₹74,20,062/-. This was disallowed by the AO on the reason that the construction of residential property was not completed within 3 years from the transfer of residential capital asset. We have gone through the provisions of the section 54 of the Act as follows:-

Sec. 54. "Profit on sale of property used for residence.

(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, then, 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 is greater than the cost of 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 section 45 as the 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 nil; or

(ii) 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 section 45; 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.

(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 utilised 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 scheme 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 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 section 45 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".

5.1 The time period allowed for making a purchase if it is done after the date of transfer is two years and if it is a construction it is three years. Thus, if the intention was to construct a residential house the period is three years, the outer limit of three years for constructing a house in the given case before us was 21-06-2011. Vide sub-sec. (2) of section 54 a deposit under capital gains scheme, if the capital gain is not appropriated for such construction has to be done before the due date for furnishing the return of income u/s (1) of sec.139 of the IT Act, 1961. Hon'ble Punjab & Haryana High Court in the case of CIT v. Ms Jagriti Aggarwal [2011] 339 ITR 610/ 203 Taxman 203/15 taxmann.com 146 has held that sub-sec. (4) of sec.139 can only be construed to as a proviso to sub-sec. (1) and thus, the due date furnishing the return mentioned in sec. 139(1) is subject to the extended period provided under section 139(4) of the IT Act, 1961. The impugned assessment year before us is assessment year : 2012-13, and the extended time period u/s 139(4) is before expiry of one year from

the end of the relevant assessment year or before completion of assessment whichever is earlier. One year from the end of the impugned assessment year would expire only on 31-03-2014. The assessment for the impugned assessment year having been completed only on 24-12-2014 the date to be reckoned for the purpose of application of sub-sec. 2 of sec. 54 in the case before us is 31-03-2014. The assessee had time upto 31-03-2014 to deposit the capital gains in capital gains account scheme, if he could not utilize it for acquiring or constructing a residence. This brings us to the question of whether assessee can be considered to have constructed or acquired a residence before 31-03-2014.

5.2 How the term purchase has to be construed in relation to interpretation of sec. 54 of the IT Act, 1961 had come up before the Hon'ble Delhi High Court in the case of CIT v. Kuldeep Singh [2014] 49 taxmann.com 167/226 Taxman 133. Their Lordship held at paras 8 to 10 of judgment dated 12-08-2014 that:-

'8. The word "purchase" can be given both restrictive and wider meaning. A restrictive meaning would mean transactions by which legal title is finally transferred, like execution of the sale deed or any other document of title. "Purchase" can also refer to payment of consideration or part consideration along with transfer of possession under Section 53A of the Transfer of Property Act, 1882. Supreme Court way back in 1979 in CIT Andhra Pradesh v. T.N. Aravinda Reddy (1979) 4 SCC 721,

however, gave it a wider meaning and it was held that the payment made for execution of release deed by the brother thereby joint ownership became separate ownership for price paid would be covered by the word "purchase". It was observed that the word "purchase" used in Section 54 of the Act should be interpreted pragmatically in a practical manner and legalism shall not be allowed to play and create confusion or linguistic distortion. The argument that "purchase" primarily meant acquisition for money paid and not adjustment, was rejected observing that it need not be restricted to conveyance of land for a price consisting wholly or partly of money's worth. The word "purchase", it was observed was of a plural semantic shades and would include buying for a price or equivalent of price by payment of kind or adjustment of old debt or other monetary considerations. It was observed that if you sell a house and make profit, pay Caesar (State) but if you buy a house or build another and thereby satisfy the conditions of Section 54, you were exempt. The purpose was plain; the symmetry was simple; the language was plain.

9. Recently Supreme Court in Civil Appeal Nos. 5899-5900/2014 titled Sh. Sanjeev Lal Etc. Etc. v. CIT, Chandigarh & Anr., decided on 01/07/2014, 2014 (8) SCALE 432 again examined Section 54 in a case where the assessee had entered into an agreement to sell a house to a third party on 27th December, 2002 and had received Rs. 15 lacs by way of earnest money and subsequently received the balance sale consideration of Rs. 1.17 crores (total being Rs. 1.32 crores) when the sale deed was executed on 24th September, 2004. In the meanwhile, the assessee had purchased another house on 30th April, 2003. Benefit under Section 54 was denied by the High Court observing that the new house had been purchased prior to execution of the sale and not within one year prior to sale of original asset i.e. new house has been purchased on 30th April, 2003 whereas the earlier asset was sold only on 24th September, 2004. The Supreme Court allowing the appeal noticed that the agreement to sell was executed on 27th December, 2002 but the sale deed could not be executed because of inter-se litigation between the legal heirs, as one of them had challenged the will under which the assessee had inherited the property. The agreement to sell, it was held had given some rights to the vendor and reduced or extinguished rights of the assessee. This, it was observed was sufficient for the purpose of Section 2(47), which defines the term transfer in relation to a capital asset. In the light of the factual matrix, it was observed that the intention behind Section 54 was to give relief to a person who had transferred his residential house and had purchased another residential house

within two years of transfer or had purchased a residential house one year before transfer. It was only the excess amount not used for making purchase or construction of the property within the stipulated period, which was taxable as long term capital gain while on the amount spent, relief should be granted. Principle of purposive interpretation should be applied to subserve the object and more particularly when one was concerned with exemption from payment of tax. The assessee, therefore, succeeded. The observations made in the said decision are also relevant on the question whether the payments made by the assessee to the person with whom he had entered into an earlier agreement to sell should be allowed to be set-off as expenses incurred in relation to the sale deed which was executed.

10. More direct are the two decisions of Madhya Pradesh High Court in Shashi Verma (Smt.) v. CIT [1997] 224 ITR 106 and Calcutta High Court in CIT v. Smt. Bharati C. Kothari (2000) 244 ITR 352. In Shashi Verma (supra), the assessee had invested the sale consideration for purchase of a flat from Delhi Development Authority and had paid part instalments. Reversing the decision of the Tribunal and allowing the appeal of the assessee, the High Court observed that the Tribunal had adopted a pedantic approach without noticing the fact that the capital gain was Rs. 31,980/- whereas the instalments paid were Rs. 71,256/-, i.e. much more than the amount of capital gain. Reference was made to Circular No. 471 dated 15th October, 1986 [1986] 162 ITR (Stat.) 41. It was observed that Section 54 of the Act says that assessee could have constructed the house and not that the construction should have necessarily been completed. Noticing that it was not easy to construct a house within the time limit of three years and under the Government schemes, construction takes years. When substantial investment was made in the construction and it should be deemed that sufficient steps had been taken and it satisfied requirement of Section'.

6.1 Now, the question before us is that whether the assessee can be considered to have constructed or acquired residential property within 3 years from the sale of residential property i.e. 21.06.2014. As seen from the record, assessee entered into a construction agreement dated 21.12.2011 and made

payment as above with reference to this construction agreement. As per the construction agreement, the assessee is required to make payment as follows:-

| Particulars | Amount | Balance payable | Remarks |
|---------------------------------------|-------------------|-----------------|---|
| Booking advance | 8,00,000 | 1,16,02,567 | Paid Rs.8 lakhs vide cheque No.635912 dt.5.12.11 |
| At the time of agreement on Dec.,2011 | 42,00,000 | 74,02,567 | Paid Rs.41,66,818/- vide cheque No. dt.21.12.2011 |
| At the time of registration | 40,00,000 | 34,02,567 | 11.01.2012 |
| On January 2012 | 10,00,000 | 24,02,567 | |
| At the time of possession | 24,02,567 | | |
| TOTAL | 124,02,567 | | |

Note: Payment schedule includes cost of UDS as per sale agreement dated 21st Dec.,2011.

The construction was completed as on 05.11.2015 and the possession was handed over to the assessee on 05.11.2015 for which no disputes.

6.2 Since it was completed beyond the stipulated period u/s.54 of the Act, the lower authority denied the exemption u/s.54 of the Act. However, the assessee has taken the possession of the property vide the sale deed dated 03.01.2012 and vendor on this day put the assessee in legal possession of the scheduled property. The period allotted for making a purchase, if it is done after the date of transfer of capital asset is two years and if it is a construction, it

is within 3 years. Thus, if the intention was to construct the residential house , the period is 3 years. The limit of three years for constructing a house, in this case it is upto 21.06.2014 vide Sec.54(2) of the Act. The capital gains which is not appropriated by the assessee is to be deposited into capital gains scheme before the due date of filing of return u/s.139(1) of the Act.

6.3 In the present case, the assessee had already appropriated the capital gains for the purpose of construction of residential unit. However, construction was not completed within the stipulated period. In our opinion, liberal interpretation to be considered while granting exemption u/s.54 of the Act as it is a beneficial provision. The judgement of Karnataka High Court in the case of CIT Vs. Smt. V.S.Shantha Kumari in 126 DTR 436(Kar.) wherein held that completion of construction within three years was not mandatory and was necessary was that the construction should be commenced. That cannot be disputed. When the commencement of the construction of the residential unit which is evidenced by construction agreement cited supra and also sale deed cited supra, in our opinion, assessee over and above satisfied the conditions laid down by Sec.54 of the Act and demonstrated his intention to

invest the capital gains in residential house. In our opinion, assessee ought not to have denied the claim of deduction u/s.54 of the Act. Accordingly, we are of the opinion that the assessee is entitled for exemption u/s.54 of the Act and the same is to be granted. The order of lower authorities is reversed. Accordingly, the ground taken by the assessee is allowed.

7. In the result, the appeal of assessee is allowed.

Order pronounced on 11th May, 2017 at Chennai.

Sd/-

(जी. पवन कुमार)

(G. Pavan Kumar)

न्यायिक सदस्य/Judicial Member

Sd/-

(चंद्र पूजारी)

(Chandra Poojari)

लेखा सदस्य/Accountant Member

चेन्नई/Chennai,

दिनांक/Dated, the 11th May, 2017.

K S Sundaram.

आदेश की प्रतिलिपि अग्रेषित/Copy to:

- | | | |
|------------------------|--------------------------|------------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त /CIT | 5. विभागीय प्रतिनिधि/DR | 6. गार्ड फाईल/GF. |