

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D", MUMBAI**

**BEFORE SHRI G.S. PANNU, HON'BLE ACCOUNTANT MEMBER AND
SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER**

ITA.No.4535/MUM/2014 (A.Y: 2010-11)

Smt Ramita Mahendra Mehta
3401/C, Oberoi Woods,
Mohan Gokhale Road,
Goregaon East,
Mumbai – 400 063

v. Income Tax officer – 9(2)(3)
Mumbai

PAN: AGSPM 7204 J

(Appellant)

(Respondent)

**Assessee by : Shri Naresh Jain
Shri Mahaveer Jain, C.A.**

Revenue by : Shri Purushotam Kumar

Date of Hearing : 03.08.2017

Date of Pronouncement : 13.09.2017

ORDER

PER C.N. PRASAD (JM)

1. This appeal is filed by the assessee against the order of the Commissioner of Income Tax (Appeals) -20, Mumbai dated 17.04.2014 for the Assessment Year 2010-11. The only grievance of the assessee in

his appeal is that the Ld.CIT(A) erred in denying the deduction u/s 54 of the Act.

2. Briefly stated the facts are that the assessee sold residential house property and claimed deduction u/s 54 of the Act. The Assessing Officer required the assessee to justify the claim for deduction u/s 54 of the Act for the reason that the assessee sold the property by entering into formal sale agreement on 11.09.2009 and since exemption u/s 54 of the Act is eligible for a new residential house which is purchased within the period of one year prior to the date of transfer of capital asset being residential house. The property was purchased by the assessee by entering into agreement dated 18.08.2007 and in which case according to the Assessing Officer the assessee not complied with the condition of purchasing a new flat within a period of one year prior to transfer of the existing property.

3. The assessee furnished its reply stating that though the agreement for purchase has been entered into on 18.08.2007 final possession of the property was received in the month of March 2009 and therefore date of final possession of the property has to be considered for the purpose of deduction u/s 54 and in which case the assessee satisfied condition of purchase of property within a period of one year prior to the date of

transfer of existing flat. Not convinced with the submissions of the assessee the Assessing Officer denied the deduction u/s 54 claimed by the assessee. On appeal the Ld.CIT(A) sustained the action of the Assessing Officer in rejecting the claim of the assessee agreeing with the view of the Assessing Officer.

4. The Learned Counsel for the assessee reiterated the submissions made before lower authorities. He also placed reliance on the decision of the Hon'ble Jurisdictional High Court in the case of CIT v. Smt. Beena K. Jain [217 ITR 363] and submits that the date of possession of new residential premises is to be considered as date of acquisition instead of the date of sale agreement or the date of registration. The Learned Counsel for the assessee further submits that following this decision of the Hon'ble Jurisdictional High Court, the Coordinate Bench on the similar circumstances held that the date of giving possession has been taken and held that assessee's claim of deduction u/s 54 of the Act is to be reckoned from the date of handing over of the possession of the flat by the builder.

5. Ld. DR vehemently supported the orders of the authorities below.

6. We have heard the rival submissions perused the orders of the authorities below. The assessee sold residential house during this Assessment Year by entering into sale agreement on 11.09.2009 and this

resulted into long term capital gains which was claimed as exemption u/s 54 of the Act as the assessee purchased a new flat by entering into agreement on 18.08.2007. The contention of the assessee was that though the agreement was entered into on 18.08.2007 for purchase of new flat, the final possession of the property for occupation was received from the builder only in the month of March 2009, though the entire purchase consideration was already paid by 11.07.2008 to the builder. Therefore, the date of final possession given by the builder has to be taken as the date of acquisition of new property for computing the capital gains u/s 54 of the Act.

7. On a perusal of the decision of the Hon'ble Jurisdictional High Court we find that the issue has been considered by the Hon'ble High Court wherein it was held as under: -

"1. The assessee, who is the respondent before us, had sold office premises on July 23, 1987, which resulted in long-term capital gains of Rs. 24,05,050. Prior to the sale she had entered into an agreement for purchase of a residential flat which agreement was dated September 4, 1985. The agreement was for purchase of a flat for a total consideration of Rs. 12,26,751 On the date of the agreement of sale, the assessee paid a sum of Rs. 1,35,000 as earnest money. This agreement was registered on October 27, 1985. The construction of the flat was finally completed in July, 1988. The assessee paid the consideration amount of Rs. 10,44,375 plus Rs. 47,376 on July 29, 1988, and she was put in possession of the said flat on July 30, 1988. The assessee claimed the benefit of exemption under section 54F of the Income-tax Act, 1961. She has accordingly been granted by the Tribunal exemption of Rs.

11,04,423 under section 54F of the Income-tax Act. The Department has made this application under section 54F of the Income-tax Act for raising the following question:

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in allowing exemption of Rs. 11,04,423 under section 54F of the Income-tax Act, 1961, considering the date of possession of the new residential premises instead of the date of sale agreement and the date of registration?"

2. Under section 54F of the Income-tax Act, in the case of an assessee if any capital gain arises from the transfer of any long-term capital asset, not being a residential house, and the assessee has, within a period of one year before or two years after the date on which the transfer took place, purchased a residential house, the capital gain shall be dealt with as provided in that section. As per the section certain exemption has to be allowed in respect of the capital gains to be calculated as set out therein. The Department contends that the assessee did not purchase the residential house either one year prior to or two years after the sale of the capital asset which resulted in the long-term capital gains. According to the Department, the agreement for purchase of the new flat was entered into more than one year prior to the sale. Hence, the petitioner is not entitled to the benefit under section 54F. 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 July 29, 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 come to the conclusion that the purchase was substantially effected when the agreement of purchase was carried out or completed by payment of full consideration on July 29, 1988, and handing over of possession of the flat on the next day."

8. Therefore, as can be seen from the above decision the question raised by the Revenue as to whether the Tribunal was right in allowing the exemption u/s 54 of the Act considering the date of possession of the new

residential premises instead of date of the sale agreement and the date of registration, has been held in favour of the assessee by rejecting appeal of the Revenue.

9. We also find that similar issue has been decided by the Coordinate Bench in the case of Bastimal K Jain v. ITO in ITA.No.2896/Mum/2014 wherein the Coordinate Bench held as under:

“5. Before us the learned counsel for the assessee argued that the assessee entered into an agreement with M/s. Sharpmind Developers on 28.12.2007. The flat intended to be purchased by the assessee was not at all constructed on 28.12.2007 and though the agreement for purchase was entered into is just a right for purchase of flat in the proposed construction and eventually property’s possession was given to the assessee by the builder only on 11.09.2009 because the flat got ready and occupancy certificate was received by the builder from the BMC only on 31.03.2009. In such facts, the learned counsel for the assessee stated that acquisition of property is to be considered as and when the possession of the flat was given to the assessee by the builder and that date falls as on 11.09.2009. According to the learned counsel for the assessee the vital conditions of section 54 of the Act are fulfilled when the property’s possession was handed over to the assessee by the builder on 11.09.2009 i.e. within the time limit prescribed u/s. 54 of the Act for claiming deduction u/s 54 of the Act. We find from the arguments of the learned counsel for the assessee as well as the learned DR that these facts are undisputed. The assessee from the very beginning has been claiming that the possession of the flat was handed over to the assessee only on 11.09.2009 and that date should be reckoned for the purpose of computation of claim of deduction u/s. 54F of the Act. We find that the learned counsel for the assessee relied on the decision of this Tribunal in the case of V M Dujodwala vs. ITO 36 ITD 130 (Mum), wherein the Hon’ble Tribunal considered the facts of the case as under:

“He submitted that the builder being out of fund and for such other reason, went on delaying the construction. Just to help the builder to fasten the construction, the payments were made in instalments much earlier to the actual possession of the property. This is very common in transaction in flats. The construction was completed at a later date and on 24-11-79, the builder expressed his desire to offer the possession of the flat. That is the first date when the property, at best, can be said to be a purchase of residential property. He stressed that even after construction of the building, the flat is not immediately available for residence to the assessee unless it is cleared by the municipal/corporation authorities. Therefore, he submitted that only when the flat construction was completed and available for residence and was actually allotted by the builder to the buyer in compliance with the agreement of sale entered upon by the builder earlier, it could be taken as ready for occupation and that was the date material for the purpose of counting period of one year within the meaning of Section 54 of the IT Act, 1961. He finally submitted that 9-4-1980, on which date the builder agreed to give possession of the flat would be taken as the date on which the assessee has purchased the property for the purpose of residence within the meaning of Section 54 of the IT Act, 1961. Till such time, he had only the right to purchase house property, he added. He relied on the following decisions:-

- (1) *CWT v. K.B. Pradhan* [1981] 130 ITR 393 (Ori.) (2) *K.P, Varghese v. ITO* [1981] 131 ITR 597 (SC) (3) *CIT v. Mrs. Shahzada Begum* [1988] 173 ITR 397/38 Taxman 31 (AP) (4) *Purushottam Govind Bhat v. First ITO* [1985] 13 ITD 939 (Bom.) (5) *Damodar Raheja v. Eighth ITO* [1984] 10 ITD 75 (Mad.).

And finally Tribunal decided the issue that in case the assessee is allowed possession of the property, only from that date the ownership is to be considered for the purpose of deduction u/s. 54 of the Act. Tribunal held as under:

“6. We have carefully gone through the facts of the case and the rival contentions. The question before us, though it is simple, raises problems of importance in metropolitan cities

where there exists lot of problems for meeting basis human needs 'house'. Just to encourage assessee, Section 54 is enacted to give relief of exemption from capital gains in the case of assessee selling existing residential units and acquiring any other residential unit. This has to be done within a period of one year either before or after the date of sale of the first house property. If that is done so, capital gains arising on transfer of the first house property will be exempt to the extent of investment in the second house property as stipulated in Section 54. The flat in cities is the most common and a peculiar feature. The builder has to take plans of construction in his own name and sometimes in the names of his vendors and start construction. He invites prospective customers, enters into agreement for sale of flats proposed to be constructed by him and at times, demands the payment of price in one or more instalment. He may sometimes to finance his own construction activity, gives discounts and accepts lesser payment. The price paid before construction is complete, will be different from the price demanded by the vendors after the flat is constructed. The buyers even after having the agreement for purchase of the flat cannot exercise any right of ownership or their right cannot be traced to any part of the construction till such time the builder actually gives the possession of a particular flat to the buyer. After the completion of structure, it has to be inspected and cleared by the municipal authorities. Then the flat is ready for occupation which the builder normally intimates to the buyer. The buyer will then take possession and actually enjoy the house property to the exclusion of others. In this flat business, at times, the builder goes financially bad and delays the construction. Against this background of flat transaction, we are now faced with the provisions of Section 54 for granting exemption to the assessee, who at one time, enters into purchase and at other times, takes possession and starts actual enjoyment of the flat. At what point of time he became owner of the house property will decide the fate of his exemption.

7. In identical issue in Purushottam Govind Bhat's case (supra) the Tribunal held as under: The right the assessee has got is a peculiar type of right which certainly cannot be classified as ownership. To say, therefore, that

the assessee has purchased the property would in law be erroneous. On the contrary, that the assessee has an interest in this flat as much as that of a full owner cannot be denied. The purpose of the assessee getting the flat allotted was to have the benefit of residential accommodation entirely in his control as if he was the full owner. Except, therefore, for a few technical requirements, the assessee can be said to be the full owner of the property. As a matter of fact, if not in law, therefore, it would be correct to say that the assessee has purchased a residential property.

8. Left with the relevant date to decide in the facts of the case, the decision of the Tribunal in Purushottam Govind Bhat's case (supra) really comes to favour the assessee. In the said case, the assessee joined the society in 1977. He was allotted a flat and occupied the same on 1-1-1980. The Tribunal held, joining the society and paying the amounts cannot really amount to purchase of a house. On the contrary, allotment of the flat would certainly give the assessee certain specific obligations and rights. The manner in which the amounts are paid and the period over which they are paid may not be of much relevance. Considering the peculiar circumstances of that case, it was held that the benefit of Section 54 should be extended by taking the date of allotment and occupation as the relevant date of purchase. Following the said decision, we are inclined to hold that in this case also, the assessee has, though, entered into agreement for purchase of flat on 22-10-77, paid the money during 1977 to 1979, but the relevant date to be taken for the purpose of applying of Section 54 should be the date on which the flat was ready for occupation by the assessee. Taking that date as the date of purchase, is within the period of one year and therefore the capital gains are clearly exempt from tax applying the provisions of Section 54.”

6. *The learned counsel for the assessee also relied on the decision of Hon'ble Bombay High Court in the case of CIT vs. Smt.*

Beena K Jain 217 ITR 363 (Bom), wherein the Hon'ble Bombay High Court has taken similar view by observing as under:

“2. Under section 54F of the Income-tax Act, in the case of an assessee if any capital gain arises from the transfer of any long-term capital asset, not being a residential house, and the assessee has, within a period of one year before or two years after the date on which the transfer took place, purchased a residential house, the capital gain shall be dealt with as provided in that section. As per the section certain exemption has to be allowed in respect of the capital gains to be calculated as set out therein. The Department contends that the assessee did not purchase the residential house either one year prior to or two years after the sale of the capital asset which resulted in the long-term capital gains. According to the Department, the agreement for purchase of the new flat was entered into more than one year prior to the sale. Hence, the petitioner is not entitled to the benefit under section 54F. 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 July 29, 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 come to the conclusion that the purchase was substantially effected when the agreement of purchase was carried out or completed by payment of full consideration on July 29, 1988, and handing over of possession of the flat on the next day.”

7. On the other hand, the learned senior DR relied on the decision of Hon'ble Gujarat High Court in the case of CIV s. Jindas Panchand Gandhi [2005] 279 ITR 552 (Guj) wherein, the issue was regarding the claim of deduction u/s. 80T and also whether the asset is a Long term or Short term, not the claim of deduction u/s. 54 of the Act.

8. In such circumstances and in the given facts of the case and also the case law relied on by learned Counsel for assessee in the

case of V M Dujodwala (supra) coordinate bench of this Tribunal and also of Hon'ble Bombay High Court in the case of Smt. Beena K Jain, supra, we are of the view that the assessee's claim of deduction u/s. 54 of the Act is to be reckoned from the date of handing over of the possession of the flat by the builder to the assessee i.e. 11.09.2009, and if we take that date, the assessee is entitled to deduction u/s. 54 of the Act because the assessee has sold his residential flat on 24.02.2010. We allow the assessee's claim and order accordingly.

10. Therefore, respectfully following the above decision of the Hon'ble Jurisdictional High Court and the Coordinate Bench, we hold that the date of final occupation of the property should be considered for calculation the period of eligibility for deduction u/s 54 of the Act. If the date of possession i.e. March 2009 is taken as date of purchase of new flat as contended by the assessee in its case the assessee is entitled to deduction u/s 54 of the Act as assessee has sold residential flat on 11.09.2009 and satisfied the requirement to purchase the new residential property within the period of one year before the date of transfer of the asset sold. Thus, we allow the claim of the assessee for deduction u/s 54 of the Act.

11. In the result the appeal of the assessee is allowed.

Order pronounced in the open court on the 13th September, 2017.

Sd/-
(G.S. PANNU)
ACCOUNTANT MEMBER
Mumbai / Dated 13/09/2017
VSSGB, SPS

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

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.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mum