

IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, MUMBAI

BEFORE SHRI B.R. BASKARAN (AM) & SHRI SAKTIJIT DEY (JM)

I.T.A. NO. 6108/MUM/2017
(Assessment Year 2013-14)

Mr. Mustansir I Tehsildar Flat No. 10, 10 th floor, Elegant Tower, Dr. Anandrao Nair Road, Opp. RBI Mumbai Central, Mumbai 400 008.	Vs.	Income Tax Officer – 21(2)(3), Mumbai.
(Appellant)	..	(Respondent)

PAN No. ADMPT9776H

Assessee by :	Dr. K. Shivaram & Shri Rahul K. Hakani
Department by :	Shri T.A. Khan
Date of Hearing :	18.12.2017
Date of Pronouncement :	18.12.2017

ORDER

PER B.R. BASKARAN, AM :

The assessee has filed this appeal challenging the order dated 04-07-2017 passed by Ld CIT(A)-33, Mumbai confirming the partial rejection of claim made by the assessee for deduction u/s 54 of the Act for assessment year 2013-14.

2. The facts relating to the issue are discussed in brief. The assessee held 1/3rd share in Flat No.2902 of an apartment named Planet Godrej located at Byculla, Mumbai. He sold the same on 05-12-2012 for a consideration of Rs.126.83 lakhs and consequent thereto, the long term capital gain was

computed at Rs.78.36 lakhs. The assessee had earlier booked a flat at Elegant Tower, which was under construction; vide agreement dated 05-02-2010. The assessee had made payments to the builder much earlier to the date of transfer of old flat as detailed below:-

From 12.04.2007 to 03-11-2009	Rs.86,38,225/-
On 21.04.2012	Rs. 7,28,525/-

The assessee also made following payments subsequent to the date of transfer of old flat:-

14.06.2014	Rs. 3,12,225/-
22.10.2014	Rs. 7,28,525/-

Thus the aggregate payments made by the assessee towards the new flat were Rs.104.70 lakhs. Since it was more than the amount of Capital gain, the assessee claimed that entire amount of capital gain of Rs.78.36 lakhs was deductible u/s 54 of the Act. The assessee treated the acquisition of new flat **as a case of "Construction"**. **As per the provisions of sec.54, the new flat is required to be constructed within 3 years from the date of transfer of old flat.** Since the old flat was transferred on 05-12-2012, the assessee submitted that the time limit was available upto December, 2015 and the new flat was acquired before that date.

3. The assessing officer, however, took the acquisition of flat as a case of purchase of flat. Accordingly he took the view that the flat should have been purchased one year before or two years after the date of transfer, as per the requirements of sec. 54. Accordingly he held that the assessee should have purchased the new flat between 6.12.2011 and 4.12.2014. Accordingly the AO held that:-

- (a) the payments aggregating to Rs.86.38 lakhs made between 12.4.2007 to 3.11.2009 falls outside the period mentioned above and hence not eligible for deduction u/s 54 of the Act.
- (b) the capital gains not utilised for purchase of new asset before the due date for filing return of income should have been deposited in Capital gains Account Scheme as per the provisions of sec. 54 of the Act. The payments of Rs.3,12,225/- and Rs.7,28,525/- made on 14.6.2014 and 22.10.2014 respectively have violated the provisions of sec. 54 of the Act, since the assessee did not deposit them in Capital gains Account scheme. Accordingly the AO held that the above said two payments are not eligible for deduction u/s 54 of the Act.
- (c) the payment of Rs.7,28,525/- made on 21.4.2012 was within the range of period mentioned by him. Accordingly he allowed deduction u/s 54 of the Act only to the extent of Rs.7,28,525/-.

Accordingly the AO computed the long term capital gain at Rs.71.08 lakhs and assessed the same.

4. The assessee could not succeed in the appeal filed before Ld CIT(A). We notice that the Ld CIT(A) took the acquisition of new flat as a case of "Purchase". Accordingly, by placing reliance on the decision rendered by **Hon'ble Bombay High Court in the case of CIT Vs. Smt. Beena K Jain (217 ITR 363)**, the Ld CIT(A) confirmed the order of the AO. Aggrieved, the assessee has filed this appeal before us.

5. We heard the parties on this issue and perused the record. We have earlier noticed that the assessee has booked a flat, which was under construction, and made payments over the year. The final payments were

made subsequent to the date of sale of old flat. The Ld A.R submitted that the final payment was made on 22-10-2014 and possession of new flat was obtained on 11-12-2014.

6. The Ld A.R submitted that the tax authorities have taken the acquisition of flat as a case of "Purchase". He submitted that the booking of flat in an apartment under construction is a case of "construction" and not a case of purchase. In this regard, he placed reliance on the decision rendered by the co-ordinate bench in the case of Asst. CIT Vs. Sagar Nitin Parikh (ITA No.6399/Mum/2011 dated 03-06-2015). He submitted that the co-ordinate bench had placed reliance on the decision rendered by the jurisdictional Bombay High Court in the case of Mrs. Hilla J B Wadia (216 ITR 376).

7. We heard Ld D.R on this issue. We notice that the Hon'ble Bombay High Court has held in the case of Mrs. Hilla J B Wadia (supra) has held that booking of flat in an apartment under construction must also be viewed as a method of constructing residential tenements. Accordingly, the co-ordinate bench has taken the view in the case of Sagar Nitin Parikh (supra) that **booking of flat in an apartment under construction is a case of "Construction". In view of the above said decision of the Hon'ble Bombay High Court and Tribunal, the acquisition of new flat in an apartment under construction should be considered as a case of "Construction" and not "Purchase".** Accordingly we set aside the view taken by the tax authorities and hold that the assessee has constructed a flat and the provisions of sec. 54 should be applied accordingly.

8. The Ld A.R submitted that the commencement of construction is not relevant for the purpose of sec. 54 of the Act. He submitted that the provisions of sec.54 only stipulate that the construction should be completed

within 3 years from the date of transfer. Accordingly he submitted that the construction may have commenced prior to the date of old asset, but the same should be completed within three years from the date of sale. In support of this proposition, the Ld A.R placed reliance on the decision **rendered by Hon'ble Karnataka High Court in the case of CIT Vs. J.R.Subramanya Bhat (1987)(165 ITR 571)**, which was followed in the case of Asst. CIT Vs. Subhash Sevaram Bhavnani (2012)(23 taxmann.com 94)(Ahd. Trib.). The Ld A.R submitted that the assessee has completed the construction of new flat within three years from the date of transfer of old asset and accordingly he submitted that the assessee has complied with the conditions of sec.54. He further submitted that the payments made towards acquisition of new flat before the due date for filing return of income was more than the amount of capital gains. He further submitted that there is no requirement that the sale proceeds realised on sale of old asset alone should be used for acquiring new asset and for this proposition, he placed reliance on the decision **rendered by Hon'ble Kerala High Court in the case of ITO Vs. K.C.Gopalan (2000)(162 CTR 0566)**.

9. The Ld D.R, on the contrary, strongly placed reliance on the order passed by Ld CIT(A).

10. Section 54 of the Act provides the condition that the construction of new residential house should be completed within 3 years from the date of transfer of old residential house. According to Ld A.R, section 54 is silent about commencement of construction and hence commencement of construction can precede the date of sale of old asset. In the instant case, the assessee had booked the flat much prior to the date of old flat. We notice **that the Hon'ble Karnataka High Court has held in the case of CIT Vs. J.R.Subramanya Bhat (supra)** that commencement of construction is not relevant for the purpose of sec. 54 and it is only the completion of

construction. The above said ratio was followed in the case of Asst. CIT Vs. Subhash Sevaram Bhavnani (2012)(23 taxmann.com 94)(Ahd. Trib.). Both these cases support the contentions of the assessee. Accordingly, for the purpose of sec. 54 of the Act, we have to see whether the assessee has completed the construction within three years from the date of transfer of old asset. In the instant case, there is no dispute that the assessee took possession of the new flat within three years from the date of sale of old residential flat. Accordingly, we are of the view that the assessee has complied with the time limit prescribed u/s 54 of the Act. Since the amount invested in the new flat prior to the due date for furnishing return of income was more than the amount of capital gain, the requirements of depositing any money under capital gains account scheme does not arise in the instant case. **Further, the Hon'ble High Court has held in the case of K.C.Gopalan** that there is no requirement that the sale proceeds realised on sale of old residential house alone should be utilised.

11. In view of the above, we are of the opinion that the assessee is entitled for deduction of full amount of capital gains u/s 54 of the Act, as he has complied with the conditions prescribed in that section. Accordingly, we set aside the order passed by Ld CIT(A) and direct the AO to allow the deduction u/s 54 of the Act as claimed by the assessee.

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

Order has been pronounced in the open court on 18.12.2017.

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 18.12.2017

SSL

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai