

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ "ई" मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

BEFORE S/SHRI B.R.BASKARAN (AM) AND AMIT SHUKLA, (JM)
सर्वश्री बी.आर.बास्करन, लेखा सदस्य एवं अमित शुकला, न्यायिक सदस्य के समक्ष

आयकर अपील सं./I.T.A. No.6399/Mum/2011

(निर्धारण वर्ष / Assessment Year :2008-09)

Assistant Commissioner of Income Tax,16(1), Matru Mandir, Tardeo Road, Mumbai-400007	बनाम/ Vs.	Shri Sagar Nitin Parikh, 143/A, Kalpataru Horizon, 14 th floor, S K Ahire Marg, Mumbai-400018
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. :AAKPP7980J

अपीलार्थी ओर से / Appellant by	Shri Love Kumar
प्रत्यर्थी की ओर से/Respondent by	Shri Sanjay R Parikh

सुनवाई की तारीख / Date of Hearing : 20.4.2015

घोषणा की तारीख /Date of Pronouncement : 3.6.2015

आदेश / ORDER

PER B.R. BASKARAN (AM)

The revenue has filed this appeal challenging the decision of Ld CIT(A) in holding that the assessee is entitled for deduction u/s 54 of the Act.

2. We heard the parties. The facts that are relevant to the issue under consideration are that the assessee sold a flat located at Fionika on 27.03.2008 and generated Long term capital gain of Rs.1.55 crores thereon. The assessee claimed deduction u/s 54 of the Act pertaining to the cost of another flat. The assessee had booked the flat with M/s Life

Style Property Venture in the year 2004 and the agreement was registered on 01-12-2004. He paid the consideration in instalments as per the agreement. He finally got the possession on 30th June, 2007. The assessee claimed that the date of possession of flat should be considered as the date of purchase of flat, whereas the AO took the view that the date of purchase should be considered as the date of entering of agreement, viz., 1.12.2004. Since the deduction u/s 54 of the Act could be availed, inter alia, only if the residential house was purchased within one year prior to the date of house giving rise to capital gain and since the date of purchase of flat, according to AO, fell beyond the period of one year, the AO rejected the claim for deduction u/s 54 of the Act. The Ld CIT(A), however, agreed with the contentions of the assessee and accordingly allowed the deduction u/s 54 of the Act. Aggrieved, the revenue has filed this appeal before us.

3. We have heard the rival contentions and perused the record. The Ld A.R reiterated the contentions that were made before the tax authorities, viz., the date of possession should be considered as the date of purchase of new house, since the assessee obtained a habitable house only on the date of possession. On the contrary, the Ld D.R placed strong reliance on the assessment order. There is no dispute with regard to the fact that the assessee can purchase a new house within one year before the date of transfer of the original residential house in order to avail deduction u/s 54 of the Act. The said deduction is also available if a new house

(a) is purchased within two years after the date on which the transfer of original house took place or

(b) is constructed within a period of three years after the date on which the transfer took place.

Thus, it is seen that the Statute has prescribed different time limits for "Purchase of a new house" and for "Construction of a new house". There should not be any dispute that the expressions "Purchase" and "Construction" denotes two different kinds of actions. The deduction is available only if a new house is purchased within one year before the date of transfer of the original residential house. Thus, if a new house is constructed within one year prior to the date of transfer of the original residential house, the deduction u/s 54 is not available.

4. In the instant case, the assessee has entered into an agreement on 01.12.2004 with a builder named M/s Life Style Property venture for purchase of a residential house at Kalpataru Horizon Worli. As per the registered sale agreement, the assessee was to pay Rs.31,98,840/-before November, 2004 and the remaining amount in instalments. As per the agreement, the builder constructed the residential apartment and finally handed over the possession on 30.06.2007. The moot question is whether the transaction of entering into an agreement with a builder for purchase of a flat that is going to be constructed is a case of "Purchase" or "Construction".

5. In this regard, we may gainfully refer to the decision rendered by the Hon'ble jurisdictional High Court of Bombay rendered in the case of Mrs. Hilla J.B.Wadia (216 ITR 376), wherein the Hon'ble High Court has held that it is a case of "Construction". Following observations made by the High Court are relevant here:-

"....In the present case, the assessee had transferred the property in which she had a half share and which was being used for the purpose of her residence to the society. The question is whether she can be said to have constructed a house property for the purpose of her residence within a period of two years from that date. This provision will have to be construed in the context of the manner in which such residential properties are now being

constructed in a city like Bombay where, looking into the cost of land, co-operative housing societies are being formed for constructing a building in which flats are allotted to the members. **This must also be viewed as a method of constructing residential tenements."**

6. An identical question, i.e., whether the booking of flat with a builder is to be considered as a case of 'purchase' or 'construction' was examined by the Mumbai bench of Tribunal in the case of ACIT Vs. Sunder Kaur Sujan Singh (3 SOT 206) and the bench came to the conclusion that it was a case of "Construction". The relevant observations are extracted below:-

"The condition laid down in the case of purchase of the residential house is that the house must have been purchased one year prior to the sale of the capital asset or two years subsequent thereto. In the case of a residential house the condition laid down is that the residential house must have been constructed within three years after the sale of the capital asset. Therefore, for proper application of this section it has to be seen whether it is a purchase or a construction in the above case. Vide Board's Circular No. 471, dt. 15th Oct., 1986 it has been explained that to qualify investment for construction under s. 54F the crucial date is the date of allotment of flat by DDA and payment of instalment was only a follow-up action and taking possession of the flat is only a formality, of course, installments have to be paid by the allottee as per the schedule fixed by the DDA. As per Board's Circular No. 672, dt. 16th Dec., 1993 the Board after referring to the abovementioned Circular No. 471 extended the facility of exemption under ss. 54 and 54F in respect of allotment of flats/house by co-operative societies and other institutions, and the allotment and construction of the flat by co-operative societies and other institutions are to be considered in similar manner for the purpose of allowing exemption under s. 54. The above circulars are binding on the revenue authorities under s. 119 of the Act. **Since the flat has been allotted to the assessee by the builder who would fall in the category of other institutions mentioned in the circulars, it has to be taken as a case of construction of the residential flat and not as a purchase of a residential flat."**

7. Another Mumbai bench of Tribunal has also considered an identical question in the case of Kishore H Galaiya Vs. ITO (137 ITD 229) and has expressed identical view. The relevant observations are extracted below:-

6.1. In the present case, the assessee sold the old residential house on 7.3.1996 and the long term capital gain arising on this account was Rs.9,98,411/-. The assessee had booked a new residential flat with the builder jointly with his wife for a sum of Rs.35,00,000/-. The assessee had paid booking amount of Rs.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.14,62,500/- 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 exemption 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 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 Smt. Sunder Kaur Sujan Singh Gadh (supra) 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.

8. The ratio laid down in the above said cases clearly show that the booking of a flat which is going to be constructed by a builder has to be

considered as a case of "Construction of flat". We have already noticed that the deduction u/s 54 is available only if the assessee constructs a new house within three years **after the date of transfer**. In the instant case, the assessee has constructed a house prior to the date of transfer of original house, in which case, the assessee is not entitled to claim deduction u/s 54 of the Act in respect of the cost of new flat.

9. Before us, the Ld A.R placed reliance on certain case law. We have gone through them and notice that all of them deal with different set of facts and hence we are of the view that they are not applicable to the issue under consideration. On the contrary, the case laws discussed above are directly related to the issue under consideration.

10. In view of the foregoing discussions, we are of the view that the assessee has not fulfilled the conditions prescribed u/s 54 of the Act and hence he is not eligible for deduction u/s 54 of the Act. Accordingly, we set aside the order of Ld CIT(A) and confirm the decision taken by the AO on the reasoning discussed above.

11. In the result, the appeal filed by the revenue is allowed.

घोषणा खुले न्यायालय में दिनांक: 3rd June, 2015 को की गई ।

Sd

sd

(अमित शुक्ला / **AMIT SHUKLA**)

(बी.आर.बास्करन / **B.R. BASKARAN**)

न्यायिक सदस्य / JUDICIAL MEMBER

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai: 3rd June, 2015.

व.नि.स./ SRL , Sr. PS

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)- concerned
4. आयकर आयुक्त / CIT concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai concerned
6. गार्ड फाईल / Guard file.

True copy

आदेशानुसार/ BY ORDER,

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