

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "F" MUMBAI**

**BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND  
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 216/MUM/2020  
Assessment Year: 2015-16**

Jyotsna Sunderlal Shroff,  
1<sup>st</sup> Floor, Panna Vihar, Vile Parle  
(East),  
Mumbai-400057.

**PAN No. AAYPS3714K  
Appellant**

Vs. Pr. Commissioner of Income Tax-25,  
401/C-10, 4<sup>th</sup> Floor, Pratyaksha Kar  
Bhavan, Bandra Kurla Complex,  
Bandra (East),  
Mumbai-400051.

**Respondent**

Assessee by : Mr. K. Gopal, AR  
Revenue by : Mr. A. Mohan, DR

Date of Hearing : 04/11/2020  
Date of pronouncement : 23/11/2020

**ORDER**

**PER N.K. PRADHAN, A.M.**

This is an appeal filed by the assessee. The relevant assessment year is 2015-16. The appeal is directed against the order passed by the Pr. Commissioner of Income Tax-25 Mumbai [in short 'Pr. CIT'] u/s 263 of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the assessee read as under :

1. The Pr. CIT erred in invoking the provisions of section 263 of the Act without appreciating that the jurisdiction to invoke the provisions of section 263 of

the Act is not satisfied. Thus, the order passed u/s263 is bad in law and the same may be quashed.

2. The Pr. CIT failed to appreciate that the original assessment order dated 07.09.2017 has been passed u/s143(3) by the A.O. after due application of mind and after carrying out proper verification with respect to the claim of deduction under section 54 of the Act. Thus, the action of the Pr. CIT in invoking the provisions of section 263 to verify the same claim again is nothing but the change of opinion which is not permissible as per law. Thus, the order passed u/s 263 is bad in law and the same may be quashed.
3. The Pr. CIT erred invoking the jurisdiction u/s 263 by directing the A.O. to re-examine the claim of deduction u/s 54 of the Act by construing the investment made in a new residential flat as the case of acquisition and not construction without appreciating that said claim has already been verified by the A.O. during the course of assessment proceedings and allowed the claim u/s 54 by taking one of the permissible views. Thus, the order passed u/s 263 is not justified and the same may be quashed.
4. The Pr. CIT failed to appreciate that the assessee has satisfied all the essential conditions to claim the deduction u/s 54 of the Act. Thus, the Assessee is entitled for claim of deduction u/s 54 of the Act.

3. Briefly stated, the facts of the case are that the assessee filed her return of income for the assessment year (AY) 2015-16 on 29.08.2015 declaring total income at Rs.62,28,820/-. In the assessment u/s 143(3) dated 07.09.2017, the Assessing Officer (AO) accepted the above income shown by the assessee.

Subsequently, the Pr. CIT issued notice u/s 263 dated 15.07.2019 to the assessee stating that the assessment order dated 07.09.2017 passed by the AO is erroneous and prejudicial to the interest of revenue with the following observations :

“(a) Cost of acquisition taken as on 01.04.1981, as per valuation report of M/s. Muzoomdar Associates Pvt. Ltd., Chartered Engineers, Corporate Valuers & Surveyors, however, the same is neither signed by anybody nor properly stamped.

(b) During the year assessee has made investment in residential property of Rs.3,62,97,800/-. As per allotment letter dt. 05.02.2015, the builder has received the cheque No. 00124 dt. 04.02.2014 of Rs.3,50,00,000/- and cheque No. 00125 dt. 05.02.2014 of Rs.12,97,800/- whereas as per agreement dated 02.11.2015, the date of cheque for Rs.3,50,00,000/- is shown as 04.02.2015. In the absence of bank statement on record, it is not possible to verify the correctness of the same.

(c) Further as per letter dt. 24.08.2017 of M/s. Ganesh & Rajendra Associates, C.As, it was submitted that as per information provided by the builder to the assessee, the occupation certificate has been received by the builder for the said building and the possession would be given of the residential flat shortly which only means that till F.Y. 2017-18 relevant to A.Y. 2018-19, the assessee has not received the possession of the property. As the new property in which capital gain is invested is not purchased/constructed before one year and within the period of three years, the capital gain claimed needs to be disallowed as the property is sold during the F.Y. 2014-15 relevant to A.Y. 2015-16 and till F.Y. 2017-18, possession is not received which is beyond three years.”

3.1 The assessee filed a reply to the above notice and submitted that all the necessary details to justify the claim u/s 54 had duly been submitted before the AO. It was also explained that section 54 requires the assessee to have constructed residential property within a period of three years on the date of

transfer; the assessee entered into an agreement dated 02.11.2015 for purchase of residential flat and the occupation certification/completion certificate was obtained on 25.07.2017 which is well within the period of three years from the date of transfer. It was further explained that obtaining possession is not a pre-condition to claim exemption u/s 54 of the Act. In this regard, the assessee filed before the Pr. CIT (i) bank statement showing details of payments, (ii) duly signed and stamped valuation report from Mazumdar Associates Pvt. Ltd. dated 02.08.2006 and (iii) occupation/completion certificate dated 25.07.2017 issued by MCGM to the developer.

However, the Pr. CIT was not convinced with the above reply of the assessee on the ground that "in paragraph 18 of the agreement, the builder talks about making endeavor to complete the construction at the earliest by 31.03.2017 ; however, the occupancy certificate received by MCGM on 25.07.2017 and therefore, the assessee could not have purchased/occupied the flat before receiving the said occupancy certificate." Thus it is observed by the Pr. CIT that as the assessee had purchased the flat and not constructed, the time limit available to her was two years and the time limit for making investment was till 19.11.2016 and since the date of sale of the old property was 19.11.2014, the date of occupancy certificate i.e. 25.07.2017 is beyond the limitation of two years from the date of transfer. Thus observing that the assessment order dated 07.09.2017 passed by the AO is erroneous and prejudicial to the interest of revenue, the Pr. CIT directed the AO to make a *de novo* order after giving due opportunity to the assessee.

4. Before us, the Ld. counsel for the assessee submits that during the course of assessment proceedings, the AO made adequate inquiry and

examined the issue of investment made in the residential flat and claim of exemption u/s 54 made to that extent; while replying to the queries raised by the AO, the assessee duly filed copy of the allotment letter dated 05.02.2015 received from the builder with respect to the new residential flat ; the assessee also furnished registered purchase agreement dated 02.11.2015 showing the details of payment towards the same. It is further stated that a copy of receipt of payment of Rs.3,50,00,000/- made through cheque No. 000124 dated 04.02.2015 drawn on HDFC Bank was also furnished to the AO and from the agreement it is apparent that the assessee had made investment within the time period prescribed u/s 54 of the Act. Stating that the assessment order is neither erroneous nor prejudicial to the interest of revenue, the Ld. counsel relies on the decision of the Hon'ble Bombay High Court in *CIT v. Gabriel India Ltd.* [1993] 203 ITR 108 (Bom), *CIT v. Nirav Modi* [2017] 390 ITR 292 (Bom) and the decision of the Hon'ble Supreme Court in *Malabar Industries Co. Ltd. v. CIT* [2000] 243 83 (SC).

4.1 The Ld. counsel further submits that as per section 54 of the Act, the time limit for purchasing a new residential unit is one year or two years after the date of transfer and in case of construction it is three years from the date of transfer ; in the present case since the transfer was done on 19.11.2014, the two years completed on 19.11.2016 in case of purchase and three years completed on 19.11.2017 in case of construction. Thus it is stated by him that as the assessee booked a residential flat in the under construction project, the time limit available to the assessee to make an investment is three years from the date of transfer ; the capital gains received on transfer of old property was invested by the assessee in a new residential flat in underconstruction

building for which the assessee received an allotment letter dated 05.02.2015 on making payment of Rs.3,62,97,800/- It is further stated that the occupation/completion certificate was received on 25.07.2017 ; the construction of the building got completed within three years from the date of transfer, however, the possession was handed over to the assessee on 26.03.2018 ; the delay in obtaining the possession was not attributable to the assessee. In this regard, reliance is placed by him on the decision by the Hon'ble Bombay High Court in the case of *CIT v. Mrs. Hilla J.B. Wadia* [1995] 216 ITR 376 (Bom), *CIT v. Girish L. Ragha* [2016] 289 CTR 213 (Bom) and the order of the Tribunal in the case of *Hasmukh N Gala v. ITO* [2017] 83 taxmann.com 49 (Mumbai-Trib.).

5. On the other hand, the Ld. Departmental Representative (DR) explains that as the new property in which capital gain is invested is not purchased/constructed before one year or within a period of three years, the capital gains need to be disallowed as the property is sold during the Financial Year (FY) 2014-15 relevant to the AY 2015-16 and till FY 2017-18, possession is not received which is beyond three years.

Drawing our attention to Explanation-2 to section 263 inserted by the Finance Act, 2015 w.e.f. 01.06.2015, the Ld. DR submits that the Pr. CIT has rightly passed order u/s 263 as (i) the AO has passed the order without making inquiries or verification which should have been made, (ii) the order is passed allowing relief u/s 54 without inquiring into the claim.

6. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

We find that in response to notice u/s 142(1) dated 02.08.2017, the assessee filed before the AO letter dated 10.08.2017 received in the office of the AO on the same date the following details :

1. Details of capital asset sold during the year
2. Proof of investment made for claiming exemption u/s 54
3. Details of investment during FY 2014-15 i.e. AY 2015-16

The assessee had filed before the AO a copy of purchase agreement dated 02.11.2015 registered on 07.11.2015, along with the allotment letter dated 05.02.2015; the said agreement contains details of payment, wherein it is mentioned that the assessee had paid a sum of Rs.3,50,00,000/- by cheque No. 000124 dated 04.02.2015 drawn on HDFC Bank in favour of the developer.

Thus the AO has made necessary inquiries/verification before making the order u/s 143(3) of the Act.

6.1 The capital gain arising on the transfer of a residential house is exempt u/s 54 in the following circumstances:

- i. the asset transferred is a residential house, the income of which is chargeable under the head “income from house property”;
- ii. the asset transferred is a long-term capital asset and hence there is a long-term capital gain;
- iii. the asset has been transferred by an individual or a Hindu Undivided Family ;
- iv. the assessee has, purchased one residential house property in Indian within one year before or two years after the date on

which transfer took place or constructed the same within the 3 years after the date of such transfer.

If all these four conditions are satisfied then the assessee can claim the exemption under section 54.

6.2 In the instant case, the assessee sold her residential house on 19.11.2014. The capital gains received on transfer of old property was invested by the assessee in a new residential flat in under construction building for which the assessee received an allotment letter dated 05.02.2015 on making payment of Rs.3,62,97,800/-. A sum of Rs.3,50,00,000/- was paid through cheque No. 00124 dated 04.02.2015 towards consideration and a sum of Rs.12,97,800/- was paid through cheque No. 00125 dated 05.02.2015 towards service tax. Thus substantial consideration towards investment was made within two years itself from the date of transfer. The purchase agreement is dated 02.11.2015 registered on 07.11.2015 along with allotment letter dated 05.02.2015.

In *Girish L. Ragma* (supra), the Hon'ble Bombay High Court has held that "where assessee sold residential property and entered into an agreement with a builder for purchasing flat for which he invested sale proceeds within prescribed period of two merely because assessee got occupancy certificate after 4 years and such delay was beyond control of assessee, assessee's claim for deduction under section 54 was to be allowed.

In *Mrs. Hilla J.B. Wadia* (supra), the assessee was held entitled to the benefit of section 54(1) where she had acquired substantial domain over the flat purchased under an agreement with the Co-operative Society coupled



with the payment done almost the entire cost of construction within a period of two years.

It is well-settled that immovable property is not conveyed by delivery of possession, but by a duly registered deed. Further, it is the date of execution of registered document, not the date of delivery of possession or the date of registration of document which is relevant. Once the executed documents are registered, the transfer will take place on the date of execution of documents and not on the date of registration of documents as held in *Alapati Venkataramiah v. CIT* (1965) 57 ITR 185 (SC), *CIT v. Podar Cements Pvt. Ltd.* (1997) 226 ITR 625 (SC) and *CIT v. Vishnu Trading & Investment Co.* (2003) 259 ITR 724 (Raj).

In *Malabar Industrial Co. Ltd v CIT* (2000) 243 ITR 83 (SC), it is held that the Commissioner has to be satisfied with the twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the revenue. If one of the conditions is absent- if the order of the Assessing Officer is erroneous but is not prejudicial to the revenue or if it is not erroneous but is prejudicial to the revenue- recourse cannot be had to section 263(1) of the Act.

In view of the above factual scenario and position of law, the order of the Pr. CIT u/s 263 of the Act is hereby quashed.

7. In the result, the appeal filed by the assessee is allowed.

**Order pronounced in the open Court on 23/11/2020.**

**Sd/-**  
**(SAKTIJIT DEY)**  
**JUDICIAL MEMBER**

**Sd/-**  
**(N.K. PRADHAN)**  
**ACCOUNTANT MEMBER**

Mumbai;

Dated: 23/11/2020

Rahul Sharma, Sr. P.S.

**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./Asst. Registrar)  
**ITAT, Mumbai**