

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'F' NEW DELHI**

**BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER**

ITA No.2291/Del./2017
Assessment Year: 2012-13

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| Mr. Rajiv Madhok, A-4/2, Vasant Vihar, New Delhi | Vs. | ACIT, Circle-30(1), New Delhi |
| PAN:AHWPM1025C | | |
| (Appellant) | | (Respondent) |

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| Assessee by | Shri Dinesh Gupta, CA |
| Department by | Shri Umesh Takyar, Sr. DR |

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| Date of hearing | 26.02.2020 |
| Date of pronouncement | 29.05.2020 |

ORDER

PER O.P. KANT, A.M.:

This appeal by the assessee is directed against order dated 31/01/2017 passed by the learned CIT(Appeals)-10, New Delhi [in short 'the Ld. CIT(A)'] for assessment year 2012-13 raising following grounds:

- 1. That on facts and in the circumstances of the petitioner's case, the learned Commissioner of Income Tax (Appeals)-10, New Delhi erred in law and on facts in upholding the order of the learned Assessing Officer and in sustaining the disallowance of the claim of Rs.2,07,62,580/- made in terms of the provisions contained in section 54F of the Income Tax Act, 1961.*
- 2. That on facts and in the circumstances of the petitioner's case, the learned Commissioner of Income Tax(Appeals)-10, New Delhi, erred in law and on facts in upholding the order of the learned assessing officer and in not allowing deduction under section 54F of the Act even for the amounts spent on construction of the residential house property after the date of long term capital gain/transfer of the original asset.*

2. Briefly stated facts of the case are that the assessee filed return of income on 27/07/2012 declaring total income of Rs. 1,70,06,340/-. The return of income filed by the assessee was selected for scrutiny assessment and statutory notices were issued and complied with. During the year under consideration, the assessee shown long-term capital gain of Rs. 2,18,91,720/- on sale of the shares on 02/09/2011, but same was claimed as not to be charged in terms of section 54F of the Act in view of the investment in purchase/construction of property bearing No.T-204/08-03 in Common wealth Games, Village, Delhi. The assessee claimed that the property was purchased/constructed within the time period provided in the section 54F of the Act and thus, he is entitled for not charging of long-term capital gain to the extent of investment in purchase/construction of the residential house property. However, according to the Assessing Officer, the residential house has been purchased prior to the time period provided in section 54F of the Act and therefore assessee is not entitled for said benefit under section 54F of the Act. The Assessing Officer, accordingly completed the scrutiny assessment on 27/03/2015 after making addition for the long-term capital gain of Rs. 2,18,91,720/-. On further appeal, the Ld. CIT(A) upheld the addition, however, reduced the addition to Rs. 2,07,62,580/- i.e. the amount which was claimed as deduction under section 54F of the Act. Aggrieved, the assessee is in appeal before the Tribunal raising the grounds as reproduced above.

3. The sole issue raised in both the grounds of the appeal is sustaining disallowance of claim of Rs. 2,07,62,580/- which was made under section 54F of the Act.

4. We have heard rival submission of the parties and perused the relevant material on record. In the case the assessee sold shares and shown long-term capital gain of Rs.2,18,91,720/-. Initially, in the documents filed before the Assessing Officer the assessee claimed to have sold the shares on 02/09/2011, however, based on share purchase agreement (SPA), the date of the sale was claimed as on 17/08/2011. The Assessing Officer and the Ld. CIT(A) has accepted the date of the sale as on 17/08/2011. Thus there is no dispute as far as date of the sale of the shares in the amount of long-term capital gain of Rs.2,18,91,720/- is concerned.

4.1 On sale of a capital asset, capital gain is charged as per provisions of section 45 of the Act. But if an assessee invest in certain new assets, the capital gain is not charged to the extent provided in the provisions of the Act. One of such provision is section 54F of the Act. In the case the dispute is regarding availing of benefit under section 54F of the Act. Under the provisions of the section 54F, the long-term capital gain is not charged, if any individual or HUF invest the entire sale consideration arising on transfer of any long-term capital asset (not being a residential house), i.e., original asset, into a purchase or construction of residential house (i.e new asset). If the cost of the new asset is less than the net consideration in respect of the original asset, the capital gain in proportion to the cost of the new asset bears to the net consideration, is not charged under section 45 of the Act.

4.2 For availing the benefit of section 54F, the investment in purchase/construction of residential house has to be made as under:

- (a) Purchase of residential house within a period of one year before or two years after the date on which the transfer of the original asset took place, or
- (b) Construction of residential house within a period of three years from the date on which the transfer of the original assessee took place.

4.3 In the case of the assessee, the transfer of the shares has taken place on 17/08/2011 and therefore time period available to the assessee for purchase/construction for availing benefit of the section 54F works out as under:

- (a) Purchase within a period of one year before the transfer of shares (i.e. period between 17/08/2010 to 16.08.2011 or purchase within two years after the date of the transfer of shares (i.e. period between 17.08.2011 to 18.08.2013) or
- (b) Construction within a period of three years from the transfer of shares (i.e. period between 17.08.2011 to 18/8/2014)

4.4 Regarding the purchase/construction of the residential house the assessee provided following information:

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| (i) | <i>The assessee entered into buyers agreement for purchase of Apartment with builder/developer i.e. Emmar MGF construction private limited and paid advance of rupees 2,03,32,669/- (Page 6-7 and 44 of PB)</i> | 29/09/2009 |
| (ii) | <i>Letter of intimation of possession received on demand of final amount called by the builder/developer(page 50 of PB)</i> | 09/04/2012 |
| (iii) | <i>Final amount of Rs 13, 76, 702/- paid to the Builder/developer(page 51 of PB)</i> | April , 2012 |

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| (iv) | <i>Offer of possession of the flat (new asset) received by the assessee from the builder and position of the flat received. (page 52 of PB)</i> | 06/07/2012 |
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4.5 The above facts related to investment in property are not in dispute. In view of the buyer's agreement dated 29/09/2009 between the assessee and Builder/Developer, the Ld AO/CIT(A) are of the view that the flat was ready on the said date and thus transfer of the flat took place on 29/09/2009. The allotment was final on 29/09/2009 and grant of completion certificate/occupancy certificate upon which letter of intimation of possession was issued are follow up procedure to the purchase of flat. According, to the Ld. AO/CIT(A), the substantial payment of the flat was made before 29/09/2009 and thus title of the property transferred in favour of the assessee on 29/09/2009.

4.6 In view of above observation, according to the Ld. AO, the residential house (flat) was purchased on 29/09/2009, which is beyond the period of purchase of residential house (i.e 17/08/2010 to 18/08/2013) and thus, the assessee was not entitled for the benefit of section 54F of the Act.

4.7 The assessee, however, referred to various clauses of the buyer agreement and submitted that on the date of the buyer agreement, the developer was yet to obtain all required permits and approval for construction, commissioning and development of the project [clause A(X)]; the super area of the flat was tentative and was to be confirmed after construction of project (clause 1.2); layout plans were subject to change (clause 1.7a); proposed building plans, design etc. were tentative (clause 8.2); if completion of the flat (project) delayed for the reasons beyond the

control of developer, then developer was to be entitled for extension of time (clause 9.4.1). In view of the clauses of the buyers agreement and possession handed over in April, 2012, the assessee contested that the flat was constructed before April, 2012 and it was within the period construction of three years after the sale of original asset (i.e. 18/08/2014). He relied on the CBDT Circular No. 471 dated 15/10/1986 and Circular No. 672 dated 16/12/1993 and submitted that in terms of scheme of the allotment and construction of the flat/house by the co-operative societies or the other institution are similar to those mentioned in para 2 of CBDT circular No. 471/Dated 15/10/1986 and thus such cases might be treated as the construction of the flat for the purpose of section 54 and 54F of the Act.

4.8 The Ld. CIT(A) rejected the contention of the assessee and held as under:

“4.2.8 Close reading of above circulars, nowhere mentioned that in order to get exemption construction could take place before the date of transfer of long term assets. On the other hand, section 54/54F makes it clear that the construction of house must complete within 3 years of the transfer. Further, circular makes it clear that the date of payment of first installment for the allotment of flats is to be seen as the date of obtaining the title of the property. The allottee gets title in the property on the issuance of the allotment letter and the payment of installment is only a follow up action and taking the delivery of the possessing is only a formality.”

4.9 Before us, the learned counsel of the assessee has submitted that date of possession of the flat should be treated as the date of purchase of the new asset in view of the following decisions:

- a. *Ayushi Patni Vs. DCIT (ITA No. 1424/Pun/2016)*
- b. *Smt. Ranjana R. Deshmuch Vs. ITO (ITA No. 697/Mum./2017)*
- c. *ITO vs. Shri Shiv Sunil Khanna (ITA No. 5857/Mum/2016)*
- d. *Smt. Ramita Mahendra Mehta Vs. ITO (ITA No. 4535/Mum./2014)*

4.10 Accordingly, submitted that in view of the possession of the flat taken on 06/07/2012, which is well within period of two years from the transfer of the original asset (i.e. between 18.08.2011 to 18.08.2013) and thus the assessee is entitled for the benefit of section 54F of the Act.

4.11 The Tribunal in the case of Ayushi Patni (supra) after following the decision of the Hon'ble Bombay High Court in the case of CIT Vs Smt. Beena Jain, 217 ITR 363, treated the date of the taking possession as the date of the purchase of the flat and allowed benefit of section 54F of the Act observing as under:

“6. We have heard the submissions made by rival sides and have perused the orders of authorities below. We have also perused the decisions on which the ld. A.R. has placed reliance. The solitary issue raised in the present appeals by the assessee and Revenue is:

Whether the assessee is eligible for claiming exemption u/s 54F in respect of residential flat / house for which the assessee has entered into an agreement for purchase more than one year before the date of transfer of capital asset ?

The dates qua, transfer of capital asset, execution of agreement for purchase of residential flat and possession of the flat are not in dispute.

7. The contention of the assessee is that since final consideration was paid and the possession of flat was received within a period of one year prior to the date of transfer of capital asset, the same should be considered as the date of purchase. Whereas, the stand of Department is that the date of execution of agreement for purchase of flat should be considered as the date of purchase.

8. The ld. A.R. has drawn our attention to Clause (12) of the deed of agreement between the assessee and the builder for purchase of flat. The said clause is reproduced herein below :

"12. Nothing contained in this Agreement shall be construed to as to confer upon the Purchaser any right whatsoever into or over the said property or the said new building or any part thereof including the said premises on execution of this agreement. It is agreed by and between the parties that conferment of title in respect of the said premises shall take place in favour of the Purchasers only on the Purchaser's

making full payment of consideration to the Developers and complying with the terms and conditions of this Agreement and on the Purchaser being admitted as a member of the said society as herein provided."

The aforesaid clause makes it unambiguously evident that the assessee has no right whatsoever in the property on mere execution of agreement. The assessee shall be conferred title of property only on making full payment of consideration to the builder. In the instant case, full consideration has been paid by the assessee for purchase of residential flat within a period of one year before the date ITA Nos.1424 & 1707/PUN/2016 of transfer of capital asset. Thereafter, actual possession of the flat was delivered to assessee on 17.09.2010 i.e., within a period of one year prior to the date of transfer of capital asset. It is an un-rebutted fact that at the time of execution of agreement, the residential property was not in existence. Therefore, taking into consideration facts of the case, the date of possession of flat is the date of actual purchase for the purpose of claiming exemption u/s 54F of the Act.

9. We find that similar issue had come up before the Hon'ble Bombay High Court in the case of CIT Vs. Smt. Beena K. Jain (supra). The Hon'ble High Court in the appeal by Department, upholding the order of Tribunal and allowed the benefit of exemption u/s 54F to the assessee. The substantial question for consideration before the Hon'ble High Court was :

"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 ?"

The Hon'ble High Court decided the issue in favour of the assessee

by answering the question 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, petitioner is not entitled to the benefit under section 54F. In our view, the Tribunal has rightly negatived 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."

10. The Mumbai Bench of the Tribunal in the case of Bastimal K. Jain Vs. ITO (supra) under similar set of facts had allowed the benefit of exemption u/s 54 to the assessee by following the ratio laid down in the case of CIT Vs. Smt. Beena K. Jain (supra).

11. Thus, in view of undisputed facts of the case and the decision rendered in the case of CIT Vs. Smt. Beena K. Jain (supra), we hold that the assessee is eligible for claiming exemption u/s 54F on the entire amount of capital gain utilized for purchase of residential property. Consequently, the appeal of the assessee is allowed and the appeal of Revenue is dismissed."

4.12 In the instant case before us also, the assessee has brought of attention to clause 46.0 of the buyers agreement (which is available on page 41 of the paper book), which is identical to clause 12 in the case of Ayushi Patni (supra) reproduced in para 8 of the decision. The relevant clause 46.0 of the buyer's agreement is reproduced as under:

"46.0 The Allottee understands and confirms that the execution of this Agreement shall not be construed as sale of transfer under any applicable law and the title to the Allottee hereby allotted shall be conveyed and transferred to the Allottee only upon his fully discharging all the obligation undertaken by the Allottee including payment of the entire sale price and other applicable charges/dues, as mentioned herein and only upon the registration of the conveyance/sale deed in his favour. Prior to such conveyance, the allottee shall have no right or title in the apartment."

9. In view of the identical facts and circumstances, the ratio of the above decision in the case of Ayushi Patni (supra) is squarely applicable over the facts of the instant case and thus accordingly, we hold that the new asset i.e. residential house has been purchased within two years from the date of transfer of the original asset i.e shares, and thus, the assessee is entitled for benefit of section 54F of the Act. The finding of the Ld. CIT(A) on the issue in dispute is accordingly set aside and the Assessing Officer is directed to allow the benefit of section 54F of the Act amounting to Rs.2,07,62,580/-. The grounds of the appeal of the assessee are accordingly allowed.

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

Order pronounced in the open court on 29th May, 2020.

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER

Dated: 29/05/2020.

RK/-(D.T.D.S)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi