

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

BEFORE SHRI S. S. GODARA, JM & DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.400/Kol/2016

(निर्धारणवर्ष / Assessment Year: 2011-12)

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| DCIT, Circle-1, Siliguri Aayakar Bhawan, Paribahan Nagar, Matigra, Siliguri, Pin-734010. | Vs. | Smt. Jennifer Chakraborty St. Michael's School, 2 nd Mile, Sevoke Road, Siliguri |
| स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: ACPPC 9278 B | | |
| (Revenue) | .. | (Assessee) |

&

आयकरअपीलसं./ITA No.514/Kol/2016

(निर्धारणवर्ष / Assessment Year: 2011-12)

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| Smt. Jennifer Chakraborty St. Michael's School, 2 nd Mile, Sevoke Road, Siliguri – 734001. | Vs. | DCIT, Circle-3, Siliguri, Pin-734001. |
| स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: ACPPC 9278 B | | |
| (Assessee) | .. | (Revenue) |

Assessee by : Shri Subash Agarwal, Advocate.

Revenue by : Shri S. Dasgupta, Addl. CIT(DR).

सुनवाईकीतारीख/ Date of Hearing : 28/05/2018

घोषणाकीतारीख/Date of Pronouncement : 31/07/2018

आदेश / ORDER

Per Dr. A. L. Saini:

The captioned two Cross-Appeals filed by the Assessee and Revenue, pertaining to Assessment Year 2011-12, are directed against an order passed by the Ld. Commissioner of Income Tax (Appeals), Siliguri, in appeal No.54/CIT(A)/SLG/2014-15, which in turn arise out of assessment order passed by the Assessing Officer u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'), dated 14.03.2014.

2. Since, the issues involved in these two appeals relate to same assessee, same Assessment Year and identical issues are involved, therefore, these appeals have been clubbed and heard together and a consolidated order is being passed for the sake of convenience and brevity.

3. Now, we shall take assessee's appeal. The grievances raised by the assessee in its appeal, being ITA No.514/Kol/2016, for Assessment Year 2011-12, are as follows:

"1. For that on the facts and in the circumstances of the case, the Ld. CIT(A) ought to have allowed the deduction u/s 54 of the Act amounting to Rs.22,87,429/- against capital gains arising out of sale of flats.

2. For that on the facts and in the circumstances of the case, the Ld. CIT(A) ought to have considered that the flats were held by the assessee for more than 3 years and were taxable as long term capital gains.

3. That the appellant craves leave to add, alter or delete all or any of the grounds of appeal."

4. The brief facts qua the issue are that assessee is a school teacher cum administrator of school and has been earning income under the head salary. The assessee also declared long term capital gain on sale of flats. During the assessment proceedings, the assessing officer examined the assessee's documents relating to provisional allotment of flats which were later on relinquished in favour of others which was termed as transferred. The ld AO noticed that the said flats though allotted in the name of the assessee but the assessee neither occupied those flats, as her own residence, nor has shown to have earned any income under the head house property from those allotted flats. The ld AO noted that assessee even had not disclosed any notional income from those flats, therefore, it was presumed by AO that electrification, water connection, plumbing were not completed, so these flats can not be called habitable. The date of relinquishment of Upohar Apartment UPL 021401 was stated as 28.10.2010 and the provisional allotment of said flat was given to the assessee on 23.05.2007. The date of investment in Flat No.2D & 2E, in Diamond City South Kolkata, which were provisionally allotted to the assessee on 11.04.2007 and assessee relinquished the said Flats on 16.04.2010.

The Assessing Officer observed that in fact these flats were provisionally allotted to the assessee, by letter of allotment, even the assessee had not paid full considerations for those flats. The Id AO pointed out that there was no doubt about assessee's provisional allotment and thereafter subsequent relinquishment of flats (three flats) by taking full consideration from the transferee after a period of three years and investment of the transfer consideration, for purchase of new flat, but the assessee does not entitle an absolute right of claiming the exemption u/s 54 of the Act. The Assessing Officer noted that in order to avail the benefit u/s 54 of the Act, the assessee being individual must have to fulfil the following conditions:

- (i) The assets are in question must be the residential house property;
- (ii) The assets should be a long term capital asset and thereafter should have resulted in long term capital gain;
- (iii) The income from the house property subject matter of transfer should have been charged to tax under the head "income from house property", or if it is self-occupied, the income from house property has been taken as nil;
- (iv) Investment must be made in another residential property within one year before or two years after the due date of transfer or if the property is to be constructed then the construction is to be completed within three years from the date of transfer.

In the light of the above conditions, the Assessing Officer noted that the assessee has never occupied stated these three flats till the date of transfer or relinquishment. The assessee neither has declared any income under the head house property from those stated three flats. The Assessing Officer further noted that it was proved beyond doubt that the properties in question had not been used for residential purpose any time before the transfer. Therefore, an inference can be drawn that the assessee failed to fulfil all the conditions as required by section 54 of the Act. Besides, on the date of transfer or relinquishment, the assessee was owner of more than two existing house property, therefore, the assessee is not

entitled to exemption u/s 54F of the Act. Therefore, the Assessing Officer disallowed the exemption claimed by the assessee u/s 54 of the Act, to the tune of Rs. Rs.22,87,429/-.

5. Aggrieved by the stand so taken by the Assessing Officer, the assessee carried the matter in appeal before the Id. CIT(A) without any success. The Id CIT(A) observed that normally the builders provisionally allotted the properties to the assessee on receipts of first installment and the assessee transferred/relinquished said provisional allotment, though after full payments but at the time when the properties were still under construction. Hence, there were no real purchases and sales of the properties. It is amply clear that the transactions were so designed to evade tax on gains generated from booking and surrendering rights of flats. In view of such, the Id CIT(A) noted that the gains of Rs.22,87,429/- generated from transfer/relinquishment of provisional allotment right, cannot be considered as long-term capital gains so as to be qualified for deduction u/s 54 of the Act, hence the addition to the tune of Rs.22,87,429/- made by AO was confirmed

6 Aggrieved by the order of the Id. CIT(A), the assessee is in further appeal before us.

7. Learned counsel for the assessee begins by pointing out that the contention of the Ld. Assessing officer that the date of agreement cannot be regarded as date of acquisition is not correct. Section 45 of the Income Tax Act, 1962 states that any profit or gains arising from transfer of a capital asset shall be chargeable to income-tax under the head 'capital gains'. The term 'capital asset' has been defined in section 2(14) of the Act, to mean property of any kind held by an assessee. But, when it comes to transfer for the purpose of levy of income-tax u/s2(47)(v), of the Act, the handing over of possession coupled with performance of the conditions specified in section 53A of T.P. Act, 1882 will be more relevant, hence the assessee is eligible to claim exemption under section 54 of the Act. The Id. counsel has put high emphasis on the word 'held' and contended that for the purpose of

capital gains, one need not be the 'owner' of capital assets as stated in Transfer of Property Act, 1882, but as per Income Tax Act, capital gains tax is payable on transfer of property 'held' by the assessee. The date of allotment of flats should be taken as the date of acquisition and not the subsequent date/s on which balance installments were paid and the possession of the flat was handed over. The assessee 'held' the properties as beneficial owner since the date of allotment by the builder and therefore, profit made out of sale of those properties after 36 months from the date of allotment should be treated as long-term capital gains. The Ld counsel for the assessee also referred CBDT's Circular No.471 dated 15/10/1986 to support his plea.

In addition to this, the Id. Counsel for the assessee also relied on the judgment of the Coordinate Bench in the case of M/s. Anindya Dutta in ITA No.473/Kol/2012 for Assessment Year 2008-09 order dated 29.11.2013 wherein it was held that since the assessee was owning legal rights over the apartments for a period of more than thirty-six months and the sale proceed out of its sale consideration were in the nature of long term capital gain(LTCG) and were invested for purchasing the new house property for residential purpose within a period of one year from the date of sale of property.

8. On the other hand, Ld. DR for the Revenue has pointed out that there was no real purchase and sales of properties and the assessee actually made profit by transferring or relinquishing her provisional letter of allotment after making full payments by installments over a period of three years, hence assessee is not eligible to claim exemption under section 54 of the Act.

9. We have given a careful consideration to the rival submissions and perused the materials available on record, we note that assessee booked a flat at Upohar Project, Kolkata on 23/05/2007, by paying the first installment of Rs.6,00,000/- and the Builder issued a 'provisional letter of allotment' on 30/05/2007. The assessee further paid a sum of Rs.36,54,078/- in five installments including payment for final installment of Rs.3,66,778/- on 08/10/2010. The assessee, just

after 20 days from the final payment, transferred the flat to another person on 28/01/2010, for a consideration of Rs.61,45,960/-, thereby making a profit of Rs.18,91,882/-. Similarly, assessee made a profit of Rs.3,94,592/- from transactions of two flats, jointly held by her with four other persons at Diamond City, Kolkata, where letter of provisional allotment' was issued by the builder on 11/04/2007, on payment of the booking amount and the final installment was paid on 12/04/2010, and the flats were transferred through letter of relinquishment of allotment on 16/04/2010, i.e. just after four days of the final payment. In this process, assessee made total capital gains of Rs.22,87,429/-, which assessee claimed as 'Long Term Capital Gains' from sales of three residential properties and claimed full exemption U/s. 54 of the Act against payment of allotment money for booking of another residential flat.

10. We note that the AO in his assessment order mentioned that the flats were not in habitable condition in any manner and the assessee had not even got the possession letter from the builder before transfer/ relinquishment and therefore, the properties in question were not residential units on the date of transfer, as those properties were not in a position to generate income which could be chargeable under the head 'income from house property'. We note that the A.O further inferred that since excepting allotment money, all other installment payments were made within a period of 36 months, the properties in question must not be treated as long term capital assets' and profit arisen out of said transactions could not be considered as 'long term capital gains.

We note that the definition of 'capital assets' under the Act, referring to 'property of any kind' carries no words of limitation. The definition is of wide amplitude to include every possible interest that a person may hold and enjoy. The definition of 'capital asset' refers to property of any kind 'held' by an assessee. In contradistinction to the word 'owner' or 'owned' definition uses the phrase 'held'. This view is also confirmed by Hon'ble Madras High Court in the case of Madathil Brothers v. DCIT (2008) 301 ITR 345 (Mad), wherein it was held that, " a reading of [section 45](#) shows that capital gains tax is chargeable on "any profits or gains

arising from the transfer of the capital asset". Read in the context of the definitions of "capital asset" and "transfer" the section carries no words of limitation to the effect that a transfer effected by a person backed up with a title passed on under a registered deed alone could be considered as resulting in a profit or gain assessable under [section 45](#). All that the section looks at is the transfer of a capital asset held as understood under [section 2\(14\) of the Act](#) and under [section 2\(47\)](#) of the Act. According to us, the AO failed to appreciate that the assessee has acquired a legal right in the capital asset in terms of Section. 2(47) of the Act r.w.s. [53A of the Transfer of Property Act 1882](#). The fact needs appreciation is that the periodic payments for the period i.e., identified and held by the assessee stretched for a period of more than 36 months i.e., from the date of allotment of flats vide allotment letter dated 30.05.2007. Therefore, the said allotment issued on 30.05.2007 and the acknowledgement receipt of initial booking amount had vested upon him title, domain and control over the flats identified by assessee. The assessee was having legal right over the property and for this we have to note the definition of capital asset where the word used is "held" in the [Section 2\(14\)](#) read with explanation to [Section 48](#) of the Act clearly depicts rights of the assessee over a capital asset and also specifies the benefit of indexation to be granted to the assessee on the basis of payments made by her for acquiring the said capital asset.

11. We note that any capital asset held by the assessee for more than a period of thirty-six months is in the nature of Long Term Capital Asset. Further, the word "held" used in [Section 2\(14\)](#) of the Act implies right over a capital asset. In the instant case of the assessee, the right over the property was held by the assessee for the period of 36 months, therefore, on transfer of these properties the 'long term capital gain' has been offered by the assessee. We note that the assessee under consideration identified the flat at Upohar Project, Kolkata on 23.05.2007 by paying first installment of Rs.6,00,000/- and builder issued a provisional letter of allotment on 30.05.2007, and from that period the assessee has been enjoying legal right over the said property. The assessee further paid a sum of Rs.36,54,078/- in five installments including payments of final installments of Rs.3,66,778/- on 08.10.2010, that is for period of thirtysix months, the rights

enjoyed by the assessee over the property in question was in the nature of long term capital assets. Since, the property is acquired is long term capital assets, therefore, the right over the property in question enjoyed by the assessee, the sale of the said property, the consideration was necessarily in the nature of Long Term Capital Gain. At the best, the date of provisional allotment letter dated 30.05.2007 for Upohar Apartment, Kolkata and in respect of two flats jointly held by her with four other persons at Diamond City South, Kolkata, the letter of provisional allotment issued by the builder on 11.04.2007, is to be considered as date of acquisition of right in the property. Therefore, based on the factual position and the relevant law involved in the issue under consideration, we are of the view that assessee is entitled to claim long term capital gain on transfer of these Flats. For that we also rely on the judgment of the Coordinate Bench in the case of M/s. Anindya Dutta in ITA No.473/Kol/2012, for Assessment Year 2008-09, order dated 29.11.2013 wherein similar facts were discussed and it was held as under:

“9. Further, Board's Circular No. 471 dated 15-10-1986, has also been considered by Hon'ble Bombay High Court in the case of CIT v. Hilla J.B. Wadia 216 ITR 376 (Bom), it was held that Section 54 of the Act has to be construed in the context of the manner in which residential properties are now being constructed in a city like Bombay where, looking to the cost of the land, co-operative housing societies are being formed for constructing a building in which flats are allotted to members. This must also be viewed as a method of constructing residential tenements. What we have to see is whether the assessee has acquired a right to a specific flat in such a builder which is being constructed by the society and whether he has made a substantial investment within the prescribed period which will entitle him to obtain possession of the flat so constructed and in which he intends to reside. The material test in this connection is domain over the flat and investment in it. Central Board of Direct Taxes Circular No. 471, dated October 15, 1986, deals with investment in flats under the self-financing scheme of the Delhi Development Authority. The Board has stated in the circular that when an allotment letter is issued to an allottee under this scheme on payment of the first instalment of the cost of construction, the allotment is final unless it is cancelled. The allottee, thereupon, gets title to the property on the issuance of the allotment letter and the payment of instalments is only a follow-up action and taking delivery of possession is only a formality. The Board has directed that such an allotment of a flat under this scheme should be treated as a case of construction for the purpose of capital gains.

10. In view of the above, we are of the view that the identified flats No. 1103 & 1104 was allotted to the assessee by way of allotment on 12-05-2004 by paying a booking money of Rs.4,64,705/- and from that period the assessee was enjoying legal right over the said property. Since the period of payment of purchase consideration of Rs.1,12,11,892/- was followed-up by the assessee till 10-09-2007 i.e., for a period of more than thirty-six months, the right enjoyed by the assessee over the period in question was in the nature of LTCS. Since the property acquired is LTCG i.e. right over the property in question enjoyed by the assessee, the sale of the said property the consideration was necessarily in the nature of

LTCG as for as the provisions of the Act abovementioned. At the best, the date of allotment letter dated 12-05-2004 is to be considered as date of acquisition of right in the property. Hence, we allow this issue in favour of assessee and against the Revenue. This issue of Revenue's appeal, raised by way of ground No.1-5, is dismissed.

11. Now coming to the issue of assessee's appeal, CIT(A) as well as Assessing Officer noted the fact that although the assessee has held the right over the capital asset and the same was in the nature of LTC asset but he denied deduction u/s. 54 of the Act by stating that the property in question although not in existence at the time of transfer and was not in the nature of house property. The CIT(A) vide his order has opined (which is summarized) as under:-

"That the conditions of section 54 of the Act were not fulfilled by the assessee. The assessee had never become owner of the property by any express or deemed provisions of the law including [section 53A](#) of the Transfer of property Act.

That the assessee doesn't qualify to be the owner of the House property as per [Section 27](#) of the act, as the owner of House Property is a person who has got the valid legal right of the property registered in his own name under the Transfer of property Act, 1882 or deemed owner as per proviso of [section 53A](#) of Transfer of Property Act.

That the assessee had only acquired a right on the date of booking of the flat by way of an agreement w.e.f. 4.2.2004 which was still to be constructed.

That in this concerned case there is no land or building on the date of transfer and it merely was a right to get a flat in future which was sold by the assessee.

That the assessee had booked two flats although in joint name; the entire amount was paid by him from his own account and entire gain belongs to him only. Therefore, right of the assessee was in two flats to be constructed in future and not a single house as is required in the provisions of [section 54](#) of the Act.

For this now, we have to go through the provisions of [Section 54](#) of the Act, which reads as under:-

"Profit on sale of property used for residence.

54.[(1)][Subject to the provisions of sub-section (2), where, in the case of an assessee being an individual or a Hindu undivided family], the capital gain arises from the transfer of a long term capital asset , being buildings or lands appurtenant thereto, and being a residential house, the income of which is chargeable under the head "Income form house property"(hereinafter in this section referred to as the original asset), and the assessee has within a period of one year before or two years after the date on which the transfer took place purchased, or has within a period of three years after that date constructed, a residential house, then, instead of the capital gain being charged to income tax as income of the previous year in which transfer took place, it shall be dealt with in accordance with the following provisions of his section, that is to say,-

From the above provisions of Section 54, it is clear that when an assessee, individual or Hindu undivided family, sales a residential building or land appurtenant thereto, and investment the capital gains for the purchase of a new residential house, he or she stand eligible to seek that capital gains tax not chargeable on the sale consideration. Here, we have to referred to the decision of Hon'ble Karnataka High Court in the case of CIT v. Smt. K.G. Rukumini Amma (2011) 96 Taxman 86 (Kar), wherein it is held that the context in which the expression 'a residential house' is used in [section 54](#) makes it clear that it was

not the intention of the legislation to convey the meaning that it refers to a single residential house. If that was the intention, they would have used the word 'one'. As in the earlier part, the words used are buildings or lands which are plural in number and that is referred to as 'a residential house', the original asset, an asset newly acquired after the sale of the original asset also can be buildings or lands appurtenant thereto, which also should be 'a residential house'. Therefore, the letter 'a' in the context it is used should not be construed as meaning 'singular'. But, being an indefinite article, the said expression should be read in consonance with the other words 'buildings' and 'lands' and, therefore, the singular 'a residential house' also permits use of plural by virtue of section 13(2) of the General Clauses Act. In the present case before us, it is clear that the builder/developer has carried out construction of a residential scheme and he constructed residential apartments. Even the property identified and held by assessee was in the nature of house property and the said property was for the use of the assessee's residential purpose. But from the facts, it is clear that there are two flats i.e. namely No.1103 & 1104 in Ashoka Tower, Parel, Mumbai and these two flats were purchased by assessee for the purpose that the same could be used by him and his wife as a single residential premises but these are actually two residential apartments built by builder-cum-developer. According to us, the assessee became the owner of property u/s. 53A of the Transfer of Property Act in terms of CBDT Circular No. 471 dated 15-10-1986. Here, we are in agreement with the argument of Ld. Counsel for the assessee that assessee was owning legal rights over the said apartments for a period of more than thirty-six months and the sale proceed out of its sale consideration were in the nature of LTCG and were invested for purchasing the new house property for residential purpose within a period of one year from the date of sale of property. Hence, the assessee is eligible for deduction Sec.54 of the Act. But in the present case, whether the assessee has invested the LTCG arising out of sale of these apartments in the new residential house or not, has not been examined by the AO, these need examination, factually. Hence, for factual examination, we set aside this issue to the file of AO.

12. In the result, Revenue's appeal is dismissed and that of assessee is partly allowed for statistical purposes.”

Based on the facts and circumstances mentioned above, we are of the view that the assessee is eligible for deduction Section 54 of the Act. The assessee has invested the long term capital gain arising out of sale of these apartments in the new residential house, therefore, the assessee is entitled to claim exemption under section 54 of the Act. Hence, the addition made by the Assessing Officer and confirmed by the Id. CIT(A) needs to be deleted. Accordingly, we delete the addition of Rs.22,87,429/-.

12. In the result, the appeal filed by the assessee (in ITA No.514/Kol/2016 Assessment Year 2011-12) is allowed.

13 Now, we shall take Revenue's Appeal (in ITA No.400/Kol/2016 for Assessment Year, 2011-12) wherein the main grievance of the Revenue is that Id.

CIT(A) has admitted fresh evidence filed by the assessee in contravention of Rule 46A of the I.T. Rules, 1962.

14 At the outset itself, during the course of hearing, the Id. DR for the Revenue has fairly agreed that Id. CIT(A) has called a remand report in respect of additional evidences submitted by the assessee, therefore, there should not be any contravention of Rule 46A. Vide Para 3.2 on Page No.11 of the order of the Id. CIT(A) wherein it is clearly stated that issue was remanded to the Assessing Officer for examination of the 'new cash flow statement' filed by the assessee along with supporting evidences and submitted his report. The remand report submitted by the Assessing Officer is reproduced below:

"The fresh evidence cannot be accepted at this stage as it is against the spirit of Rule 46A(1) of the I.T. Rules. In the course of assessment proceedings, the assessee was offered ample opportunity to explain the 'unexplained cash' and the assessee had even availed of such opportunity by filing the cash flow statement. Nothing prevented the assessee of filing such revised cash statement before the A.O during assessment stage. The assessee also failed to give any evidence of credit entries in her bank despite offering several opportunities as is evidenced in the order sheet. Even the bank statements were not furnished and the A.O has to obtain the same from the concerned banks. The AR of the assessee also admitted that he is unable to file any balance sheet of the assessee."

Therefore, the Id. DR for the Revenue has submitted that Id CIT(A) admitted additional evidences and these evidences were sent by him to the assessing officer for his verification and proper remand report was called during the appellate proceedings, hence there is no violation of Rule 46A of the I.T. Rules. The Id. Counsel for the assessee has also agreed with the proposition canvassed by the Id DR for the Revenue.

15. We have given a careful consideration to the rival submissions and perused the materials available on record, we note that Id. DR for the Revenue as well as the Id. Counsel for the assessee, both have agreed that whatever additional evidences submitted during the appellant proceedings, the same had been sent by the Id. CIT(A) to the Assessing Officer for his examination and in turn, the Assessing Officer sent a remand report to the Id. CIT(A) and the said remand has

been duly considered by the Id. CIT(A) along with the rejoinder submitted by the assessee, therefore, by no any stretch of imagination it can be said that there is violation of Rule 46A of the I.T. Rules, 1962. Considering the factual position explained above, we dismiss the appeal of the Revenue.

16. In the result, the appeal filed by the Revenue (in ITA No.400/Kol/2016), is dismissed.

17. In the result, the appeal of the assessee in ITA No.514/Kol/2016 is allowed, whereas, appeal of the Revenue in ITA No.400/Kol/2016, is dismissed.

Order is pronounced in the open court on 31.07.2018.

Sd/-
(S. S. GODARA)
न्यायिकसदस्य / JUDICIAL MEMBER

Sd/-
(A.L.SAINI)
लेखासदस्य / ACCOUNTANT MEMBER

कोलकाता /Kolkata;

दिनांक/ Date: 31/07/2018

(RS, Sr. PS)

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/The Assessee- Smt. Jennifer Chakraborty
2. प्रत्यर्थी/ The Revenue/Department- DCIT, Circle-3, Siliguri, Pin-734001
3. आयकरआयुक्त(अपील) / The CIT(A), Siliguri
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, कोलकाता/ DR, ITAT, Kolkata
6. गार्डफाईल / Guard file.
सत्यापितप्रति

True Copy

By Order

Senior Private Secretary,
Head of Office/D.D.O,
I.T.A.T, Kolkata Benches,
Kolkata.