

**=-IN THE INCOME TAX APPELLATE TRIBUNAL,
'A' BENCH, KOLKATA****Before Shri Rajpal Yadav, Vice-President (KZ)
&
Shri Girish Agrawal, Accountant Member****I.T.A. No. 1209/KOL/2019
Assessment Year: 2010-2011**

Pradeep Kumar Sonthalia,.....Appellant
34, Pankaj Mallick Sarani,
Jayantika Apartment, 1st Floor,
Kolkata-700019
[PAN:AHFPS8270A]
-Vs.-

Deputy Commissioner of Income Tax,.....Respondent
Central Circle-1(4), Kolkata,
Aayakar Bhawan Poorva, 3rd Floor,
110, Shantipally, Kolkata-700107

Appearances by:

N o n e, appeared on behalf of the assessee

Shri Biswanath Das, Sr. DR, appeared on behalf of the Revenue

Date of concluding the hearing : 3rd August, 2022

Date of pronouncing the order : October 12, 2022

O R D E R**Per Rajpal Yadav, Vice-President (KZ):-**

The assessee is in appeal before the Tribunal against the order of Id. Commissioner of Income Tax (Appeals)-20, Kolkata dated 15.03.2019 passed for assessment year 2010-11.

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

- (1) *That in the facts and circumstances of the case, the Learned Assessing Officer has erred in disallowing the claim of the assessee for deduction under section 54 and 54F of the Act while passing order 263/153A/143(3) under section since the particulars relating to deduction claimed u/s section 54 and 54F of the Act were already forming part of regular books of accounts and no incriminating materials whatsoever were found during the course of search. The Ld. CIT (A) has erred in confirming the action of the Ld. Assessing Officer.*

1. *(2) That in the facts and circumstances of the case, the Ld. Learned Assessing Officer erred in concluding that the appellant is not eligible to claim deduction under section 54 and 54F of the Act. The Ld. CIT (A) has erred in confirming the action of the Ld. Assessing Officer.*

(3) That in the facts and circumstances of the case, the Learned Assessing Officer has erred in levying interest under section 234A and 234B and/or the calculation of tax and interest thereon is incorrect.

3. In response to the notice of hearing, no one has come present on behalf of the assessee. Therefore, we proceed *ex-parte* against the assessee.

4. The assessee has claimed exemption under section 54 and 54F of the Income Tax Act. Such exemption has been denied to the assessee by observing that it has booked the flat with the builder in earlier year but ultimately took the possession in subsequent years. Therefore, he failed to fulfil the conditions of section 54 and 54F. We take note of the finding recorded by the ld. CIT(Appeals), which reads as under:-

"5. Findings of CIT (A)- In the instant case the appellant has earned the Long Term Capital Gain of Rs. 10,16,649/- on sale of flat at Dhanbad and Long Term Capital Gain of Rs.37,28,015/- on sale of shares of Shree Ram Electrocast Pvt. Ltd. respectively. These were claimed exemption under section 54 and 54F of the Act respectively. There is no dispute regarding quantum of Capital Gain. However, the Assessing Officer disallowed the exemption claimed by the appellant under section 54 and 54F of the Act.

The sequence of events involved in the instant case are given hereunder :

- (i) The appellant booked a flat to be constructed by the builder at Sahara Grace Gurgaon in F.Y.2003-04.*
- (ii) The appellant took home loan from ICICI Home Finance Ltd. in May, 2004 and installments were paid till March, 2010.*
- (iii) Possession of the aforesaid flat was obtained by the appellant on 09.03.2009.*
- (iv) Against the LTCG earned by the assessee as mentioned above, the appellant claimed exemption u/s.54 and 54F.*

However, the Assessing Officer disallowed exemption claimed by the appellant under section 54 and 54F of the Act on the ground that the flat was booked with the builders for construction much before the date of transfer of capital assets (which resulted capital gains).

The moot question that arises is when the appellant is eligible for exemption u/s.54 and 54F of the Act. It should be construed from the date of booking of the flat or date of possession. The appellant has relied on several case laws to submit that it should be construed from the "date of possession". It has been argued that as per section 53A of the T.P. Act the date of possession is the date when the assessee is to be treated as "deemed owner" and accordingly it should be treated as "date of purchase." The Ld. A/R has accordingly argued that since Long Term Capital Gain arose within one year before the date of possession, hence the appellant is entitled to exemption u/s.54 and 54F

On going through the records, I find that substantial payments against the said flat was already made before possession. It is relevant to refer to on CBDT's Circular No.471 dated 15.10.1986, further clarified by CBDT Circular No.672 dated 16.12.1993 that relevant extracts of which is reproduced hereunder:

"Board have been advised that under the above circumstances, the inference that can be drawn is that the D.D.A. takes up the construction work on behalf at the allottee and that the transaction involved is not a sale. Under the scheme the tentative cost of construction is already determined and the D.D.A. facilitates the payment of cost of construction. Therefore, for the purpose of capital gains tax the cost of the new asset is the tentative cost of construction and the fact that the amount was allowed to be paid in installments does not affect the legal position stated above. In view of these facts it has been decided that case of allotment of flats under the Self- Financing Scheme of the D.D.A. shall be treated as cases of construction for the purpose of Capital Gains."

Further, reliance is placed on the various case laws, w'herein it has been held that the flats constructed by the private developers are also covered by Circular 471 and 672 and therefore, entitled for deduction u/s.54 with reference to date of booking.

- (i) Kishor H. Galaiya Vs. Income Tax Officer, Ward 8(2)(3) [2012] 24 taxmann.com 11 (Mumbai)*
- (ii) Assistant Commissioner of Income Tax, Circle 25(3) vs. Smt. Sunder Kaur Sujan Gadh (2005) 3 SOT 206 (Mumbai).*
- (iii) Sri Ved Prakash Rakhra vs. Assistant Commissioner of Income Tax, Circle 6(1), Bangalore (ITAT).*
- (iv) Mrs. Jyoti Arun Kothari Vs. ITO [(TS-737-ITAT-2013 (Mumbai))*
- (v) CIT vs. Smt. Brinda Kumari (2001) 114 Taxmann 266 (Del.)*
- (vi) CIT vs. Kuldeep Singh (2014) 49 taxmann.com 167 (Del.)*
- (vii) Farida A Dungurpurwala vs. ITO (2014) 52 taxmann.com 277 (Mumbai Tribunal)*

The moot question is whether the agreement with builder to purchase a flat that is going to be constructed, is the case of purchase or construction. In this regard, Hon'ble Court of Mumbai, in the case of Hilla T.B. Vadia 216 ITR 376 held that it is a case of

construction. Further, on identical question, i.e., whether the booking of flat with the builder is to be considered a case of ACIT vs. Sardar Kaur Sujan Singh and it was held to be a case of construction. In recerh/Jidtlgements in the case of CIT vs. Bindra Kumar (2001). 114 taxmann.com 266 Hon'ble High Court of Delhi [jurisdiction High Court] has held that the purchase of property in multi storied building amounts to construction of building within the meaning of section 54(1) for the purpose of claiming of exemption.

From the judgments discussed above it is clear that the agreements with the builder to purchase a flat that is going to be constructed, is the case of construction. Thus, it is clear that the assessee has not 'purchased' the property at Sahara Grace, Gurgaon, but acquired it on 09.03.2009 by way of 'construction'. Hence, the action of the Assessing Officer in disallowing claim u/s.54 and 54F of the Act is correct as deduction claimed by the appellant is not satisfying the requirements of section 54 and 54F of the Act to claim the deductin with respect to 'construction' of property. For claiming deductin under the condition of 'construction' of property', the property must be constructed after the transfer of capital assets, resulting in Long Term Capital Gain, where from exemption u/s.54 and 54F is claimed and not before the date of transfer of capital assets. Hence, the criteria at section 54 and 54F of the Act is not satisfied and thus the assessee is not eligible for claiming deduction of the same.

Hence, appeal filed by the appellant is dismissed.

5.1. Incidentally the assessee has taken an opposite view in the case of Mr. Nithin Sonthalia (Associated Person) for A.Y.2014-15 and in the case of Kusumlata Sonthalia (A.Y.2015-16).Therefore, it cannot be the case of the assessee that it can pick and choose the benefit of section 54 and 54F both on the basis of allotment of property in some cases and possession of property in some other cases.

6. Ground No.5 is consequential in nature and therefore no adjudication is required.

7. Ground No.6 is general in nature and therefore no adjudication is required.

In the result appeal of the assessee is dismissed".

5. It is pertinent to observe that the case of the assessee is covered by Circular No. 471 and 672 of the CBDT, because the assessee has booked the flat, which has not been disputed by the Revenue. The dispute is that deduction ought to be claimed in the year when flat was booked and not in the year when possession was taken. On the other hand, the case of the assessee is that capital gain has been arose in the year in which he took the possession of the flat and, therefore, this capital gain be set off against price of the flat, which ultimately came to his possession. To our mind, the Id. CIT(Appels) failed to take cognizance of the judgments referred by him in paragraph 5 (extracted supra). The assessee has utilized the capital gain arose within one year from taking possession of

the new flat and, therefore, on the basis of the Circulars and the judgments referred by the Id. CIT(Appeals), is entitled for the deduction. Accordingly, we allow the claim of the assessee and direct the Id. Assessing Officer to grant deduction under section 54 and 54F of the Income Tax Act. Accordingly, the appeal of the assessee is allowed *ex-parte*.

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

Order pronounced in the open Court on October 12, 2022.

**Sd/-
(Girish Agrawal)
Accountant Member**

**Sd/-
(Rajpal Yadav)
Vice-President (KZ)**

Kolkata, the 12th day of October, 2022

*Copies to :(1) Pradeep Kumar Sonthalia,
34, Pankaj Mallick Sarani,
Jayantika Apartment, 1st Floor, Kolkata-700019*

*(2) Deputy Commissioner of Income Tax,
Central Circle-1(4), Kolkata,
Aayakar Bhawan Poorva, 3rd Floor,
110, Shantipally, Kolkata-700107*

(3) Commissioner of Income Tax (Appeals)-20, Kolkata

(4) Commissioner of Income Tax- , Kolkata;

(5) The Departmental Representative

(6) Guard File

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By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.