

आयकर अपीलीय अधिकरण

मुंबई पीठ " एच ", मुंबई

श्री विकास अवस्थी, न्यायिक सदस्य एवं

श्री अमरजीत सिंह, लेखाकार सदस्य के समक्ष

IN THE INCOME TAX APPELLATE TRIBUNAL

MUMBAI BENCH " H ", MUMBAI

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &

SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

आअसं.267 एवं 268 /मुं/2023 (नि.व. 2013-14)

ITA NO.267 & 268/MUM/2023(A.Y.2013-14)

Hemant Shridhar Phatak,
301, 3rd Floor, Green Park,
A-Wing, Rheja Estate, Kulup Wadi,
Borivali (East), Mumbai – 400 066.

PAN: AICPP-1925-D

..... अपीलार्थी/Appellant

बनाम Vs.

The Asst. Commissioner of Income Tax-35(1), Mumbai
(ITO -42(2)(3), Room No.719, Kautilya Bhawan,
Bandra Kurla Complex, Bandra (East),

Mumbai – 400 051.

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : S/Shri Devang Divecha &
Bharat Vyas

प्रतिवादी द्वारा/Respondent by : Shri Dinesh Chourasia, Sr.AR

सुनवाई की तिथि/ Date of hearing : 16/05/2023

घोषणा की तिथि/ Date of pronouncement : 15/06/2023

आदेश/ORDER

PER VIKAS AWASTHY, JM:

These two appeals have been filed by the assessee for Assessment Year 2013-14. In ITA NO.267/Mum/2023 the assessee has assailed the order of Commissioner of Income Tax(Appeals), National Faceless Appeal Centre, Delhi [in short 'the CIT(A)'] dated 29/11/2022, whereby the First Appellate Authority

has dismissed the appeal of assessee rejecting claim of exemption u/s. 54 of the Income Tax Act, 1961 [in short 'the Act'].

1.1 In ITA No.268/ Mum/2022 the assessee has assailed the order of CIT(A) dated 29/11/2022 confirming penalty levied u/s. 271(1)(c) of the Act. Since both the appeals germinate from same set of facts, these appeals are taken up together for adjudication and are decided by this common order.

ITA NO.267/MUM/2022-A.Y. 2013-14:

2. The facts of the case in brief as emanating from records are: The assessee in its return of income claimed exemption of Rs.45,46,285/- u/s. 54 of the Act on long term capital gains from sale of a residential house. The assessee had sold a flat on 04/08/2012. The flat sold by the assessee was jointly owned by the assessee with his wife. The assessee booked two flats in the joint name with his wife on 18/4/2011. The possession of the flats was received by the assessee on 26/11/2014 (possession letters at page 315 and 318 of the paper book). The assessee claimed that since assessee has utilized long term capital gain arising from sale of residential house towards purchase of new residential house within the time specified u/s. 54(1) of the Act, the assessee is eligible to claim exemption u/s. 54 of the Act. The Assessing Officer held that the assessee had booked the residential flats, beyond one year before the date of transfer of a residential house and the possession of flat was received after two years from transfer of a residential house, hence, the assessee is not eligible to claim exemption u/s. 54 of the Act. Aggrieved against the assessment order dated 21/03/2016 passed u/s. 143(3) of the Act, the assessee filed appeal before CIT(A). The CIT(A) vide impugned order

upheld the findings of the Assessing Officer and dismissed appeal of the assessee. Hence, the present appeal.

3. Shri Devang Divecha appearing on behalf of the assessee submitted that admittedly the assessee and his wife Rituja Hemant Phatak had jointly sold long term capital asset i.e. Flat bearing No.905, 9th Floor, B-2 Wing in DSK Madhuban(Wing A & B) Co-operative Housing Society Ltd., Mehra Indl Estate, Andheri Kurla Road, Saki Naka ,Andheri (East), Mumbai 400 068. vide agreement for sale dated 04/08/2012. The assessee and his wife in joint name booked two flats i.e. Flat No.1303 &1304 at Raheja Reflection Serenity, B-Wing on 18/04/2011. The possession of the flats were handed over to the assessee and his wife on 26/11/2014. The Id. Authorized Representative of the assessee pointed that when the flats were booked they were under construction. It is only after completion of construction in 2014 that the possession of the flats were handed over to the assessee. He asserted that one of the condition u/s. 54 of the Act for claiming exemption is that the assessee has within a period of three years after the date of transfer of long term capital asset has constructed one residential house in India. The Tribunal in the case of Mustansir I Thahasildar vs. ITO, 168 ITD 523(Mum) held that the acquisition of a new flat in a building under construction is akin to construction and not purchase of property for the purpose of claiming relief u/s. 54 of the Act. The possession of flat on completion was handed over to the assessee within a period of three years from the date of transfer of capital asset, hence, the condition for claiming exemption u/s. 54 of the Act is satisfied. He further submitted that the exemption provision being beneficial provision should be liberally construed.

4. Per contra, Shri Dinesh Chourasia representing the Department vehemently supported the order of CIT(A) and prayed for dismissing appeal of the assessee. The Id. Departmental Representative submitted that new property was acquired by the assessee beyond the time limit as specified u/s. 54 of the Act for claiming benefit of exemption.

5. We have heard the submissions made by rival sides and have examined the orders of authorities below. The solitary issue raised by the assessee in appeal by the assessee is against disallowance of claim of exemption u/s. 54 of the Act. Before proceeding further to decide the issue it would be relevant to refer to the sequence of events.

Date	Events.
18/04/2011	The assessee along with his wife Mrs. Rituja Hemanth Phatak enters into a registered agreement for sale with Rahejha Universal Ltd. for purchase of Flat No.1303 & 1304, 13 th Floor, B-Wing at Raheja Reflection Serenity, Mumbai.
04/08/2012	The assessee and his wife sold Flat No.905, 9 th Floor, B-Wing, DSK Madhuban Co-operative Housing Society.
26/11/2014	The possession letter of Flat No.1303 & 1304 at Raheja Reflection Serenity received by the assessee.

The contention of the assessee is that flats were booked by the assessee in a building under construction and the possession of the flats were received by the assessee within three years from the date of transfer of long term capital asset, hence, the assessee qualifies the condition i.e. the assessee has within a period of three years after the date constructed one residential house in India.

6. The relevant extract of the provisions of section 54 of the Act as applicable to the assessment year under appeal reads as under:

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 from house property" (hereafter 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 property transfer took place purchased], or has within a period of three years after that date constructed, a residential house in India], then instead of the capital gain being charged to income-tax as income of the previous year in which the transfer took place.....,"

A bare perusal of the provisions of sub-section(1) to section 54 would show that for the purpose of availing benefit of section 54 of the Act, the assessee from the date of sale of long term capital asset **should either within a period of one year before or two years after the date on which the transfer took place purchase or within a period of three years after the date construct a residential house in India.**

6.1 In the instant case, the assessee purchased two residential flats vide registered sale agreement dated 18/11/2011 i.e. more than one year before the date of transfer of capital asset. Undisputedly, at the time of purchase of residential flats the building was under construction. On completion of construction, possession of the flats were handed over to the assessee on 26/11/2014. The assessee at the time of entering into an agreement for purchase of flats had paid earnest money of Rs.11,97,150/-. The remaining consideration was paid by the assessee over a period of time as per the schedule of payment. A perusal of the schedule of payment annexed to the Agreement of Sale as Annexure-F shows that the payments are related to the stage of construction i.e. after the completion of construction upto a

particular level, the assessee was required to pay specified percentage of the total consideration. The final installment was to be paid at the time of handing over of possession of the Flat. The assessee received possession of completed flats within three years from the date of transfer of old residential house.

7. The Tribunal in the case of Mustansir I Thahasildar vs. ITO(supra) has held that where the assessee has acquired a flat in a building under construction, it would be a case of construction and not purchase of property. The relevant extract of decision setting out the facts and conclusion is as under:

“5. We heard the parties on this issue and perused the record. We have earlier noticed that the assessee has booked a flat, which was under construction, and made payments over the year. The final payments were made subsequent to the date of sale of old flat. The Ld A.R submitted that the final payment was made on 22-10-2014 and possession of new flat was obtained on 11-12-2014.

6. xxxxxxxx

7.xxxxxxxx

8.xxxxxxxx

9.xxxxxxxx

10. Section 54 of the Act provides the condition that the construction of new residential house should be completed within 3 years from the date of transfer of old residential house. According to Ld A.R, section 54 is silent about commencement of construction and hence commencement of construction can precede the date of sale of old asset. In the instant case, the assessee had booked the flat much prior to the date of old flat. We notice that the Hon’ble Karnataka High Court has held in the case of CIT Vs. J.R.Subramanya Bhat (supra) that commencement of construction is not relevant for the purpose of sec. 54 and it is only the completion of construction. The above said ratio was followed in the case of Asst. CIT Vs. Subhash Sevaram Bhavnani (2012)(23 taxmann.com 94)(Ahd. Trib.). Both these cases support the contentions of the assessee. Accordingly, for the purpose of sec. 54 of the Act, we have to see whether the assessee has completed the construction within three years from the date of transfer of old asset. In the instant case, there is no dispute that the assessee took possession of the new flat within three years from the date of sale of old residential flat. Accordingly, we are of the view that the assessee has complied with the time limit prescribed u/s 54 of the Act. Since the amount invested in the new flat

prior to the due date for furnishing return of income was more than the amount of capital gain, the requirements of depositing any money under capital gains account scheme does not arise in the instant case. Further, the Hon'ble High Court has held in the case of K.C.Gopalan that there is no requirement that the sale proceeds realised on sale of old residential house alone should be utilised."

Thus, the Co-ordinate Bench held that de hors the fact that the assessee had booked a new flat prior to one year from the date of transfer of old flat, since, the building in which new flat was booked was under construction, the assessee fulfils the condition i.e. the assessee within a period of three years after the date of transfer of old flat constructed a residential house in India. In the instant case the assessee acquired possession of new flat on 26/11/2014 and old residential property was sold on 04/08/2012. The construction of flat completed within 3 years from the date of transfer of old residential asset. The section is silent about commencement of construction. The section only mandates that a residential house is constructed within three years after the date of transfer.

7.1 In the case of CIT vs. Hilla J B Wadia, 216 ITR 376 (Bom), the Hon'ble Jurisdictional High Court has held that where an assessee has utilized capital gains from transfer of old residential asset towards purchase of flat in a building under construction, *'this must also be viewed as a method of constructing residential tenement.'* The only other condition that has to be satisfied is that the assessee must have acquired a right to a specific flat in such a building under construction.

8. No contrary decision is brought to the notice of the Bench. In light of facts of the case and decisions referred above, we accept the appeal of assessee. The assessee is eligible to claim exemption u/s. 54 of the Act as the construction of residential house completed within three years from the

relevant date. Consequently, the impugned order is set-aside and appeal of the assessee is allowed.

ITA NO.268/MUM/2022 -A.Y. 2013-14:

9. The Id. Authorized Representative of the assessee submitted that the Assessing Officer initiated penalty proceedings u/s. 271(1)(c) of the Act after disallowing assessee's claim of exemption u/s. 54 of the Act. The Assessing Officer vide order dated 27/09/2016 levied penalty of Rs.14,72,240/-. Against the order levying penalty, the assessee filed appeal before the CIT(A). The CIT(A) vide impugned order dismissed appeal of the assessee and upheld penalty levied u/s. 271(1)(c) of the Act. The Id. Authorized Representative of the assessee submitted that assessee in his return of income had disclosed the transaction of capital gain on sale of a flat and the assessee had not suppressed any material fact. The exemption u/s. 54 of the Act was claimed on a bonafide belief, hence, cannot be a reason for levy of penalty. In support of his submissions, he placed reliance on the decision in the case of CIT vs. Reliance Petroproducts (P) Ltd., 189 Taxman 322(SC).

10. The Id. Departmental Representative vehemently defended the impugned order and prayed for dismissing appeal of the assessee.

11. Both sides heard, orders of authorities below examined. At the outset penalty levied u/s. 271(1)(c) of the Act is liable to be deleted as we have allowed the quantum appeal of the assessee in ITA No.267/Mum/2023 (supra). Once the substratum for levy of penalty is eroded, the penalty levied u/s. 271(1)(c) of the Act does not survive.

12. Even on merits, penalty levied u/s. 271(1)(c) of the Act is not sustainable. It is not the case of Assessing Officer that the assessee has not made full disclosure of capital gains from sale of long term capital asset. The case of the Revenue is that the assessee has made wrong claim of exemption u/s. 54 of the Act on the long term capital gain. The Hon'ble Apex Court in the case of Reliance Petroproducts (P) Ltd. (supra) has held that merely because the assessee has claimed expenditure for which claim was not accepted or was not acceptable to the Revenue that by itself would not attract penalty u/s. 271(1)(c) of the Act. Thus, merely for the reason that the assessee had made claim of exemption u/s. 54 of the Act which was not acceptable to the Assessing Officer, penalty u/s. 271(1)(c) of the Act cannot be levied.

13. Thus, for the reasons stated above penalty levied u/s. 271(1)(c) of the Act is unsustainable. The impugned order is set aside and the appeal of assessee is allowed.

14. To sum up, ITA No.267/Mum/2023 & ITA No.268/Mum/2023 of the assessee are allowed.

Order pronounced in the open court on Thursday the 15th day of June, 2023.

Sd/-

(AMARJIT SINGH)

लेखाकार सदस्य/ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/Dated 15/06/2023

Vm, Sr. PS(O/S)

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. The PCIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

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BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai