

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "F" NEW DELHI

BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER  
AND  
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

आ.अ.सं./I.T.A No.415/Del/2022  
निर्धारणवर्ष/Assessment Year: 2012-13

Phillip Koshy, C/o K B Chandna & Co., E-27, NDSE-II, Delhi. PAN No. ARMPK8500C	बनाम Vs.	DCIT, Central Circle-29, Delhi.
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

Assessee by	Shri Yudhister Mehtani, CA
Revenue by	Shri Vivek Vardhan, Sr. DR

सुनवाईकीतारीख/ Date of hearing:	01.01.2024
उद्घोषणाकीतारीख/ Pronouncement on	21.03.2024

आदेश /O R D E R

PER C.N. PRASAD, J.M.

This appeal is filed by the assessee against the order of the Ld.CIT(Appeals)-30, New Delhi dated 29.12.2021 for the AY 2012-13.

The assessee has raised the following grounds: -

"1. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not only confirming the disallowance of deduction u/s 54 of the Act Rs.1,08,23,892/- made by the Ld. A.O but also enhancing by Rs.23,23,208/- thereby resulting in total disallowance of deduction of Rs.1,31,47,100/- as claimed by the assessee u/s 54 of the Act. And that too without any basis, material or evidence available on record and which is against the facts & circumstances of

*the case and by recording incorrect facts & findings and without observing the principles of natural justice.*

*2. That in any case and in any view of the matter, action of Ld.CIT(A) in not only confirming the disallowance of deduction u/s 54 of Rs.1,08,23,892/- made by Ld. A.O but also enhancing the same by Rs.23,23,208/- thereby resulting in total disallowance of deduction of Rs.1,31,47,100/- as claimed by the assessee u/s 54 of the Act is bad in law and against the facts and circumstances of the case.*

*3. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not reversing the action of Ld. A.O in charging interest u/s 234A, 234B and 234C of Income Tax Act, 1961.*

*4. That the appellant craves the leave to add, modify, amend or delete any of the grounds of appeal at the time of hearing and all the above grounds are without prejudice to each other.”*

2. Briefly stated the facts are that the assessee filed his return of income on 31.03.2014 declaring income of Rs.76,870/-. During the assessment year under consideration the assessee sold two properties at Mumbai and claimed deduction u/s 54 of the Act at Rs.1,31,47,100/- on the above said two properties. The assessee purchased plot at Bangalore on 05.10.2007 and entered into construction agreement in the same year for construction of residential house with Shri Satya Sai Construction who completed the construction on the said plot and handed over the position of the building in March, 2012. The assessee met part of the cost of

construction in installments from loan raised from Axis Bank. The assessee claimed deduction u/s 54 of the Act as the assessee sold two properties in the financial year relevant to the current assessment year and the possession of the building constructed was taken after the date of sale of the two properties. The AO while completing the assessment, however, restricted the deduction claimed u/s 54 of the Act to Rs.1,08,23,892/- as against Rs.1,31,47,100/- claimed by the assessee on the ground that an amount of Rs.23,23,208/- was paid to the builder after the sale of the properties by the assessee. The AO also denied the claim of the assessee for deduction u/s 54 of the Act on the ground that the assessee did not meet the cost of construction from the sale proceeds of the properties but was paid from out of loan obtained by the assessee from Axis Bank.

3. On appeal, the Ld. CIT(Appeals) not only sustained the action of the AO in denying deduction of Rs.1,08,23,892/- as was done by the AO he also denied the claim of deduction of Rs.23,23,208/- which was allowed u/s 54 of the Act by the AO, by enhancing the income of the assessee to that extent.

4. Before us, the Ld. Counsel for the assessee made his submissions as under: -

*“The admitted facts are (kindly refer para 5.2 at page 4 of assessment order):*

- i. The Assessee sold the Original Assets (Two Flats) in November 2011 and December 2011 (At para 1 & para 3 of page 4 of Assessment Order).*
- ii. The Assessee Purchased plot in 2007 and the Construction agreement was also made in 2007 (At Para 1 of page 1 of Assessment order).*
- iii. Payment for construction was made from 2007 to 2012.*
- iv. Offer of possession was made vide letter dated 20.01.2012 stating that possession of the Villa will be handed over on 12.02.2012 with a request to clear the balance due of Rs.23,23,208/- (PB 27).*
- v. Payment of Rs.23,23,208/- (PB 26) was made to the builder through capital gain scheme account.*

*Facts of the case are that the Ld. AO allowed the deduction u/s 54 of the Income-tax Act, 1961 of Rs.23,23,208/- on the ground that the assessee had made payment of Rs.23,23,208/- to M/s Sri Satya Sai Constructions (Developer) for the Construction of the property at Bangalore out of the Capital Gain account after the date of sale of Original Asset.*

*In this regard, it is submitted that No Provision has been made by the statute that in order to avail benefit of section 54 the assessee has to utilize the amount received by him on sale of original capital asset for the purpose of meeting the cost of the new asset. Once this is so, the appellant was entitled to benefit u/s 54 of the Act.*

*In this connection, reliance is placed on the following judicial pronouncements:*

- CIT vs Kapil Kumar Agarwal, 2016, IT Appeal No. 12 of 2015 (Punjab & Haryana High Court) (CLC Page No. 24-31);*

- *ITO vs K.C Gopalan; (1999) 107 Taxman 591(Kerala High Court)(CLC Page No.32-36);*
- *Commissioner of Income Tax vs J.R Subramanya Bhat (1986) 54 CCH 359 Karnataka High Court(CLC Page No. 37-40);*
- *Commissioner of Income Tax vs H.K. Kapoor (1997) 65CCH 0674 Allahabad High Court (CLC Page No. 41-43).*

*The Ld. AO made the following adverse observations: -*

- a) The sale proceeds of the property in 2011 cannot be utilized for purchase of Plot in 2007 (page no.4 of the assessment order).*
- b) Construction cost was met from borrowed funds by relying on the Hon'ble 1TAT Mumbai in the case of Milan Sharad Ruparel Vs. ACIT, (2009) 27 SOT 61 (Mum )(page no.4 of the assessment order).*
- c) Repayment of Loan of Rs.35 Lakhs was made from the sale proceeds of the property is also not acceptable (page no.4 of the assessment order).*
- d) Evidence regarding payment made for the purpose of construction of the Property has not been submitted/page no.4 of the assessment order).*

*The main contention of the Ld. AO is that though the assessee has invested a sum of Rs.162.36 lakhs in the new house at Bangalore, but he has invested Rs.23,23,208/-out of the capital gain and accordingly the LD. AO granted the benefit of Rs.23,23,208/- u/s 54 of the Act.*

*Regarding construction of new house before the date of sale of original capital Asset, the assessee places reliance on the decision of Hon'ble Madras High Court in the case of C. Aryama Sundaram Vs. The Commissioner*

*of Income Tax-3, Tax Case (Appeal) No. 520 of 2017 (Madras High Court) (CLC Page No. 17-23), wherein, it the Hon'ble High Court has been held as under (CLC Page No. 22)-*

*"23 It is not in dispute that the new residential house has been constructed within the time stipulated in Section 54(1) of the said Act. It is not a requisite of Section 54 that construction could not have commenced prior to the date of transfer of the asset resulting in capital gain. If the amount of capital gain is greater than the cost of the new house, the difference between the amount of capital gain and the cost of the new asset is to be charged under Section 45 as the income of the previous year. If the amount of capital gain is equal to or less than the cost of the new residential house, including the land on which the residential house is constructed, the capital gain is not to be charged under Section 45 of the said Act.*

*24. For the reasons discussed above, the appeal is allowed. The questions framed above are answered in favour of the appellant assessee and against the respondent revenue. The first question is answered in the affirmative and the second question is answered in the negative. No costs."*

*Construction from Borrowed Funds:*

*The Ld. AO has stated that construction cost was met from loan taken from axis bank and repayment of loan was made which is not in acceptable in view of provisions of section 54 of the act and by relying upon the decision of Hon'ble 1TAT Mumbai stated that the assessee is not eligible for deduction u/s 54F if the assessee constructed or purchase a residential house out of borrowed funds.*

*The assessee places reliance on the Decision of Hon'ble Delhi Bench of ITAT in the Case of Neelam Handa, Delhi Vs ITO, ITA No 384/Del/2016 Vide order dated 13, may*

2016(CLC Page No. 44-50) in which Hon'ble Tribunal while considering the decision of Mumbai bench of tribunal in the case of Milan Sharad Ruparel vs AC1T (2010) 5 ITR (Trib) 570 (ITAT [Mum]and relying on the decision of Honorable Bombay High Court in CIT Vs Dr. Parishca held that (CLC Page No. 50): -

*“Despite assessee has borrowed funds from ICICI Bank for Purchase of new House property, she is entitled to deduction u/s 54 of the Income Tax Act.”*

*However, the Ld. CIT(A) enhanced the Income by Rs.23,23,208/- by disallowing the entire deduction u/s 54 by holding that “the property was ready for occupation in all likelihood in or prior to 2010 i.e. more than a year before the sale of Original Asset”.*

*In this regard, our respectful submissions are as follows:*

*It is submitted that the assessee though entered into agreement to sell and construct in 2007 and paid money during 2007 to 2012 but the relevant date to be taken for the purpose of the section 54 should be the date on which the builder expressed his desire to offer the possession of the property or on the date of clearance of balance dues and then the handing over.*

*Therefore, it is on this date, it would be taken as ready for occupation and that was the date material for the purpose of counting period within the meaning of section 54 of the Act. Since, 12.02.2012 being the date of offer of possession /and date of payment i.e. 27.02.2012, which is within the period of three years from the sale of original asset, the appellant is entitled to claim the benefit of section 54 of the Act.*

*Regarding date of possession, reliance is placed on the following judgments:*

- *Bastimal K fain vs. ITO 15(1)(2), Mumbai in IT A No. 2896/Mum/2014 dated 08.06.2016 (Hon'ble ITAT, Mumbai) (CLC Page No. 1-8).*
- *Reji Easow vs. ITO, Ward 3(5), Thane in ITA No. 1557/Mum/2020 (Hon'ble ITAT, Mumbai) (CLC Page No. 9-14)*
- *CIT vs. Smt. Beena K. Jain, (1996) 217 ITR 363 (Hon'ble Bombay High Court) (CLC Page No. 15-16).*

*Ld. CIT (A) made the following adverse observations (para 10.2 of page 25 of the appellate order): -*

- a) The Maintenance charges become applicable only after the expiry of one year (defect liability period) from the completion of the construction/project. Almost 85% of the Total amount was paid by the appellant by 29.07.2009.*
- b) The maintenance charges become due to builder and that they were also paid from 25.12.2011, thus for all practical purposes the appellant was the owner of the property in 2010. No buyer will agree to pay Maintenance charges to the builder before the completion of the project/construction of the house or during the defect liability period.*
- c) The appellant did not take the possession of the property till other two properties were sold with an intention to camouflage the transactions and claim exemption of the LTCG u/s 54.*

*Our submissions are as follows:*

*The Ld. CIT (A) has referred to maintenance charges become applicable only after the expiry of one year (defect liability period) from the completion of the construction /Project which is against the facts of the case.*



*In reply, it is submitted that these maintenance charges are not linked to maintenance of flat but these are related to maintenance of all the common area and the facilities provided and the same can be verified from the scope of maintenance services defined at Annexure IV of the Agreement to Sell & Construct (PB 127).*

*Further, as per Agreement to sell and construct in para 1 of Common maintenance and maintenance deposit (PB-121), it is stated that -*

*The Purchaser/s from the date the schedule 1 property is handed over or deemed to have been handed over shall be liable to proportionately share and pay by the developer or the Agency appointed by the Developer for maintenance of all the common areas and facilities in the Retreat.*

*Thus, there is no question of Defect Liability Period and that maintenance charges become payable immediately on handing over or deemed to handing over of the possession.*

*The Ld. CIT(A) observed that the appellant did not take the possession of the property till other two properties were sold with an intention to camouflage the transactions and claim exemption of the LTCG u/s 54.*

*In this connection, it is submitted that since the offer of possession was made by the builder vide its letter dated 20.01.2012 offering possession on 12.02.2012 subject to clearance of the dues amount of Rs.23,23,208/-, how could the owner take the possession of the property before 12.02.2012. Further, Ld. CIT(A) has himself stated in para 10.2 at page 24 of the appellate order that “generally builder demand 85% of the cost of the property linked to different stages of construction and remaining 15% at time of completion /handing over of the construction.”*

*The maintenance charges become due to the builder and they were also paid from 25.12.2011, thus for all practical purposes the appellant was the owner of the property in 2010.*

*In this connection, the Facts regarding Maintenance Charges are as below as per letter: -*

S.No.	Cheque No.	Cheque No.	Amount (Rs.)	Date of clearing	Page No. in our Paper Book
1.	079805	25.12.2011	31,022	25.01.2012	(PB-68)
2.	133893	20.01.2012	31,022	25.01.2012	(PB-68)
3.	133894	17.04.2012	31,022	18.04.2012	(PB-78)
4.	133895	17.10.2012	31,022	20.10.2012	(PB-88)

*It is further stated that cheque no. 079805 issued by the assessee towards first payment of maintenance charges which was cleared on 25.01.2012 i.e. after the date of possession letter. Hence, the payment was made on after the sale of original asset.*

*Therefore, in view of above facts and circumstances of the case, it is prayed that the appeal of the appellant may kindly be allowed.”*

5. On the other hand, the Ld. DR strongly placed reliance on the orders of the Ld. CIT(Appeals).

6. Heard rival submissions. The only issue to be decided is as to whether the assessee is entitled for deduction u/s 54 of the Act on the two properties sold by the assessee during the assessment year under consideration when the assessee has taken position of the constructed property after the date of sale of the two properties. Identical issue came up before the Hon’ble Madras High Court in the case of C. Aryama Sundaram Vs. CIT, Tax Case (Appeal

No.520/2017) dated 06.08.2018, wherein the Hon'ble High Court held as under: -

*“19. The conditions precedent for exemption of capital gain from being charged to income tax are:*

*(i) The assessee should have purchased a residential house in India either one year before or two years after the date of transfer of the residential house which resulted in capital gain or alternatively constructed a new residential house in India within a period of three years from the date of the transfer of the residential property which resulted in the capital gain.*

*(ii) If the amount of capital gain is greater than the cost of the residential house so purchased or constructed, the difference between the amount of the capital gain and the cost of the new asset is to be charged under Section 45 as the income of the previous year.*

*(iii) If the amount of the capital gain is equal to or less than the cost of the new residential house, the capital gain shall not be charged under Section 45.*

*20. What has to be adjusted and/or set off against the capital gain is, the cost of the residential house that is purchased or constructed. Section 54(1) of the said Act is specific and clear. It is the cost of the new residential house and not just the cost of construction of the new residential house, which is to be adjusted. The cost of the new residential house would necessarily include the cost of the land, the cost of materials used in the construction, the cost of labour and any other cost relatable to the acquisition and/or construction of the residential house.*

*21. A reading of Section 54(1) makes it amply clear that capital gain is to be adjusted against the cost of new residential house. The condition precedent for such adjustment is that the new residential house should*

*have been purchased within one year before or two years after the transfer of the residential house, which resulted in the capital gain or alternatively, a new residential house has been constructed in India, within three years from the date of the transfer, which resulted in the capital gain. The said section does not exclude the cost of land from the cost of residential house.*

22. *It is axiomatic that Section 54(1) of the said Act does not contemplate that the same money received from the sale of a residential house should be used in the acquisition of new residential house. Had it been the intention of the Legislature that the very same money that had been received as consideration for transfer of a residential house should be used for acquisition of the new asset, Section 54(1) would not have allowed adjustment and/or exemption in respect of property purchased one year prior to the transfer, which gave rise to the capital gain or may be in the alternative have expressly made the exemption in case of prior purchase, subject to purchase from any advance that might have been received for the transfer of the residential house which resulted in the capital gain.*

23. *At the cost of repetition, it is reiterated that exemption of capital gain from being charged to income tax as income of the previous year is attracted when another residential house has been purchased within a period of one year before or two years after the date of transfer or has been constructed within a period of three years after the date of transfer of the residential house. It is not in dispute that the new residential house has been constructed within the time stipulated in Section 54(1) of the said Act. It is not a requisite of Section 54 that construction could not have commenced prior to the date of transfer of the asset resulting in capital gain. If the amount of capital gain is greater than the cost of the new house, the difference between the amount of capital gain and the cost of the new asset is to be charged under Section 45 as the income of the previous year. If the amount of capital gain is equal to or less than the cost of the new residential house,*

*including the land on which the residential house is constructed, the capital gain is not to be charged under Section 45 of the said Act.”*

7. Ratio of the decision squarely applies to the facts of the assessee's case. We further observed that in the case of CIT Vs. Kapil Kumar Aggarwal (382 ITR 56) the Hon'ble Punjab & Haryana High Court held that section 54F of the Act, nowhere envisages that sale consideration obtained by the assessee from original capital asset is mandatorily required to be utilized for purposes of meeting cost of new asset. It was, therefore, held that where investment made by the assessee although not entirely sourced from capital gains but was within stipulated time and if more than capital gain earned by assessee, the assessee is entitled to exempt u/s 54F of the Act. Similar view has taken by the Hon'ble Kerala High Court in the case of ITO Vs. K C Gopalan (107 Taxman 591).

8. The Hon'ble Allahabad High Court in the case of CIT Vs. H.K. Kapoor (234 ITR 753) held that exemption on capital gains u/s 54 of the Act could be allowed notwithstanding the fact that the construction of new house had begun before the sale of the old house while holding so the Hon'ble High Court observed as under: -

*“2. The facts are that the assessee and his brother owned a residential house at Golf Link in moiety. The said property was sold on 10th July, 1963 for a sum of Rs.4,11,000/-. The ITO computed the capital gains from*

*the sale of one half share of the assessee at Rs. 1,28,477 after allowing the initial exemption of Rs.5,000/-.*

*The assessee pleaded before the ITO that capital gains to the extent of being invested in the construction of a new house at Safdarjang Enclave, New Delhi was not taxable under s. 54 of the Act. Whereas the ITO accepted the contention that the Golf Link house had been used for the purpose of residence for more than two years before the sale, he rejected the contention of the assessee that the Safdarjang Enclave, New Delhi, house had been completed by the assessee within a period of two years from the date of sale of the Golf Link house. The ITO was, therefore, of the view that s. 54 of the Act was not applicable.*

*In the alternative, the assessee pleaded before the ITO that he started the construction of another residential house at 64 Surya Nagar, Agra on 10th March, 1963 and that came to be completed within two years of the sale of the Golf Link house and that the capital gains to the extent of being invested in the construction of the Surya Nagar house was not taxable under s. 54 of the Act. The ITO, however, took the view that the assessee had started construction of this house prior to the sale of the Golf Link house. He, therefore, rejected the alternative contention too of the assessee.*

*On appeal, the AAC had agreed with the ITO.*

*On further appeal, the Tribunal reproducing s. 54 in its order found as follows:*

*"A perusal of the above provision will show that it does not lay down that the construction of any house must be begun after the sale of the old residential house and that the sale proceeds of the old residential house must be used for the construction of the new residential house. We are, therefore, of the opinion that the assessee complied with the requirement of the s. 54 of the Act in respect of the construction of the house at 64 Surya Nagar, Agra and that he is entitled to the*

*exemption out of the capital gains from the sale of the house at Golf Link to the extent of the cost of construction of the house at 64, Surya Nagar, Agra. We, therefore, direct the ITO to modify the assessment accordingly."*

3. *The question for consideration is whether exemption on capital gains could be refused to the assessee simply on the ground that the construction of the Surya Nagar, Agra house had begun before the sale of the Golf Link house. Similar question came up for consideration before the Karnataka High Court in the case of CIT vs. J.R. Subramanya Bhat (1987) 64 CTR (Kar) 286:(1987) 165 ITR 571 (Kar):TC 22R 219. In the case before the Karnataka High Court, the date of the sale of the old building was 9th Feb., 1977. The completion of the construction of the new building was in March, 1977, although the commencement of construction started in 1976. On these facts, the Karnataka High Court held that it was immaterial that the construction of the new building was started before the sale of the old building. We fully agree with the view taken by the Karnataka High Court. The Tribunal was right in holding that capital gains arising from the sale of the Golf Link house to the extent it got invested in the construction of the Surya Nagar house, will be exempted under s. 54 of the Act.*

4. *Coming to question No. 3, it will suffice to say that it is misconceived. The Tribunal did not record any finding that the assessee did not invest the capital gains in the construction of the new house. Exemption was refused for the simple reason that the assessee had started the construction of the Surya Nagar house before the sale of the Golf Link house. Therefore, the question that for availing the benefit under s. 54 of the Act it is not necessary that the sale proceeds of the old building must be used in the construction of the new building was not before the Tribunal."*

9. In view of what is discussed above, respectfully following the decision of the Hon'ble Madras High Court in the case of C. Aryama

Sundaram Vs. CIT (supra) and the decision of the Hon'ble Allahabad High Court in the case of CIT Vs. H.K. Kapoor (supra) we reverse the findings of the Ld. CIT(Appeals) and direct the AO to allow deduction u/s 54 of the Act as claimed by the assessee.

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

Order pronounced in the open court on 21/03/2024

**Sd/-**  
**(DR. BRR KUMAR)**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**(C.N. PRASAD)**  
**JUDICIAL MEMBER**

Dated: 21/03/2024

*\*Kavita Arora, Sr. P.S.*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT  
(DR)/Guard file of ITAT.

**By order**

**Assistant Registrar, ITAT: Delhi Benches-Delhi**