

IT: If assessee at the time of assessment proves that he has already invested capital gains to purchase/construct a new residential house within stipulated period, exemption under Section 54 cannot be denied to the assessee even if the amount was not deposited by assessee in the capital gain account scheme before filing of Income-tax return as required by section 54(2)

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IN THE ITAT CHANDIGARH BENCH 'B'

Mrs. Seema Sabharwal

v.

Income-tax Officer, Ward-4, Panchkula*

**SANJAY GARG, JUDICIAL MEMBER
AND MS. ANNAPURNA GUPTA, ACCOUNTANT MEMBER
IT APPEAL NO. 272 (CHD.) OF 2017
[ASSESSMENT YEAR 2013-14]
FEBRUARY 5, 2018**

Section 54, of the Income-tax Act, 1961 - Capital gains - Profit on sale of property used for residence (Section 54F v. Section 54) - Assessment year 2013-14 - Whether sub-section (2) of section 54, regulates procedure for substantive rights of exemption provisions under section 54 and this enabling section cannot abridge or modify substantive rights given vide sub-section (1) of section 54 otherwise, real purpose of substantive provision, i.e., sub-section (1), will got defeated - Held, yes - Whether if assessee at time of assessment proceedings, proves that he has already invested capital gains on purchase/construction of new residential house within stipulated period, benefit under substantive provisions of section 54(1) cannot be denied to assessee and any different or otherwise strict construction of sub-section (2) will defeat very purpose and object of exemption provisions of section 54 - Held, yes [Paras 7-10] [In favour of assessee]

FACTS

- The assessee had earned capital gain on sale of his residential property on 17-9-2012 and the amount was paid by the assessee to the builder for purchase of a new house on 9-9-2014 within 2 years of the date of transaction of sale of the house property.
- The Assessing Officer noticed that as per the agreement with the builder, the house was to be completed within 4 years, whereas, as per the provisions of section 54, the house should have been constructed within 3 years from the date of receipt of the capital gains and accordingly he denied deduction under section 54.
- The Commissioner (Appeals) held that section 54F was on condition of investment in residential house, however, section 54 did not have the word 'investment' in residential house. He further observed that the assessee was supposed to deposit the proceeds from the sale of house property in the specified scheme/capital gains account, but it did not deposit the same in the capital gain account/scheme with the

bank rather it deposited the amount in the FDRs, and confirmed the action of the Assessing Officer in disallowing the claim of the assessee.

- On appeal:

HELD

- The second point on which claim has been denied to the assessee is that the assessee did not deposit the amount of sale receipt in the capital gains account scheme before the due date for filing of return under section 139(1). [Para 9]
- Sub-section (2) of section 54 is an enabling provision which provides that the assessee should deposit the amount earned from capital gains in a scheme framed in this respect by the Central Government till the amount is invested for the purchase/construction of the residential house. This provision, has been enacted to gather the real intention of the assessee to invest the amount in purchase/construction of a residential house. As per the provisions of sub-section (1) of section 54, the assessee has been given two years time to purchase and three years time to construct a residential house subsequent to the date of transfer of the original asset. At the time of the assessment proceedings, subsequent to the date of transfer of the original asset, an assessee may claim that he will invest the amount in purchase/construction of a new house, though not have taken any steps towards that direction till then. In such a scenario, there should not be any method or procedure before the Assessing Officer through which, he could gather the real intention of the assessee, as the assessee, by saying so, may delay the taxation of the capital gains earned at least for three years from the date of transfer of original asset. Hence, sub-section (2) puts an embargo to the assessee to casually claim the benefit of section 54 at the time of assessment without being any act done to show his real intention of purchasing/constructing a new residential unit. Sub-section (2), therefore, governs the conduct of the assessee that the assessee should put the amount of capital gains in an account in any such bank or institution specifically notified in this respect and that the return of the assessee should be accompanied by submitting a proof of such deposit. Hence, sub-section (2) is an enabling provision which governs the act of the assessee, who intends to claim the benefit of the exemption provisions of section 54. The real purpose of the enabling provision is the compliance of the substantive provision of sub-section (1) to section 54. Sub-section (2) of section 54 in fact, regulates the procedure for the substantive rights of the exemption provisions under section 54 and this enabling section cannot abridge or modify the substantive rights given vide sub-section (1) of section 54 otherwise, the real purpose of substantive provisions, *i.e.*, sub-section (1) will got defeated. The primary goal of exemption provisions of section 54 is to promote housing. The procedural and enabling provisions of sub-section (2) thus cannot be strictly construed to impose strict limitations on the assessee and in default thereof to deny him the benefit of exemption provisions, if the assessee as the time of assessment proceedings, proves that he has already invested capital gains on the purchase/construction of the new residential house within the stipulated period the benefit under the substantive provisions of section 54(1) cannot be denied to the assessee. Any different or otherwise strict construction of sub-section (2) will defeat the very purpose and object of the exemption provision of section 54 the second point on which claim has been denied to the assessee is that the assessee did not deposit the amount of sale receipt in the capital gains account scheme before the due date for filing of return

under section 139(1). [Para 9]

CASE REVIEW

CIT v. Smt. Bharti C. Kothari [\[2001\] 117 Taxman 538 \(Cal.\)](#) (para 4) and *CIT v. Shri K. Ramachandra Rao* [\[2015\] 56 taxmann.com 163/230 Taxman 334](#) (para 4) *followed*.

CASES REFERRED TO

Smt. Ranjeet Sandhu v. Dy. CIT [\[2011\] 16 taxmann.com 210/\[2012\] 49 SOT 7 \(Chd.\)](#) (para 3), *Rajiv B. Shah v. ITO* [I.T. Appeal No. 262 (Mum.) of 2015, dated 8-7-2016] (para 3), *Mrs. Madhu Kaul v. CIT* [IT Appeal No. 89 of 1999, dated 17-1-2014] (para 4), *CIT v. Smt. Bharati C. Kothari* [\[2001\] 117 Taxman 538 \(Cal.\)](#) (para 4) and *CIT v. K. Ramachandra Rao* [\[2015\] 56 taxmann.com 163/230 Taxman 334 \(Kar.\)](#) (para 9).

M.S. Vohra *for the Appellant.* **Manjit Singh, Sr. DR** *for the Respondent.*

ORDER

Sanjay Garg, Judicial Member - The present appeal has been preferred by the assessee against the order of the Commissioner of Income Tax (Appeals), [hereinafter referred to as CIT (A)], Panchkula dated 13.12.2016.

2. The brief facts relating to the issue are that during the assessment proceedings the Assessing officer noted that the assessee had shown Long Term Capital Gain at nil on sale of Flat No. 1902 M. Marathan Next Gen. Lower Parel, Mumbai for Rs. 5,20,00,000/- on 17.09.2012, after reducing thereon indexed cost at Rs. 1,31,67,571/-, cost of transfer at Rs. 35,000/- and cost of improvement at Rs. 86,98,452/-. The Assessing officer examined about claim of various costs and after considering the documentary evidences submitted by the assessee accepted the cost of house at Rs. 1,35,22,571/- and cost of improvement at Rs. 86,98,452/-. Thus, computed a long term capital gain of Rs. 2,97,78,977/-. The Assessing officer also noted that assessee had claimed exemption for Rs. 3,00,00,000/- on account of investment in another Flat No. 402, Emerald Road No.1, Juhu Scheme, Vide Parle (West) on 11.09.2014. The Assessing officer asked the assessee to submit the purchase deed of the flat. An agreement between M/s Sun Vision Emerald, Shri Suresh M. Shroff and Ms. Seema Sasbarwal was produced. The Assessing officer observed that as per provisions of section 54, Long Term Capital Gain on sale of residential house was required to be invested in purchase of residential house within a period of one year before or two years after the date of transfer or construction of residential house within a period of three years after the date of transfer. In the case of assessee, the transfer of residential house took place on 17.09.2012 and investment in another residential house as per agreement took place on 11.09.2014. As per clause 15 of agreement, the assessee had to take possession of new residential flat on or before August, 2016. The Assessing officer concluded that assessee had only purchased the right to purchase the flat which was proposed to be given after four years from the date of transfer in August 2016. Thus, the Assessing officer found that conditions as per provisions of section 54 were not complied and, therefore, the claim of exemption u/s 54 of the Act of Rs. 2,97,78,977/- was not allowed.

3. Being aggrieved by the above order of the Assessing officer, the assessee preferred appeal before the CIT (A) and cited various case laws wherein it has been held that if assessee invests the capital gains in a house which is under construction and due to some reasons, the possession is delivered late to the assessee, even then, the investment of the amount will be considered towards the purchase / consideration of the house and that the assessee in these circumstances will be eligible to claim deduction u/s 54 of the Act. The Ld. CIT (A), however, did not agree with the above contention of the

assessee. He tried to distinguish the case laws referred to by the assessee on the grounds that the decisions of the various Benches of the Tribunal including the decision of the Chandigarh Bench of the ITAT in the case of *Smt. Ranjeet Sandhu v. Dy. CIT* [2011] 16 taxmann.com 210/[2012] 49 SOT 7 and Mumbai Bench in the case of '*Rajiv B. Shah v. ITO*' in ITA No. 262/Mum/2015 dated 8-7-2016 and discussed that the same were relating to the claim of deduction u/s 54F and not u/s 54 of the Act, whereas, the assessee had claimed deduction u/s 54 of the Act. He held that though the section 54F is on condition of investment in residential house, however, the section 54 did not have the word 'investment' in residential house. He, therefore, held that the case laws cited by the assessee were not applicable to the case in hand. He further observed that even the assessee was supposed to deposit the proceeds from the sale of house property in the specified scheme/capital gains account, however, the assessee in this case did not deposit the same in the capital gain account / scheme with the bank rather the assessee deposited the amount in the FDRs. He further observed that the capital gains had arisen on account of transfer of capital assets to the assessee on 17.9.2012 and the due date of filing of the return u/s 139(1) was 31.7.2013, however, the entire amount of Rs. 3 crores was paid to the builder by cheque on 9.9.2014 and, hence, the assessee had failed to comply with the conditions stipulated u/s 54(2) of the Act. He, therefore, confirmed the action of the Assessing officer in disallowing the claim of the assessee.

4. We have heard the rival contentions and have also gone through the records. Admittedly, the capital gain had arisen to the assessee on 17.9.2012 and the amount was paid by the assessee to the builder for purchase of a new house on 9.9.2014 i.e. within 2 years of the date of transaction of sale of the house property. The Assessing officer denied the claim because as per the agreement with the builder, the house was to be completed within 4 years, whereas, as per the provisions of section 54 of the Act, the house should have been constructed within 3 years from the date of receipt of the capital gains. Though the assessee has relied upon various cases wherein liberal construction has been taken by the Tribunal as well as various High Courts which is in consonance of the object for which the exemption provisions of sections 54 & 54F of the Act have been enacted i.e. to promote purchase and construction of residential houses. Various courts have held that if assessee invests the amount in purchase / construction of building within the stipulated period and the construction is in progress, then the benefits of exemptions, cannot be denied to the assessee. Reliance in this respect can be placed on the decision of the Jurisdictional High Court of Punjab & Haryana in the case of '*Mrs. Madhu Kaul v. CIT*' ITA No. 89 of 1999 vide order dated 17-1-2014 and further on the decision of the Hon'ble Calcutta High Court in '*CIT v. Smt. Bharati C. Kothari*' [2001] 117 Taxman 538 and also on the decisions of the various Coordinate Benches of the Tribunal. We have also gone through the provisions of sections 54 & 54F of the Act and we do not find any such distinction as drawn by the CIT(A) or any such dissimilarity in the wordings of the provisions from which any such conclusion can be drawn that u/s 54F of the Act the investment is to be considered and / or that u/s 54 of the Act, the house must be completed within the stipulated period of three years or that investment is not be considered. We may further point out here that even the decision of the Hon'ble Calcutta High Court is in relation to the provisions of section 54 only, wherein, the Hon'ble Calcutta High Court has categorically held that if agreement for purchase of residential flat is made and the entire amount is paid within three years from the date of sale, the basic requirement for claiming relief u/s 54(1) of the Act is to be taken as fulfilled. The issue, thus, is squarely covered in favour of the assessee by the various decisions of the Hon'ble High Court.

5. Now the second point on which claim has been denied to the assessee is that the assessee did not deposit the amount of sale receipt in the capital gains account scheme before the due date for filing of return u/s 139(1) of the Act.

6. The Ld. Counsel for the assessee in this respect has submitted that since the provisions of section 54 are beneficial provisions promoting purchase / construction of residential houses, hence, liberal construction should be taken to the provisions. He has further submitted that since the assessee had

complied with the investment of the amount earned in purchase / construction of other house, within the stipulated period, hence, substantial compliance has been made by the assessee.

7. On the other hand, Ld. DR while referring to the provisions of section 54 of the Act, has submitted that the assessee was required to deposit the capital gains in the relevant scheme and since the said requirement under the provisions was not complied with, hence, the assessee is not entitled to claim for the benefit under the exemption provisions of section 54 of the Act.

8. We have heard the rival contentions. Before deliberating further on this issue we would like to reproduce the relevant provisions of section 54 of the Act herein 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 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 transfer took place purchased, or has within a period of three years after that date constructed, one 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, it shall be dealt with in accordance with the following provisions of this section, that is to say,—

- (i) if the amount of the capital gain is greater than the cost of the residential house so purchased or constructed (hereafter in this section referred to as the new asset), the difference between the amount of the capital gain and the cost of the new asset shall be charged under section 45 as the income of the previous year; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be nil; or
- (ii) if the amount of the capital gain is equal to or less than the cost of the new asset, the capital gain shall not be charged under section 45; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be reduced by the amount of the capital gain.

(2) The amount of the capital gain which is not appropriated by the assessee towards the purchase of the new asset made within one year before the date on which the transfer of the original asset took place, or which is not utilised by him for the purchase or construction of the new asset before the date of furnishing the return of income under section 139, shall be deposited by him before furnishing such return [such deposit being made in any case not later than the due date applicable in the case of the assessee for furnishing the return of income under sub-section (1) of section 139] in an account in any such bank or institution as may be specified in, and utilised in accordance with, any scheme which the Central Government may, by notification in the Official Gazette, frame in this behalf and such return shall be accompanied by proof of such deposit; and, for the purposes of sub-section (1), the amount, if any, already utilised by the assessee for the purchase or construction of the new asset together with the amount so deposited shall be deemed to be the cost of the new asset :

Provided that if the amount deposited under this sub-section is not utilised wholly or partly for the purchase or construction of the new asset within the period specified in sub-section (1), then,—

- (i) the amount not so utilised shall be charged under section 45 as the income of the previous year in which the period of three years from the date of the transfer of the original asset expires; and
- (ii) the assessee shall be entitled to withdraw such amount in accordance with the scheme aforesaid.

Explanation.—[Omitted by the Finance Act, 1992, w.e.f. 1.4.1993"]

9. A perusal of the above reproduced provisions of section 54 of the Act reveals that it deals with the capital gains earned on sale of property used for residence and as per the provisions of sub-section (1) of section 54 of the Act, if an assessee, after sale of his residential property, has within a period of one year before or two years after the date of such transfer or within a period of three years, constructs a residential house, the capital gains will not be charged to tax upto the extent of the amount spent on the purchase or construction of residential house. Sub-section (1) of section 54 of the Act is a substantive provision enacted with the purpose of promoting purchase / construction of residential houses. However, sub-section (1) of section 54 is an enabling provision which provides that the assessee should deposit the amount earned from capital gains in a scheme framed in this respect by the Central Government till the amount is invested for the purchase / construction of the residential house. This provision, in our view, has been enacted to gather the real intention of the assessee to invest the amount in purchase / construction of a residential house. As per the provisions of sub-section (1) of section 54, the assessee has been given two years time to purchase and three years time to construct a residential house subsequent to the date of transfer of the original asset. At the time of the assessment proceedings, subsequent to the date of transfer of the original asset, an assessee may claim that he will invest the amount in purchase / construction of a new house, though not have taken any steps towards that direction till then. In such a scenario, there should not be any method or procedure before the Assessing officer through which he could gather the real intention of the assessee, as the assessee, by saying so, may delay the taxation of the capital gains earned at least for three years from the date of transfer of original asset. Hence, sub-section (2) puts an embargo to the assessee to casually claim the benefit of section 54 at the time of assessment, without being any act done to show his real intention of purchasing / constructing a new residential unit. Sub-section (2), therefore, governs the conduct of the assessee that the assessee should put the amount of capital gains in an account in any such bank or institution specifically notified in this respect and that the return of the assessee should be accompanied by submitting a proof of such deposit, hence, sub-section (2) is an enabling provision which governs the Act of the assessee, who intends to claim the benefit of the exemption provisions of section 54. The real purpose of the enabling provision is the compliance of the substantive provision of sub-section (1) to section 54 of the Act. Sub-section (2), in fact, regulates the procedure for the substantive rights of the exemption provisions u/s 54 of the Act. This enabling section, in our view, cannot abridge or modify the substantive rights given vide sub-section (1) of section 54 of the Act, otherwise, the real purpose of substantive provision i.e. sub-section (1) will get defeated. The primary goal of exemption provisions of section 54 is to promote housing. The procedural and enabling provisions of sub-section (2) thus cannot be strictly construed to impose strict limitations on the assessee and in default thereof to deny him the benefit of exemption provisions. In our view, if the assessee at the time of assessment proceedings, proves that he has already invested the capital gains on the purchase / construction of the new residential house within the stipulated period, the benefit under the substantive provisions of section 54(1) cannot be denied to the assessee. Any different or otherwise strict construction of sub-section (2), in our view, will defeat the very purpose and object of the exemption provisions of section 54 of the Act. Our above view, is fortified with the decision of the Hon'ble Karnataka High Court in the case of *CIT v. K. Ramachandra Rao* [\[2015\] 56 taxmann.com 163/230 Taxman 334](#) wherein the Hon'ble High Court has directly dealt with this issue while interpreting the identical worded provisions of section 54F(2) of the Act. The following question of law was framed by the Hon'ble High Court on this issue:—

"(2) When the assessee invests the entire sale consideration in construction of a residential house within three years from the date of transfer can he be denied exemption under Section 54F on the ground that he did not deposit the said amount in capital gains account scheme before the due date prescribed under Section 139(1) of the IT Act?"

10. The said question has been answered by the Hon'ble High Court in the following words:—

"As is clear from Sub-Section (4) in the event of the assessee not investing the capital gains either in purchasing the residential house or in constructing a residential house within the period stipulated in Section 54F(1), if the assessee wants the benefit of Section 54F, then he should deposit the said capital gains in an account which is duly notified by the Central Government. In other words if he want of claim exemption from payment of income tax by retaining the cash, then the said amount is to be invested in the said account. If the intention is not to retain cash but to invest in construction or any purchase of the property and if such investment is made within the period stipulated therein, then Section 54F(4) is not at all attracted and therefore the contention that the assessee has not deposited the amount in the Bank account as stipulated and therefore, he is not entitled to the benefit even though he has invested the money in construction is also not correct."

11. Though the Hon'ble High Court in relation to the issue of claim of exemption u/s 54F of the Act has held that what matters is the intention of the assessee to purchase / construct new house. The Hon'ble Karnataka High Court has held that if the intention is not to retain cash but to invest in construction or any purchase in property and if such investment is made within the period stipulated therein, than section 54F(4) is not at all attracted. We may clarify here that provisions of section 54(2) are almost identically worded as in section 54F(4) of the Act. Admittedly, in this case, the assessee has invested the amount for the purchase / construction of the house within the stipulated period as also observed above while deciding the first issue. The assessee has proved such investment during the assessment proceedings and, thus, the assessee has complied with the requirement of substantive provisions and, thus, is entitled to the claim of exemption u/s 54F of the Act. In view of this, we direct the Assessing officer to grant exemption to the assessee as permissible under the provisions of section 54 of the Act.

12. In the result, the appeal of the assessee stands allowed.

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*In favour of assessee.