

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD “ B ” BENCH – AHMEDABAD

Before Shri S. S. Godara, JM & Shri Manish Borad, AM.

ITA No.37/Ahd/2014
Asst. Year: 2009-10

Bhailalbhai N. Patel, 10, Sandalwood Society, B/h Kalpana Society, Race Course Circle, Vadodara.	Vs.	DCIT, Circle-4, Baroda.
Appellant		Respondent
PAN ACUPP 2966J		

Appellant by	Shri M. K. Patel, AR
Respondent by	Shri James Kurien, Sr.DR

Date of hearing: 21/12/2016
Date of pronouncement: 03 /01/2017

O R D E R

PER Manish Borad, Accountant Member.

This appeal by the assessee for Asst. Year 2009-10 is directed against the order of Id. CIT(A)-III, Baroda, dated 29.10.2013 vide appeal no. CAB/III/184/2011-12 arising out of order u/s 143(3) of the IT Act, 1961 (in short the Act) framed on 29.11.2011 by DCIT, Circle-4, Baroda. Sole substantive grievance of the assessee in this appeal is against the order of Id. CIT(A) confirming the order of Assessing Officer denying deduction of Rs.29,62,200/- u/s 54 of the Act.

2. Briefly stated facts of the case are that assessee is an individual. He filed his return of income on 30.3.2010 disclosing total income at Rs.65,02,760/-. The case was selected for scrutiny assessment and notice u/s 143(2) followed by notice u/s 142(1) of the Act were issued and duly served. Necessary details/informations as called for were furnished. During the year assessee sold a house property situated at Jyoti employee's Co-op. Housing Society at Fatehgunj, Baroda, and received Rs.54,00,000/- as sale consideration. Assessee claimed index cost of acquisition at Rs.9,37,800/-, deduction u/s 54EC of the Act for investment in bonds at Rs.15,00,000/- and the remaining amount of long term capital gain was claimed as deduction u/s 54 of the Act for constructing residential house in which assessee has invested Rs.53,96,287/- which included cost of land. Ld. Assessing Officer observed that construction of residential house against which assessee has claimed deduction u/s 54 of the Act commenced before 18.7.2008 i.e. the date of transfer of property on which assessee has earned long term capital gain. Ld. Assessing Officer further observe that deduction for construction of residential house is allowable u/s 54 of the Act only if the assessee constructs the house within a period of three years after the date of transfer of original asset, whereas assessee commenced and almost completed the construction of new residential house much before the date of transfer of capital asset and therefore, the plea of the assessee that he had used the funds received on sale of one residential house in construction of new house is baseless and accordingly rejected the claim of deduction u/s 54 of the Act at Rs.29,62,200/-.

3. Aggrieved, assessee went in appeal before Id. CIT(A) but could not succeed as Id. CIT(A) dismissed the assessee's appeal by observing as follows :-

5.3 I have gone through the facts of the case as well as the submissions made by the AR. The main contention of the appellant is that the exemption u/s. 54 cannot be refused simply on the ground that the construction of the new residential house has begun before the sale of old house. His claim is that since he occupied the newly constructed house after the sale of old house, hence he should be allowed exemption u/s. 54, despite the fact that the construction of the house had started long before the sale of the old house and almost entire expenses had been made before the transfer of the old house. For this purpose, the appellant has relied upon the decisions of Allahabad High Court in the case of H.K.Kapoor (Supra) and of Karnataka High court in the case of J. r. Subramaniam Bhatt (Supra).

5.3.1 From the details of expenses submitted by the appellant before the AO and reproduced in assessment order, it is seen that out of total expenses of Rs. 30,48,531/- only following one expense has been incurred after the date of transfer of the old house j,e 18/07/2008:

Name of Party	Bill No	Bill Dtd	Amt (Rs.)	Particulars / Details
Amarshinh Prajapati	2	09/08/2008	65251.00	Civil Work Labour Charge

Besides, from these details of expenses, it is seen that the main construction of the house had already been completed well before 31/03/2008 and the expenses incurred after that are only in the nature of decorative items, channel, hook, brackets, glasses, etc. which are apparently for interior decoration of the house.

5.3.2 The decisions in the case of J,R. Subramaniam (Supra) .which was concurred by Hon'ble Allahabad High Court in the case of H.K.Kapoor (Supra) had been discussed and analyzed by the Hyderabad Bench of ITAT in its decision in the case of Smt Nimma Gadda Sridevi reported in 33 taxmann.com 306 (Hyd). The bench has held as follows in this order:

- In the instant case, the question came up for consideration was ? whether the cost of construction incurred by the assessee after the sale of capital asset, though the construction commenced before the sale and the construction completed within two years from the sale of capital assets, is entitled for deduction under section 54F. [Para 9]*

- *A bare look to the provisions of section 54F shows that the above provisions are incentive provisions intended to augment the investment in residential houses. It is the settled legal position that incentive provisions should be construed liberally in such a manner that object of the statute is fulfilled rather than the manner which may frustrate the object. [Para 11]*
- *The Circular No. 471, dated 15-10-1986, clearly shows that object of sections 54 and 54F was to augment the investment in residential accommodation. Considering the said object, the Board took the view that payment to Delhi Development Authority, under self-financing scheme, amounted to investment in construction of residential house even though the assessee himself had not constructed the house. In view of the same, the Commissioner (Appeals) was not justified in applying strict rule of interpretation. [Para 13]*
- *In view of the above discussion, it is opined that investment in residential house which would have taken place after the sale of existing capital asset is to be considered for deduction under section 54F as the investment in residential house would not only include the cost of purchase of the house but also the cost incurred in making the house habitable because an inhabitable premises, cannot be equated with a residential house. If a person cannot live in the premises, then such premises cannot be considered as a residential house. In case of semi-finished house, the assessee will have to invest huge money on finishing the house to make it habitable. Therefore, the investment in a house would be complete only when such house becomes habitable. [Para 14]*
- *Further in the case of Chandru L Raheja v. ITO [1988] 27 ITD 551 (Bom.), it was held that when the assessee had already purchased land, started construction of a building then only that part of the investment in new house that was made out of the sale proceeds received after the transfer of the old house would qualify for deduction under section 54. [Para 15]*
- *In view of the above, it is clear that whatever investment is made by the assessee in construction of new property within the period stipulated under section 54F after the sale of existing property the assessee is entitled for deduction in respect of same. In other words, the investment in new property made by the assessee was not entitled for deduction under section 54F to the extent made before the sale of property. [Para 17]"*

5.3.3 Similarly the Hon'ble Gujarat High Court in its decision in the case of Smt. Shantaben P. Gandhi 6 taxmann.com 356 (Guj) held as follows:

Having regard to the facts and findings recorded by the Tribunal, it could not possibly be disputed that the new house property was constructed long before the transfer of the larger plot took place and not within a period of two years after the date of such transfer. It was true that the assessee paid a substantial portion of the cost of construction to M and obtained possession of the new house property on 20-3-1970, that is to say, the day on which the conveyance in respect of the larger plot was executed, but that, however, was a matter of no consequence, so far as the satisfaction of the relevant condition was concerned. For the satisfaction of the relevant condition, what had to be seen was an objective fact, namely, whether the new house property was constructed within a period of two years after the date of the transfer of the property on the sale of which the capital gain arose. Merely because the payment of a substantial portion of the agreed charges of the contracts was made and possession of the newly constructed property was obtained on the same day on which the conveyance was executed, it could not necessarily follow in all cases that the new building was not constructed up to that time.

This was not one of those cases where for one reason or the other, not within the control of the assessee, the new house property which the assessee intended to put up had not been completely constructed so as to be fit for occupation. There was nothing on the record to show that the property constructed on the smaller plot was not fully constructed and that it was not fit for occupation. The finding, in fact, was that the construction was completed on 31-3-1968 but for some reason possession was not taken till 20-3-1970. Accordingly, it could not be held that the house property had not been "constructed" within the meaning of section 54 on the day on which it was found to have been actually constructed.

Therefore, it could not be said that the assessee had constructed any house property within a period of two years after the date of transfer of its house property on the larger plot so as to be entitled to the benefit of section 54."

5.3.4 Similarly in the decision of the ITAT Mumbai Bench in the case of [2001] 78 ITD 206 (NUM.), Ms. M.N. Palia, the Bench has held on similar facts as follows:

"It was clear that no investment in the new residential house constructed by the assessee was made within one year prior to the sale of shares. Entire investment was made from 11-11-1988 to 8-5-1991 and meagre sums of Rs. 5,000 and Rs. 13,240.20 were shown to be invested in the new asset on 6-4-1992 and 15-10-1992 respectively. The completion certificate obtained from Architect in itself was vague as it did not specify the date of completion of the said house.

The assessee's said house was complete by 8-5-1991 and the amount shown to be expended on 6-4-1992 and 15-10-1992 as well as the certificate obtained from the Architecture were the exercise by the assessee to come within the four corners of section 54F. One was unable to understand that how a house stated to be incomplete as on 8-5-1991 where the substantial investment of Rs. 2,72,500 was made became complete with a meagre amount of Rs. 5,000 expended by the assessee on 16-4-1992 and a certificate was issued by the Architectures on 5-8-1992 that the said house was complete. This also showed that it was a concocted exercise of the assessee to come within the preview of section 54F. Otherwise the house was complete on 8-5-1991, that is, much before one-year prior to the sale of original asset. In the circumstances, as the conditions laid down under section 54F were not fully complied as the assessee had not made the required investment in the new asset within one year prior to the sale of original asset, assessee was not entitled to exemption under section 54F.

Thus, the Assessing Officer's order in respect of addition made relating to long-term capital gain was to be maintained."

5,3.5 Similarly in the present case the details of expenses furnished by the appellant clearly established that the newly constructed house was fully constructed before the date of the transfer of the old house and was in complete habitable condition. Thus this house property having been already been constructed as on the date of transfer of the old house, the decision of Hon'ble Gujarat High Court in the case of Smt. Shantaben P. Gandhi (Supra) and the decision of Mumbai Tribunal in the case of Ms. M.N. Palia (Supra) are clearly applicable in this case. Without prejudice to this, as per the decision in the case of Smt. Nimma Gaddu Sridevi (Supra), only the expenditure made after the date of sale of original property would be eligible for deduction u/s 54. Such amounts comes to Rs.65,251/- in this case. Hence the action of the AO of disallowing deduction u/s 54 is upheld and the appeal is dismissed.

4. Aggrieved, assessee is now in appeal before the Tribunal.
5. Ld. AR submitted that the assessee claimed deduction of Rs.29,62,200/- u/s 54 of the Act towards constructing new residential house for which assessee paid Rs.53,96,287/-. Ld. AR duly accepted the fact that the construction of the new residential house on which deduction u/s 54 of the Act is claimed was started in the year 2006 and a considerable portion was constructed before the date of

transfer of capital asset on 18.7.2008. However, construction of residential house eligible for investment u/s 54 of the Act was completed on 16.4.2009 i.e. the date on which completion certificate was issued by concerned authority. Ld. AR further submitted that section 54 of the Act contemplates that deduction can be claimed under this section against long term capital gain from sale of residential house if another residential house is purchased within a period of one year or two years after the date of transfer of capital asset or if the assessee construct residential house within a period of three years after the date of transfer of capital asset. Ld. AR firmly contended that the deduction u/s 54 of the Act is allowable when the construction of residential house is completed and it is immaterial when the construction starts, main emphasis is on the date of completion of construction which in the case of assessee was 16.4.2009 and is well within the specified period of three years from 18.07.2008 i.e. date of transfer of capital asset.

6. On the other hand Id. DR supported the orders of lower authorities.

7. We have heard the rival contentions and perused the material placed before us. Through this appeal assessee has assailed the order of Id. CIT(A) confirming the action of Id. Assessing Officer denying deduction of Rs.29,62,200/- u/s 54 of the Act with regard to investment in new residential house claimed against long term capital gain from sale of residential house.

8. We observe that assessee sold his old residential house at Jyoti Employees' Co-op. Housing Society at Fatehgunj, Baroda for a sale consideration of Rs.54 lacs and claimed index cost of acquisition of Rs.9,37,800/-. This gave rise to long term capital gain of Rs.44,62,200/-. Deduction u/s 54 EC of the Act was claimed at Rs.15 lacs towards investment in specified bonds. Further against the remaining amount of long term capital gain of Rs.29,62,200/- assessee claimed deduction u/s 54 of the Act towards construction of another residential house at 10, Sandalwood Society, near Kalpana Society Race Course, Baroda.

9. Litigation arose between the Revenue and the assessee for the reason that Id. Assessing Officer on the basis of his examination of records observed that construction of new residential house was completed much before the date of transfer of old residential house i.e. 18.07.2008. This observation of Id. Assessing Officer was on the basis of the details provided by assessee towards cost incurred under various heads for the construction of residential house which mainly arose during the year 2006 & 2007 and only a minor amount was spent after 18.07.2008. Id. Assessing Officer observed that assessee has not purchased any residential house within one year or after two years of the date of transfer of capital asset i.e. 18.07.2008 but has claimed deduction u/s 54 for constructing a house completed on 16.4.2009. Id. Assessing Officer denied the deduction u/s 54 of the Act by taking a view that the construction of impugned residential house was completed much before the date of transfer of capital

asset on 18.07.2008 and was occupied by the assessee for residential purpose and only a minor expenditure was incurred after 18.07.2008 which in the view of Id. Assessing Officer was not sufficient compliance of the provisions of section 54 of the Act as the amount of sale consideration was not invested in the new residential house.

10. We further observe that Id. CIT(A) confirmed the view of Id. Assessing Officer by referring and relying on the judicial pronouncements as referred above in the preceding paragraphs. Id. CIT(A) in his appellate order referred and relied on the decision of the Co-ordinate Bench, Hyderabad in the case of Smt. Nimma Gaddu Sridevi wherein it was held that the investment in house would be complete only such house becomes **habitable** (emphasis supplied). This particular word habitable is of crucial importance because construction of a structure may take years but it becomes residential house only when it is habitable and the person resides therein has legal permission given by the local authorities to use it for residential purposes.

11. In this context we analyze the facts provided by the assessee vide his submission dated 25.11.2011 before Id. Assessing Officer. Relevant para 4 of the reply dated 25.11.2011 is reproduced below :-

4.2- Submission of the assessee.

The assessee submitted his reply dated 25.11.2011. The para No 4 reads as under:

"04. As regards my sale of old house and constructing a new house, it may please be noted that as per the details submitted earlier, I have constructed a new residential house in F.Y. 2008-09. The old house was sold in the same financial year also. The cost of newly constructed house for residential purposes is Rs. 53,96,287/- including cost of land. Thus, the entire capital gain earned on sale of the old house stand fully invested either in construction of new house or capital gains bonds allowable u/s 54EC.

I have started occupying the said premises from 02.09.2008. The local self government has also started levying the local municipal taxes for usage of water, sewage etc. Copy of the bill of Local Self Govt. (VMC) is enclosed herewith Annexure-4. The electricity bill also has been in my name at the new premises. Its copy is enclosed herewith Annexure-S.

As regards the completion certificate to be obtained from the Local Self Government, it may please be noted that there was a dispute as to entry of land lord who has sold the land to me in the city. survey record. Therefore, the completion certificate could not be obtained. The issue was resolved by city survey superintendent no. 1, Vadodara vide his order no. City S/Re. Ca, No.7/2009/ward-I dated 16.04.2009. Its copy is enclosed herewith for your perusal and record (Annexure-6). I have moved the matter before the Local Self Government to get the completion certificate. Nevertheless, it is important fact that though I have not received the construction completion certificate from the Local Self Government, I have been occupying the said premises as my Residential House. I have paying regularly the municipal taxes, electricity charges, telephone expenses which are basic for the purpose of occupying any house for residential purposes. It would not be out of place to stress here that there is a substantial compliance of law as regards usage of the funds on sale of the one residential house and construction and occupying of the new residential house within the time frame allowed under the Act. Thus, there is a substantial compliance of the provisions of law. The procedural part which has not so much significance as against the usage of the funds and occupying the new residential premises, my claim of exemption u/s 54 may please be allowed. It would be an important matter for your Hon. to note that the legal hitch as regards the old land lord in the city survey record was a factor beyond my control.

For your record details of the construction expenses right from the starting of construction activity along with copies of bills are as per Annexure - 7. Majority of the payments for the construction are paid by cheque only from my bank account with Bank of India, University Branch, Vadodara. I have =d construction activity prior to the date of sale of the old house but its completion has taken place after the date of sale of the old house, which may please be noted by your Hon.

In view of the above, your Hon. Are hereby requested to uphold and allow my claim of Rs. 27,01,596/- (Rs. 42,01,596 long term capital gain minus Rs.15,00,000 investment in bonds u/s 54EC)."

12. In the above referred para no.4 of assessee's reply dated 25.11.2011 it gives a very clear picture of the facts of the case. Assessee has not objected to the fact that major construction of the impugned house was completed much before the date of transfer of capital asset i.e. 18.07.2008 but there was some litigation going on between the local authorities and the previous landlord which was finally resolved by the City Service Superintendent on 16.4.2009 on the basis of which assessee moved his application to get the

completion certificate. This fact of completion certificate along with some expenditure incurred by assessee for the completion of residential house on 16.4.2009 shows that construction of residential house was completed on 16.04.2009, as on this date the residential house actually became habitable.

13. We further observe that both the lower authorities have taken a common view that the sale consideration of the old residential house should form part of construction in the residential house for claiming deduction 54 of the Act. Provisions of section 54 of the Act contemplates that deduction u/s 54 of the Act can be made by assessee only if a residential house is purchased within one year before or two years after the date of transfer of old residential house or in the alternative if the assessee constructs new residential house within three years from the date of transfer of capital asset. We find that the assessee is eligible to claim deduction under this section even if a new residential house is purchased within one year before the date of transfer of capital asset which means that assessee has to make use of funds other than the sale consideration of house sold for investing in a residential house and it is not mandatory that only the sale consideration of house sold is to be utilized for purchasing or constructing a new residential house. In the given case assessee has utilized other funds (apart from sale consideration) for constructing residential house and for this reason only he cannot be denied deduction u/s 54 of the Act.

14. Further going through the provisions of section 54 of the Act we also observe that there is no mention about the date of start of construction of residential house but it only refers to a construction of a residential house which in our view is the date of completion of the constructed residential house habitable for the purpose of residence.

15. We are, therefore, of the view that in the case of assessee long term capital gain arose from sale of old residential house on 18.07.2008 and assessee invested Rs.53,92,287 in constructing another residential house construction of which was commenced in 2006 but was completed on 16.4.2009 and was well within the statutory time limit meant for constructing of new residential house within 3 years from the date of transfer of capital asset as envisaged in the provisions of section 54 of the Act and, therefore, assessee is eligible to claim deduction u/s 54 of the Act at Rs.29,62,200/-. Accordingly, we set aside the orders of lower authorities and allow the appeal of assessee.

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

Order pronounced in the open Court on 3 rd January, 2017

Sd/-
(S. S. Godara)
Judicial Member

sd/-
(Manish Borad)
Accountant Member

Dated 03/01/2017

Mahata/-

Copy of the order forwarded to:

1.	The Appellant
2.	The Respondent
3.	The CIT concerned
4.	The CIT(A) concerned
5.	The DR, ITAT, Ahmedabad
6.	Guard File

BY ORDER

Asst. Registrar, ITAT, Ahmedabad

1. Date of dictation: 22/12/2016 & 02/01/17
2. Date on which the typed draft is placed before the Dictating Member: 03/01/2017 other Member:
3. Date on which approved draft comes to the Sr. P. S./P.S.:
4. Date on which the fair order is placed before the Dictating Member for pronouncement: _____
5. Date on which the fair order comes back to the Sr. P.S./P.S.:
6. Date on which the file goes to the Bench Clerk: 03/01/2017
7. Date on which the file goes to the Head Clerk:
8. The date on which the file goes to the Assistant Registrar for signature on the order:
9. Date of Despatch of the Order: