Income Tax Appellate Tribunal - Pune
P.K. Datta vs Income Tax Officer on 24 June, 2005
Equivalent citations: (2006) 100 TTJ Pune 133
Bench: M Shrawat, K Bansal
ORDER K.G. Bansal, A.M.

1. This appeal arises out of the order of learned CIT(A), Nashik, passed on 12th Nov., 1996. The corresponding order of assessment was made by the ITO, Ward 1(9), Nashik, on 27th Jan., 2004.

2.1 The controversy in the instant case revolves around computation of capital gain under Section 54 accruing to the assessee on sale of his residential property, situated at Pune. In the return of income, the assessee had shown sale consideration at Rs. 3,75,000. A sum of Rs. 40,100 was deducted from the sale consideration and it consisted cost price of Rs. 30,000, commission expenditure of Rs. 7,500 and incidental expenses of Rs. 2,600. The resultant capital gain of Rs. 3,34,000 was claimed to be exempt on the ground that the residential house is under construction at Kalpataru Society, Nashik. The assessee was requested to substantiate his claim regarding exemption under Section 54. In this connection, he filed a copy of agreement of sale executed at Nashik on 8th Sept., 1998 between Kalpataru Construction Developers/Builders on one side and Mr. P.K. Datta on the other side for purchase of Unit No. 2, Row Housing Scheme on Plot No. 54-55-56B, R.S. No. 712/1 in D'Souza Colony, Nashik with purchase consideration of Rs. 3,82,500, and bank pass book with Bank of Maharashtra, Canada Corner Branch, bearing account No. 6345, being the account opened under Capital Gains Account Scheme, 1988. The ITO pointed out that for availing of the benefit under Section 54 one of the two conditions, namely, (i) the assessee has purchased a residential house within a period of one year before or two year after the date of transaction of sale, or (ii) has constructed a residential house within a period of three years after the sale of the old residential house, should be satisfied. In this connection, the ITO pointed out that the assessee had entered into an agreement with the builder, Kalpataru Construction, on 8th Sept., 1988. He further pointed out that the aforesaid bank account, bearing No. 6345, was merely a savings account and not an account maintained under Capital Gains Account Scheme, 1988. From this savings account, the assessee had transferred a sum of Rs. 1,60,000 to another savings account and this account was utilized for obtaining a term deposit for nine months on 4th Aug., 1990. The assessee also gave a loan of Rs. 40,000 to his friend, Shri More. When it was pointed out to the assessee that withdrawals from this account were not utilized for specified purposes, mentioned under Section 54(1), it was explained in the letter dt. 17th Dec., 1993 that the builder was delaying construction of his house and, therefore, he decided to delay payments to him. In view thereof, he decided to place the money in term deposit for nine months but no explanation was furnished regarding loan to his friend. In view of the fact that the conditions regarding utilization of money in the Capital Gains Account Scheme were not fulfilled, the ITO disallowed the assessee's claim under Section 54. However, he allowed prorata exemption under Section 53. Aggrieved by this order, the assessee filed appeal before the learned CIT(A), Nashik.

2.2 In the course of appellate proceedings before the first appellate authority, the assessee filed submissions vide letters dt. 7th Sept., 1996 and 11th Oct., 1996. It was, inter alia, submitted that (i) the assessee had appropriated a sum of Rs. 2,50,000 towards purchase of new Flat at Nashik before

the due date of filing the return of income being 30th June, 1991, and, therefore, there was no need to open an account under Capital Gains Account Scheme. The new residential house was completed by 21st Sept., 1991, i.e., within two years of the sale of the old residential house; (ii) the assessee had claimed deduction under Sections. 53 and 54 and it would be wrong to say that he modified his claim of exemption from Sections 54 to 53; (iii) construction was completed on 21st Sept., 1991 but the conveyance deed was executed on 15th Feb., 1993. Since the assessee got the new residential house constructed within a period of three years from the builder (from 20th June, 1990 to 26th June, 1993), he was entitled to exemption under Section 54. In order to buttress his claim, reliance was placed on the decision of CIT v. Mrs. Hilla J.B. Wadia and Board's Circular Nos. 471, dt. 15th Oct., 1986, and 672, dt. 16th Dec., 1993. These matters were considered by the learned CIT(A). It was mentioned that the assessee sold his old residential house at Pune on 26th June, 1990 for a sum of Rs. 3.75 lakhs. The assessee had booked a flat at Nashik with Kalpataru Construction on 8th Sept., 1988 for a consideration of Rs. 3,82,500. It was further mentioned that the consideration seems to have been enhanced subsequently to Rs. 4.80 lakhs. Till the date when the residential house at Pune was sold, i.e., 26th June, 1990 an amount of Rs. 1.15 lakh had been paid to the builder (as per the paper book filed, the payments aggregate to Rs. 1.55 lakhs). It is also mentioned that two amounts of Rs. 1.50 lakhs and Rs. 1 lakh were paid to the builder on 27th June, 1990 and 13th May, 1991 respectively. The entire cost of Rs. 4.80 lakh was paid by the assessee by 15th Feb., 1993. It is also mentioned that in the return of income, the assessee had claimed exemption under Section 53 and Section 54F on the ground that the entire capital gains on sale of Pune property had been invested in the new property at Nashik by 30th June, 1991. The learned CIT(A) pointed out that the assessee had not constructed the new residential property on his own. He had booked a row-house with M/s Kalpataru Construction, developers and builders, who handed, over the possession of the row-house on its completion to the assessee. The row-house agreed to be purchased by the assessee was not an independent residential property as there were other row-houses and flats constructed by the builders and developers and purchased by other customers. Thus, he was of the view that it is not a case of construction of a house by the assessee but one of purchase from the builders and developers. Since the new residential house was not purchased within the specified period of two years from the date of sale of the old residential house, he held that provisions under Section 54F were not applicable. He was also of the view that Circular Nos. 471 and 672 are applicable in case of construction by the Delhi Development Authority of flats under self-financing scheme. This authority is a Government undertaking and a private builder cannot be treated at par with this authority. Accordingly, he denied exemption to the assessee for any deduction from the capital gain under Section 54 of the Act. (Note : Section 54F mentioned by learned CIT(A) should be read as Section 54).

3.1 Before us, the learned Counsel of the assessee referred to the letter dt. 8th March, 2001, filed in the course of earlier hearing by Hon'ble Members of the Tribunal. In this letter, it was, inter alia, submitted that the assessee had sold . his residential property at Pune on 26th June, 1990 for a consideration of Rs. 3.75 lakhs. Capital gains on this sale were recomputed at Rs. 3.20 lakhs by the ITO. The assessee entered into a contract with Kalpataru Constructions, Nashik on 8th Sept., 1988 for a construction of a row-house as per his specifications at a cost of Rs. 3.82 lakhs. A total sum of Rs. 4,05,000 was paid in five unequal instalments on 26th May, 1989, 25th July, 1989, 1st Sept., 1989, 27th June, 1990 and 13th May, 1991. The construction of the row-house was completed along

with rest of the building on 21st Jan., 1991 as per the completion certificate issued by municipal corporation, Nashik on 30th Nov., 1991. The contractor was delaying completion of internal finishing of the row-house and in view thereof, the assessee did not pay the full amount. Thus, there was a delay in taking possession of the property and the possession was taken in the last week of February 1993. Finally, the sale deed was executed on 15th March, 1993 for a consideration of Rs. 4.80 lakhs. On the basis of the aforesaid facts, the assessee claimed the whole of capital gains accruing on sale of Pune residential house was exempt under the provisions of Section 54. However, the ITO held that the new residential house was purchased after one year of the date of the sale of the old house and the sale consideration of the old house was not deposited in Capital Gains Account Scheme. Therefore, he denied exemption under Section 54 but allowed exemption under Section 53 on prorata basis. The CIT(A) took the view that the assessee had not constructed the row-house but had purchased it beyond the period of two years from the date of the sale of the old residential house at Pune and, accordingly, held that the assessee was not entitled to any exemption under Section 54. In the background of aforesaid facts and findings, it was submitted that there is no dispute regarding the fact that capital gains of Rs. 3.20 lakhs accrued on sale of residential house at Pune. The construction of the new residential property started on 5th Feb., 1990, by which time the assessee had paid a sum of Rs. 1.55 lakhs as advance for construction of the row-house. The major portion of the construction was completed by 30th Nov., 1991 when municipal corporation of Nashik issued completion certificate. The assessee had also paid a total amount of Rs. 4,05,000 before the due date of filing of return of income for this assessment year and, thus, by this date he had full domain over row-house to be built on his behalf. Ultimately he got the possession of the row-house in February 1993. In order to support his claim, the assessee relied on the decisions reported at CIT v. Ms. Hilla J.B. Wadia (supra), CIT v. J.R. Subramanya Bhat , CIT v. T.N. Aravinda . In the course of hearing the learned Counsel of the assessee also relied on the cases reported at CIT v. Smt. Bhamti C. Kothan and Kanwal Mohini Malhotia v. ITO. As against this, the learned Departmental Representative relied on the order of CIT(A) to canvass that deduction has been rightly denied to the assessee.

3.2 We have considered the facts of the case and various submissions made before us. We have also examined the orders passed by the authorities below. In view of the orders of the authorities below and various submissions made before us, it appears to us that the main question to be decided in this case is whether the assessee had purchased a new residential property or it had constructed a new residential property. The question becomes of paramount importance in view of admitted position that the old residential house was sold on 26th June, 1990. and the possession of new residential house property was taken in February 1993. If it is a case of construction of the house by the assessee, then it can be said that the construction was completed on 30th Nov., 1991 as per the completion certificate issued by municipal corporation, Nashik. Thus, the construction was completed within the specified period of three years. However, if it is a case of purchase of a new residential property, then in accordance with the provisions of Section 2(47)(v), it could be argued that the date of purchase would fall in February 1993, which is beyond the period of two years of the sale of the old residential house. In coming to the true nature of transaction, we will have to have regard to the agreement made between Kalpataru Construction and the assessee. From various paragraphs of the agreement, it is seen that the developers/builders had entered into a development agreement with one Shri Shailendra Arvind Sukathankar, the original owner, for development of

land admeasuring about 747.00 sq. mtrs. As per this development agreement, developer proposed to construct row-houses with independent approaches on the land belonging to the original owner. The assessee applied to the developer for allotment of the row-house to be constructed on the said land as per plan attached with the agreement. In accordance with this agreement, the assessee agreed to purchase Unit No. 2 admeasuring 158 sq. mtrs. as shown in the plan as his share in the land measured 117 sq. mtrs. In terms of this agreement, the assessee was required to pay various sums aggregating to Rs. 3,82,500 from the date of booking till the date of possession. The agreement enjoined upon the assessee not to commit any default in payments of instalments and in case of default or breach of any term or condition of the agreement, the developer was entitled to terminate the agreement and sell off row-house to any other person. The agreement also provided for charging interest @ 24 per cent per annum for any delay in payment of any amount by the assessee to the developer. The stamp duty, registration charges, etc. were to be borne by the purchaser, the assessee. It appears that certain letters were obtained by the assessee from the builders/developers. The first letter dt. 14th Sept., 1996 confirmed that the possession of the row-house was given to the assessee in February 1993 and the total consideration was Rs. 4.80 lakhs. The other letter was dt. 29th Oct., 1996 confirming that builders/developers had entered into agreement with the assessee to construct on his behalf a row-house bearing No. Unit-B and the assessee had agreed to pay costs of construction in a progressive manner as detailed in the agreement. The row-house was constructed in accordance with the municipal regulations in a period of three and half years. The internal lay-out of the Unit-B was different from Unit-A and it was constructed as per the desire and directions of the assessee. It may be mentioned that there is at least one patent error in this letter when it stated the assessee had agreed to pay the costs of construction. In fact, what assessee paid was purchase consideration which would include profit of the builder also. The first question is whether these subsequent letters have any effect on the agreement entered into between the builders/developers on one hand and the assessee on the date of 8th Sept., 1988. This issue was not discussed by the lower authorities. However, we are of the view that agreement dt. 8th Sept., 1988 was a binding contract between two parties, which was fully acted upon by the contracting parties and, therefore, letters subsequently obtained from builders/developers are in the nature of letters procured subsequently. They do not change the substance of the transaction evidenced by way of a written document. Having decided this, we proceed to discuss various cases relied upon by the assessee.

4.1 The learned Counsel of the assessee relied on the decision of the Hon'ble Bombay High Court in the case of CIT v. Mrs. Hilla J.B. Wadia (supra). The facts of the case were that the assessee and her husband jointly owned a house property, which they agreed to sell to a proposed Andromeda Co-operative Housing Society for a consideration of Rs. 8 lakhs. Pursuant to the agreement of sale, this property was conveyed to the society. The assessee received Rs. 4 lakhs in March, 1973. In October 1973, the agreement was made between the society and the assessee under which the society agreed to allot a Flat No. 7 in the building to be constructed, for which the assessee agreed to pay a sum of Rs. 2,59,360 to the society. Out of this amount, a sum of Rs. 30,000 was payable towards allotment of shares in the society. The balance amount of Rs. 2,29,360 was to be treated as loan to the society. It was agreed that the society will attempt to construct the building within a reasonable time but the assessee was not entitled to cancel the agreement or claim any damages. Out of the sum of Rs. 2,59,360 payable by the assessee, a sum of Rs. 2,51,238 was paid by the

assessee in November 1974, i.e., within a period of two years from the date of conveyance of the property to the society. On these facts, the Tribunal held that the assessee was entitled to relief under Section 54 of the IT Act. On a reference, the Hon'ble Bombay High Court pointed out that Section 54 has to be interpreted in the manner in which residential properties are being constructed in a city like Bombay where looking to enormous cost of land, co-operative societies are being formed to construct buildings in which flats are allotted to the members. This must be viewed as a manner of constructing residential tenement. The Court further observed that what is to be seen is that whether the assessee has acquired right to a specific flat in such a building which is being constructed and whether he has made substantial investment within the prescribed period, which will entitle him to obtain the possession of the flat. The material test is whether the assessee has obtained domain over the flat because of investment in it. The Court also observed that the CBDT in Circular No. 471 dealt with investment in flats under self-financing schemes of the DDA. It has been clarified that when a letter of allotment is issued to an allottee under this scheme on payment of first instalment of cost of construction, the allotment is final unless it is cancelled. In such circumstances, the Board has directed that allotment of flat under the scheme should be treated as a case of construction for the purpose of exemption under Section 54. In view of above, the Hon'ble Court held that the assessee had acquired domain over the flat and almost entire requisite amount had been paid in a period of two years. While, the Hon'ble . Court allowed relief under Section 54, it expressed an opinion that such apartments are likely to arise frequently in a city like Bombay and, therefore, it desired that in order to avoid litigation on the topic, the Board should issue a circular similar to the one issued in connection with construction by DDA for proper guidance of the IT Department. It appears that no circular has been issued by the Board to extend the benefit to assessee's acquiring tenements other than ones under self-financing schemes of DBA. The learned Counsel had also relied on the decision of Kanwal Mohini Malhotm v. ITO (supra) decided by Pune Bench. The facts of this case were similar to the facts of the case of Mrs. Wadia (supra). The Tribunal referred to the difficulties of construction independently in a city like Bombay, leading to a practice of construction and allotment of flats through societies and it was held that the construction through the society should be taken as construction by the assessee on the facts and in the circumstances of the case. We have considered the ratio of these decisions. We are of the view that the Hon'ble Court wanted to give benefit to assessee's acquiring tenements through co-operative societies in metropolitan town like Bombay on the lines of benefit given to the assessee's acquiring flats in metropolitan town like Delhi by the board in respect of acquisition of flats in self-financing schemes of the DDA. The relief was given in the case of Mrs. Wadia (supra) on a concession with a hope that concession will be formalized through the subsequent notification of the Board. In the first place that did not happen. Secondly, in the instant case, property has been acquired in a small town of Nashik, where problems faced by the assessee in Bombay and Delhi are not encountered. Further, Mrs. Wadia was the owner of the land which was conveyed to the society for construction of tenements and she also agreed to acquire a tenement in the society. That is not the case here. Therefore, the facts of those cases are not at all in pan materia with the facts of the instant case. But the Hon'ble Court also laid down the criterion of domain over the new property.

4.2 The learned Counsel of the assessee further relied on the decision of Hon'ble Karnataka High Court in the case of CIT v. J.R. Subramanya Bhat (supra). The facts of the case were that the assessee was owner of a building of which he had occupied the ground floor and the second floor

was let out. He sold the building in 1977. In March, 1976, he commenced construction of a new house, which was completed in March, 1977. The assessee claimed exemption from the capital gains tax under Section 54. The ITO rejected the claim that the construction of new building had commenced much earlier than the sale of old building and major portion of the old building was let out. The Tribunal was of the view that the ground floor and land appurtenant to the building was in occupation of the assessee and the new building was completed within a period of two years of the sale of the old building. Therefore, exemption was allowed to the assessee from the capital gains tax. The Hon'ble Court held that major portion of the residential property was used by the assessee for his own residence and it was in the occupation of the assessee and that although the construction of the new building was started before the sale of the old building, its construction was completed within the period of two years of sale of the Old building. Therefore, it was held that the assessee was entitled to the exemption under Section 54. In that case, the assessee had constructed new building on his own and it was not a case of allotment of a tenement constructed in blocks by a builder/developer. Therefore, the ratio of that case also does not apply to the facts of the instant case.

4.3 The learned Counsel also relied on the decision of the apex Court in the case of CIT v. T.N. Arvinda Reddy (supra). The facts of the case were that four brothers, members of a HUF, partitioned joint family properties leaving undivided a common house. The assessee, the eldest of them, had sold his house incurring liability to the capital gains tax. Each of the three brothers then executed a release deed valuing his share in the common house at Rs. 30,000 in favour of the assessee towards the extra share agreed to be given. The question was whether this would amount to purchase of the house leading to exemption under Section 54. The Hon'ble Court held that the word "purchase" had to be given common meaning, i.e., buy for a price or equivalent of price by payment in kind or adjustment towards a debt or for other monetary consideration. Accordingly, the Hon'ble Court held that each release was a transfer of the releaser's share to the releasee and the transferee-assessee had purchased the share of each brother and, therefore, he was entitled to exemption under Section 54(1). The question in that case was whether release amounts to purchase and the Court held the matter in favour of the assessee. However, that is not the case here. The question before us is whether the assessee had constructed the row-house or had purchased the row-house and for this purpose we will have to examine the terms and conditions of proprietary agreement embodied in agreement of sale made on 8th Sept., 1988 between the developer/builder and the assessee.

4.4 The learned Counsel also relied on the decision of Hon'ble Calcutta High Court in the case of CIT v. Smt. Bhaiati C. Kothari (supra). The facts of the case were that the assessee sold her flat on 30th April, 1981, and entered into an agreement for purchase of a flat on 29th April, 1982. The entire amount of purchase consideration for the new flat was paid within a period of three years from the date of sale of old flat. The AO was of the view that exemption under Section 54(1) was available to the extent of investment made during the period of two years of the sale of old flat. The Tribunal held that since the assessee had invested the entire amount within a period of three years, she was entitled to exemption under Section 54. On these facts, the Hon'ble Court held that the purpose behind Section 54 is that if an assessee sells the residential house and purchases a new house utilizing the capital gains arising out of a sale of the old house, then the liability from capital gain is

remitted. Where the assessee himself constructs house or gets it constructed by a contractor or a third party would not make any difference to the situation. The Hon'ble Court applied the test of domain and control over the property of the assessee and negated the test of registration. It was concluded that if the money is paid and possession has been taken within the stipulated period, then the assessee was entitled to exemption under Section 54.

4.5 As against this, the learned Departmental Representative relied on the order of CIT(A), the summary of which has already been furnished.

5. We have considered the facts of the case and rival submissions. The undisputed facts are that the assessee sold the old property in Pune, on 26th June, 1990. He also entered into agreement with Kalpataru Construction for acquiring a row-house in the blocks to be built by him at Nashik. In the period of two years from the date of sale of the old property, he had paid a sum of Rs. 4,15,000 to the developer. The construction was completed on 30th Nov., 1991, but the possession was given in February, 1993. On perusal of the agreement of sale, we find that it is not an agreement for construction by Kalpataru Constructions on behalf of the assessee, but it is an agreement for construction of row-houses by Kalpataru Constructions and sale of one row-house to the assessee. This is because of the various terms and conditions of the agreement mentioned earlier including the condition regarding termination of agreement on happening of certain events which are in the nature of default by the assessee. No doubt, as per Section 2(47), the transfer of the row-house was completed in February 1993 when the possession was given to the assessee. However, the Hon'ble Calcutta High Court has held that it is not the legal formalities which should be considered for exemption under Section 54 but the test of domain and control over the property should be applied. That was also the view of Bombay High Court in the case of Mrs. Wad/a (supra). We find that within the stipulated period of two years, substantial sum of Rs. 4.15 lakhs had been paid out of a total consideration of Rs. 4.80 lakhs. Therefore, it can be said that the domain and control over the property had passed to the assessee within a period of two years from the date of sale of old property. Accordingly, it is held that the assessee is entitled to exemption under Section 54.

6. Before parting, it may be mentioned that the assessee had taken 12 grounds of appeal. However, these grounds were modified on 28th April, 2005 and forwarded to Authorised Representative on 3rd May, 2005. In the modified grounds, three grounds were taken. The sum and substance of these grounds is that the learned CIT(A) erred in denying exemption under Section 54. We have held the matter in favour of the assessee on this issue.

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