

IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH: KOLKATA

Before: **Shri M. Balaganesh, Accountant Member** and
Shri S.S. Viswanethra Ravi, Judicial Member

I.T.A No. 41/Kol/2016

A.Y: 2010-11

Amit Parekh

PAN: AFNPP6141H

[Appellant]

Vs.**I.T.O., Ward 30(2), Kolkata**

[Respondent]

For the Appellant

: Shri D.S. Damle, FCA, Id.AR

For the Respondent

: Shri Arindam Bhattacharya, Addl.CIT, Id.Sr.DR

Date of hearing : 11-01-2018

Date of pronouncement : 04-04-2018

ORDER**Shri S.S.Viswanethra Ravi, JM:**

This appeal by the Assessee is directed against the order of the Commissioner of Income Tax (Appeals), 8, Kolkata dt. 30-11-2015 for the A.Y 2010-11.

2. The only issue is to be decided as to whether the CIT-A is justified in confirming the order of AO in denying exemption u/s. 54 of the Act in the facts and circumstances of the case.

3. The brief facts of the case are that the assessee is an individual and engaged in the business of commission agency for car finance and other products. The AO found that the assessee claimed capital gain of Rs.59,07,247/- as exempt u/s. 54 of the Act by relying on various case laws. The AO was of the opinion that the assessee did not invest capital gain in purchasing new residential unit. Further, he found that the assessee availed house building loan of Rs.82,50,000/- from ICICI Bank and invested only an amount of Rs. 9,37,921/- in new residential unit out of capital gain. The AO found that the claim of assessee was not in conformity with the spirit of provisions as laid down in section 54 of the Act for claim of deduction. Accordingly, he

denied the same and disallowed the sum of Rs.49,69,326/- [Rs. 59,07,247 – Rs.9,37,921] and added the same to the total income of assessee under LTCG u/s. 54 of the Act.

4. The CIT-A after considering the submissions of assessee restricted the addition towards the capital gains at Rs.36,10,248/- in place of Rs.49,69,326/- as estimated by the AO.

5. The Id.AR of the assessee submits that the issue in hand is covered by the decision of Hon'ble High Court of Punjab & Haryana in the case of Kapil Kr. Agarwal reported in (2016) 66 taxman. Com 191 (P & H) and referred to paras 16 & 17 of the said order and argued that the assessee is entitled to claim exemption u/s. 54 of the Act and prayed to allow the ground nos. 1 & 2 of assessee's appeal challenging the denial of exemption u/s. 54 of the Act.

6. On the other hand the Id. DR relied on the orders of the AO & CIT-A.

7. Heard the rival submissions and perused the material on record and the case laws relied on by the assessee. The facts remained admitted that the cost of new residential unit is more than the capital gain noted by the AO & CIT-A in their respective orders. Part of capital gain was utilized initially by the assessee for investment in purchase of new residential unit within specified time. We find that the facts of the case of the Hon'ble Punjab & Haryana High Court in the case of Kapil Kumar Agarwal is identical to the facts of the present case. The Hon'ble High Court of Punjab & Haryana considered the decision of Hon'ble High Courts of Kerala & Gauhati in the case of K.C Gopalan & Rajesh Kumar Jalan respectively and held that section 54 of the Act provides that the assessee has to purchase a house property for the purpose of his own residence within the period of one year on or after the date on which the transfer of property took place or assessee should have constructed a

house property within a period of 2 years after the date of transfer. We find that it is clear from the AO's order that the assessee sold his residential units during the financial year 2009-10 and purchased a new residential flat, got its possession on 17-06-2010 and it is well within time prescribed in the Act involving section 54 and thereby the assessee is entitled to claim exemption u/s. 54 of the Act. Merely because assessee had availed house building loan of Rs. 82.50 lacs from bank for purchasing a new residential unit, that cannot act as a disqualification for claim of exemption u/s. 54 when the primary conditions imposed in Sec. 54 of the Act were satisfied. As discussed, the relevant portion of the decision of the Hon'ble Punjab & Haryana High Court in the case of Kapil Kumar Agarwal is reproduced herein below for better understanding:-

"16. Adverting to the judicial pronouncements, in K.C. Gopalan's case (supra), while considering identical issue, it was observed by the Kerala High Court as under:—

". The assessee has to construct or purchase a house property for his own residence in order to get the benefit of section 54. The wording of the section itself would make it clear that the law does not insist that the sale consideration obtained by the assessee itself should be utilised for the purchase of house property. The main part of section 54 provides that the assessee has to purchase a house property for the purpose of his own residence within a period of one year before or after the date on which the transfer of his property took place or he should have constructed a house property within a period of two years after the date of transfer. Clauses (i) and (ii) of section 54 would also make it clear that no provision is made by the statute that the assessee should utilise the amount which he obtained by way of sale consideration for the purpose of meeting the cost of the new asset.

6. A reading of sections 53 and 54 of the Act would make it clear that a special provision is made in respect of capital gains arising out of transfer of particular type of capital asset, namely, house property which was being used by the assessee or a parent of his for the purpose of their residence. Entitlement of the exemption under section 54 relates to the cost of the acquisition of a new asset in the nature of a house property for the purpose of his own residence within the specified period."

17. Further, following the judgment of the Kerala High Court in K.C.Gopalan's case (supra), the Gauhati High Court in Rajesh Kumar Jalan's case (supra) [2006] held as under:—

"11 We are of the view that the assessee had already appropriated the entire capital gain for purchase of the new asset within the stipulated time. In this regard, we find support from the decision of the Kerala High Court in the case of K.C. Gopalan wherein it was held that the assessee is entitled to exemption under Section 54 even though for the construction of the new house, the amount that was received by way of sale of his old property as such was not utilised. It was held by the Kerala High Court that no provision is made by the statute that the assessee should utilise the amount which he obtained by way of sale consideration for the purpose of meeting the cost of the new asset. It was held that Section 54 only provides that the assessee has to purchase a house property for the purpose of his own residence within a period of one year before or after the date on which the transfer of his property took place or he should have constructed a house property within a period of two years after the date of transfer. It was further held that entitlement of exemption under Section 54 relates to the cost of acquisition of a new estate in the nature of a house property for the purpose of his own residence within the specified period.

18. In Anandraj's case (supra), the relevant conclusion recorded by Karnataka High Court read thus:—

"6. It is not in dispute that the assessee sold the agricultural land and the consideration received is in the nature of a long term capital gain. Even before the sale of the property, he had borrowed housing loan and started construction on the site belonging to him. After the sale, the amount spent towards construction of the house is more than the consideration received by the sale of agricultural land and therefore, he is entitled to the benefit of section 54F of the Act."

19. In the present case, the investment made by the assessee being within the stipulated time and more than the capital gain earned by him, the addition of Rs. 1,21,32,636/- was rightly deleted by the Tribunal under the head long term capital gain. Learned counsel for the revenue has not been able to point out any error in the approach adopted by the Tribunal reversing the findings recorded by the CIT(A) and the Assessing Officer, warranting interference by this Court.

20. In view of the above, no substantial question of law arises. The appeals stand dismissed."

8. Respectfully following the above, we find that the CIT-A was not justified in restricting the addition on this issue. He has not considered the submissions of assessee in its right perspective. The order of the CIT-A on this issue is set aside and direct the AO to delete the impugned addition. Thus, ground nos. 1 & 2 of assessee's appeal are allowed.

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

Order pronounced in the open court on 04-04-2018

Sd/-
M. Balaganesh
Accountant Member

Sd/-
S.S. Viswanethra Ravi
Judicial Member

Dated : 04-04-2018

PP(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant/Assessee: Shri Amit Parekh, Flat 31J, Tower 4, 375 South City, Prince Anwar Shah Road, Kolkata-68.
2. Respondent :I.T.O. Ward 30(2), Kolkata.
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy, By order,

Sr.PS/H.O.O
ITAT Kolkata