

**IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC” BENCH, MUMBAI**

SHRI AMIT SHUKLA, JUDICIAL MEMBER,

आयकरअपीलसं./ I.T.A. No. 744/Mum/2022

(निर्धारणवर्ष / Assessment Year: 2011-12)

Munish Babaji Sawant 102, Gomati CHS, Sant Dnyaneshwar Road, Borivali(E), Mumbai 400066	बनाम/ Vs.	ITO 15(3) (2) Mumbai Matru mandir, Income Tax Office, Tardeo Raod, Grant Road (W), Mumbai 400007
स्थायीलेखासं ./जीआइआरसं ./PAN No. AVTPS0273R		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri. Anil Sathe
प्रत्यर्थीकीओरसे/ Respondent by	:	M/s. Neeta Jeph
सुनवाईकीतारीख/ Date of Hearing	:	30.08.2022
घोषणाकीतारीख / Date of Pronouncement	:	28.11.2022

आदेश / O R D E R

Per Amit Shukla, Judicial Member:

The aforesaid appeal has been filed by the assessee against the order dated 12.03.2022, passed by NFAC Delhi, for the quantum of assessment passed u/s, 143(3) for the assessment year 2011-12.

2. The only issue raised by the Assessee in various grounds of Appeal relates to addition of Rs. 29,40,881/- on account of denial of

exemption u/s. 54. The facts and briefs are that as per AIR information, it was noticed that Assessee has sold a residential flat at Rs. 46,00000/- on 04.06.2010. However, the capital gain arising from the sale of the said flat was not reflected in the return of income, as the assessee believed that the gain was exempt under section 54. However, the revised computation was placed on record during the course of the assessment proceedings, where in the assessee claimed the entire capital gains as exempt under section 54. The capital gains arising from the sale of residential house was invested in purchase of new house vide agreement dated 20.03.12. The entire purchase consideration was paid by 31.03.2012 and possession was obtained on 23.04.2012. However, the assessee did not deposit the amount of capital gains in the capital gains account scheme before the due date of filling return of income u/s 139(1) which was 31.07.2011.

3. The Assessing Officer held that;

i) The Assessee did not show the capital gains in his computation of income along with return of income. These facts emerged during the scrutiny proceedings. Therefore, as held by the Supreme Court in Goetz (I) ltd. 284 ITR 323 (SC), no new claim

can be made before the Assessing Officer except through a revised return and not through mere filling of revised computation as in this case.

ii) There is failure on the part of the Assessee to deposit the capital gains in the capital gains account scheme before due date of furnishing return of income u/s 139(1).

In view of the same, AO denied the exemption u/s 54 to the assessee.

4. The Ld. CIT (A) upheld the contention of the Assessing Officer holding that:

i) Claim u/s 54 is not automatic unlike the exemptions prescribed u/s 10. Hence it is required to be made in the return of income to avail the benefit of sec. 54.

ii) The assessee has not satisfied the condition u/s 54(2) with regard to depositing the amount in capital gains deposit account as the new property is not acquired before the due date for filing the return u/s 139(1).

iii) A provision providing for an exemption, concession or exception as the case may be has to be construed strictly with certain exceptions.

iv) The assessee was required to deposit the proceeds in the specified capital gains account before the due date for filing the return u/s 139(1), which the appellant failed to do and hence his claim u/s 54 was rejected.

5. Before us, the Ld. Counsel submitted that;

- *Firstly*, the decision of the Apex Court in Goetze (India) Ltd. applies only to the power of the assessing officer to admit claim of the assessee otherwise than by way of revised return and not to power of appellate authorities to admit the claim and he referred to the judgment of **Pruthvi Brokers and shareholders (P) Ltd. 349 ITR 336 (Bom)** ;
- *Secondly*, if the investment u/s 54 is made within the due date specified u/s 139(4), Capital Gain exemption cannot be denied merely on account of failure on the part of the assessee to deposit the capital gains in the capital gains account scheme before due date specified u/s 139(1). In support he relied on **Ms. Jagriti Aggarwal [2011] 15 taxmann.com 146 (Punjab &Haryana)**.
- *Thirdly*, where assessee was in a position to satisfy that amount for which deduction was sought for under section 54 was

utilized either for purchasing or constructing residential house in India within time prescribed under section 54(1), assessee could not be denied benefit of section 54 for mere non-compliance of a procedural requirement under section 54(2). For this proposition he relied upon **Venkata Dilip Kumar [2019] 111 taxmann.com 180 (Madras)**.

- *Lastly, without prejudice, he submitted that the appellant was prevented by sufficient cause in complying with provisions of sec. 54(2) on account of personal difficulties. He was deputed to project in South Africa by his employer w.e.f. 04.07.2010. Before proceeding to South Africa, he had given power of attorney to his father to look after his financial transactions. Unfortunately, his father had a paralytic stroke and was hospitalized from 22.11.2020 to 01.12.2010. Since then he was suffering from permanent physical disability. On account of all these circumstances, the appellant could not comply with the provisions of sec. 54(2).*

6. On the other hand, Ld. DR strongly relied the order of the Assessing Officer and CIT (A) and submitted that it is a statutory requirement that Assessee should deposit the proceeds in the

special capital gains account before the due date of filing of the return of income u/s. 139(1) which Assessee has failed to do so and Assessee has to satisfy the condition prescribed u/s. 54(2).

7. After hearing, both the parties and on perusal of the impugned order, it is seen that, Assessee had on capital gain from the sale of flat the relevant chronology of events is as under:

Event	Date
Date of agreement of sale of property giving rise to capital gains	04.06.2010
Due Date of filing return of income under sec. 139(1)	31.07.2011
Date of purchase agreement of new Flat in respect of which the appellant claimed exemption u/s 54	20.03.2012
Possession of flat	23.04.2012
Actual Date of filing return of income	31.08.2012
Due Date of filing return of income u/s 139(4)	31.03.2013

7. Thus, there is no dispute that Assessee had earned capital gain on sale of flat and the same was invested in purchase of new

house within the time provided u/s. 54. The entire purchase consideration was paid by 31st March, 2012 and possession was obtained on 23.04.2012. However, in the return filed u/s 139(1). The Assessee had not disclosed capital gain albeit had made a claim before the Assessing Officer in the revised computation.

8. First of all, I agree with the contention of the Ld. Counsel that if a claim was not made in the return of income the same can be made during the course of assessment proceedings and the judgment of Hon'ble Supreme Court in case of **GOETZE** (India Ltd.) applies only to the power of the Assessing Officer and not to the power of the appellate authorities to admit the claim.

9. Issue here is, whether the benefit or exemption from capital gain tax can be given, if the investment has been made in terms of section 54 within date specified u/s. 139(4); or can capital gain exemption be denied merely because on account of failure on part of the Assessee to deposit the capital gains in the capital gains account scheme before the due date specified u/s 139 (1). I find that, this issue stands covered by the decision of Hon'ble Panjab & Haryana High Court in the case of **CIT vs. M/s. Jagriti Aggarwal**

(Supra). Hon'ble High Court on similar set of facts and on similar, issue had observed and held as under:

10. Having heard learned counsel for the parties, we are of the opinion that Sub-Section (4) of Section 139 of the Act is, in fact, a proviso to Sub-Section (1) of Section 139 of the Act. Section 139 of the Act fixes the different dates for filing the returns for different assesses. In the case of assessee as the respondent, it is 31st day of July of the Assessment Year in terms of clause (c) of the Explanation 2 to Sub-Section 1 of Section 139 of the Act, whereas Sub-Section (4) of Section 139 provides for extension in period of due date in certain circumstances. It reads as under:

"(4) Any person who has not furnished a return within the time allowed to him under Sub-Section(1), or within the time allowed under a notice issued under Sub-Section (1) of Section 142, may furnish the return for any previous year at any time before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment whichever is earlier, Provided that where the return relates to a previous year relevant to the assessment year commencing on the 1st day of April 1988, or any earlier assessment year, the reference to one year

aforesaid shall be construed as a reference to two years from the end of the relevant assessment year."

11. *A reading of the aforesaid Sub-Section would show that if a person has not furnished the return of the previous year within the time allowed under Sub-Section (1) Le before 31st day of July of the Assessment Year, the assessee can file return before the expiry of one year from the end of the relevant Assessment Year.*

12. *The sale of the asset having been taken place on 13.1.2006, falling in the previous year 2006-2007, the return could be filed before the end of relevant assessment year 2007-2008 i.e. 31.3.2007 Thus, Sub-Section (4) of Section 139 provides extended period of limitation as an exception to Sub-Section (1) of Section 139 of the Act. Sub-Section (4) is in relation to the time allowed to an assessee under Sub-Section (1) to file return. Therefore, such provision is not an independent provision, but relates to time contemplated under Sub-Section (1) of Section 139. Therefore, such Sub-Section (4) has to be read along with Sub-Section (1). Similar is the view taken by the Division Bench of Karnataka and Gauhati High Courts in Fathima Bai's case (supra) and Rajesh Kumar Jalan's case (supra) respectively.*

13. *In view of the above, we find that due date for furnishing the return of income as per Section 139(1) of the Act is subject to the extended period provided under Sub-Section (4) of Section 139 of the Act.*

14. *Consequently, the question of law is answered against the Revenue and in favour of the assessed Thus, the present appeal is dismissed.*

10. Similarly, Hon'ble Madras High Court in the case of **Venkata Dilip Kumar vs. CIT (Supra)**, held and observed that:

- Section 54 deals with profit on sale of property used for residence. It contemplates that 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' 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 the capital gain shall be dealt with in accordance with the provisions made under section 54(1)(i)(ii) instead of being

charged to income tax as income of the previous year in which the transfer took place. In other words, to put it precisely, the capital gain so landed in the hands of the assessee, instead of being dealt with as income, will be dealt with by giving deduction to such capital gain, provided the assessee has satisfied the requirement contemplated under the above said provision. For seeking benefit of deduction under section 54, the assessee should have purchased one residential house either one year before the transfer or two years after the date of such transfer or constructed a residential house within a period of three years after the date of such transfer. Therefore, it is evident that the intention of the legislature for granting deduction under section 54 is that the assessee should be given the benefit of not taxing the capital gain so received by treating it as income, if he has purchased the house one year before or two years later or constructed the same within three years, from the date of transfer. Thus, this compliance is to be treated and construed as substantial compliance to consider the claim of the benefit under section 54. Thus, it is clear that meeting out the expenses towards the cost of construction of the house

within a period of three years entitles an assessee for claiming deduction under section 54.

- No doubt, section 54 (2) contemplates that if the amount of the capital gain is not appropriated by the assessee towards purchase of new assets within one year before the date on which the transfer of original asset took place or which is not utilised by him for the purchase of new asset before the date of furnishing the return of income under section 139, he has to deposit the said sum in an account in any such bank and utilised in accordance with any scheme which the Central Government may, by notification frame in that behalf. In other words, if the assessee has not utilised the amount of the capital gain either in full or part, such unutilised amount should be deposited in a capital gain account to get the benefit of deduction in the succeeding assessment years.
- In instant case, the only objection raised by the revenue is that the disputed sum has not been deposited in the capital gain account. At the same time, it is not in dispute that the petitioner/assessee has deposited Rs. 1.50 crores in the capital gain deposit account and the deduction was granted to the said

sum under section 54. The dispute is only with regard to the balance sum spent on additional construction cost, which to the revenue, is not entitled for deduction under section 54, since it was not deposited in capital gain account as required under section 54(2).

- It is viewed that the contention of the revenue to deny the benefit of deduction to the petitioner/assessee cannot be justified for the following reasons:
- Section 54(2) cannot be read in isolation and on the other hand, application of section 54(2) should take place only when the assessee failed to satisfy the requirement under section 54(1). While the compliance of requirement under section 54(1) is mandatory and if complied, has to be construed as substantial compliance to grant the benefit of deduction, the compliance of requirement under section 54(2) could be treated only as in nature. If the assessee with the material details and particulars satisfies that the amount for which deduction is sought for under section 54 is utilised either for purchasing or constructing the residential house in India within the time prescribed under section 54(1), the deduction is bound to be

granted without reference to section 54(2), which compliance would come into operation only in the event of failure on the part of the assessee to comply with the requirement under section 54(1). Mere non compliance of a procedural requirement under section 54(2) itself cannot stand in the way of the assessee in getting the benefit under section 54, if he is, otherwise, in a position to satisfy that the mandatory requirement under section 54 (1) is fully complied with within the time limit prescribed therein.

11. Thus, respectfully following the aforesaid ratio and principle laid down by the Hon'ble High Courts, I hold that if the investment u/s 54 has been made within the time limit of date specified u/s. 139(4), exemption cannot be denied. Thus, the claim of exemption u/s. 54 is allowed to the Assessee.

12. **In the result of the Assessee is allowed.**

Orders pronounced in the open court on 28.11. 2022.

Sd/-
(Amit Shukla)
Judicial Member

मुंबई Mumbai;दिनांक Dated : 28.11.2022

Mrs. Urmila

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./ Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ **ITAT, Mumbai**

