IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "C" BENCH

Before: Shri T.R. Senthil Kumar, Judicial Member
And Shri Narendra Prasad Sinha, Accountant Member

ITA No. 324/Ahd/2020
Assessment Year 2013-14

Shri Jignesh Jaysukhlal Ghiya, E-301, Nilamber Bellissimo, Bhaili-Vasana Road, Vadodra-391410 **PAN: ACDPG8833E** **(Appellant)**	Vs	The DCIT, Circle-4(2), Vadodara **(Respondent)**

Assessee Represented: Shri Tushar Hemani, Sr. Adv. &
Shri Parimalsinh B. Parmar, A.R.
Revenue Represented: Shri Hishikes Hement Patki, Sr.D.R.

Date of hearing : 09-05-2024
Date of pronouncement : 07-08-2024

आदेश/ORDER

PER : T.R. SENTHIL KUMAR, JUDICIAL MEMBER:-

This appeal is filed by the Assessee as against appellate order dated 31.05.2018 passed by the Commissioner of Income Tax (Appeals)-4, Vadodara arising out of the assessment order passed under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') relating to the Assessment Year 2013-14.

2. The Registry has noted that there is a delay of 672 days in filing the above appeal by the assessee. The assessee filed a detailed Notarized Affidavit explaining the Ld. CIT(A) vide order dated 31-05-2018 partly allowed the appeal with a direction to recalculate exemption u/s. 54 of the Act. Hence no appeal was preferred by the assessee against the Ld. CIT(A)'s order. However the Ld. A.O. given effect to the Appellate order vide order dated 23-07-2018 but the same was served upon the assessee only on 19-03-2020 which was during the sudden outbreak of Covid-19 Pandemic period. However the assesse filed its appeal on 12-06-2020 thereby delay of 672 days and requested to condone the delay. The Ld. D.R. filed a report dated 17-04-2024 from the Assessing Officer, however confirms that the giving effect order though was passed on 23.07.2018, there is no proof of date of service of this order to the assessee. Since the assessee also confirms in his Affidavit, pursuant to the recovery action initiated by the Assessing Officer, he came to know about the giving effect order. Thus the explanation offered by the assessee is accepted and the delay of 672 days in filing the above appeal is hereby condoned.

3. The brief facts of the case is that the assessee is an individual and deriving income from Salary, House Property, Capital Gain and Other sources. For the Asst. Year 2013-14, assessee filed its belated Return of Income u/s. 139(1) on 26.03.2014 declaring total income of Rs.31,71,420/-. The return was taken up for scrutiny assessment and determining the total income as Rs.54,88,603/-. The Assessing Officer has made addition of Rs.23,17,183/- as Long Term Capital Gain. The assessee sold a residential house on

09.01.2013 for Rs.45,00,000/- and then purchased a unfinished flat for Rs.25,60,000/- on 17.02.2014 and the sale considerations were paid between 04.08.2011 to 08.12.2011 (much before the sale of the original property). The assessee also entered into a Construction Agreement on 25.02.2014 to complete the construction of unfinished flat for a total consideration of Rs.51,65,000/-. This consideration was paid during 08.12.2011 to 16.02.2014. It is thereafter the assessee filed his belated Return of Income u/s. 139(4) of the Act and claiming exemption u/s. 54 (restricted to Rs.23,17,183/-). The Assessing Officer denied the benefit of Section 54 as the assessee failed to deposit unutilized amount of capital gain in separate account and also not filed the Return of Income as prescribed u/s. 139(1) of the Act.

4. Aggrieved against the same, the assessee filed an appeal before Ld. CIT(A) who partly allowed the appeal and directing the Assessing Officer to recompute the deduction u/s. 54 by observing as follows:

> *".....From the documentary evidence, it transpires 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 appellant 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.*
>
> *In view of the above discussion, it is clear that whatever investment made by the appellant in construction of new property within the period stipulated u/s. 54F after the sale of existing property the assessee is entitled for deduction u/s. 54F of the Act. In other words, the investment in new property made by the assessee is not entitled for deduction u/s. 54F of the Act to the extent made before the sale of property. Only that portion*

of investment made in the new property in accordance with section 54F of the Act is entitled for deduction u/s. 54F of the Act. Accordingly, I direct the assessee to furnish the details of investment made in the construction of new residential building after the sale of existing property before the due date of filing of return of income u/s. 139(1) of the Act. The Assessing Officer shall consider that investment made by the assessee in the construction of new property after the sale of existing property in terms of section 54F of the Act. In the result, appeal of the assessee is partly allowed for statistical purposes.

4. In the result, the appeal of the assessee is allowed."

5. Aggrieved against the appellate order, assessee is in appeal before us raising the following Grounds of Appeal:

1.00 Order is Bad in Law.

1.01 On the facts and circumstances of your appellant's case and in law, the ld CIT(A)-4,Vadodara has erred in disposing the appeal in vague manner without appreciating the fact that investment in new property was made as per provisions of section 54F of the Act, further erred in making contrary/confusing statements with respect to allowability of exemption directing Id AO to allow deduction in vague manner.

1.2. Your appellant prays that the Order be treated as Bad in Law.

2.00 Denial of exemption u/s 54F of the Income Tax Act, 1961.

2.01 On the facts and circumstances of your appellant's case and in law, the ld CIT (A) 4, Vadodara has grievously erred in confirming addition of Rs.23,17,183/- on account of denying the exemption claimed u/s 54F of the Act without considering the legislative intent and spirit of law with respect to allowability of exemption u/s 54F of the Act. While doing so, the ld CIT (A) erred in not considering following lapses as bonafide in nature:

> *Not parking money in designated bank account i.e. Capital Gain Saving Scheme Account and utilizing the same for purchase of new property.*
>
> *Filing return of income belatedly, not appreciating that before filing return of income, money was utilized for appropriate purpose.*

2.02 Your appellant therefore prays Your Honor to hold so now and direct the ld. AO to allow exemption.

6. Ld. Senior Counsel Shri Tushar Hemani appearing for the assessee submitted that construction of the new flat have been completed within three years (25.02.2014) from the date of transfer of original asset (09.01.2013). Thus assessee is eligible for exemption u/s. 54 even in respect of investment made prior to the date of transfer of original asset. Thus the date of commencement of construction his irrelevant for the purpose of claim of exemption u/s. 54 of the Act, so long as construction is completed within three years from the date of "transfer of original asset". Further the assessee is eligible for exemption u/s. 54 of the Act even in respect of amount of investment in construction made prior to the date of "transfer of original asset" and placed reliance on the following decisions:

- ➤ Bhailalbhai N. Patel vs. DCITITA 37/Ahd/2014;
- ➤ACIT vs. Subhash S. Bhavnani - (2012) 23 taxmann.com 94 (Ahd);
- ➤ Kapil Kumar Agarwal vs. DCIT-(2019) 178 ITD 255 (Del);
- ➤CIT vs. J. R. Subramanya Bhat (1987) 165 ITR 571 (Karnataka);
- ➤CIT vs. H. K. Kapoor-(1998) 234 ITR 753 (Allahabad);
- ➤CIT vs. Bharti Mishra-(2014) 41 taxmann.com 50 (Del);

6.1. Accordingly, Ld. Senior Counsel submitted that the Ld. CIT(A) was not justified in restricting the claim of exemption u/s. 54 of the Act to the extent of investment made after date of transfer of original asset. Since the overall investment of Rs.77,25,000/- namely cost of the Flat Rs.25,60,000/- + construction value Rs.51,65,000/- which is much higher than the Long Term Capital Gain on transfer of original asset, the entire Long Term Capital Gain will be exempt as per Section 54 of the Act, even in a case

where the return is filed belatedly but well within the due date prescribed u/s. 139(4) of the Act.

7. Per contra, Ld. D.R. appearing for the Revenue supported the orders passed by the Lower Authorities and requested to uphold the same.

8. We have given our thoughtful consideration and perused the materials available on record. It is undisputed fact that the assessee sold his residential house property for a consideration of Rs.45,00,000/- on 09.01.2013 which has resulted in Long Term Capital Gain of Rs.23,17,183/- after applying cost of indexation. Similarly undisputed fact is the assessee purchased new uncompleted flat on 17.02.2014 for a sale consideration of Rs.25,60,000/- and entered into a Construction Agreement for Rs.51,65,000/- on 25.02.2014 and the construction cost were paid from 08.12.2011 to 06.02.2014 and the assessee filed its belated Return of Income u/s. 139(4) on 26.03.2014 claiming exempt LTCG u/s. 54 of the Act.

8.1. To appreciate the facts better, the provisions of section 54 of the Act is reproduced as under:

> *" If 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, a residential house 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;"*

Also, section 54 provides a recourse to the assessee for not purchasing a residential house within the above time frame which says that –

> *"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 utilized 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 in an account in any such bank or institution as may be specified in, and utilized in accordance with, any scheme which the Central Government may, by notification in the Official Gazette, frame in this behalf".*

8.2. We found 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, whereas Provisions of section 54 of the Act contemplates that deduction u/s 54 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 Flat and it is not mandatory that only the sale consideration of Flat sold is to be utilized for purchasing or constructing a new residential house. In the present case the

assessee has utilized other funds (apart from sale consideration) for constructing new residential house and for this reason only he cannot be denied deduction u/s 54 of the Act.

8.3. 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.

8.4. Next question arise whether the assessee is entitled for claiming exemption u/s. 54 where the return is filed belatedly u/s. 139(4) of the Act. This issue is also considered by the Co-ordinate Bench of this Tribunal in the case of Manilal Dasbhai Makwana-Vs-ITO reported in (2018) 96 Taxmann.com 219 wherein held as follows:

> *10. We have carefully considered the submissions made on behalf of the Revenue and also perused the assessment order as well as the first appellate order of the CIT (A). The assessee in the present appeal has controverted the denial of deduction claimed under 5.548 towards capital gain arising sale of agricultural land. It is the case of the assessee that it has purchased new asset (agricultural land) on 06.02.2013 which falls within the extended due date for filing the return of income under s.139(4) of the Act. The assessee has filed its return of income on 24.02.2014 (i.e. after investment in new asset) under section139(4) of the Act. It is thus the claim of the assessee before the lower authorities that the assessee complies with the condition placed under section 54B(2) of the Act for the purposes of eligibility of deduction under section 54B(1) of the Act. It is apparently the case of the assessee that the embargo placed under s 54B(2) is that the un- utilized capital gain is required to be invested for acquisition of new asset within the time limit prescribed under s.139 of the Act and therefore the time limit cannot be restricted to what is referred to under section 139(1) of the Act but also extends to encompass extra time limit available under s.139(4) of the Act.*

11. We find ourselves in agreement with the case made out by the assessee before the lower authorities as noted above. Section 54B(2) of the Act enjoins that the capital gain is required to be utilized by the assessee towards purchase of new asset before furnishing of return of income under s.139 of the Act. Alternatively, in the event of non-utilization of capital gains towards purchase of new asset, the assessee is required to deposit specified bank account before the due date of filing of return of income under 139(1) of the Act. Thus, a distinction has been drawn in the Act in the two situations (i) where purchase of new asset is involved and (in where the assessee opts to deposit the unutilized am in the specified bank account. The assessee, in the instant case does not claim to have deposited the money in the specified bank accounts under capital gain claim at all Therefore, the claim of the same is required to be weighed on the second time of Section 54(2) of the Act whether the capital gain has been utilized for the purchase of new asset before the date of furnishing return of income under 139 of the Act. As noted, the legislature in its own wisdom has used the expression Section 139 for purchase etc. of new asset while on the other hand time limit under s. 139(1) has been specified for deposit in capital gain account scheme. When viewed equitably and liberally, the distinction between the two different forms of expression to time limit can yield different results. Section 139 encompasses both Section 139(1) and 139(4) of the Act. There is a normal presumption that words are used in Act of Parliament correctly and exactly and not loosely and in-exactly. In the present case, we are concerned with the utilization of capital gains by purchase of new asset for which the legislature has stopped short by making reference of Section 139 of the Act, in variation to Section 139(1) of the Act referred for deposit in capital gain scheme. This distinction assumes significance for interpretation of a beneficial provision. Thus, a beneficial view may be taken to say that Section 139 being omnibus and colorless would cover extended time limit provided under s. 139(4) of the Act. ***Thus, when an assessee furnishes return subsequent to due date of filing return under s.139(1) but within the extended time limit under s.139(4), the benefit of investment made up to the date of furnishing of return of income prior to filing return under s.139(4) cannot be denied on*** *such beneficial construction. Thus, on first principles, we hold that the capital gains utilized towards purchase of new asset before furnishing of return of income before either under s.139(1) or under s.139(4) of the Act will be deemed to be sufficient compliance of Section 54(2) of the Act."*

9. Further the Hon'ble High Court of Madras in the case of C. Aryama Sundaram Vs. CIT reported in (2018) 97 taxmann.com 74 wherein on an identical facts held as follows:

20. What has to be adjusted and/or set off against the capital gain is, the cost of the residential house that is purchased or constructed. Section 54(1)

of the said Act is specific and clear. It is the cost of the new residential house and not just the cost of construction of the new residential house, which is to be adjusted The cost of the new residential house would necessarily include the cost of the land, the cost of materials used in the construction, the cost of labour and any other cost relatable to the acquisition and/or construction of the residential house.

21. A reading of Section 54(1) makes it amply clear that capital gain is to be adjusted against the cost of new residential house. The condition precedent for such adjustment is that the new residential house should have been purchased within one year before or two years after the transfer of the residential house, which resulted in the capital gain or alternatively, a new residential house has been constructed in India, within three years from the date of the transfer, which resulted in the capital gain. The said section does not exclude the cost of land from the cost of residential house.

22. It is axiomatic that Section 54(1) of the said Act does not contemplate that the same money received from the sale of a residential house should be used in the acquisition of new residential house. Had it been the intention of the Legislature that the very same money that had been received as consideration for transfer of a residential house should be used for acquisition of the new asset, Section 54(1) would not have allowed adjustment and/or exemption in respect of property purchased one year prior to the transfer, which gave rise to the capital gain or may be in the alternative have expressly made the exemption in case of prior purchase, subject to purchase from any advance that might have been received for the transfer of the residential house which resulted in the capital gain.

23. At the cost of repetition, it reiterated that exemption of capital gain from being charged to income tax as income of the previous year is attracted when another residential house has been purchased within a period of one year before or two years after the date of transfer or has been constructed within a period of three years after the date of transfer of the residential house. It is not in dispute that the new residential house has been constructed within the time stipulated in Section 54(1) of the said Act. It is not a requisite of Section 54 that construction could not have commenced prior to the date of transfer of the asset resulting in capital gain. If the amount of capital gain is greater than the cost of the new house, the difference between the amount of capital gain and the cost of the new asset is to be charged under Section 45 as the income of the previous year. If the amount of capital gain is equal to or less than the cost of the new residential house, including the on which the residential house is constructed, the capital gain is not to be charged under Section 45 of the said Act

24. For the reasons discussed above, the appeal is allowed. The questions framed above are answered in favour of the appellant assessee and

against the respondent revenue. The first question is answered in the affirmative and the second question is answered in the negative. No costs.

9.1 Respectfully following the above judicial precedents, we are of the considered view, the assessee is eligible for deduction u/s. 54 of the Act and we hereby direct the Assessing Officer to grant deduction and delete the addition made by him. Thus the Ground of Appeal raised by the Assessee are allowed.

10. In the result, the appeal filed by the Assessee is allowed.

Order pronounced in the open court on 07 -08-2024

Sd/- **Sd/-**
(NARENDRA PRASAD SINHA) **(T.R. SENTHIL KUMAR)**
ACCOUNTANT MEMBER **True Copy** **JUDICIAL MEMBER**
Ahmedabad : Dated 07/08/2024

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद