* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
\+ **ITA No. 117/2014**

Reserved on: 18th July, 2014
% **Date of Decision: 12th August, 2014**

The Commissioner of Income Tax II ....Appellant
Through Mr. Sanjeev Sabharwal, Sr. Standing Counsel with Mr. Ruchir Bhatia, Adv.

Versus

Kuldeep Singh …Respondent
Through None

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J.

Commissioner of Income Tax Delhi II, in this appeal which pertains to assessment year 2006-07 submits that the assessee, an individual has been wrongly granted benefit of Section 54 of Income Tax Act, 1961 (Act, for short). The respondent assessee contrary to the statutory mandate, it is submitted had not purchased the second property within two years from the date of sale of the first property. The secondary issue raised pertains to whether Rs.5,00,000/- paid for cancellation of the earlier agreement for sale of the original property and Rs.2,50,000/- paid as brokerage, could be allowed to set off from the sale consideration received.

2. The assessee in his return filed on 8th January, 2007 h declared a taxable income of Rs.47,88,579/-, but as noticed above he had claimed benefit of Section 54 of the Act on sale consideration of Rs.2 crores declared as income from capital gains on the sale of house property bearing No. B-383, New Friends Colony, New Delhi vide sale deed dated 3rd June, 2005 from the purchaser Bansi Lal Gupta. Under Section 54 of the Act, exemption of Rs.37,86,273/- had been claimed, inter alia, on the ground that the said amount had been invested in purchase of a new residential property at Gurgaon. The assessee filed details before the Assessing Officer to establish that he had paid Rs.61,15,000/- upto 12th May, 2006 for purchase of property at Gurgaon along with details, date of payments etc.

3. The Assessing Officer referred to the copy of the flat buyers agreement dated 9th February, 2006 between the assessee and the builder and observed that the ownership in the new property would be conferred on the date of issuance of occupation certificate. Further, the expected date of completion was 36 months from the date of the agreement dated 9th February, 2006 i.e. 8th February, 2009. He held that the assessee was not entitled to benefit of Section 54 as he had not purchased the new property within a period of one year before the

sale of first property on 3rd June, 2005 or within two years from t date on which the transfer took place. The assessee had not constructed residential house within three years from 3rd June, 2005. Assessing Officer observed that legal ownership of the property never vested in the assessee within the aforesaid period and therefore, the purchase was not completed within two years which was the period stipulated and specified in Section 54 of the Act. He, accordingly, computed the long term capital gain, after granting benefit of indexation on cost of acquisition and cost of improvement, at Rs.45,36,273/-. While examining the question of capital gains, the Assessing Officer also disallowed the claim of the assessee to the extent of Rs.7,50,000/- as cost incurred for transfer.

4. On the second aspect, the finding of the tribunal is that the assessee had entered into an earlier agreement to sell for sale of the property at New Friends colony and had received Rs.10,00,000/- from one Ashok K. Singhal. However, this agreement was cancelled to enable the assessee to enter into the transaction resulting in capital gains. Rs.10,00,000/- was refunded to Mr. Ashok K. Singhal and Rs.5,00,000/- was paid as cancellation charges. Rs.2,50,000/- was paid to one Rajat Kapur who acted as a broker in the first deal. The

payment of Rs.2,50,000/- to Rajat Kapur as well as payment Rs.10,00,000/- and Rs.5,00,000/- were by cheque and this is undisputed. The assessee had also filed several documents to support and show that there was an earlier transaction with Ashok K. Singhal. He had also filed copy of the receipt for Rs.2,50,000/- executed by Rajat Kapoor indicating his PAN and other details.

5. In view of the aforesaid factual position, as discussed by the tribunal in paragraph 9 of their order, we do not think that the aforesaid payments can be challenged on the ground that they were not genuine or were not made. Finding of the tribunal are factual and cannot be categorized or treated as perverse. Similarly, we do not think that it can be said in the facts of the present case that these payments were not directly relatable to the transaction for sale dated 3rd June, 2005, which had resulted in income by way of capital gains. Finding of the tribunal in the said aspect is quite clear and on the basis of the said facts, the tribunal has rightly held that the aforesaid expenditure was incurred and was wholly connected with the sale transaction dated 3rd June, 2005. By cancelling earlier transaction and ensuring that the rights created by the earlier agreement to sell do not

obstruct the sale transaction, aforesaid payments of Rs.5,00,000/- Ashok Singhal and Rs.2,50,000/- to Rajat Kapur, have been made.

6. This brings us to the other question whether the assessee had "purchased" the second property and, therefore, payment made of Rs.37,86,273/- was entitled to exemption under Section 54 of the Act. Section 54 of the Act as applicable to assessment year 2006-07 reads as under:-

> "54. Profit on sale of property used for residence.--(1) Subject to the provisions of sub-section (2), where, in the case of an assessee being an individual or a Hindu undivided family 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" (hereafter in this section referred to as the original asset), 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, 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; or

(ii) if the amount of the capital gain is equal to or less than the cost of the new asset, the capital gain shall not be charged under section 45; 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 reduced by the amount of the capital gain.

Explanation.--Omitted by FA 87 wef 1-4-88.

(2) The amount of the capital gain which is not appropriated by the assessee towards the purchase of the new assets made within one year before the date on which the transfer of the original asset took place, or which is not utilised 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 such deposit being made in any case not later than the due date applicable in the case of the assessee for furnishing the return of income under sub-section (1) of section 139 in an account in any such bank or institution as may be specified in, and utilised in accordance with, any scheme which the Central Government may, by notification in the Official Gazette, frame in this behalf and such return shall be accompanied by proof of such deposit ; and, for the purposes of sub-section (1), the amount, if any, already utilised by the assessee for the purchase or construction of the new asset together with the amount so deposited shall be deemed to be the cost of the new asset:

Provided that if the amount deposited under this sub-section is not utilised wholly or partly for the purchase or construction of the new asset within the period specified in sub-section (1), then,--

(i) the amount not so utilised shall be charged under section 45 as the income of the previous year in

> which the period of three years from the date of the transfer of the original asset expires ; and
>
> (ii) theassessee shall be entitled to withdraw such amount in accordance with the scheme aforesaid.
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> Explanation.--Omitted by Finance Act, 1992, wef 1-4-1993."

7. It is accepted position and it is not disputed by the Revenue that Rs.37,86,273/- had been invested by the assessee for purchase of the property at Gurgaon. However, legal title in the said property was not passed or transferred to the assessee within a period of two years from the date of sale of the first property on 3rd June, 2005. The second property it is apparent was still under construction though the builder had entered into and executed the flat buyers agreement with the assessee dated 9th February, 2006. The said agreement mentions the apartment number and gives specific detail of the property. The payments were linked to stage of construction and that amount of Rs.2,90,46,250/- was payable within 27 months of booking i.e. on or before 12th February, 2008 and the total cost of flat/apartment was Rs. 3,13,09,375/-. Thus, the consideration being paid by the respondent assessee was nearly 9 times income by way of capital gains which was earned by the assessee.

8. The word 'purchase' can be given both restrictive and wic meaning. A restrictive meaning would mean transactions by which legal title is finally transferred, like execution of the sale deed or any other document of title. 'Purchase' can also refer to payment of consideration or part consideration along with transfer of possession under Section 53A of the Transfer of Property Act, 1882. Supreme Court way back in 1979 in ***CIT Andhra Pradesh vs. T.N. Aravinda Reddy*** (1979) 4 SCC 721, however, gave it a wider meaning and it was held that the payment made for execution of release deed by the brother thereby joint ownership became separate ownership for price paid would be covered by the word 'purchase'. It was observed that the word 'purchase' used in Section 54 of the Act should be interpreted pragmatically in a practical manner and legalism shall not be allowed to play and create confusion or linguistic distortion. The argument that 'purchase' primarily meant acquisition for money paid and not adjustment, was rejected observing that it need not be restricted to conveyance of land for a price consisting wholly or partly of money's worth. The word 'purchase', it was observed was of a plural semantic shades and would include buying for a price or equivalent of price by payment of kind or adjustment of old debt or other monetary considerations. It was observed that if you sell a house and make profit,

pay Caesar (State) but if you buy a house or build another and there satisfy the conditions of Section 54, you were exempt. The purpose was plain; the symmetry was simple; the language was plain.

9. Recently Supreme Court in Civil Appeal Nos. 5899-5900/2014 titled ***Sh. Sanjeev Lal Etc.Etc. vs. CIT, Chandigarh & Anr.,*** decided on 01/07/2014, 2014 (8) SCALE 432 again examined Section 54 in a case where the assessee had entered into an agreement to sell a house to a third party on 27th December, 2002 and had received Rs.15 lacs by way of earnest money and subsequently received the balance sale consideration of Rs.1.17 crores (total being Rs.1.32 crores) when the sale deed was executed on 24th September, 2004. In the meanwhile, the assessee had purchased another house on 30th April, 2003. Benefit under Section 54 was denied by the High Court observing that the new house had been purchased prior to execution of the sale and not within one year prior to sale of original asset i.e. new house has been purchased on 30th April, 2003 whereas the earlier asset was sold only on 24th September, 2004. The Supreme Court allowing the appeal noticed that the agreement to sell was executed on 27th December, 2002 but the sale deed could not be executed because of inter-se litigation between the legal heirs, as one of them had challenged the will under which the assessee had inherited the property. The agreement to sell, it was held

had given some rights to the vendor and reduced or extinguished rigl of the assessee. This, it was observed was sufficient for the purpose of Section 2(47), which defines the term transfer in relation to a capital asset. In the light of the factual matrix, it was observed that the intention behind Section 54 was to give relief to a person who had transferred his residential house and had purchased another residential house within two years of transfer or had purchased a residential house one year before transfer. It was only the excess amount not used for making purchase or construction of the property within the stipulated period, which was taxable as long term capital gain while on the amount spent, relief should be granted. Principle of purposive interpretation should be applied to subserve the object and more particularly when one was concerned with exemption from payment of tax. The assessee, therefore, succeeded. The observations made in the said decision are also relevant on the question whether the payments made by the assessee to the person with whom he had entered into an earlier agreement to sell should be allowed to be set off as expenses incurred in relation to the sale deed which was executed.

10. More direct are the two decisions of Madhya Pradesh High Court in ***Shashi Verma (Smt.) vs. CIT*** [1997] 224 ITR 106 and Calcutta High Court in ***CIT vs. Smt. Bharati C. Kothari*** (2000) 244 ITR 352. In

Shashi Verma (supra), the assessee had invested the sale considerati for purchase of a flat from Delhi Development Authority and had paid part installments. Reversing the decision of the Tribunal and allowing the appeal of the assessee, the High Court observed that the Tribunal had adopted a pedantic approach without noticing the fact that the capital gain was Rs.31,980/- whereas the installments paid were Rs.71,256/-, i.e. much more than the amount of capital gain. Reference was made to Circular No. 471 dated 15th October, 1986 [1986] 162 ITR (Stat.) 41. It was observed that Section 54 of the Act says that assessee could have constructed the house and not that the construction should have necessarily been completed. Noticing that it was not easy to construct a house within the time limit of three years and under the Government schemes, construction takes years. When substantial investment was made in the construction and it should be deemed that sufficient steps had been taken and it satisfied requirement of Section 54.

11. What has been stated in the judgment of the Madhya Pradesh High Court in 1997, in practical terms and in reality still holds good. This is a matter of common knowledge that flats or apartments being constructed by builders take time. The Government Housing Boards also take time and seldom adhere to the promised date. Similar view has

been taken in ***Bharati C. Kothari (supra)*** wherein reference was ma to the decision of Andhra Pradesh High Court in ***CIT vs. Shahzada Begum (Mrs.)*** [1988] 173 ITR 397 and it was observed that assessee had entered into an agreement within two years for purchase of a flat which was under construction. Payment for the said flat was made within three years from the date of sale of the first property. No doubt the assessee was not constructing the new asset herself but she had purchased the flat. Reference was made to the decision of the Surpeme Court in ***CIT vs. J.H. Gotla*** [1985] 156 ITR 323 (SC), wherein it has been observed:

> "Where the plain literal interpretation of a statutory provision produces a manifestly unjust result which could never have been intended by the Legislature, the court might modify the language used by the Legislature so as to achieve the intention of the Legislature and produce a rational construction. The task of interpretation of a statutory provision is an attempt to discover the intention of the Legislature from the language used. It is necessary to remember that language used is at best an imperfect instrument for the expression of human intention. It is well to remember the warning administered by Judge Learned Hand that one should not make a fortress out of the dictionary but remember that statutes always have some purpose or object to accomplish and sympathetic and imaginative discovery is the surest guide to their meeting."

12. Moreover, in ***Bharati C. Kothari's Case (supra)*** it was stated as under:-

> "The purpose behind the exemption under section 54(1) is that if any assessee sells his residential house and purchases a new house against those sale considerations that capital gains tax arising out of the sale of the earlier house should not be taxed. Whether the assessee himself constructs the house or he gets it constructed by a contractor or a third party that does not make any difference. The basic requirement for the purpose of relief under section 54(1), is that the assessee should invest the sale proceeds in the construction of a residential house, which has been constructed for the assessee. Keeping in view the above observations and reasons given by the Tribunal, no case is made out for interference."

It was observed that the basic purpose behind Section 54 is to ensure that the assessee is not taxed on the capital gains, if he replaces his house with another house and spends money earned on the capital gains within the stipulated period.

13. The view we have taken gets support from sub-section (2) to Section 54. The aforesaid sub-section requires the assessee to deposit unspent amount not utilized by the assessee for purchase or construction of a new asset before the date of furnishing of return, in a specified account. It further states that the amount, if already utilized for purchase or construction of the new asset with the amount so deposited will be deemed to be cost of a new asset subject to the proviso. The word 'purchase' is used in sub-section (2) and indicates that the said word is not restricted or confined to registered

sale deed or even possession but has a wider connotation. Tl proviso supports the aforesaid interpretation and stipulates that the amount deposited but not utilized wholly or partly for purchase or construction of new asset within the specified period will be charged to tax under Section 45 in the previous year in which the period of three years from the date of transfer of original asset expired. The period of three years is stipulated as this is the longer period specified in the sub-section (1) to Section 54. It is only the balance amount which is not utilized which is to be brought and charged to tax. The entire amount of sale consideration or the capital gains is not to be brought to tax, but the unspent amount/figure is taxed.

14. In view of the aforesaid position, we do not think that any substantial question of law arises and thus the present appeal is dismissed. No costs.

(SANJIV KHANNA)
JUDGE

(V. KAMESWAR RAO)
JUDGE

August 12th, 2014
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