

Sec. 54 relief allowable if new house was purchased within one year prior to date of agreement to sell: ITAT

Summary – The Kolkata ITAT in a recent case of Gautam Jhunjunwala, (the Assessee) held that where assessee had purchased a new residential property within one year prior to date of execution of agreement to sell residential property owned by him, assessee's claim for deduction under section 54 was to be allowed

Facts

- The assessee entered into an agreement to sell a flat on 16-9-2011 and out of sale consideration of Rs. 30 lakhs, received Rs. 1 lakh by way of advance money. The sale deed of said flat was registered on 27-12-2011. The assessee had purchased a new residential flat on 4-10-2010.
- The assessee's claim for deduction under section 54 was denied by Assessing Officer on the ground that assessee did not purchase the residential flat within one year of sale of old asset. For said purpose, Assessing officer had taken date of registration of property sold as the date of transfer, *i.e.*, 27-12-2011.
- The Commissioner (Appeals) confirmed the order passed by Assessing Officer.
- On second appeal:

Held

- The assessee's claim for exemption of his capital gain as per section 54(1) has been denied by the Assessing Officer on the ground that the assessee did not purchase the residential flat within one year of sale of the old asset. In the instant case, the old house has been transferred by the assessee on 27-12-2011 whereas they had purchased new flat on 4-10-2010. Thus the new asset was purchased more than one year prior to the date on which the transaction in respect of the old residential house had been effected. For the said reason the Assessing Officer did not grant benefit under section 54. On appeal, the Commissioner (Appeals) confirmed the order of the Assessing Officer. The assessee contended that as per the provision of section 2(47) which defines the term 'transaction' which has been given an inclusive definition and as per the said definition, whenever there is an extinction of any right in respect of a capital asset such an extinction would mean transfer of the property. It was, therefore, submitted that by executing the agreement to sale, a right has been created in favour of the buyer of the property and certain right in respect of the old residential house which the assessee enjoyed had been extinguished and, therefore, the agreement dated 16-9-2011 ought to have been considered as the date of transfer and not the registration date 27-12-2011 as taken by the Assessing Officer.
- In order to avail the benefit of section 54, one must purchase a residential house/new asset within one year before or two years after the date on which transfer of the old residential house in respect

of which the long term capital gain had arisen. In the instant case, the residential house was transferred by the assessee *vide* sale deed registered on 27-12-2011. The sale deed has been executed in pursuance of an agreement to sell which had been executed on 16-9-2011 and out of the total sale consideration of Rs. 30 lakhs, Rs. 1 lakh has been received by the assessee by way of advance/earnest money (cheque dated 16-9-2011 though encashed on 21-11-2011). So when the agreement to sale has been executed a new residential flat had been purchased by the assessee on 4-10-2010 within one year from the date of agreement to sell the old asset. As per section 2(47) which defines the word 'transfer' in relation to a capital asset it can be said that if a right in the property is extinguished by an agreement to sell, the capital asset can be deemed to have been transferred.

- So, in the light of the definition of 'transfer' as defined under section 2(47) it is clear that when any right in respect of any capital assets is extinguished and that right is transferred to someone, it would amount to transfer of a capital asset. In the light of the aforesaid definition and taking into consideration the facts of the present case, it is noted that the assessee executed an agreement to sell for Rs. 30 lakhs consideration in respect of its capital asset on 16-9-2011 for transferring the old residential house/original asset in question and a sum of Rs. 1 lakh in cheque was received as advance consideration though encashed only on 21-11-2011. The said cheque has not bounced/dishonoured. So, in the light of the aforesaid facts and in view of the definition of the term 'transfer' it can be concluded that some right in respect of capital asset (old asset) in question had been transferred in favour of the vendee and, therefore, some right which the assessee had in respect of the capital asset in question had been extinguished because after execution of the agreement to sell, it would not open to the assessee to sell the property to someone else in accordance with law. As observed by the Supreme Court a right in personam had been created in favour of the vendee in whose favour the agreement to sale had been executed and who had also paid Rs. 1 lakh by way of advance/earnest money. It is not the case of the Assessing Officer/Commissioner (Appeals) that the vendee as per agreement to sale is not the vendee when the registration of conveyance deed was executed on 26-12-2011 and, therefore, as per the ratio laid by the Supreme Court in *Sanjeev Lal v. CIT* [2014] 46 taxmann.com 300/225 Taxman 239/365 ITR 389, there is force in the claim made by the assessee to claim exemption under section 54 and it is held that once an agreement to sale is executed in favour of vendee, the said vendee got a right to get the property transferred in his favour by filing a suit under Specific Performance Act and, therefore, some right in respect of the said property (old residential property) belonging to the assessee had extinguished and some rights had been created in favour of the vendee/transferee when the agreement to sale has been executed. Thus, a right in respect of the capital asset (old residential property in question) had been transferred in favour of the vendee/transferee on 16-9-2011 and, therefore, since purchase of the new property on 4-10-2010 which fact has been disputed by the Assessing Officer/Commissioner (Appeals) the purchase of the property is well within one year from the date of transfer as per section 2(47), therefore, the appeal of the assessee is allowed.

- For the sake of completeness, it is noted that the agreement to sell is an unregistered documents and a question may arise as to whether the said unregistered document is admissible in evidence in a suit for specific performance in the light of the provision of section 17(1)(a) of the Registration Act, 1908. An unregistered agreement to sell cannot be looked into for seeking benefit of part performance under section 53A of Transfer of property Act, 1882 in view of amendment of section 53A by Act 48 of 2001 with effect from 24-9-2001, however, an unregistered agreement to sell can always be a basis for a suit for specific performance in view of section 49 of Registration Act.
- In the light of the discussion, it is held that though the agreement to sell is not registered, the vendee can seek decree of specific performance on the basis of unregistered agreement to sell in accordance to law.
- So, in the facts and circumstances of the case, the appeal of the assessee is allowed and Assessing Officer is directed to grant exemption under section 54.