JMVD LEGAL UPDATES

ON *"WHETHER THE ALLOTMENT LETTER IS ADEQUATE ENOUGH FOR GRANT OF EXEMPTION U/S 54F OF THE INCOME TAX ACT, 1961"*

APRIL 11, 2020

Author: Rohit Dubey, Senior Associate (Taxation), Indore Office.
https://in.linkedin.com/in/rohit-dubey-970b38146

Section 54 F of the Income Tax Act, 1961 provides for exemption from tax on Capital gain on transfer of certain capital assets, in case of investment in residential house. While Section 54 grants relief from tax on capital gains in respect of a residential house, this section grants relief from tax on capital gains in respect of any long-term capital asset other than a residential house. Identical issues have arisen under this section and u/s 54 E to 54 ED, such as the year of applicability of the drawback provision if the money is not applied to the purchase of the new asset, eligibility of exemption for a new asset purchased in the name of another and so on. But apart from these identical issues there also exists the issue that whether the relief u/s 54 F is available when only the letter of allotment (for the new residential house) has been obtained within the stipulated time period, and the possession and registration of the said house is obtained after the expiry of stipulated time period. Hence, this research note puts forth a synopsis of various judicial decisions on the captioned issue.

The moot question herein for consideration is, ***whether for the purpose of claiming exemption, registration and/or possession of the concerned residential property is required (irrespective of the fact that amount required to be invested has been actually invested on or before specified date and registry done on the basis of PDC, which are cleared post specified date)****, or* ***it is required to make investment of the requisite amount by way acquiring the right in the property concerned on before specified date (irrespective of the fact whether registration and /or possession of the concerned property is done or not)?***

The essence of Section 54 F that revolves around the moot question is reproduced hereunder:

> *"(1) Subject to the provisions of sub-section (4), where, in the case of an assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of any long-term capital asset, not being a residential house (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, one residential house in India…"*

Section 54 F was brought into action through the Finance Act, 1982 and since then this issue had been confronting between the assessee and revenue. The word "purchase" being central to the relief under this section, has not been given any definition under the Act and has been left for wide connotation by the revenue and the various appellate authorities. An attempt was made by the CBDT to clarify this issue, through its Circulars No. 471 dated 15.10.1986 & No. 672 dated 16.12.1993, wherein the following clarifications were made:

A. [Circular No. 471/1986]:

…2. The Board had occasion to examine as to whether the acquisition of a flat by an allottee under the Self-Financing Scheme (SFS) of the D.D.A. amounts to purchase or is construction by the D.D.A. on behalf of the allottee. Under the SFS of the D.D.A., the allotment letter is issued on payment of the first instalment of the cost of construction. The allotment is final unless it is cancelled or the allottee withdraws from the scheme. The allotment is cancelled only under exceptional circumstances. The allottee gets title to the property on the issuance of the allotment letter and the payment of instalments is only a follow-up action and taking the delivery of possession is only a formality. If there is a failure on the part of the D.D.A. to deliver the possession of the flat after completing the construction, the remedy for the allottee is to file a suit for recovery of possession.

3. The Board have been advised that under the above circumstances, the inference that can be drawn is that the, D.D.A. takes up the construction work on behalf of the allottee and that the transaction involved is not a sale. Under the scheme the tentative cost of construction is already determined and the D.D.A. facilitates the payment of the cost of construction in instalments subject to the condition that the allottee has to bear the increase, if any, in the cost of construction. Therefore, for the purpose of capital gains tax the cost of the new asset is the tentative cost of construction and the fact that the amount was allowed to be paid in instalments does not affect the legal position stated above. In view of these facts, it has been decided that cases of allotment of flats under the Self-Financing Scheme of the D.D.A. shall be treated as cases of construction for the purpose of capital gains.

B. [Circular No. 672/1993]:

The Board has since received representations that even in respect of allotment of flats/houses by co-operative societies and other institutions, whose schemes of

allotment and construction are similar to those of Delhi Development Authority, a similar view should be taken.

2. The Board has considered the matter and has decided that if the terms of the schemes of allotment and construction of flats/houses by the co-operative societies or other institutions are similar to those mentioned in para 2 of Board's Circular No. 471, dated 15-10-1986 (Sl. No. 428), such cases may also be treated as cases of construction for the purposes of sections 54 and 54F of the Income-tax Act.

It is pertinent to note here that even when a valid attempt has been made by CBDT to clarify this issue, both the above said circulars lack the element of generality. Even when the second Circular had an intention to enlarge the applicability of clarification it enlarged it merely to the co-operative societies and other institutions "similar to", whether this excludes the schemes brought by private entities?

In this respect, we need to now look into the various judicial pronouncements on the captioned issue. Some of them are as follows:

i. <u>Vinod Kumar Jain v. Commissioner of Income Tax, Ludhiana and others, 2010 (9) TMI 850 [Punjab and Haryana High Court]:</u>

A flat was allotted to the appellant on 07.06.1986, the letter of allotment was conveyed on 30.06.1986, and the assessee therein paid the first installment on 04.07.1986. The department was of the view that merely a receipt of letter of allotment on payment of first installment, doesn't qualifies for it to be called a "purchase". The P & B High Court was of view that the assessee was conferred with a right to hold a flat on payment of first installment, which was later identified and the possession was delivered on later date, The mere fact that possession was delivered later, doesn't detract from the fact that the allottee was conferred a right to hold property on issuance of an allotment letter. It also observed that the payment of balance installments, identification of a particular flat and

delivery of possession are consequential acts that relate back to and arise from the rights conferred by the allotment letter.

ii. ACIT 25(2) v. Shri Keyur Hemant Shah, ITA No. 6710/Mum/2017 [ITAT Mumbai]:

An identical circumstance was adjudicated by ITAT by holding that, "*...5.3 The only surviving issue is assessee's eligibility to claim deduction u/s 54F. The undisputed fact, in that respect, are that the assessee has made the payment within stipulated time as envisaged by Section 54F and the allotment in a specific property has been obtained by the assessee on 14/04/2012 which is evident from allotment letter as placed on page nos. 186 to 190 of the paper-book. Therefore, since all the conditions of Section 54F was fulfilled by the assessee, there could be no occasion to deny the benefit of deduction to the assessee. Therefore, no infirmity could be found in the impugned order."*

iii. Praveen Gupta v. Assistant Commissioner of Income Tax, (2012) 20 Taxmann 308 [ITAT Delhi]:

Another relevant finding is in the following manner, *"29....it is not necessary that to constitute a capital asset the assessee must be the owner by way of a conveyance deed in respect of that asset for the purpose of computing capital gain. The assessee had acquired a right to get a particular flat from the builder and that right of the assessee itself is a capital asset. The word 'held' used in Section 2 (14) as well as Explanation to Section 48 clearly depicts that assessee must have some right in the capital asset which is subject to transfer. By making the payment to the builder and having received allotment letter in lieu thereof, the assessee will be holding capital asset."*

iv. CIT v. Sardarmal Kothari, 302 ITR 286 [Madras High Court] & CIT v. Sambandan Udaykumar, 345 ITR 389 [Karnataka High Court]:

It was held that, if the assessee has invested money in the house at the time of its construction within the time limit, the exemption cannot be denied on the ground that the construction has not been completed.

v. CIT v. Ajit Singh Khajanchi, 297 ITR 95 [Madhya Pradesh High Court]:

It was held that, *"for the purpose of claiming exemption u/s 54 F, the registration of the purchase of property is not compulsory, as this section speaks of purchase or construction and not registration."*

vi. Madhu Kaul v. CIT, ITA 89/1999 [P & B High Court]:

The Circular No. 471/1986 & the findings in Vinod Kumar Jain v. Commissioner of Income Tax, Ludhiana and others, were followed and it was held that, *"the allottee gets title to the property on the issuance of an allotment letter and the payment of instalments is only a consequential action upon which the delivery of possession flows – the provisions of Sections 2(14), 2(29A) and 2(42A) encompasses within its ambit those cases of capital asset which are held by an assessee."*

vii. ACIT 2 (1), Indore v. Shri Sanjay Kumath, ITA No. 448/Ind/2013 [ITAT Indore]:

It was held that, *"Board vide Circular No. 672 after referring Circular No. 471 extended the facility of exemption u/s 54 & 54F in respect of allotment of flat/house. Thus, as per the CBDT Circular also, the assessee acquired the rights/title in the flat by way of allotment letter on 22.1.2005. This allotment letter was duly confirmed by the assessee by making various payment as narrated above. Out of total payment of ₹ 33.15 lakhs, the assessee made payment of Rs.6.23 lakhs in the month of allotment itself i.e. January, 2005. Subsequent payment was also made as per the terms agreed with the builder. Only*

after receipt of entire amount, the builder has executed agreement with the assessee on 27.2.2009. The assessee has sold the said flat on 05.03.2009. Since the assessee has acquired all the rights in the flat on 22.01.2005, the period of holding is to be computed with respect to the date of allotment i.e. 22.01.2005. Taking the date of sale as 05.03.2009, the holding period of flat with the assessee was more than 36 months, therefore, there is no infirmity in the order of CIT(A) for allowing assessee's claim for exemption u/s 54/54F, by treating the capital assets so sold as long term capital assets."

viii. CIT v. Mrs. Hilla J.B. Wadia, [1993] 69 Taxmann 114 (Bom.) [Bombay High Court]:

It was observed that the board had stated in Circular No. 471 that when an allotment letter is issued to an allottee under this scheme on payment of the first installment of the cost of construction, the allotment is final unless it is cancelled. The allottee, thereupon, gets title to the property on the issuance of the allotment letter and the payment of installments is only a follow up action and taking delivery of possession is only a formality. The Board has directed that such an allotment of flat under this scheme should be treated as cost of construction for the purpose of capital gains. Further this view was also followed by the M.P. High Court in Smt. Shashi Varma v. CIT, (1997) 224 ITR 106 (M.P.).

ix. PCIT v. Vembu Vaidyanathan, ITA No. 1459/2016 [Bombay High Court]:

It was held that, *"We notice that the CBDT in its circular No. 471 dated 15/10/1986 had clarified this position by holding that when an assessee purchases a flat to be constructed by Delhi Development Authority ("D.D.A." for short) for which allotment would be relevant date for the purpose of capital gain tax as a date of acquisition. It was noted that such allotment is final unless it is cancelled or the allottee withdraw from the scheme and such allotment would be cancelled only under exceptional circumstances.*

In view of the judicial pronouncements and relevant provision mentioned above, it is clearly inferable that for the purpose of claiming exemption u/s 54F it is required to make investment of the requisite amount by way acquiring the right in the property concerned on or before the specified date (irrespective of the fact whether registration and /or possession of the concerned property has been done or not) and it doesn't requires registration and actual taking of possession of the new residential house by the assessee per se, but rather acquiring (purchase) of the ownership rights in the said property and making the investment of the amount would suffice. Accordingly, receipt of the letter of allotment and making of the investment of the requisite amount is sufficient enough for the exemption u/s 54F of the Act. The CBDT circulars (471/1986 & 672/1993) though floated with specific applicability, had been followed by the appellate authorities in general parlance (w.r.t. the exemption u/s 54F when letter of allotment has been received within stipulated time period) across the country.

JMVD® LEGAL

Corporate, Tax, Intellectual Property & Business Advisory

Law Firm

Our Offices

Principal Office
302, Man Heritage, Opp. High Court, South Tukoganj, Indore-452001, Madhya Pradesh, India

Mumbai Office
D-401, Surana Regency Annexe, Near Baneshwar Temple, Worli, Mumbai-400030, Maharashtra, India

Indore- I Office
402, A D Imperial, Opp. High Court, South Tukoganj, Indore-452001, Madhya Pradesh, India

Indore- II Office
11-d, Slice-4, Scheme-78, Vijaynagar, Indore-452010, Madhya Pradesh, India

Phone: +91 731 4947938; Email: tax@jmvdlegal.com, rohitdubey@jmvdlegal.com;
Website: www.jmvdlegal.com