

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

ITA No. 566 of 2005

Date of decision: 04.05.2012

Ashok Syal

-----Appellant

Vs.

**The Commissioner of Income Tax, Central Circle, Jalandhar and
another**

----Respondents

**CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE GURMEET SINGH SANDHAWALIA**

Present:- Ms. Radhika Suri, Advocate for the appellant.

Mr. Rajesh Katoch, Advocate for the respondents.

Ajay Kumar Mittal,J.

1. This appeal has been preferred by the assessee under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 10.5.2005, Annexure A.5 passed by the Income Tax Appellate Tribunal, Amritsar (for brevity, "the ITAT") in ITA No.395 of 2000. It was admitted on 13.11.2006 for determining following substantial questions of law:-

“i) Whether in the facts and circumstances of the case, the Tribunal was right in denying the appellant the benefit of Section 54 of the Income Tax Act on the ground that the residential house of the petitioner was not residential in nature due to lack of amenities when the rental income of the residential unit has been taxed as income from house property in the preceding years?

ii) Whether under Section 54 of the Income Tax Act, the

term residential means a dwelling place with basic amenities fit for human habitation and which is actually habitable and does not include any other parameter to be called residential?

2. Briefly, the facts as narrated in the appeal may be noticed. The assessee is a resident of Jalandhar. He filed his return on 22.8.1997 for the assessment year 1997-98 in which long term capital gain amounting to Rs.3,98,300/- from sale of his residential house measuring 250 square yards at Delhi for a sum of Rs.8 lacs was claimed to be exempted on the ground that investment was made for purchase of residential plot in Janta Enclave, District Ludhiana for a sum of Rs.4,08,000/-. The Assessing officer during scrutiny concluded vide order dated 14.9.1999, Annexure A.3 that the residential plot purchased by the assessee was only one room set in Ludhiana and therefore as it was having no amenities, the exemption under section 54 of the Act could not be granted to the assessee and addition of Rs.5,34,428/- was made on account of long term capital gain. Aggrieved by the order passed by the Assessing officer, the assessee filed an appeal before the Commissioner of Income Tax (Appeals), Jalandhar [CIT(A)]. The CIT (A) vide order dated 2.6.2000, Annexure A.4 concluded that the residential house could not be considered for the purpose of exemption under section 54(1) of the Act on the ground that there was only one room, kitchen and dry latrine. The CIT(A) did not accept the plea of the assessee that the said house was a residential house within the meaning of Section 54 of the Act and dismissed the appeal. Feeling aggrieved, the assessee filed an appeal before the ITAT,

which was dismissed vide order dated 10.5.2005, Annexure A.5. Hence the instant appeal by the assessee.

3. Learned counsel for the appellant submitted that the property which was purchased by the assessee was a residential house as the assessee had built a room which was let at the rate of Rs.250/- per month, though to a labourer. According to the counsel, once it was habitable, it would fall within the parameters of a “residential house” and the benefit under section 54(1) of the Act was admissible to the assessee.

4. On the other hand, learned counsel for the revenue supported the order passed by the ITAT.

5. After giving our thoughtful consideration to the respective submissions made by learned counsel for the parties, we do not find any merit in the submissions made by learned counsel for the assessee-appellant.

6. It would be expedient to reproduce Section 54 of the Act which reads thus:-

“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.

(2) The amount of capital gain which is or 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 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 utilized 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 utilized 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 utilized 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 utilized 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) the assessee shall be entitled to withdraw such amount in accordance with the scheme aforesaid.”

7. A perusal of the aforesaid provision shows that the exemption under Section 54 of the Act is available on transfer of a long term capital asset in respect of residential house and land or building appurtenant thereto to an assessee who is either individual or Hindu undivided family. It is also essential that the income of the same is chargeable under the head 'Income from house property'. Further requirement under this provision is that the assessee within a period of one year before or two years after that date purchases or within a period of three years after that date constructs a residential house.

8. In the present case, in order to examine the entitlement of the assessee for exemption under Section 54 of the Act, it is to be seen whether assessee had constructed residential house within three years of the transfer of Delhi property. For doing so, the meaning of the term “house” is to be explored. What is the meaning of the word “house”? The term “house” has not been given any statutory definition and, thus, has to be assigned meaning as understood in common parlance. As per dictionary, it means abode, a dwelling place or building for human habitation. A building, in order to be habitable by a human being, is ordinarily required to have minimum facilities of washroom, kitchen, electricity, sewerage etc.

9. Adverting to the findings recorded, the authorities had come to the conclusion that only one room had been built with bricks and mud. There were no amenities like boundary wall, kitchen, toilet, electricity, water and sewerage connection etc. Further, the residential plot was situated in Janta Enclave, a colony approved by PUDA. As per Bye-laws of PUDA, no construction could be made without getting the map and drawings approved from PUDA which had not been done. Still further, no source of investment had been established. The ITAT while adjudicating the issue against the assessee, in para 12 had noticed as under:-

“12.xxxxxxxx The requirement of section 54(1) of the Income Tax Act for claiming exemption of capital gains is that the assessee has within a period of three years from the date of transfer of the property constructed a residential house. The assessee in this case is stated to have constructed one room, kitchen and latrine in the

property in question. According to the AO and the material available on record, it was found that only one room has been built up with bricks and mud. This room was also not having any boundary wall, no toilet, no electricity and no sewerage connection. The area of the plot is measuring 237.08 sq. yds which was purchased for Rs.4,32,500/-. Therefore, by any stretch of imagination, it cannot be presumed to be a residential house, it is not fit for habitation for any purpose. In the case of K.B.Pradhan (supra), the house which was in process of construction and was not complete was not considered to be a house. The facts of the present case clearly state that the assessee sometime in February 1999 constructed one muddy room which was let out to the tenant, Shri Ram Kishan on 1.3.1999. Shri Ram Kishan was a labourer at the time of construction of said muddy room. The CIT(A) has clearly recorded the findings in para 3.11 of the appellate order that the assessee was given various opportunities by AO from February 1998 to July 1999 to prove its case and therefore sufficient opportunity was given to the assessee. These facts clearly show that when the assessment was in progress, the assessee in order to make the claim of the construction of the residential house has raised a construction of muddy room with tin-sheets and also given on rent to some labourer who was working for raising of the construction of the muddy room. It appears from these facts that the assessee never intended to raise any construction of residential house in the plot in question. Otherwise the assessee would have got prepared some proper site plan to raise the plinth and other proper construction in the huge plot of land. The assessee has not taken any steps whatsoever for raising construction for the residential

house. These facts, therefore, would clearly support the findings of the authorities below that the assessee never raised construction of residential house in the plot, in question. It appears to be afterthought deliberate arrangement to raise muddy room so that the assessee could take plea before the authorities below that the residential house is constructed in the plot, in question. The AO also specifically observed that no source of investment is also proved. The tenant Shri Ram Kishan, who was examined by the AO clearly proves that he was labourer and was earning Rs.70/- to Rs.80/- per day and he has denied to have any latrine in the property which the assessee claimed to have raised in the property. He was also not aware of the name of the landlord. These facts would clearly prove that the assessee has not constructed any residential house. We may also mention that the assessee in the trading and profit and loss account in the assessment year 1999-2000, copy of which is filed at page 46 of the paper book has mentioned rental income of Rs.250/- and added the same to the gross profit of the business. The showing of rental income in the profit and loss account of business would also prove that the assessee never raised construction of residential house. It would also contradict the submission of the assessee. Admittedly no amenities like boundary wall, kitchen, electricity, water and sewerage etc. were found available in the muddy room. Therefore, the authorities below have rightly held that the assessee did not construct any residential house in the property in question. The claim of the assessee was, thus, rightly rejected under Section 54(1) of the Income Tax Act.”

10. Learned counsel for the appellant was unable to assail the

conclusion arrived at by the authorities below that no residential house had been constructed by the assessee.

11. A Division Bench of this Court in *Dr. A.S.Atwal v. Commissioner of Income Act*, (2005) 146 Taxman 171 (Punjab & Haryana) while considering the scope of Section 54 of the Act came to the conclusion that the benefit of Section 54 was admissible where the property sold by the assessee was invested in a house. It was further recorded that a house was one which could be used by the assessee for his residence and putting up of tin sheds for being used by somebody to reside without there being basic living amenities like bathroom, kitchen, electricity etc., would not pass the definition/test of “dwelling unit” or a “house”.

12. In view of the above, no illegality could be found in the findings recorded by the Tribunal. Accordingly, it is held that the property was not a house and the assessee was not entitled to the benefit under Section 54 of the Act.

13. Accordingly, the questions of law raised are answered against the assessee and in favour of the revenue.

14. The appeal is dismissed.

(Ajay Kumar Mittal)
Judge

May 04, 2012
'gs'

(Gurmeet Singh Sandhawalia)
Judge