IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH 'A', HYDERABAD

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER and
SMT. ASHA VIJAYARAGHAVAN, JUDICIAL MEMBER

ITA No. 557/Hyd/2012
Assessment year 2008-09

The ITO Ward-6(3) Hyderabad Appellant	Vs.	Ms. Apsara Bhavana Sai Hyderabad PAN: AHCPB3872H Respondent

Assessee by: Sri G.S. Phani Kishore
Revenue by: Sri K.C. Devadas

Date of hearing: 08.08.2013
Date of pronouncement: 13.09.2013

O R D E R

PER CHANDRA POOJARI, AM:

This appeal is directed against the order of the CIT(A)-IV, Hyderabad dated 31.01.2012 for assessment year 2008-09.

2. The Revenue raised the following grounds of appeal:

1. *The CIT(A) erred on both facts and law.*

2. *The CIT(A) erred in allowing exemption u/s. 54F to the assessee though the owned more than one residential houses as on the date of transfer.*

3. Brief facts of the case are that the assessee is housewife, having income from 'house property'. In her return of income, filed for the A.Y. 2008-09 on 26.3.2009, she had declared an income of Rs. 24,325/ -. However, it was observed that in the computation of total income, the assessee had shown having received Long Term Capital gains of Rs. 1,37,02,475/- on sale of shares. Out of the same, Rs. 1,12,28,000/- were claimed as exempt u/s. 54F (CGS), while Rs. 25,00,000/- u/s. 54EC (REC).

Evidence and details in respect of the said investments were filed by the assessee. During the course of assessment proceedings, it was observed that the assessee had shown income from 'House property' in her e-return, in respect of the following properties:

(i) Property at 204, Meenakshi Royal Court, Road No. 11, Banjara Hills, Hyderabad.

(ii) Property at 301, My Home Navadeep, Madhapur, Hyderabad.

4. From the above, the Assessing Officer noted that the assessee owned more than 2 houses. He noted that as per the provisions of sec. 54F, exemption is not available where the assessee owns more than 1 residential house, other than the new asset, on the date of transfer of original asset. It was noted that the date of transfer of shares in the case of the assessee was between April, 2007 to November, 2007. As on the date of transfer of shares, however, the assessee owned more than one house. The Assessing Officer, therefore, required the assessee to explain as to why her claim of exemption u/s. 54F should not be disallowed.

5. In response, the assessee furnished a copy of the Gift Deed dated 2.4.2007 in respect of the property at 204, Meenakshi Royal Court, Road No. 11, Banjara Hills, Hyderabad, stating that the same had been gifted to Sri B. Siddhardh, aged 11 years, a minor represented by Sri B. Jaya Kumar. The Assessing Officer noted that as per the provisions of sec. 27, any person, who transfers, otherwise than for adequate consideration, any house to a minor child, shall be deemed to be the owner of the house property so transferred. He further noted that the Gift Deed was not registered and the gift had been claimed as given to the assessee's son only, who was a minor. Accordingly, the Assessing Officer concluded that such gift deed was furnished only with an intention to show that she had transferred the impugned property to her minor son before the transfer of shares.

6. In view of the above facts, the Assessing Officer required the assessee to explain as to why the claim of exemption should not be disallowed, as the assessee was owning more than one house as on the date of transfer. Vide letter dated 16.12.2010 it was submitted by the assessee that sec. 27 defines a owner of a house in the context of computing income from house property under the head "Income from House Property", within the provisions of sec. 22 to 26. It was averred that the assessee had got the Gift Deed notarized, which duly conveyed the transfer and is therefore a legal transfer.

7. Alternatively, the assessee claimed that the house at "My Home Navadeep" is a joint property, held by the assessee jointly with her husband. The assessee relied on the decision in the case of ITO vs. Rasiklal N. Satra (100 TTJ 1039), holding that share in a house *per se* is not a single ownership. Accordingly, it was claimed that the assessee was eligible for exemption u/s. 54. On a consideration of the contentions of the assessee, the Assessing Officer opined that as per sec. 123 of the Transfer of Property Act, unless a gift of property is registered and stamped, and further attested by two witnesses, it is invalid. He noted that a Gift Deed which is not registered does not pass on any title of ownership in favour of the 'donee'. Therefore, in the process of a valid gift, the following steps are involved:

(i) Execution of the Gift deed

(ii) Donee's acceptance of the gift

(iii) Payment of adequate stamp duty and registration of the property

(iv) Handing over of possession of the property

(v) Mutation of the property in Municipal records by the donee ID his name.

8. The Assessing Officer noted that in the assessee's case there was no execution of the Gift deed, payment of stamp duty and registration of the property. Besides, possession of the property had also not been handed over to the minor son. In addition to this, the computation of total income showed that the property was self occupied and was in possession of the assessee only. The Assessing Officer verified from the web site of the Greater Hyderabad Municipality Corporation also and found that the assessee had been shown as owner thereof, having tax dues of Rs. 8358/- as on April, 2010, even though the same was claimed as gifted to her son. The Assessing Officer noted that the effect of non registration of documents is that the same cannot be adopted or received as evidence of any transaction affecting such property. Accordingly, the Assessing Officer concluded that the so called gift is not a valid gift and therefore, it does not exist in the eyes of law. He noted that the assessee had transferred the shares of Nandan Bio Matrix on 2.4.2007 itself, the date on which the aforesaid gift deed was claimed as executed. On verification of the Stamp Vendor book, he further found that 24 stamp papers had been purchased by one Sri Srinivas for Nandan Bio Matrix Ltd., V. Bhaskara Rao, V. Jaya Kumar , M. Phaneesh, Ch. Jadav and V. Sujata, on 14.3.2005 for business purpose. He opined that the left over stamp paper was used by the assessee to show that the gift deed had been executed on 2.4.2007 itself. Accordingly, concluding that the assessee had resorted to devious device of gifting the property to her minor son for claiming exemption u/s. 54F and avoid payment of taxes on long term capital gain arising from sale of shares, even though she continued to be owner of the property. The claim of exemption u/s. 54F of the Act was denied.

9. The Assessing Officer further noted that as per the provisions of sec. 27 of the IT Act, the transfer of property to a minor son shall not be regarded as a transfer and the assessee

shall be deemed to be the owner of the property. He, therefore, concluded that in effect the assessee shall be deemed to be the owner of the said property, even if it was transferred to the minor son of the assessee.

10. With regard to the alternative claim of Joint ownership of the property at "My Home Navadeep", the Assessing Officer noted that in the case of Dr. P.K. Vasanthi Rangarajan vs. DCIT, in ITA No. 1753/Mds/2004 dated 25-7-2005 the Chennai ITAT had held that when the assessee is owning the part of a residential property, though not fully, it amounts to owning any residential property as envisaged in sec. 54F before amendment and the assessee becomes disqualified for exemption under sec. 54F. The Assessing Officer noted that as per the said decision partial ownership in the property amounts to full ownership and hence the assessee is not eligible for exemption u/s. 54F of the Act.

11. The Assessing Officer further noted that since the assessee was holding the "My Home Navadeep" property jointly with her husband, she had full rights over the same and it could not be said that she was not owning that property. It was also noted that as per the letter of the assessee, the entire rental receipt of Rs. 2,55,400/ - for the year had been considered in the return or income of the assessee only, while her husband had not shown any rental income from the said property.

12. The Assessing Officer further noted that in the case of CIT Vs. Chandanben Madanlal (245 ITR 182) (Guj), it was held that purchase of a share in the residential house is equivalent to purchase of residential house for the purpose of sec. 54. Accordingly, he opined that in view of the said decision also, share in a residential property is equivalent to one house. Accordingly, concluding that the assessee was owning more than 2 houses as

on the date of transfer of shares, the Assessing Officer held that the assessee was not eligible for exemption u/s. 54F of the Act. Against this, the assessee went in appeal before the CIT(A).

13. Before the CIT(A) the assessee reiterated that a share in the joint property should be regarded as a share only and not as a single individual ownership. It was averred that the Assessing Officer did not consider the legal position standing as on date. It was contended that the assessee's case is clearly covered by the decisions, such as those in ITO vs. Rasiklal Satra (supra) and in Seth Banarsi Dass Gupta vs. CIT (81 ITR 170) (All), SB Sugar Mills Ltd. vs. CIT (166 ITR 783) (SC). It was averred that as per the judgement of the Apex Court, a co-owner means a person entitled to a share in the property but cannot be recognised as the single owner. The decisions in the cases of Shivnarayan Chowdary vs. CIT (108 ITR 104) (Luck.) and in CIT vs. P. Aravinder Reddy (120 ITR 46) were also cited.

14. The assessee further contended that the decision of the Tribunal in the case of Rasikal N. Satra (supra) was not contested further, and therefore, shall be considered as final. She maintained that it has been established in the said case that part ownership of the house property could not be a disqualification for claiming exemption u/s. 54F, as joint ownership has not been considered as a single (numeric) ownership of a house property. Therefore, a joint ownership in a house should not be considered in counting the numeric strength of the house property as envisaged under the said provisions for claiming exemption u/s. 54F and should be excluded.

15. The assessee submitted that in the case of Seth Banarsi Das Gupta (supra), SB Sugar Mills Ltd. (supra) also a fractional share in an asset was not considered as coming within the ambit of

single ownership. It was held that the test to determine a single owner is that "the ownership should be vested fully in one single name and not as joint owner or a fractional owner". The assessee submitted that that the share in a joint ownership in the property at "My Home Navadeep" should be excluded and not considered as disqualification for claiming exemption u/s. 54F of the Act.

16. The CIT(A) observed that as regards the property at 204, Meenakshi Royal Court, Road No. 11, Banjara Hills, Hyderabad, it is the contention of the assessee that in view of the gift deed dated 2.4.2007, whereby the said property was gifted to the assessee's minor son, the assessee was no more the owner of the said property. It is also contended that the provisions of sec. 27 of the Act to the effect that any person, who transfers, otherwise than for adequate consideration, any house to a minor child, shall be deemed to be the owner of the house property so transferred, is relevant only in the context of computation of income from 'House property' and not for the purpose of deciding ownership in the context of Sec. 54F of the Act.

17. The CIT(A) further observed that the contentions of the assessee are unacceptable. Firstly, it is clear that the Gift deed dated 2.4.2007 is not a registered document, so as to have any legal sanctity. In the absence of registration of the gift and attestation thereof' by two witnesses, the rights of the owner cannot be considered as transferred in favour of the so-called 'donee'. Besides, it is seen that the so called "gift deed" is claimed as executed only on the date of transfer of shares of Nandan Bio Matrix by the assessee. It is also seen that while the assessee did not pay any stamp duty towards this nor she got the property registered later, even the stamp papers used by the assessee for the same were those purchased by the personnel of Nandan Bio Matrix Ltd. itself on 14.3.2005 for business purpose. Under the

circumstances, it is clear that the entire arrangement of "Gift" is only an afterthought, put on record only with a view to show that the assessee was owning only one house as on the date of transfer of shares.

18. The CIT(A) observed with regard to the deeming fiction created by Sec. 27 of the Act, it is true that the same has been prescribed in the context of computation of income from house property, however, it is clear that the provisions of sec. 54F have been enacted with a view to give fillip to the Housing Sector only. Therefore, in order to decide the eligibility of an assessee for deduction u/s. 54F, the said provision is required to be applied, so as to ensure that the intended incentive is not misused. Accordingly, even if there had been a valid and registered gift deed, the assessee could not have been considered as not being the owner of the house so gifted, for the reason that in the instant case the gift was made to a minor child, without adequate consideration.

19. The CIT(A) observed that in the instant case, however, there was no valid gift at all. It is seen that the assessee not only continued to stay in the same premises but was also being shown as the owner of the property in the municipal records even till April, 2010. Besides, in the computation of total income, the property was shown as self occupied, showing that she was in possession of the said property. In view of the above facts, it is clear that the assessee continued to be the owner of the property at 204, Meenakshi Royal Court, Road No. 11, Banjara Hills, Hyderabad.

20. As regards the property at 301, My Home Navdeep, Madhapur, Hyderabad, the CIT(A) observed that admittedly the same was jointly owned by the assessee with her husband. The

question, therefore, is whether the part ownership of the assessee of the said flat could be considered as ownership of the flat. In this regard, it is seen that in the decision in the case of Dr. P.K. Vasanthi Rangarajan (supra), it has indeed been held that if an assessee owns part of a residential property, though not fully, it amounts to owning of a residential property as envisaged in sec. 54F before amendment, and the assessee becomes disqualified for exemption u/s. 54F. However, is also seen that the Tribunal Mumbai in the case of Rasiklal N. Satra (supra) have taken a view that ownership is different from absolute ownership. They have held that in the case of a residential unit, none of the co-owners can claim that he is the owner of the residential house. The Tribunal observed that ownership of a residential house means ownership to the exclusion of all others. In this regard they relied on the decision of the Supreme Court in the case of Seth Banarasi Dass Gupta vs. CIT (166 ITR 783), holding that fractional ownership is not sufficient for claiming even fractional depreciation u/s. 32 of the Act. It was held that the word "own" would not include a case where a residential house is partly owned by one person or partly owned by other person(s). The Tribunal felt that after the aforesaid decision of the Supreme Court, the Legislature could have amended the provisions of sec. 54F to include part ownership. However, since the same is not done, it was to be held that the word "own" in sec. 54 F would include only the case where a residential house is fully and wholly owned by the assessee and not one owned by more than one person.

21. The CIT(A) observed that while it may be true that the said decision of the Tribunal Mumbai Benches in the case of Rasiklal N. Satra (supra) was not contested further, it is also seen that the Chennai Bench of the Tribunal in a recent decision in the case of ACIT Vs. K. Surendra Kumar in ITA No. 1324/Mds/2010 dated 12.8.2011 have followed the same decision. Going against the

decision of their Co-ordinate Bench in the case of Dr. P.K. Vasanthi Rangarajan (supra), the Tribunal noted that the decision of the Supreme Court in the case of Seth Banarasi Dass Gupta (supra) had not been considered by them, whereas the same was considered in the decision in the case of Rasiklal N. Satra (supra) by the Tribunal Mumbai Benches. Since in the said case the assessee was only a part owner of the two residential properties, they held that he could not be said as owning a residential house as required for the purpose of benefit u/s. 54F of the Act.

22. The CIT(A) observed that as per the facts of the case of the present assessee, even though the assessee is still considered as the owner of the property at 204, Meenakshi Royal Court, Road No. 11, Banjara Hills, Hyderabad, she is undisputedly only a part owner of the property at 301, My Home Navadeep, Madhapur, Hyderabad. In the light of the decisions of the Tribunal Mumbai and Chennai Benches as discussed above, the assessee cannot be considered as owning the latter property, in exclusion of the joint owner, i.e., her husband, so as to be called the "owner" of flat No. 301, My Home Navdeep, Madhapur, Hyderabad for the purpose of sec. 54F of the Act. Under these circumstances, the assessee can be said as owning only one property as on the date of sale of shares, and therefore, is eligible for deduction u/s. 54F of Rs. 1,12,28,000/-. Accordingly, the CIT(A) decided the grounds raised by the assessee in her favour and directed the Assessing Officer to revise the computation of income. Against this, the Revenue is in appeal before us.

23. The learned DR submitted that the CIT(A) wrongly granted deduction u/s. 54F of the Act, though the assessee is owning more than one residential house. According to the learned DR the assessee has the following houses:

(i) 204, Meenakshi Royal Court, Road No. 11, Banjara Hills, Hyderabad (gifted to minor son through an un-registered gift deed).

(ii) 301, My Home Navdeep, Madhapur, Hyderabad (jointly owned with her husband).

24. Further, he submitted that the gift to the minor son through an unregistered gift deed is invalid. Being so, the title in the property has not been passed to the assessee's minor son and the assessee is the absolute owner of that property. Further, the assessee being partial owner of the property at 301, My Home Navdeep, Madhapur, Hyderabad, considering the partial ownership and absolute ownership of the other house situated at 204, Meenakshi Royal Court, Road No. 11, Banjara Hills, Hyderabad, the assessee is owning more than one house and is not entitled for deduction u/s. 54F of the Act. Further, he submitted that even partial ownership is to be considered as full ownership in the property and she cannot granted deduction u/s. 54F of the Act. For this proposition, he relied on the following judgements:

i) CIT vs. Ravinder Kumar Arora (342 ITR 38) (Del) – In that case the assessee has purchased a new residential house along with his wife. The AO granted deduction u/s. 54F to the extent of 50% as per the assessee's share in the property. On further appeal, the Tribunal as well as the High Court held that the assessee is entitled for full exemption u/s. 54F of the Act and the Assessing Officer was not justified in restricting the exemption to the extent of 50% of the amount invested in the new residential house.

ii) Mrs. Kamlesh Bansal vs. ITO (109 TTJ 417) wherein it is held that the assessee investing capital gain in construction of a residential house on the land owned by her husband and under agreement having 50% share therein was eligible for exemption u/s. 54F not-withstanding absence of registered deed in hear favour.

iii) Further, he relied on the judgement of Calcutta High Court in the case of Madgual Udyog vs. CIT (184 ITR 484). He also relied on the order of the Tribunal inthe case of DCIT vs. M/s. Greenko Energies Pvt. Ltd. in ITA Nos. 3-7/Hyd/13 dated 10.5.2013.

25. According to the DR even fractional or partial ownership of the immovable property disentitles the assessee for claiming deduction u/s. 54F of the Act. Finally, he submitted that even the fractional ownership of the property by the assessee at 301, My Home Navdeep, Madhapur, Hyderabad along with her husband and owning a property at 204, Meenakshi Royal Court, Road No. 11, Banjara Hills, Hyderabad is to be treated as assessee is owning more than one residential house and the assessee is entitled for deduction u/s. 54F of the Act.

26. On the other hand, the learned AR submitted that even if the gift deed made to assessee's minor son in respect of property situated at 204, Meenakshi Royal Court, Road No. 11, Banjara Hills, Hyderabad is invalid, the partial ownership of the property situated at 301, My Home Navdeep, Madhapur, Hyderabad along with her husband cannot be construed as owning of residential house and it should be treated as owning only one residential house and the assessee is to be granted deduction u/s. 54F of the Act and the order of the CIT(A) is to be confirmed. The AR relied on the following judgements:

i) Seth Banarsi Das Gupta vs. CIT (supra) wherein the Apex Court held that depreciation on assets is to be granted only when the assessee is owner of the property and not in respect of a fractional ownership of the property.

ii) Mysore Minerals Ltd. vs. CIT (239 ITR 775) wherein the Apex Court held that any one in his possession of property in his own title exercising such dominion over the property as would enable the others being excluded therefrom and having right to use and occupy the property in his own right would be the owner of the building. According to the AR the fractional ownership cannot be construed as the assessee is owning second residential house. Being so, the assessee is entitled for deduction u/s. 54F of the Act.

iii) The AR also relied on the judgement of Supreme Court in the case of CIT vs. Vegetable Products Ltd. (88 ITR 192) for the proposition that when two views are possible, the view which favours the assessee is to be adopted.

27. In rejoinder, the learned DR submitted that the judgements relied on by the learned AR are relating to granting of deduction u/s. 32 and the language used therein is entirely different from section 54F of the Income-tax Act and these judgements are not applicable to the facts of the case.

28. We have heard both the parties and perused the material on record. Exemption u/s. 54F has been granted to the assessee with a view to encourage construction of one residential house. The construction/purchase of a house other than one residential house is not covered by section 54F of the Act. The concession provided u/s. 54F w.e.f. 1.4.2001 would not be available in a case

where the assessee already owns, on the date of transfer of the original assets, more than one residential house. Therefore, it is clear that emphasis has been given on owning more than one residential house by any assessee. The assessees, who already owns, on the date of transfer of the original asset, more than one residential house, are not eligible for the concession provided u/s. 54F of the Act. Even if other residential house may be either owned by the assessee wholly or partially. Therefore, the concession has been given only to encourage that any assessee should have his own residential house. In other words, when any assessee who owns more than one residential in his/her own title exercising such dominion over the residential house as would enable other being excluded therefrom and having right to use and occupy the said house and/or to enjoy its *usufruct* in his/her own right should be deemed to be the owner of the residential house for the purpose of section 54F of the Act. The proviso to section 54F of the Act clearly provides that no deduction shall be allowed if the assessee owns on the date of transfer of the residential asset more than one residential house.

29. This has been considered in the case of Smt. Bhavana Thanawala vs. ITO (15 SOT 377) (Mum). In the case of Ravinder K. Arora vs. ACIT (supra) it was held that even joint ownership of the property by the assessee along with his wife is construed as investment by the assessee and deduction u/s. 54F is allowable.

30. In the case of Smt. V.K.S. Bawa vs. ACIT (53 ITD 232) wherein it was held that when an assessee has become owner of a share (fractional) in property bequeathed to her by her mother, by the time the assessee purchased another property, she could not claim exemption u/s. 54F of the Act.

31. In the case of Ravinder Kumar Arora (supra) it was held that the assessee having invested the entire amount of long term capital gain in purchase of new residential house was entitled to exemption u/s. 54F in respect of the entire amount even though the new property was in the joint names of assessee and his wife.

32. In view of the foregoing discussion, if an assessee is jointly owning more than one property, then the assessee is not entitled for deduction u/s. 54F of the Act. Considering the totality of the facts of the case, we are inclined to reverse the order of the CIT(A). The ground taken by the Revenue is allowed.

33. In the result, appeal of the Revenue is allowed.

Order pronounced in the open court on 13th September, 2013.

Sd/-	Sd/-
(ASHA VIJAYARAGHAVAN)	(CHANDRA POOJARI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Hyderabad, dated the 13th September, 2013

Copy forwarded to:

1. The Income Tax Officer, Ward-6(3), 6th Floor, 'C' Block, IT Towers, AC Guards, Hyderabad
2. Ms. Apsara Bhavana Sai, 8-2-615/A/204, Road No. 11, Banjara Hills, Hyderabad.
3. The CIT(A)-IV, Hyderabad.
4. The CIT-III, Hyderabad.
5. The DR – A Bench, ITAT, Hyderabad.

Tprao