IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH ' A '

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER AND
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER

I.T. A. No.699/Bang/2014
(Assessment Year : 2009-10)

Smt. Babitha Kemparaje Urs,
No.191, 2nd Cross, 1st Main,
Netaji Nagar, Lalithadripuram,
Mysore. .... Appellant.

Vs.

Commissioner of Income Tax,
Mysore. ..... Respondent.

Appellant By : Shri P. Dinesh, Advocate.
Respondent By : Shri Pramod Singh, CIT (D.R)

Date of Hearing : 7.8.2017.
Date of Pronouncement : 13.09.2017.

O R D E R

Per Shri Vijay Pal Rao, J.M. :

This appeal by the assessee is directed against the revision order dt.27.03.2014 of Commissioner of Income Tax, Mysore under Section 263 of the Income Tax Act, 1961 (in short 'the Act').

2. The assessee has raised the following grounds :

1. On the facts and in the circumstances of the case, the conditions precedent being absent, the proceeding initiated under Section 263 of the Act was opposed to law and the order passed under Section 263 is liable to be cancelled.

2. On the facts, there being no error much less an error prejudicial to the interest of the Revenue, the learned CIT ought to have refrained from invoking the provisions of Section 263 of the Act.

3. The learned CIT ought to have appreciated that there being no error in the order of the assessing authority who after being satisfied with the explanation offered by the Appellant passed the assessment order, the proceedings initiated under Section 263 of the Act is on a mere change of opinion which is not permissible in law.

4. The learned CIT ought to have refrained from directing the assessing authority to disallow the deduction under Section 54F as claimed by the Appellant in respect of capital gain which was in order.

5. On the facts, the learned CIT ought to have accepted the explanation of the Appellant and refrained from exercising powers under Section 263 of the Act.

6. Without prejudice, the addition as suggested by the learned CIT is excessive, arbitrary and unreasonable and ought to be deleted in toto.

7. For these and such other grounds that may be urged at the time of hearing, the appellant prays that the appeal may be allowed.

3. The assessment in the case of the assessee was completed under Section 143(3) on 1.12.2011 whereby the Assessing Officer determined the total income at Rs.1,90,010 after allowing the claim of deduction under Section 54 of the Act. Subsequently, on verification of documents furnished during the assessment proceedings the CIT, Mysore noticed

that the assessee had deposited a sum of Rs.11,50,000 in capital gain scheme on 14.12.2009 and purchased a site on 6.5.2010 for Rs.21,60,000. The CIT noted that the assessee had not complied with the condition prescribed under Section 54F of the Act for claiming the deduction as the assessee has not deposited the amount in capital gain account scheme before the due date of filing the return of income and also has not constructed the new house within the period of three years from the date of transfer. Thus the CIT issued a show cause notice under Section 263 dt.28.2.2014. The assessee vide his letter dt.12.3.2014 requested for grant of time to appear before the CIT. Since there was no appearance from the assessee on the date fixed for hearing, the CIT has passed the impugned order on the basis of material available on the assessment record. The CIT has finally held that the assessee is not eligible for deduction under Section 54F in respect of the amount deposited in capital gain account scheme as well as in respect of the investment made for purchase of site. Accordingly, the CIT set aside the assessment order and directed the Assessing Officer to pass fresh order as per the directions given in the impugned order.

4. Before us, the learned Authorised Representative of the assessee has submitted that during the course of assessment proceedings under Section 143(3), the Assessing Officer issued the notice under Section 143(2) along with a detailed questionnaire dt.29.6.2011 whereby the Assessing Officer asked the assessee to furnish the details of immovable properties, property owned including investment made in the property during the year, details of property sold, copy of sale deed and details of capital gain thereon etc. The learned Authorised Representative has submitted that in response to the said notice and questionnaire, the assessee furnished entire relevant details including the sale deed dt.6.5.2010 whereby the assessee purchased a new site for construction of house. Thus after considering the reply and details filed by the assessee, the Assessing Officer was satisfied with the claim and allowed the deduction u/s. 54F while passing the scrutiny assessment. He has further submitted that the CIT has not granted sufficient opportunity before passing the impugned order. Thus the assessee was not afforded an effective hearing and opportunity to furnish the relevant details to satisfy the CIT that the assessee had complied with the conditions prescribed under Section 54F of the Act. The learned

Authorised Representative of the assessee has further pointed out that the assessee invested a sum of Rs.20 lakhs being advance for purchase of site on 6.7.2009 and finally the site was purchased by sale deed dt.6.5.2010 therefore the investment in purchase of new site was made within the prescribed period under Section 54F of the Act. Further the house was finally constructed in the year 2012 and therefore the assessee is eligible for deduction under Section 54F of the Act. In support of his contention he has relied upon the decisions of various High Courts as well as the co-ordinate bench of this Tribunal as under :

(i) CIT Vs. Shakuntala Devi 389 ITR 366

(ii) Prin. CIT & Other Vs. C. Gopalaswamy 384 ITR 307

(iii) CIT Vs. Smt. B S Shantakumari 233 Taxmann 347

(iv) Saraswathy Vs. ITO TS-5263-ITAT-2017 Chennai

(v) G. Ramesh Vs. ITO 71 taxmann.com 165

5. On the other hand, the learned Departmental Representative has relied upon the impugned order passed under Section 263 and submitted that the assessee has not invested the entire sale proceeds for purchase or construction of a new house and deposited a sum of Rs.11,50,000 in capital gains account on 14.12.2009 which is beyond the time period

allowed under Section 54F. Further the investment made for purchase of the site without completion of the construction of the new house within the period of 3 years from the date of transfer of the existing asset is not eligible for deduction under Section 54F as the construction of the new house was not completed within the period prescribed under Section 54F.

6. We have considered the rival submissions as well as the relevant material on record. As regards the sufficient and proper opportunity of hearing was not given by the CIT before passing the impugned order, we find that the show cause notice under Section 263 was issued on 28.02.2014 and the case was posted on 14.3.2014. The assessee vide its letter dt.12.3.2014 requested for grant of 15 days time. However the CIT adjourned the case on 21.3.2014 and granted only one week time to the assessee. Further there is nothing in the impugned order to show that the assessee was either intimated or served with the notice of posting of hearing of the case on 21.3.2014. Finally the impugned order was passed by the CIT on 27.3.2014. Thus it appears that due to the time barring case, the CIT has passed the impugned order without granting an appropriate and effective opportunity of hearing to the assessee. The

learned Authorised Representative has pointed out that the assessee has finally completed the construction of the house in the year 2012 however the relevant record could not be furnished before the CIT for want of proper opportunity. Thus it is manifest from the record that the show cause notice under Section 263 was issued by the CIT at the fag end of the expiry of two years from the end of the financial year in which the assessment was completed under Section 143(3) and therefore the CIT was having a limited period of one month for completing the proceedings and passing the impugned order. We further note that the assessee furnished the record before the Assessing Officer however the Assessing Officer while passing the assessment order under Section 143(3) has not discussed about the satisfaction of the conditions as provided under Section 54/54F though the Assessing Officer has stated in the order that the assessee has purchased a residential property and also deposited in the specific account. Therefore the assessment order suffered from lack of adequate and proper enquiry on this issue. As far as the claim of the assessee regarding investment made in purchase of the site, we find that even if the assessee finally could not construct the new house within the time period specified under Section 54F once the

assessee has invested the proceeds of sale of existing asset for the purpose of construction of new house the deduction under Section 54 cannot be denied before as the period of three years has not been expired before passing the impugned assessment order by the Assessing Officer. Therefore to that extent, we do not find any error in the assessment order passed by the Assessing Officer under Section 143(3) while allowing the claim of the assessee under Section 54F of the Act.

7. As regards the claim of deduction under Section 54 in respect of the amount deposited in capital gain account scheme when the assessee has finally constructed the house then the condition of construction of the residential house has to be seen and not the depositing the amount in the capital gain scheme. The Hon'ble High Court in the case of **Prin. CIT Vs. C. Gopalaswamy** (supra) has held that the condition precedent for claiming benefit under Section 54/54F is that capital gain realize from capital asset should have been invested either in purchase of residential house or in constructing the residential house. If after making the entire payment merely a registered sale deed has not been executed and registered in favour of the assessee before the period stipulated he cannot be denied the benefit under Section 54F of the Act. Similarly if he

has invested the money in construction of residential house then merely the construction was not completed in all respects and it was not in fit condition to occupy within the period prescribed under Section 54F of the Act the benefit u/s.54/54F cannot be claimed. Once it is demonstrated that the consideration received on transfer of the asset has been invested either in purchasing a residential house or in construction of residential house even though the transactions are not complete in all respects as required under the law that would not disentitle the assessee from benefit. The Hon'ble High Court has reiterated its view again in the case of **CIT Vs. Shakuntala Devi** (supra) wherein the relevant facts were recorded in para 3 and the findings have been given in paras 10 to 13 as under :

" 10. Facts on hand would clearly indicate that assessee had sold a flat at Mumbai for a total consideration of Rs. 1,71,00,000/- on 04.02.2003 and thereby Long Term Capital Gains was arrived at Rs. 1,44,68,032/-. In the return of income assessee claimed exemption under Section 54 of the Act, contending interalia that said amount had been reinvested by her for purchase of another residential property namely, a flat at Mumbai itself for a total consideration of Rs. 3,25,00,000/- as per Memorandum of Understanding entered on 08.09.2003. It is also not in dispute that assessee had been paid a sum of Rs. 2,40,00,000/- as advance between 12.04.2003 to 24.09.2003 as against the total consideration of Rs. 3,25,00,000/-. The Assessing Officer, as already noticed hereinabove, denied the exemption and brought the entire capital gain to tax. Section 54 of the Act which provides for claiming exemption reads as under:ð

> "54. (1) Subject to the provision 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 the 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 the capital gain which is not 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 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*) the assessee shall be entitled to withdraw such amount in accordance with the scheme aforesaid."

11. A reading of the above Section would make it explicitly clear that proceeds of sale of the property is to be reinvested within a period of two years, which would not be

chargeable to tax. The intention of Legislature was to encourage the investment in the acquisition of residential house or construction thereof. The condition precedent for claiming benefit under said provision is that the capital gains realized from sale of a capital asset should be reinvested either in purchasing a residential house or utilised for constructing a residential building. If it is established that consideration so received on alienation of property has been invested in either purchasing a residential building or spent on construction of residential building, an assessee would be entitled to the benefit flowing from Section 54 of the Act irrespective of the fact that transaction not being complete in all respects. In other words, it has to be examined or discerned from the facts of each case as to whether the assessee had undertaken such an exercise or not?

12. The main purpose of Section 54 of the Act is to give relief in respect of profits on the sale of a residential house. Necessary conditions to be fulfilled for the applicability of Section 54 are:ð

(*i*) Assessee should be an individual or a Hindu Undivided Family;

(*ii*) Capital assets should result from the transfer of a long term capital asset;

(*iii*) Capital gain must arise from transfer of building which is chargeable as 'income from house property';

(*iv*) Property should be a residential house;

(*v*) Assessee must have within a period of two years after that date purchased another property;

(*vi*) Property purchased must be residential;

(*vii*) Exemption would be available only to the extent the sale proceeds are utilised;

(*viii*) Where re-investment in a residential property is not made before due date for filing report, amount not so utilised till such date is required to be deposited in Capital Gain Account Scheme.

Thus, if the above conditions are satisfied, assessee is entitled to claim benefit of the provision of Section 54.

13. Facts on hand would disclose that assessee had owned a flat at Mumbai and sold the same on 04.02.2003 for a total consideration of Rs. 1,70,00,000/-. Subsequent to such sale she entered into an agreement for purchasing another property for a total consideration of Rs. 3,25,00,000/- by agreement dated 08.09.2003. Said agreement came to be entered into within six months from the date of sale i.e., 04.02.2003 and assessee had paid a total consideration of Rs. 2,40,00,000/- between April' 2003 to September' 2003. After making the payment, a registered sale deed had not been executed in favour of the assessee before completion of two years period pursuant to Memorandum of Understanding dated 08.09.2003. The consideration received by her under sale dated 04.02.2003 has been paid by the assessee for purchasing another property and reinvestment has been made within two years as contemplated under

Section 54 of the Act. These facts are not in dispute. Thus, long-term capital gains computed by virtue of sale deed stood adjusted by virtue of payment made by assessee for purchasing another property under Memorandum of Understanding dated 08.09.2003. As such, Tribunal has rightly held that date of purchase was to be taken as the basis for reckoning the period of two years prescribed under Section 54 of the Act for extending the benefit flowing therefrom. In the instant case consideration paid by assessee under Memorandum of Understanding dated 08.09.2003 would fully cover the consideration of capital gains portion for being eligible to claim exemption under Section 54 of the Act.ò

8. In the case of **CIT & Other Vs. B.S. Shantakumari** (supra), the Hon'ble High Court while dealing with this issue has again held in paras 9 & 10 as under :

"9. That apart, co-ordinate bench of this Court in Sambandam Udaykumar's case referred to supra has examined similar issue and has held that the words used in Section 54F are 'purchased' or 'constructed' and held that the condition precedent for claiming benefit under such provision is the capital gain realized from sale of a Long Term capital asset should have been parted by the assessee and invested either in purchasing a residential house or in constructing a residential house. It has also been held that if the assessee has invested money in constructing the residential house, merely because the construction was not complete in all respects or such building is yet to be completed fully or the building not being in a fit condition for being occupied, would by itself not be a ground for the assessee to be denied the benefit under Section 54F of the Act. It has been held by the co-ordinate bench as under:

> "The intention of the legislature was to encourage investments in the acquisition of a residential house and completion of construction or occupation is not the requirement of law. The words used in the section are 'purchased' or 'constructed'. For such purpose, the capital gain realized should have been invested in a residential house. The condition precedent for claiming benefit under the said provision is the capital gain realized from sale of capital asset should have been parted by the assessee and invested either in purchasing a residential house or in constructing a residential house. If after making the entire payment, merely because a registered sale deed had not been executed and registered in favour of the assessee before the period stipulated, he cannot be denied the benefit of Section 54F of the Act. Similarly, if he has invested the money in construction of a residential house, merely because the construction was not complete in all respects and it was not in a fit condition to be occupied within the period stipulated, that would not disentitle the assessee from claiming the benefit under Section 54F of the Act.".

10. We are in complete agreement with the ratio laid down by the co-ordinate bench of this Court. It has also been noticed by this Court that on the facts of the present case, assessee had produced material evidence before the First Appellate Authority to demonstrate that the construction was on the verge of completion by

producing photographs and this aspect, though not noticed in detail, same came to be noticed by the Tribunal to reject the appeal of Revenue. It was also noticed by the Tribunal that construction of the building having been completed and same having been occupied by the assessee, is also a factor to dismiss the appeal of the revenue.

In the circumstances narrated hereinabove, we are of the considered view that no substantial questions of law arises for being formulated and adjudicated."

Thus in view of the above binding precedent of the Hon'ble jurisdictional High Court, the assessee has established a prima facie case of claim of deduction under Section 54F. Therefore when the CIT has not afforded an effective opportunity of hearing and the Assessing Officer has not conducted a proper enquiry, then in the facts and circumstances of the case we set aside the impugned revision order passed under Section 263 and remit the matter to the record of the Assessing Officer for considering the relevant record in support of the claim that the assessee has finally constructed the residential house and then consider and decide this issue in the light of the decisions of the Hon'ble jurisdictional High Court cited supra.

9. In the result, the appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on 13th Sept., 2017.

Sd/-	Sd/-
(INTURI RAMA RAO)	**(VIJAY PAL RAO)**
Accountant Member	Judicial Member

Bangalore,
Dt. 13.09.2017.

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