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IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, JUDICIAL MEMBER
AND SHRI JASON P. BOAZ, ACCOUNTANT MEMBER

ITA No.568/Bang/2018
Assessment year : 2006-07

Mrs. S. Suma, No.159, 2nd Main, Kengeri Satellite Town, Bangalore – 560 060. **PAN: CFYPS 1314E**	Vs.	The Income Tax Officer, Ward 4(4), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Balram R. Rao, Advocate
Respondent by	:	Smt. P. Renuga Devi, Jt.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	14.06.2018
Date of Pronouncement	:	20.07.2018

O R D E R

Per N.V. Vasudevan, Judicial Member

This is an appeal by the assessee against the order dated 15.02.2018 of the CIT(Appeals)-3, Bengaluru relating to assessment year 2006-07.

2. The assessee is an individual. She owned a property at 269, 2nd Main, Banashankari III Stage, Chennammanakere Achukattu, Bangalore, [hereinafter referred to as "the old property"] comprising of land measuring 3500 sq.ft. together with construction measuring 1 sq. (100 sq.ft.) with AC Sheet roof, mud wall, mud flooring and jungle wood used for doors & windows without any civic amenities. The assessee got this property

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through registered Gift/settlement Deed dated 27.04.2002. The description of the property in the aforesaid Settlement Deed is as follows:-

"SCHEDULE

All that piece and parcel of immovable property bearing No.66, Katha No.42, House List No.38 measuring East to West : 30'-0" (Thirty Feet) and North to South : 50'-0" (Fifty Feet) and Property bearing No. 67 Katha No.10/3, measuring East to West : 30'-0" (Thirty Feet) and North to South : 50'-0" (Fifty Feet) situated at Ittamadu Village, Uttarahalli Hobli, Bangalore South Taluk, now coming under the purview of Bangalore Mahanagara Palike Ward No.55, in all measuring East to West : 60'-0" (Sixty Feet) and North to South : 50'-0" (Fifty Feet) and bounded on:-

EAST BY : Road.

WEST BY : Property bearing No.65,

NORTH BY : Road,

SOUTH BY : Property bearing Nos.61 and 62.

BUILDING DESCRIPTION : Residential Building constructed on the Schedule property with plinth area of One Square having A.C.Sheet Roof, Mud wall, Mud flooring and Jungle Wood used for Doors and Windows without any civic amenities."

3. The assessee entered into a Joint Development Agreement (JDA) in respect of the aforesaid property dated 14.12.2005 with M/s. Vasthushree Developers, a partnership firm (the Developer). As per the JDA, the assessee was to receive 40% of the share of the land of the property and 40% of the super built-up area and proportionate car parking in the premises to be constructed over the old property. The Developer was entitled to 60% of the super built-up area + car parking. It appears that the assessee did not file return of income for the AY 2006-07. The JDA was entered into on 14.12.2005.

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4. According to the revenue, by entering into the aforesaid JDA, the assessee had effected transfer of old property and the capital gain on such transfer was liable to be taxed in AY 2006-07. The proceedings u/s. 147 of the Act were initiated by the AO on the basis of copy of JDA which is a registered document, copy of which was in the possession of the AO. The notice u/s. 148 of the Act dated 27.03.2013 was sent to the assessee at Banashankari III Stage address, but the same was returned by the postal authorities with the postal remarks "no such person". Another notice u/s. 148 of the Act was served by affixture and at the same address. Vide notice dated 142(1) of the Act which is stated to be served on the assessee, the AO called upon the assessee to produce the details of long term capital gain on transfer of the old property under the JDA. According to the order of assessment, the assessee did not appear in the proceedings despite opportunities. In the circumstances, the AO proceeded to complete the assessment u/s. 144 of the Act to the best of his judgment. The AO computed the LTCG on transfer of old property as follows:-

	Rs.
Estimated sale consideration in respect of land measuring – 60% of 3000 Square Feet (Guidance value/FMV) 1800 x 220 = 396000 + 216000	25,56,000
Less: Cost of acquisition (as on 24.07.2002) – Rs.9,00,000/- for 1800 Square Feet @ Rs.500/- per Square Feet Cost indexed value Rs.9,00,000 x 497/ 426	10,50,000
Taxable Capital gain	15,06,000

5. Aggrieved by the order of AO, the assessee preferred an appeal before the CIT(Appeals). Before the CIT(Appeals), the assessee submitted that the assessee was entitled to deduction u/s. 54 of the Act. Under section 54 of the Act, if a long term capital asset being a building or land appurtenant thereto and being a residential house is transferred, the capital

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gain arising from such transfer if it is invested in acquiring a new asset, the assessee would be entitled to deduction to the extent of capital gain so utilized. Under section 54F of the Act, similar deduction is allowed, but section 54F applies only where the capital asset that is transferred is not a residential house. Thus, section 54 applies to transfer of a residential house and section 54F applies to transfer of long term capital asset, not being a residential house.

6. In the present case, the stand of the CIT(Appeals) was that there was no residential house in the old property and therefore deduction u/s. 54 cannot be allowed. The plea of the assessee was that in any event, the assessee would be entitled to deduction u/s. 54F of the Act, which applies to long term capital asset, other than a residential house which may also include the land which is the subject matter of transfer.

7. The CIT(Appeals) examined the claim of assessee for deduction u/s. 54 of the Act. There was also a claim made by the assessee before the CIT(Appeals) that a transfer within the meaning of section 2(47) of the Act would take place only in the previous year in which the assessee received her share of built-up area of construction from the builder as per the terms of the JDA and not in the previous year in which the JDA was entered into between the assessee and the builder. This issue was, however, decided against the assessee by the CIT(Appeals) by placing reliance on the provisions of section 2(47)(v) of the Act which deals with transaction involving allowing possession of immovable property to be taken or retained in part performance of the contract of the nature referred to in section 53A of the Transfer of Property Act, 1882.

8. As far as deduction u/s. 54 of the Act is concerned, the CIT(Appeals) took the following view:-

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> 5.0 a) It is observed that the property sold was a piece of land and the description of the same is clear from the sale deed. Although the appellant has tried to show on the basis of certain documents that there was a structure on the property and the same was also let out by her and that property tax was paid on the same, however these documents do not show that such structure existed on land as on the date of sale of the property. Even if for the sake of argument it is considered that the temporary structure without civic amenities was a residential house for the purposes of Section 54 of the Act, this is always possible that the temporary structure was demolished and a clear piece of land was handed over to the developer. The intimation of that might not have been given to the relevant authorities and as such property tax was computed by such authority for the temporary structure even after the same was demolished. This is important to note that there isn't any reference to any such structure in the Joint development Agreement (JDA) and it only refers to the land. The sale consideration is only for land. The schedule to the JDA describes the dimensions of the land and there isn't any reference to any structure on the land. As per clause 12.1 on page 25 of the JDA the appellant has transferred her 60% share in the land comprised in the scheduled property. This is also possible that the temporary structure was in 40% part of the land which was not transferred and thus retained by the appellant. Thus claim of the appellant under Section 54 of the Act would not survive."

9. The CIT(Appeals) also examined the claim of assessee u/s. 54F of the Act and was of the view that the assessee owned another house at Banashankari 3rd Stage and therefore assessee was not entitled to deduction u/s. 54F of the Act. U/s. 54F of the Act, long term capital gain will be exempt if the assessee utilizes the long term capital gain in constructing a residential house. Under proviso to section 54F of the Act, the assessee should not own more than one residential house, other than the new asset on the date of transfer of the original asset. According to the CIT(Appeals), the assessee owned another house and therefore deduction

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u/s. 54F of the Act cannot be given. The following were the conclusions of CIT(Appeals) in this regard:-

> "b) As regards claim of the appellant under Section 54F of the Act, in case the temporary structure was part of the appellant's 40% share of land and if it existed as on the date of the transfer, the appellant would not be eligible for deduction under Section 54F of the Act as the appellant herself has claimed the same to be a residential house. Further a perusal of the income tax return of the appellant for AY 2007-08 shows that the appellant was owner of a residential house at `BSK 3rd Stage', with a value of Rs 4,83,100/-. In the statement of affairs as on 31.03.2011 (As enclosed with the return of income for AY 2011-12), the description of this property with value of Rs 4,83,100/- is given as Houses(Flats) at BSK 3rd Stage. Thus the appellant would not satisfy the conditions laid down in the proviso to section 54F(1) of the Act and such she would not be eligible to claim any deduction under this Section."

10. Apart from the above, the AO adopted the cost of construction of the flats which the assessee was to receive from the builder as 40% of her share by applying the cost of construction rate at Rs.1,800 per sq.ft. The CIT(Appeals) was of the view that as per clause 9 of the JDA, if the developer and the assessee want to adjust the built-up area over and above their respective shares, consideration for each sq.ft. of built-up area to e adjusted was fixed at Rs.2,000 per sq.ft. The CIT(Appeals) was of the view that this rate should be applied to arrive at the full value of the consideration on transfer of the capital asset. He accordingly enhanced the quantum of long term capital gain.

11. Aggrieved by the aforesaid order of CIT(Appeals), the assessee is in appeal before the Tribunal.

12. We have heard the rival submissions. The ld. counsel for the assessee submitted that there is clear evidence to show a building viz., a

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residential house existed over the old property and therefore the provisions of section 54 of the Act ought to have been applied. In this regard, the ld. counsel placed reliance on the decision of the Hon'ble High Court of Karnataka in the case of *Dr. R. Balaji (2014) 22 Taxman 305 (Kar)* wherein the Hon'ble High Court in the context of section 54 of the Act, held that a house of 200 Sq.ft. with RCC Cement flooring etc. can be said to be a residential house. His alternate submission was that even assuming that the provisions of section 54F of the Act are applicable, still the assessee would be entitled to the deduction. In this regard, the ld. counsel for the assessee placed reliance on the decision of the Hon'ble High Court of Karnataka in the case of *CIT v. K.G. Rukminiamma, 331 ITR 221 (Kar)* wherein the Hon'ble High Court took the view that if on a JDA, multiple flats are received by the assessee, that has to be construed as one house and deduction u/s. 54 cannot be denied. It was also submitted that the conclusions of CIT(Appeals) that assessee owned another house at BSK 3rd Stage is incorrect because the property referred to by the CIT(A) in his order is nothing but the property which was subject matter of JDA.

13. It was further submitted that the CIT(Appeals) was not justified in enhancing the long term capital gain because the clause in the JDA regarding adjustment and how the rate on which built-up area has to be adjusted is only in the event of change in the constructed are of flats allotted to the Assessee and when such change is very marginal. That cannot be applied as the cost of construction of the new asset.

14. The ld. DR relied on the order of the CIT(Appeals).

15. We have given a very careful consideration to the rival submissions. As far as the question whether section 54 of the Act would apply, it is clear from the Settlement Deed dated 24.07.2002 under which the assessee got

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the property that there was a residential house in the property which was subject matter of JDA. The CIT(Appeals), however, proceeded on the basis that the JDA does not make any reference to any building. We have perused the JDA and we find that the description as given in the schedule to JDA is as follows:-

"SCHEDULE

All the piece and parcel of property bearing Bangalore Mahanagara Palike Old No.66 & 67, New No.17 situated at Ittamadu Village, Uttarahalli Hobli, Bangalore South Taluk, Bangalore – 560 085, now coming under Bangalore Mahanagara Palike Ward No.55, in all measuring East to West : 60'-0" (Sixty Feet) and North to South : 50'-0" (Fifty Feet), totally measuring 3000 Sq. Feet or thereabout and bounded on:-

EAST BY : Road.
WEST BY : Property bearing No.65,
NORTH BY : Road,
SOUTH BY : Property bearing Nos.61 and 62."

16. From the above description, we cannot come to the conclusion that the subject matter of the JDA is only a land, because the reference is to property bearing Bangalore Mahanagara Palike Old No.66 & 67, New No.17 situated at Ittamadu Village, Uttarahalli Hobli, Bangalore South Taluk, Bangalore – 560 085. In the case of *Dr. R. Balaji vs DCIT,* the decision of the ITAT Bangalore which was confirmed by the Hon'ble Karnataka High Court as reported in *(2014) 222 Taxman 305 (Karn)*, wherein the question was whether a house of 200 sq.ft. RCC with cement floor and civic amenities on the said property could be said to be "a residential house" for the purpose of allowing deduction u/s. 54 of the Act. The Hon'ble High Court approved the findings of the Tribunal and held that

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the assessee fulfilled conditions for grant of exemption under section 54 of the Act. There is no other basis given by the revenue authorities to come to conclusion that there was no building in existence at the time when the JDA was entered into. The assessee would therefore be entitled to deduction u/s. 54 of the Act.

17. Even assuming that there was no building over the property that was subject matter of JDA, still the assessee would be entitled to deduction u/s. 54F of the Act. We are of the view that there is no basis for the conclusion of CIT(A) that the assessee owned more than two residential houses. The conclusions of the CIT(A) in this regard are without any basis. As already observed, the property referred to by the CIT(A) is nothing but 'BSK 3rd Stage' which was subject matter of the JDA, as stated by the ld. counsel for the assessee before us.

18. As far as the deduction u/s. 54F of the Act on the question whether if under a JDA multiple flats are given to the owner whether deduction u/s.54F of the Act can be given, the decision of the Hon'ble High Court of Karnataka and the other decision cited before us supports the plea of the assessee that deduction u/s. 54F of the Act cannot be denied on the ground that multiple flats are obtained by the assessee. The ld. DR in this regard had placed reliance on the decision of the Hon'ble High Court of Karnataka in the case of *CIT v. Late Khubchand M Makhija, ITA No.496/2007 dated 18.12.2013*.

19. We have given careful consideration to the rival submissions. We find that the facts of the Assessee's case are similar to the case of *Smt.K.G.Rukminiamma (supra)* decided by the Hon'ble Karnataka High Court. In the case of *K.G.Rukminiamma*, the facts were, on a site measuring 30' x 110' the assessee had a residential premises. Under a

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joint development agreement she gave that property to a builder for putting up flats. Under the agreement 8 flats are to be put up in that property and 4 flats representing 48% is the share of the assessee and the remaining 52% representing another 4 flats is the share of the builder. So the consideration for selling 52% of the site was 4 flats representing 48% of built up area and the 4 flats are situated in a residential building. The Court held that the 4 flats constitute 'a residential house' for the purpose of sec 54. The 4 residential flats cannot be construed as 4 residential houses for the purpose of sec 54. It has to be construed as "a residential house" and the assessee is entitled to the benefit accordingly. In that view of the matter, the Court held that the Tribunal as well as the appellate authority were justified in holding that there is no liability to pay Capital Gains tax as the case squarely falls under sec. 54 of the Income Tax Act, 1961.

20. As far as the decision of the Hon'ble Madras High Court in the case of *V.R. Karpagam, Income Tax Appeal No.301 of 2014. judgment dated 18/8/2014* is concerned, the facts were similar to the case of the assessee. The assessee in the case of *V.R.Karpagam* entered into an agreement with M for development of a piece of land owned by it. As per agreement, assessee was to receive 43.75% of built up area after development, which was translated into five flats. The Assessee claimed exemption u/s 54F on the value of five flats. The AO granted benefit of capital gains in respect of one flat and the CIT(A) affirmed findings of AO holding that claim of assessee u/s 54F for all five flats could not be admitted, but however, he took the view that the assessee would be entitled to benefit of s. 54F in respect of one single flat with largest area. In appeal, the Tribunal held that assessee was eligible for exemption u/s 54F on all five flats received by her in lieu of land she had parted with and the word "a" appearing in s. 54F should not be construed in singular, but should be understood in plural. The

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Hon'ble Madras High Court upheld the order of the Tribunal. It was also held that amendment was made to s. 54F with regard to word "a" by Finance (No.2) Act, 2014 with effect only from 01.04.2015 withdrawing deduction for more than one flat (residential house). Post amendment, viz., from 01.04.2015, benefit of s. 54F will be applicable to one residential house in India. However, prior to said amendment, a residential house would include multiple flats/residential units. Similar decisions were rendered on identical facts by the Hon'ble Madras High Court in the case of *CIT vs Gumanmal Jain [2017] 80 taxmann.com 21 (Mds)*.

21. As far as the decision of the Hon'ble Karnataka High Court in the case of *Khubchand Makhija (supra)* is concerned, as rightly pointed out by the learned counsel for the Assessee, the facts of the aforesaid case are clearly distinguishable from the facts of the case of the Assessee and the facts of the case of *K.G.Rukmaniamma (supra)* decided by the Hon'ble Karnataka High Court. In the case of the *Late Khubchand M Makhija (Supra)*, the facts were that one residential house was sold and the Long Term Capital Gain on such sale was used to buy two independent residential houses. This aspect has been noticed by the Hon'ble Court in paragraph 15 & 16 of the judgment in the case of *Khubchand M.Makhija (supra)* wherein the distinguishing facts between the facts of *K.G.Rukminiamma (supra)* and the facts of the case in *Khubchand M.Makhija (supra)* were brought out by the Hon'ble Karnataka High Court.

22. In the light of the law as explained in the various judicial pronouncements referred to above, we are of the view that the CIT(Appeals) ought to have allowed deduction claimed by the assessee either u/s. 54 or 54F of the Act.

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Another aspect which needs to be considered is that the conclusion of CIT(Appeals) that since the assessee did not file return of income making claim for deduction u/s. 54 of 54F of the Act, the same cannot be allowed. On this aspect, we are of the view that the CIT(Appeals) as an appellate authority cannot deny the benefit of deduction which the assessee is entitled to in law. In this regard, the ld. counsel for the assessee has brought to our notice that the decision of the ITAT Mumbai Bench in the case of *Dr. Ashwin Balchand Mehta v. JCIT*, ITA No.5329 &6923/Mum/2012, order dated 06.11.2015, wherein the Tribunal after considering the decision of the Hon'ble Bombay High Court in the case of *CIT v. Pruthvi Brokers & Shareholders Pvt. Ltd., 349 ITR 336 (Bom)*, held that even if a claim is not made before the AO, it can be made before the appellate authorities. We are of the view that a lawful claim of deduction cannot be denied by the revenue authorities purely on technicalities. Tax is to be levied and collected in accordance with the law. If the assessee is entitled to deduction while computing the long term capital gain, that cannot be denied on the ground that such a claim was not before the AO. In Manohar Reddy Basani Vs. ITO ITA. No. 1307/Hyd/2017 order dated 30.5.2018, the ITAT Hyderabad Bench took the view that deduction u/s.54F of the Act cannot be denied for the reason that a claim to that effect was not made in a return of income.

23. The CIT(Appeals) has placed reliance on a decision in the case of Goetz India Ltd. 284 ITR 323) (SC) which was rendered in the context of raising an additional ground which, in our view, is not appropriate. In the given facts and circumstances, we are of the view that the assessee is entitled to deduction u/s. 54 / 54F of the Act and the same is directed to be allowed.

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24. In the result, the appeal of the assessee is allowed.

Pronounced in the open court on this 20th day of July, 2018.

Sd/-	Sd/-
(JASON P. BOAZ)	(N.V. VASUDEVAN)
Accountant Member	Judicial Member

Bangalore,
Dated, the 20th July, 2018.
/ Desai Smurthy /

Copy to:

1. The Appellant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Senior Private Secretary
ITAT, Bangalore.