

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

RESERVED ON : 12.06.2018

DELIVERED ON : 06.08.2018

CORAM

THE HON'BLE MS. INDIRA BANERJEE, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE ABDUL QUDDHOSE

**Tax Case (Appeal) No. 520 of 2017**

**C.Aryama Sundaram**

.. Appellant

Vs.

**The Commissioner of Income Tax-3,**

**Chennai - 600 034.**

.. Respondent

PRAYER: Appeal under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras "D" Bench, Chennai, dated 27.12.2016 passed in I.T.A.No.1208/Mds/2015.

For Appellant :

Mr.R.Balasubramanian

for M/s.Maya J Nichane

For Respondent:

Ms.V.Pushpa

for Mr.M.Swaminathan

## **JUDGMENT**

Ms.Indira Banerjee, Chief Justice

This appeal is against an order dated 27.12.2016 of the Income Tax Appellate Tribunal, allowing the appeal being I.T.A.No.1208 /Mds/2015 of the appellant assessee for statistical purpose.

2. The appellant assessee, being an individual and a Senior Advocate practising in the Supreme Court of India, had filed his return of income for the assessment year 2010-11 declaring taxable income of Rs.12,20,97,560/- and the same was processed under Section 143(1) of the Income Tax Act, 1961, hereinafter referred to as the said Act.

3. The return filed by the appellant assessee was selected for scrutiny and notice under Section 143(2) of the said Act was issued on 25.8.2011. Thereafter, another notice under Sections 143(2) read with Sections 129 and 142(1) of the said Act was issued.

4. The appellant assessee sold a residential house property at No.137, Sundar Nagar, New Delhi on 15.1.2010 in favour of one Smt.Vanadana Manchanda, for a total consideration of Rs.12,50,00,000/- and the total long term capital gain that arose to the appellant assessee was

Rs.10,47,95,925/-. In the meanwhile, on 14.5.2007, the appellant assessee purchased the property with superstructure thereon at No.138, JorBagh, New Delhi for a total consideration of Rs.15,96,46,446/-. After demolishing the existing superstructure, the appellant assessee constructed a residential house at a cost of Rs.18,73,85,491/-. Thus, the appellant assessee claimed entire long term capital gain as exempt from tax under Section 54 of the said Act.

5. The Assessing Officer held that only that part of the construction expenditure incurred after the sale of the original asset would be eligible for exemption under Section 54 of the said Act and based on records held that cost of construction incurred after the sale of the original asset was Rs.1,14,81,067/-. Exemption of Rs.1,14,81,067/- was allowed as relief under Section 54 of the said Act.

6. Aggrieved by the tax demanded, the appellant assessee filed appeal, being I.T.A.No.305 CIT(A)-13/2014-15, before the Commissioner of Income Tax (Appeals)-13. By an order dated 30.03.2015, the Commissioner of Income Tax (Appeals) -13, dismissed the appeal of the appellant assessee and upheld the view of the Assessing Officer that only that part of the construction expenditure incurred after the sale of the original asset would be eligible for exemption under Section 54 of the said Act.

7. Assailing the order of the Commissioner of Income Tax (Appeals) -13, the appellant assessee filed appeal, being I.T.A.No.1208/Mds/2015, before the Income Tax Appellate Tribunal, "D" Bench, Chennai. By an order dated 27.12.2016, the Income Tax Appellate Tribunal, held that Section 54 of the said Act is a beneficial provision and had to be construed liberally on compliance of the conditions and allowed the appeal of the appellant assessee for statistical purpose. The operative portion of the order reads as follows:

“8. In the present case, considering the Apparent facts, material on record and judicial decisions and the written submission, we are of the opinion that the assessee is entitled for cost of construction in respect of Residential property, even though the assessee has not invested in capital gain accounts scheme but complied the main condition, of the provisions of the Section 54(i) of the Act. Accordingly, we remit the disputed issue to the file of the Assessing Officer to consider the deduction u/s. 54 of the Act for construction cost incurred by the assessee as above and Assessing Officer should provide adequate opportunity to the assessee to substantiate their cost of construction before passing the order on merits. Accordingly, the appeal is allowed

8. Being aggrieved by the order of the Income Tax Appellate Tribunal, the appellant assessee filed this appeal.

9. Learned counsel appearing on behalf of the appellant assessee submitted that the new residential property had been constructed within a period of three years from the date of sale of the old property. He argued that construction of a property cannot be done without land underneath it and, therefore, the cost of construction of the property should also include the cost of land.

10. Learned counsel further argued that the appellant assessee was entitled to full exemption under Section 54 of the said Act. The learned Tribunal ought to have directed the Assistant Commissioner of Income Tax to complete the assessment by granting the appellant assessee full exemption under section 54 of the said Act.

11. The appeal of the appellant assessee was admitted on the following questions of law:

i. When capital gain arises from sale of building and/or land appurtenant thereto and a residential house is constructed within

three years from the date of such sale, whether the cost of the new asset, which is eligible for set-off against capital gain, would include the cost of the land, if such land had been purchased three years prior to sale of the property from which capital gain arose ?

ii. Whether, in computation of cost of new asset contemplated in Section 54(1) of the Income Tax Act, the cost of land can be segregated from the cost of the constructed house property ?

12. Section 45(1) of the said Act provides that any profits or gains arising from the transfer of a capital asset effected in the previous year, save as otherwise provide in, inter alia, Section 54 shall be chargeable to income tax under the head capital gains and shall be deemed to be the income of the previous year in which the transfer took place. The mode and manner of computation of capital gains is governed by Section 48 of the said Act.

13. Section 54 of the said Act provides as follows:

“54. (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, one residential house in India, 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 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."

14. Under Section 54(1) of the said Act, the capital gain arising from transfer of a residential house is not to be charged to income tax as income of the previous year, if the assessee has within a period of one year before or two years after the date of transfer of that residential house purchased another residential house in India or has within a period of three years after the date of transfer constructed a residential house in India and if the amount of the cost of the residential house so purchased or constructed is equal to or less than the amount of capital gain.

15. It is a well settled principle of construction and interpretation of statutes that statutory provisions should, to the extent feasible, be interpreted and/or construed in accordance with plain meaning of the language used in those provisions.

16. On a plain reading of Section 54(1) of the said Act, the transfer of a long term asset, which would include a residential house, would be chargeable to income tax as a capital gain, except in circumstances specified in the said section.

17. It is not necessary for this Court to go into the question of mode and method of computation of capital gain as there is no dispute in this regard, which requires adjudication in this appeal.

18. The question is, whether any part of the capital gain from transfer of the residential house is exempt from the capital gain tax and if so to what extent?

19. The conditions precedent for exemption of capital gain from being charged to income tax are:

(i) The assessee should have purchased a residential house in India either one year before or two years after the date of transfer of the residential house which resulted in capital gain or alternatively constructed a new residential house in India within a period of three years from the date of the transfer of the residential property which resulted in the capital gain.

(ii) If the amount of capital gain is greater than the cost of the residential house so purchased or constructed, the difference between the amount of the capital gain and the cost of the new asset is to be charged under Section 45 as the income of the previous year.

(iii) If the amount of the capital gain is equal to or less than the cost of the new residential house, the capital gain shall not be charged under Section 45.

20. What has to be adjusted and/or set off against the capital gain is, the cost of the residential house that is purchased or constructed. Section 54(1) of the said Act is specific and clear. It is the cost of the new residential house and not just the cost of construction of the new residential house, which is to be adjusted. The cost of the new



residential house would necessarily include the cost of the land, the cost of materials used in the construction, the cost of labour and any other cost relatable to the acquisition and/or construction of the residential house.

21. A reading of Section 54(1) makes it amply clear that capital gain is to be adjusted against the cost of new residential house. The condition precedent for such adjustment is that the new residential house should have been purchased within one year before or two years after the transfer of the residential house, which resulted in the capital gain or alternatively, a new residential house has been constructed in India, within three years from the date of the transfer, which resulted in the capital gain. The said section does not exclude the cost of land from the cost of residential house.

22. It is axiomatic that Section 54(1) of the said Act does not contemplate that the same money received from the sale of a residential house should be used in the acquisition of new residential house. Had it been the intention of the Legislature that the very same money that had been received as consideration for transfer of a residential house should be used for acquisition of the new asset, Section 54(1) would not have allowed adjustment and/or exemption in respect of property purchased one year prior to the transfer, which gave rise to the capital gain or may be in the alternative have expressly made the exemption in case of prior purchase, subject to purchase from any advance that might have been received for the transfer of the residential house which resulted in the capital gain.

23. At the cost of repetition, it is reiterated that exemption of capital gain from being charged to income tax as income of the previous year is attracted when another residential house has been purchased within a period of one year before or two years after the date of transfer or has been constructed within a period of three years after the date of transfer of the residential house. It is not in dispute that the new residential house has been constructed within the time stipulated in

Section 54(1) of the said Act. It is not a requisite of Section 54 that construction could not have commenced prior to the date of transfer of the asset resulting in capital gain. If the amount of capital gain is greater than the cost of the new house, the difference between the amount of capital gain and the cost of the new asset is to be charged under Section 45 as the income of the previous year. If the amount of capital gain is equal to or less than the cost of the new residential house, including the land on which the residential house is constructed, the capital gain is not to be charged under Section 45 of the said Act.

24. For the reasons discussed above, the appeal is allowed. The questions framed above are answered in favour of the appellant assessee and against the respondent revenue. The first question is answered in the affirmative and the second question is answered in the negative. No costs.

(I.B., C.J.) (A.Q., J.)

Index : No

Internet : Yes

sasi/bbr

To:

1. The Registrar

Income Tax Appellate Tribunal

“D” Bench, Chennai.

2. The Commissioner of Income Tax (Appeals)-4

Chennai - 600 034.

3. The Income Tax Officer

Business Ward-XV(1)

Chennai - 600 034.

THE HON'BLE CHIEF JUSTICE

AND

ABDUL QUDDHOSE, J.

(sasi)