

IN THE INCOME TAX APPELLATE TRIBUNAL

“C” BENCH : BANGALORE

BEFORE SHRI ARUN KUMAR GARODIA, ACCOUNTANT MEMBER AND
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 575/Bang/2019
Assessment Year : 2013-14

Shri Basheer Noorullah Khan, No. 116B, 5 th Block, KHB Colony, Koramangala, Bangalore – 560 034. PAN: AJXPK3037H	Vs.	The Commissioner of Income Tax (Appeals), Bangalore.
APPELLANT		RESPONDENT
Assessee by	:	Shri B.S. Balachandran, Advocate
Revenue by	:	Dr. P.V. Pradeep Kumar, Addl. CIT (DR)
Date of hearing	:	11.07.2019
Date of Pronouncement	:	31.07.2019

ORDER

Per Shri A.K. Garodia, Accountant Member

This appeal is filed by the assessee and the same is directed against the order of Id. CIT(A)-9, Bangalore dated 18.01.2019 for Assessment Year 2013-14.

2. The grounds raised by the assessee are as under.

“1) The order of the lower authority is erroneous in law and on facts in so far as claim for deduction under section 54/54F has been denied.

2)The learned CIT(A) erred in confirming the disallowance of section 54/54F. on the ground that there is no registered conveyance by purported following the decisions of the Hon S.C. cited in the appellate order. to the effect that there is no transfer .

3)The learned CIT(A) failed to appreciate that those decisions are not directly on the point and on the contrary the decision cited by the appellant is directly on the issue under consideration and hence the learned CIT(A) ought to have followed the same.

4)The learned CIT(A) has erred in holding that law laid down in the case of Mysore Mineral and Podar Cements has undergone a change after amendment to registration act and therefore is not a valid law, and thus erroneously refused to follow the same. .

5)The learned CIT(A) erred in not considering and appreciating the fact that the appellant was not claiming any benefit of doubt of

ambiguity in the provisions of law but has based his claim on the basis of settled legal position and therefore the decision in the case of Dilip Kumar and Co has no relevance.

5) For these and any other ground that may be urged at the time of hearing, this appeal may be allowed in the interests of equity and justice.”

3. It was submitted by Id. AR of assessee that the issue involved in the present appeal is regarding allowability of deduction u/s. 54F of the IT Act. He drawn our attention to para no. 13 of the order of Id. CIT(A) and pointed out that it is noted by Id. CIT(A) in this para that assessee has paid sum of Rs. One crore to the vendor B Z Zameer Ahmed Khan but he has not registered the sale document. He further pointed out that in the same para, it is noted by Id. CIT(A) that this document is in the form of sale agreement only and he further noted that in the absence of registered sale deed, this transaction can at best be treated as an advance for purchase which can be reversed at any time. Thereafter, he submitted that Id. CIT(A) has considered the amendments in section 17A of the Registration Act, 1908 and also the amendments in section 53A of the Transfer of Property Act, 1882 and he has followed the judgment of Hon'ble Apex Court rendered in the case of CIT Vs. Balbir Singh Maini as reported in [2017] 86 taxmann.com 94 (SC) and he has also considered another judgment of Hon'ble Apex Court (Constitution Bench) rendered in the case of Commissioner of Customs (Import), Mumbai Vs. M/s. Dilip Kumar and Company in Civil Appeal No. 3327 of 2007 and disallowed the claim of the assessee for deduction u/s. 54F of the IT Act. He placed reliance on the judgment of Hon'ble Delhi High Court rendered in the case of Balraj Vs. CIT as reported in 254 ITR 22. He also filed written submissions of two pages. He submitted that the issue may be decided after considering written submissions and also after considering the judgment of Hon'ble Delhi High Court cited by him. The Id. DR of revenue supported the orders of authorities below. He also placed reliance on the same judgment of Hon'ble Apex Court rendered in the case of CIT Vs. Balbir Singh Maini (supra) and in particular our attention was drawn to para nos. 19 and 20 of this judgment.
4. We have considered the rival submissions. First of all, we reproduce the provisions of section 54F of the IT Act. The same are as under.

Capital gain on transfer of certain capital assets not to be charged in case of investment in residential house.

54F. (1) Subject to the provisions of sub-section (4), where, in the case of an assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of any long-term capital asset, not being a residential house (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 (hereafter in this section referred to as the new asset), the capital gain shall be dealt with in accordance with the following provisions of this section, that is to say,—

- (a) if the cost of the new asset is not less than the net consideration in respect of the original asset, the whole of such capital gain shall not be charged under section 45 ;
- (b) if the cost of the new asset is less than the net consideration in respect of the original asset, so much of the capital gain as bears to the whole of the capital gain the same proportion as the cost of the new asset bears to the net consideration, shall not be charged under section 45:

Provided that nothing contained in this sub-section shall apply where—

- (a) the assessee,—
 - (i) owns more than one residential house, other than the new asset, on the date of transfer of the original asset; or
 - (ii) purchases any residential house, other than the new asset, within a period of one year after the date of transfer of the original asset; or
 - (iii) constructs any residential house, other than the new asset, within a period of three years after the date of transfer of the original asset; and
- (b) the income from such residential house, other than the one residential house owned on the date of transfer of the original asset, is chargeable under the head "Income from house property".

Explanation.—For the purposes of this section,—

"net consideration", in relation to the transfer of a capital asset, means the full value of the consideration received or accruing as a result of the transfer of the capital asset as reduced by any expenditure incurred wholly and exclusively in connection with such transfer.

(2) Where the assessee purchases, within the period of two years after the date of the transfer of the original asset, or constructs, within the period of three years after such date, any residential house, the income from which is chargeable under the head "Income from house property", other than the new asset, the amount of capital gain arising from the transfer of the original asset not charged under section 45 on the basis of the cost of such new asset as provided in clause (a), or, as the case may be, clause (b), of sub-section (1), shall be deemed to be income chargeable under the head "Capital gains" relating to long-term capital assets of the previous year in which such residential house is purchased or constructed.

(3) Where the new asset is transferred within a period of three years from the date of its purchase or, as the case may be, its construction, the amount of capital gain arising from the transfer of the original asset not charged under section 45 on the basis of the cost of such new asset as provided in clause (a) or, as the case may be, clause (b), of sub-section

(1) shall be deemed to be income chargeable under the head "Capital gains" relating to long-term capital assets of the previous year in which such new asset is transferred.

(4) The amount of the net consideration 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] 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 by which—

(a) the amount of capital gain arising from the transfer of the original asset not charged under section 45 on the basis of the cost of the new asset as provided in clause (a) or, as the case may be, clause (b) of sub-section (1), exceeds

(b) the amount that would not have been so charged had the amount actually utilised by the assessee for the purchase or construction of the new asset within the period specified in sub-section (1) been the cost of the new asset, shall be charged under section 45 as 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 the unutilised amount in accordance with the scheme aforesaid.

Explanation.—[Omitted by the Finance Act, 1992, w.e.f. 1-4-1993.]

5. As per the provisions of this section 54F, it is seen that the requirement is this that the assessee should purchase a residential house within the prescribed period to claim deduction under this section. This is admitted position of fact in the present case that assessee has paid an amount of Rs. One crore to the vendor B Z Zameer Ahmed Khan but he has not registered the sale document. The only document available is in the form of sale agreement which is a registered sale agreement. Now under these facts, we have to decide as to whether it can be said that assessee has purchased a residential house within the prescribed time period. As per the judgment of Hon'ble Apex Court rendered in the case of CIT Vs. Balbir Singh Maini (supra), it was held that after the commencement of the Amendment Act of 2001, if an agreement,

like the JDA in that case is not registered, then it shall have no effect in law for the purposes of section 53A of the Transfer of Property Act, 1882. In that case, the issue in dispute was this as to whether as per the unregistered JDA, any transfer has taken place and any income has accrued to the assessee. Whereas in the present case, the dispute is this as to whether the assessee has purchased a house property or not for claiming deduction u/s. 54F of the IT Act.

6. At this juncture, we now examine the applicability of judgment of Hon'ble Delhi High Court rendered in the case of Balraj Vs. CIT (supra) on which reliance has been placed by Id. AR of assessee. As per the facts noted in this case in para no. 2 of the judgment, it is noted that the assessee sold property belonging to him on December 3, 1974 and by reason of the agreement of sale coupled with possession, the assessee reported to have purchased a property for Rs. 2.03 Lakhs on February 6, 1975. In the same para, this is also noted that if the aforementioned transaction amounts to purchase of property, the same would be within a period of one year. The Hon'ble Delhi High Court noted that the only question for consideration in that case was this as to whether this transaction by way of agreement of sale coupled with possession can be accepted as a purchase within the meaning of section 54 of the IT Act. This is also noted in the same para that out of the agreed consideration of Rs. 2.03 Lakhs, the assessee paid an amount of Rs. 1.73 Lakhs at the time of entering into the said agreement. In that case, the AO as well as the Id. CIT(A) and the Tribunal rejected the claim of the assessee on this ground that the assessee did not become the owner of the property as the said transaction was not evidenced by registration as provided u/s. 17 of the Registration Act. The Hon'ble Delhi High Court came to the conclusion that for applying the provisions of section 54F of the IT Act, it is not necessary that the assessee should become the owner of the property because section 54 of the said Act speaks of purchases. The Hon'ble Delhi High Court in that case followed the judgment of Hon'ble Apex Court rendered in the case of CIT Vs. T.N. Aravinda Reddy as reported in [1979] 120 ITR 46 wherein it was held that the word 'purchase' occurring in section 54(1) of the IT Act had to be given its common meaning, viz., buy for a price or equivalent of price by

payment in kind or adjustment towards a debt or for other monetary consideration. The Hon'ble Delhi High Court has also considered another judgment of Hon'ble Apex Court rendered in the case of CIT Vs. Podar Cement Pvt. Ltd. as reported in [1997] 226 ITR 625. In section 54F also, the same term is used i.e. purchase as in section 54. This is also noted by Hon'ble Delhi High Court that as per the section 17 of Registration Act, registration is required but the Hon'ble Delhi High Court came to the conclusion that for the purpose of provisions u/s. 54F, it is not essential that the assessee should become the owner of the property. Hence in our considered opinion, this subsequent judgment of Hon'ble Apex Court rendered in the case of CIT Vs. Balbir Singh Maini (supra) does not change the situation regarding applicability of this judgment of Hon'ble Delhi High Court cited by Id. AR of assessee. Now we reproduce para nos. 19 and 20 of this judgment of Hon'ble Apex Court rendered in the case of CIT Vs. Balbir Singh Maini (supra). The same are as under.

“19. It is also well-settled by this Court that the protection provided under Section 53A is only a shield, and can only be resorted to as a right of defence. See Rambhau Namdeo Gajre v. Narayan Bapuji Dhgotra (Dead) through LRs. (2004) 8 SCC 614 at 619, para 10. An agreement of sale which fulfilled the ingredients of Section 53A was not required to be executed through a registered instrument. This position was changed by the Registration and Other Related Laws (Amendment) Act, 2001. Amendments were made simultaneously in Section 53A of the Transfer of Property Act and Sections 17 and 49 of the Indian Registration Act. By the aforesaid amendment, the words “the contract, though required to be registered, has not been registered, or” in Section 53A of the 1882 Act have been omitted. Simultaneously, Sections 17 and 49 of the 1908 Act have been amended, clarifying that unless the document containing the contract to transfer for consideration any immovable property (for the purpose of Section 53A of 1882 Act) is registered, it shall not have any effect in law, other than being received as evidence of a contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by a registered instrument. Section 17(1A) and Section 49 of the Registration Act, 1908 Act, as amended, read thus:

“17(1A). The documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such

commencement, then they shall have no effect for the purposes of the said Section 53A.” “49. Effect of non-registration of documents required to be registered. No document required by Section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall-

- (a) affect any immovable property comprised therein, or*
- (b) confer any power to adopt, or*
- (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:*

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1887 (1 of 1877) or as evidence of any collateral transaction not required to be effected by registered instrument.”

20. The effect of the aforesaid amendment is that, on and after the commencement of the Amendment Act of 2001, if an agreement, like the JDA in the present case, is not registered, then it shall have no effect in law for the purposes of Section 53A. In short, there is no agreement in the eyes of law which can be enforced under Section 53A of the Transfer of Property Act. This being the case, we are of the view that the High Court was right in stating that in order to qualify as a “transfer” of a capital asset under Section 2(47)(v) of the Act, there must be a “contract” which can be enforced in law under Section 53A of the Transfer of Property Act. A reading of Section 17(1A) and Section 49 of the Registration Act shows that in the eyes of law, there is no contract which can be taken cognizance of, for the purpose specified in Section 53A. The ITAT was not correct in referring to the expression “of the nature referred to in Section 53A” in Section 2(47)(v) in order to arrive at the opposite conclusion. This expression was used by the legislature ever since sub-section (v) was inserted by the Act of 1987 w.e.f. 01.04.1988. All that is meant by this expression is to refer to the ingredients of applicability of Section 53A to the contracts mentioned therein. It is only where the contract contains all the six features mentioned in Shrimant Shamrao Suryavanshi (supra), that the Section applies, and this is what is meant by the expression “of the nature referred to in Section 53A”. This expression cannot be stretched to refer to an amendment that was made years later in 2001, so as to then say that though registration of a contract is required by the Amendment Act of 2001, yet the aforesaid expression “of the nature referred to in Section 53A” would somehow refer only to the nature of contract mentioned in Section 53A, which would then in turn not require registration. As has been stated above, there is no contract in the eye of law in force under Section 53A after 2001 unless the said contract is registered. This being the case, and it being clear that the said JDA was never registered, since the JDA has no efficacy in the eye of law, obviously no “transfer” can be said to have taken place under the aforesaid document. Since we are deciding this case on this legal

ground, it is unnecessary for us to go into the other questions decided by the High Court, namely, whether under the JDA possession was or was not taken; whether only a licence was granted to develop the property; and whether the developers were or were not ready and willing to carry out their part of the bargain. Since we are of the view that sub-clause (v) of Section 2(47) of the Act is not attracted on the facts of this case, we need not go into any other factual question.”

7. From para no. 19 of this judgment as reproduced above, it is noted by Hon'ble Apex Court in this case that the direction provided u/s. 53A is only a shield and can only be resorted to as a right of defence. In the same para, this is also noted by Hon'ble Apex Court that unless the document containing the contract to transfer for consideration any immovable property (for the purpose of Section 53A of 1882 Act) is registered, it shall not have any effect in law, other than being received as evidence of a contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by a registered instrument. In this judgment, there is no reference on this aspect of the judgment of Hon'ble Delhi High Court that it is not essential for the purpose of section 54 of the IT Act that assessee should become owner of the property. If that is so, then whether the registered sale deed is there or not is not relevant. We also find that the assessee has submitted an affidavit which is reproduced by Id. CIT(A) in his order and as per the affidavit, it is stated by the assessee that upon executing the agreement dated 28.03.2013 for sale with B.Z. Zameer Ahmed Khan, in consideration of paying Rs. One crore on the strength of the agreement took possession of the property to safe guard his interests and since then he has been using it as a rest house. It is also stated in the affidavit that in terms of the agreement, both the parties are entitled to specific performance of the obligations under the agreement dated 28.03.2013. It is also stated in the same affidavit that he is peacefully holding the possession even though the time for the balance payment of Rs. 1.5 Crores has been extended by mutual consent as provided in the agreement. The Id. CIT(A) has also reproduced the confirmation from B.Z. Zameer Ahmed Khan dated 26.12.2018 as per which it is stated by the vendor that he had entered into an agreement for sale of a property for Rs. 2.5 Crores by an indenture dated 28.03.2013. He has also stated that he has delivered possession of the property on the date of agreement as an assurance that the interest of the said purchaser B. Noorulla Khan are safe guarded in view of clause 13 of the agreement which entitles both the parties to a specific performance of the respective obligations. He has also stated in his confirmation that B. Noorulla Khan is entitled to the property in question and he is entitled for the consideration as mentioned in the agreement. Under these facts, in our considered opinion, this judgment of Hon'ble Delhi High Court cited by Id. AR of assessee is squarely applicable and we have come to this conclusion that judgment of Hon'ble Apex Court rendered in the case of CIT Vs. Balbir Singh Maini (supra)

has not changed the legal position. In our considered opinion, as per the judgment of Hon'ble Apex Court rendered in the case of CIT Vs. Balbir Singh Maini (supra), the assessee has not become the owner of the property because there is no registered sale deed as executed by the vendor. But the judgment of Hon'ble Delhi High Court is not on this basis that the assessee buyer has become owner of the property in question even without a registered sale deed. Had this been the judgment of Hon'ble Delhi High Court, this judgment would be said to be bad in law after this judgment of Hon'ble Apex Court rendered in the case of CIT Vs. Balbir Singh Maini (supra), but the decision of the Hon'ble Delhi High Court is this that as per the requirement of section 54, the assessee buyer is not required to become absolute owner of the property in question. On this aspect of the matter, this subsequent judgment of Hon'ble Apex Court does not make difference because as per this subsequent judgment of Hon'ble Apex Court rendered in the case of CIT Vs. Balbir Singh Maini (supra), the assessee has not become the owner of the property in question because there is no registered sale deed executed by the vendor but as per the judgment of Hon'ble Delhi High Court, becoming the owner of the property in question is not required for the purpose of section 54 of the IT Act. Section 54F of the IT Act is parametria with section 54 of the IT Act. Hence, we respectfully follow this judgment of Hon'ble Delhi High Court and decide the issue in favour of the assessee.

8. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on the date mentioned on the caption page.

Sd/-
(PAVAN KUMAR GADALE)
Judicial Member

Sd/-
(ARUN KUMAR GARODIA)
Accountant Member

Bangalore,
Dated, the 31st July, 2019.
/MS/

Copy to:

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

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Bangalore.