IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.8.2020

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THE HONOURABLE MR. JUSTICE T.S.SIVAGNANAM

AND

THE HONOURABLE MRS. JUSTICE V.BHAVANI SUBBAROYAN

TAX CASE APPEAL NO.181 OF 2019

(heard through video conferencing)

Ms.Moturi Lakshmi ...Appellant

Vs

The Income Tax Officer, Non
Corporate Ward 3(5),
Chennai-34. ...Respondent

APPEAL under Section 260A of the Income Tax Act, 1961 against the order dated 15.3.2018 made in ITA.No.234/Chny/2017 on the file of the Income Tax Appellate Tribunal, Chennai 'D' Bench for the assessment year 2013-14.

For Appellant : Mr.Ramanakumar

For Respondent : Mrs.R.Hemalatha, SSC

Judgment was delivered by T.S.SIVAGNANAM,J

This appeal by the assessee filed under Section 260A of the Income Tax Act, 1961 (for short, the Act) is directed against the order dated 15.3.2018 made in ITA.No.234/Chny/2017 on the file of the Income Tax Appellate Tribunal, Chennai 'D' Bench (for brevity, the Tribunal) for the assessment year 2013-14.

2. The appeal has been admitted on 25.2.2019 on the following substantial question of law :

> "*Whether, for the purpose of Section 54 of the Income Tax Act, the advance payment made by the assessee for the purchase of a residential flat would constitute a part of purchase or not, when such advance is made to the seller of flat prior to the date of sale of capital asset in question ?*"

3. We have heard Mr.Ramanakumar, learned counsel appearing for the appellant – assessee and Mrs.R.Hemalatha, learned Senior Standing Counsel appearing for the respondent – Revenue.

4. The facts, which are necessary for answering the substantial question of law framed for consideration, are as follows :

The assessee, who is an individual, filed her return of income for

the assessment year under consideration namely 2013-14 on 07.4.2014 for a total income of Rs.2,52,480/-. The return of income was processed under Section 143(1) of the Act. Subsequently, the case was selected for scrutiny and the assessment was completed under Section 143(3) of the Act by order dated 23.3.2016 whereby the Assessing Officer disallowed the investments made by the assessee prior to the sale of asset, which was on 15.11.2012.

5. As against the said order of assessment dated 23.3.2016, the assessee filed an appeal before the Commissioner of Income Tax (Appeals)-4, Chennai-34 [hereinafter called the CIT(A)]. However, the appeal was dismissed vide order dated 29.11.2016. Aggrieved by that, the assessee filed further appeal before the Tribunal, which also dismissed the appeal by the impugned order.

6. The substantial question of law framed for consideration in this appeal has been answered in several decisions and the issue is no longer res integra. To answer the substantial question of law, we may have to refer to the two decisions of the Hon'ble Division Bench of this Court namely

(i) in the case of ***CIT Vs. K.Srinivasan [reported in (2010) 235 CTR 0588]*** wherein the question, which was framed for consideration, was as to ***whether the Tribunal was right in law in***

holding that the investment in the new asset for the purpose of deduction under Section 54F need not be out of sale consideration received on sale of the original asset. The question was answered in the following lines :

> *"10. Section 54F provides option to the assessee to invest even within a period of one year before the date on which the transfer takes place. No such precondition to that effect is imposed by the provision. Only the Assessing Officer assumed that there is a precondition, which is not contemplated by the provision. Section 54F is clear, unambiguous and plain. It is only a mere presumption and assumption of the Revenue. It is well settled principle that taxing statute shall have to be interpreted on the basis of the language. The often quoted famous observation of Rowlatt,J in the case of Cape Brandy Syndicate Vs. IRC [(1921) 1 KB 64] are very relevant and at p.71, it has been held as follows:*
>
> *`In a taxing statute, one has to look mainly at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the*

language used.'

Section 54F encourages investment in residential house and the same is required to be interpreted in such a manner as not to nullify the object. Therefore, we are of the view that the assessee is entitled to the relief under Section 54F and confirm the concurrent findings given by both the appellate authorities. The learned counsel appearing for the Revenue is also unable to furnish any material or evidence or case law or compelling reason to take a contrary view of the Tribunal.

11. For the foregoing reasons, we are of the view that the order of the Tribunal is in conformity with law. Under these circumstances, we are of the view that no question of law, much less substantial question of law, arises for consideration. Accordingly, the tax case appeal is devoid of merits and the same is dismissed."

And

(ii) in the case of ***C.Aryama Sundaram Vs. CIT [reported in (2018) TaxCorp (DT) 73811]*** wherein one of the substantial questions of law framed for consideration was ***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.

7. In fact, the argument of the Revenue in the said case is identical to that of the argument made by Mrs.R.Hemalatha, learned Standing Counsel appearing for the Revenue in the case on hand. She has argued that the language of Section 54(1) of the Act is very clear and that this being a benefit given to the assessee, it requires a strict interpretation. In this regard, she has referred to the decision in the case of ***Commissioner of Customs (Import), Mumbai Vs. Dilip Kumar & Co. and Ors [reported in (2018) 9 SCC 1].*** The Hon'ble First Bench considered the said argument in the said judgment and held in favour of the assessee. The relevant portions of the decision of the Hon'ble First Bench of this Court in the case of ***C.Aryama Sundaram*** are as hereunder :

> *"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 it 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."

8. The Constitution Bench judgment of the Hon'ble Supreme Court in the case of ***Dilip Kumar*** dealt with the aspect as to how the exemption provisions were to be construed and it has been held that the provisions had to be construed strictly and the benefit of any ambiguity should lean in favour of the Revenue.

9. The Hon'ble Supreme Court in the case of ***Sh.Sanjeev Lal Vs. CIT [reported (2014) 365 ITR 0389]*** considered the scope of Section 54 of the Act and held as follows :

"In addition to the fact that the term "transfer" has been defined under Section

2(47) of the Act, even if looked at the provisions of Section 54 of the Act which gives relief to a person who has transferred his one residential house and is purchasing another residential house either before one year of the transfer or even two years after the transfer, the intention of the Legislature is to give him relief in the matter of payment of tax on the long term capital gain. If a person, who gets some excess amount upon transfer of his old residential premises and thereafter purchases or constructs a new premises within the time stipulated under Section 54 of the Act, the Legislature does not want him to be burdened with tax on the long term capital gain and therefore, relief has been given to him in respect of paying income tax on the long term capital gain. The intention of the Legislature or the purpose with which the said provision has been incorporated in the Act, is also very clear that the assessee should be given some relief. Though it has been very often said that common sense is a stranger and an incompatible partner to the Income Tax Act and it is also said that equity and tax are strangers to each other, still this Court has often observed that purposive interpretation

should be given to the provisions of the Act. In the case of Oxford University Press v. Commissioner of Income Tax [(2001) 3 SCC 359] this Court has observed that a purposive interpretation of the provisions of the Act should be given while considering a claim for exemption from tax. It has also been said that harmonious construction of the provisions which subserve the object and purpose should also be made while construing any of the provisions of the Act and more particularly when one is concerned with exemption from payment of tax. Considering the aforestated observations and the principles with regard to the interpretation of Statute pertaining to the tax laws, one can very well interpret the provisions of Section 54 read with Section 2(47) of the Act, i.e. definition of "transfer", which would enable the appellants to get the benefit under Section 54 of the Act."

10. In the decision in the case of ***Sh.Sanjeev Lal,*** the Hon'ble Supreme Court pointed out the intention of the Legislature i.e to give relief to the assessee in the matter of payment of tax on the long term capital gains. Therefore, in our considered view, the decision in the case of ***Sh.Sanjeev Lal*** would come to the aid and assistance of the

assessee.

11. The decision of the Delhi High Court in the case of ***CIT Vs. Bharti Mishra [reported in (2014) 265 CTR 0374],*** is referred to support the contention that Sections 54 and 54F are pari materia.

12. In the decision of the Karnataka High Court in the case of ***CIT Vs. K.Ramachandra Rao [reported in (2015) 277 CTR 0522],*** the entire scheme of Section 54 of the Act was explained and it was held that there was no prohibition for the assessee for putting up construction out of the sale consideration received by such transfer of site, which was owned by him as it was clear from the language of the provision. It was further held that though the original asset was sold much after purchase of vacant site, still the beneficial provision should be extended to the assessee.

13. In another decision of the Karnataka High Court in the case of ***CIT Vs. J.R.Subramanya Bhat [reported in (1987) 165 ITR 0571],*** the Income Tax Officer rejected the claim of the assessee on the ground that construction of the new building had commenced much earlier to the sale of the old building. This finding was reversed by the Court by holding that the date of sale of the old building was immaterial, that what was required to be seen was as to whether the assessee constructed the building within two years from the date of

sale of the old building and that he was entitled to the relief under Section 54F of the Act. The same effect is in the decision of the Punjab & Haryana High Court in the case of ***CIT, Faridabad Vs. Shri.Kapil Kumar Agarwal [reported in (2015) TaxCorp (DT) 62501]*** wherein it was held that ***Section 54F of the Act nowhere envisages that the sale consideration obtained by the assessee from the original capital asset is mandatorily required to be utilized for the purchase or construction of a house property.***

14. In the decision of the Kerala High Court in the case of ***ITO Vs. K.C.Gopalan [reported in (1999) 107 Taxman 591],*** a learned Single Judge held that the wording of Section 54 of the Act would make it clear that the law does not insist that the sale consideration obtained by the assessee itself should be utilized for the purchase of house property. The same effect is in the decision of the Division Bench of the Allahabad High Court in the case of ***CIT Vs. H.K.Kapoor [reported in (1998) 234 ITR 0753].***

15. To explain the intention of the Legislature, the learned counsel for the appellant has referred to the Notes on Clauses of Finance Bill, 1982 wherein in Clause 11 sought to amend Section 54 of the Act and it has been stated as follows :

"Sub-Clause (a) seeks to amend Sub-

Section (1) of Section 54. Under the proposed amendment, in the case of the assessee being an individual, the long term capital gains arising on the transfer of a residential house will be exempt from income tax if the assessee has, within a period of one year before or after that date either purchased or within a period of three years after that date constructed a residential house. For this purpose, the long term capital asset means a capital asset, which is not a short term capital asset."

16. From the above, it is clear that the intention of the Legislature was to either purchase before or after the date of sale and the word 'purchased' or 'constructed' used in the Notes on Clauses amply makes the intention clear. In the light of the above discussions, we hold that the substantial question of law is required to be answered in favour of the assessee.

17. In the result, the above tax case appeal is allowed and the substantial question of law is answered in favour of the assessee. No costs.

17.8.2020

RS

T.S.SIVAGNANAM, J

AND

V.BHAVANI SUBBAROYAN, J

RS

To

1.The Income Tax Appellate Tribunal, Chennai 'D' Bench.

2.The Income Tax Officer, Non Corporate Ward 3(5), Chennai-34.

TCA.No.181 of 2019

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