IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH " A "

BEFORE SHRI ARUN KUMAR GARODIA, ACCOUNTANT MEMBER AND
SHRI VIJAY PAL RAO, JUDICIAL MEMBER

I.T.A. No.503/Bang/2017 (Assessment Year : 2007-08)		
Smt. K.R. Lakshmi, No.4019, 6th Cross, 7th Block, Jayanagar, Bengaluru. PAN ACRPL 9956D	Vs.	Income Tax Officer, Ward 7(2)(2), Bengaluru.
Appellant		Respondent.

Appellant By : Shri Ashok Kulkarni, Advocate. Respondent By : Shri AR.V.Sreenivasan, JCIT (D.R)

Date of Hearing : 19.04.2017.
Date of Pronouncement : 28.04.2017.

<u>O R D E R</u>

<u>Per Shri Vijay Pal Rao, J.M.</u> :

This appeal by the assessee is directed against the order dt.23.12.2016 of Commissioner of Income Tax (Appeals), Bangalore for the Assessment Year 2007-08.

2. The assessee has raised the following grounds :

1. The order of the Hon'ble Commissioner of Income Tax (Appeals) is opposed to law and facts of the case.

2. The Hon'ble Commissioner of Income Tax (Appeals) erred in holding that the Appellant is the joint owner of the subject property and the capital gains accrued in the hands of the appellant.

3. The Hon'ble Commissioner of Income Tax (Appeals) ought to have held that the subject property belonged to Late K. Rajaraju (HUF) and the said HUF had entered into Joint Development Agreement and received super built area in the form of flats in consideration of land surrendered.

4. Alternatively and without prejudice the Hon'ble Commissioner of Income Tax (Appeals) ought to have held that there was no transfer of the capital asset during the relevant previous year attracting the provisions of capital gains.

5. Alternatively and without prejudice, the computation of capital gains is not in accordance with law.

6. The Hon'ble Commissioner of Income Tax (Appeals) ought to have held that the ratio of the decision of the Karnataka High Court decision in CIT Vs T.K. Dayalu is not applicable in the facts of the appellant's case.

7. The Hon'ble Commissioner of Income Tax (Appeals) ought to have allowed in computing capital gains the deduction u/s 54F of the Income Tax Act.

8. The Hon'ble Commissioner of Income Tax (Appeals) reliance on the Karnataka High Court decision in the case of Unique Shelters (P) Ltd V/s UOI is wholly misplaced.

9. The appellant craves for leave to add to, delete from or amend the grounds of appeal.

3. Ground Nos.2 & 3 are regarding assessment of capital gains in the hand of the assessee as against the claim of HUF. The assessee is an individual and filed return of income for the Assessment Year under consideration on 31.7.2007. Subsequently, the Assessing Officer received information from the Investigation Wing that the assessee along with four others had executed a Joint Development Agreement (in short JDA) dt.11.7.2006 with builder M/s. Latitude Projects Pvt. Ltd. As per the said agreement in consideration of the assessee agreeing to transfer undivided share of land 50%, the builder agreed to construct and deliver 3,846 sq. ft. of super built up area in the form of apartment along with 52% of car parking and other amenities in the constructed area. Since the assessee did not offer any capital gain in the return of income and this transaction was in the nature of transfer of land therefore, the Assessing Officer proposed to assess the capital gain accrued in the hands of the assessee and reopened the assessment by issuing notice under Section

148 of the Income Tax Act, 1961 (in short 'the Act') on 27.03.2014. In the reassessment the Assessing Officer had computed the capital gain as per the market value of super built up area amounting to Rs.56,26,692. The assessee challenged the action of the Assessing Officer before the CIT (Appeals) and contended that since the JDA was executed by five members of the family and therefore property belongs to the HUF and any capital gain arising out of the JDA has to be charged in the hand of the HUF. However, the CIT (Appeals) was not convinced with the contention of the assessee and confirmed the action of the Assessing Officer.

4. Before us, the learned Authorised Representative of the assessee has reiterated his contention as raised before the authorities below and submitted that the property in question was purchased on 14.10.1959 and 22.1.1962 and thereafter there was partition among the family members and on 24.6.2002 there was a Memorandum of family partition whereby the partition took place way back on 14.8.1980 was reduced in writing and registered. Therefore the learned Authorised Representative has submitted that after the partition the property again belongs to the new HUF of which Sri K.R. Ravishankar is the Karta and the members of the HUF. Hence the learned Authorised Representative has submitted that when the property belongs to the family and

particularly to the HUF then the capital gain arising out of the JDA cannot be assessed to tax in the hand of the assessee.

5. On the other hand, the learned Departmental Representative has relied upon the findings of the authorities below and submitted that except the submissions and claim made by the assessee there is no document which can demonstrate that there was any HUF in existence at any point of time. He has further contended that even the JDA was signed by all the owners in their individual capacity and not in the capacity of Karta of HUF. Therefore the claim of the assessee cannot be accepted in the absence of any material to show that there was a HUF and the land in question belongs to HUF.

6. We have considered the rival submissions as well as the relevant material on record. There is no dispute that the JDA dt.11.7.2206 was signed by the co-owners of the land in their individual capacity. There is no mention of the ownership of the land belongs to HUF either in the JDA or in any other document. Further the assessee has not produced any record to show that the HUF was in existence as there is no return of income ever filed by so called HUF. The CIT (Appeals) has dealt with this issue in paras 6.1 and 6.2 as under :

6.1 From the close perusal of the JDA, it is evident that the agreement was entered into by the Appellant and others as joint owner of the property under consideration and there is no mention of HUF. The Appellant, when asked for, submitted that the said late K. Rama Raju (HUF) has never filed the return of income. The plea of the Appellant that the family partition which took place on 05.04.2009 was the sole basis of their individual ownership and before that there was a HUF which was the owner of the property, does not have any corroborative evidence/ ground to stand.

6.2 In the said JDA in page number 4 & 5 it has been clearly mentioned that *" The said Sri Rama Raju and Subba Raju under sale deed dated 22.01.1962 , registered as document number 15, book number I, volume 30, pages 248-250, before the several registrar Bangalore South taluk Bangalore also purchased 0-04 Guntas in survey number 63/2 and 0-15 Guntas of land in Sy no 60/1 of Sarakki village and thus came to be the owner of land measuring 1 acre 19 Guntas in survey number 60/1 and 63/2 of Sarakki village Uttrahalli Hobli, Bangalore South taluk:".* In the JDA the appellant and 4 other co-owners have entered into an agreement as first party treating themselves as owners. In the succeeding paragraphs also the appellant and other co-owners had mentioned themselves in pleural saying them as 'OWNERS'. There is no mention of late K. Rama Raju (HUF) in the JDA or even in the family partitions. In page number 9 of the agreement the co-owners had mentioned that they are in absolute possession of the property. The contention of appellant that the developer insisted for signature of all the family members in the JDA and therefore all the members have signed doesn't seems to be logical as the Developers

always insist that all the owners should sign on the agreement and it cannot be insisted that if the property belongs to HUF then all the coparceners should sign on the agreement. Nonetheless, in such situation the same should have been mentioned in the JDA. Accordingly I find no merit in these grounds of appeal and therefore they are dismissed.

Thus it is clear that the JDA was signed by the assessee along with 4 co-owners in the capacity of the co-owners of the land and nowhere there is any expression or indication that the JDA was signed on behalf of the HUF. The facts recorded by the CIT (Appeals) has not been disputed by the assessee

however the only contention of the learned Authorised Representative is that since the property was purchased long back and thereafter there was a partition in the family therefore the land belongs to HUF. We do not find any substance or merit in this contention of the AR of the assessee in the absence of establishing this fact that any HUF was in existence and the JDA was executed on behalf of the HUF. Accordingly, we do not find any error or illegality in the impugned order of the CIT (Appeals) qua this issue.

6. Ground Nos.4 to 6 are regarding the transaction under JDA amounts to transfer of capital asset.

7. We have heard the learned Authorised Representative as well as learned Departmental Representative and considered the relevant material on record. This issue is covered by the Hon'ble jurisdictional High Court in the case of **CIT Vs. Dr.T.K. Dayalu** 202 Taxman 531. The CIT (Appeals) has decided this issue by following the decision of Hon'ble jurisdictional High Court cited supra, therefore, once the possession was given to the builder for construction of housing project then in view of the binding precedent of Hon'ble jurisdictional High Court in the case of **CIT Vs. Dr.T.K. Dayalu** (supra) we do not find any reason to interfere with the finding of the CIT (Appeals).

8. Ground Nos.7 & 8 are regarding rejection of claim of deduction under Section 54F of the Act.

9. We have heard the learned Authorised Representative as well as learned Departmental Representative and considered the relevant material on record. The CIT (Appeals) has rejected the claim of the assessee in para 9.2 as under :

9.2 A tax deduction/ exemption is intended to lower an individual's taxable income and the amount one has to pay for his taxes but to avail the deduction one has to file the Return of Income. The Appellant has filed its return of income for the A.Y. 2007-08 but no claim of deduction under section 54F/ 54 of the Act was claimed. It is also a matter of fact that in the instant case, the appellant never claimed exemption u/s 54/ 54F in the return of income (ROI) filed. No exemption was claimed for the A.Y. 2007-08 either in the original return and even the appellant got an opportunity to file return in response to notice u/s 148, the appellant opted to consider the original return as return filed against the notice u/s 148 of the Act. Further in the case of Unique Shelters (P) Ltd v UOI (2013), 37 taxmann.com 338, the Hon'ble High Court of Karnataka has observed that deduction cannot be allowed unless the return is filed. In view of the above I am of the considered view that, as the appellant has not claimed exemption u/s 54 of the Act in the entire proceedings so far for the A.Y. 2007-08 and thus the facts of the case is *different from the case of CIT Vs. Smt. K.G. Rukminiamma (supra), in which claim under Section 54F was allowed under Section 54 of the Act. Accordingly, I find no occasion to interfere with the order of Assessing Officer on this issue."*

Thus it is clear that the CIT (Appeals) has not gone into the merits of the issue but the claim has been rejected on technical ground that the assessee has not claimed this deduction under Section 54F of the Act in the return of income. It

is pertinent to note that when the assessee has not offered any capital gain in the return of income then the question of claiming the deduction under Section 54F in the return of income does not arise. Even otherwise the assessee took a stand that the capital gain is not assessable in the hand of the assessee. Therefore the CIT (Appeals)'s view is completely misunderstanding of the decision dt.31.07.2013 of Hon'ble jurisdictional High Court in the case of **Unique Shelters Pvt. Ltd. V. Union of India** which was relied upon by the CIT (Appeals) while rejecting the claim of the assessee. Once the Assessing Officer has proposed to make the addition of capital gain in the hand of the assessee then all other related claim or deduction attached to the addition of income are to be taken into account. Therefore in view of the facts and circumstances of the case when the claim of the assessee on merit is prima facie allowable in view of the decision of Hon'ble jurisdictional High Court in the case of **CIT Vs. K.G. Rukmani Amma** 331 ITR 211, we set aside the impugned order of CIT (Appeals) on this issue and remit the same to the record of the CIT (Appeals) for deciding on merits. Needless to say that an opportunity of hearing be afforded to the assessee before passing the order.

10. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 28th April, 2017.

Sd/-	Sd/-
(ARUN KUMAR GARODIA)	**(VIJAY PAL RAO)**
Accountant Member	Judicial Member

Bangalore,
Dt.28.04.2017.

*Reddy gp

Copy to :

1. Appellant
2. Respondent
3. C.I.T.
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard File.

Assistant Registrar
Income Tax Appellate Tribunal
Bangalore.