

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 579/JP/2013
निर्धारण वर्ष/Assessment Year : 2005-06

The ACIT, Circle- 1, Kota.	बनाम Vs.	Smt. Zahida Bano, 5-B-18, Vigyan Nagar, Kota.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ABSPB6777A		
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent

निर्धारिती की ओर से/ Assessee by : Shri Mahendra Gargieya (Adv.)
राजस्व की ओर से/ Revenue by : Shri Ajay Malik (Addl.CIT)

सुनवाई की तारीख/ Date of Hearing : 25/01/2018
उदघोषणा की तारीख/Date of Pronouncement: 31/01/2018

आदेश / ORDER

PER: VIJAY PAL RAO, J.M.

This appeal by the Revenue is directed against the order of Id.
CIT(A) dated 26.03.2016 for the assessment year 2005-06. The
Revenue has raised the following grounds:-

*"On the facts and in the circumstances of the case, the Id. CIT(A)
has erred in :-*

*(i) deleting the capital gain of Rs. 44,84,675/- assessment in the
A.Y. 2005-06;*

(vi) the appellant craves liberty to raise additional ground and to modify/amend the ground of appeal at the time of hearing.”

2. The assessee filed his return of income on 01.10.2011 declaring total income Rs. 8,13,460/- which was processed u/s 143(1) of the Act on 28.02.2006. Subsequently the AO reopened the assessment by issuing the notice u/s 148 of the Act on 05.06.2009 to assess the capital gain on a transfer of plot of land for the assessment year under consideration instead of the capital gain shown by the assessee in the assessment year 2006-07 and claim the deduction u/s 54F of the Act. The AO completed the reassessment and assessed the capital gain for the year under consideration without giving the benefit of section 54F of the Act. On appeal, the Id. CIT(A) has decided this issue in favour of the assessee by holding that the capital gain arose on account of transfer of the plot of land in the assessment year 2006-07 and not in the assessment year 2005-06.

3. Before us, Id. AR DR has submitted that the Id. CIT(A) has decided this issue on the ground that the capital gain was assessed for the assessment year 2006-07 as held by the Id. CIT(A) while deciding the appeal for the assessment year 2006-07. However, when the condition of transfer as provided u/s 2(47)(v) r.w.s. 53A of the Transfer

of Property Act are satisfied then the transfer of land in question was completed on the date when the assessee has entered into an agreement and allowed the developer to construct the flat on the plot of land. He has submitted that as per the agreement dated 13.09.2004 the assessee allowed the developer company to construct the flat and may receive the advance for sale of flats so constructed. Therefore, when the assessee has transferred the possession and received more than 50% of the consideration during the year under consideration then, as per the provisions of Section 2(47) (v) of the Income Tax Act the transfer is completed and long term capital gain arising the said transfer is liable to be assessed in the year under consideration. The Id. DR has pointed out that the assessee received Rs. 40,11,000/- out of total consideration of Rs. 75,11,000/- during the year under consideration and therefore, the transaction of transfer will be deemed to have been completed in the year under consideration. He has relied upon the orders of the Assessing Officer.

4. On the other hand, Id. AR has submitted that as per the agreement dated 13.09.2004 the assessee has only granted licence to the developer to carrying out of the construction of flats and only after receipt of the entire sale consideration the assessee has handed over

the possession of the plot of land in question. He has referred to the terms and conditions of the agreement and submitted that it is specifically mentioned in the agreement that only after the entire sale consideration is received the possession of the land will be handed over to the developer. He has further pointed out that for the assessment year 2006-07 the assessment was completed u/s 143(3) where in the AO held that the capital gain was to be considered in the assessment year 2005-06 only. However, the Id. CIT(A) decided this issue for the assessment year 2006-07 in favour of the assessee and allowed the deduction u/s 54F which was not challenged by the Department. Thus, once the Department has accepted the order of the Id. CIT(A) for the assessment year 2006-07 then the contrary stand cannot be taken by the Department. He has further submitted that even in the case of the husband of the assessee this issue was decided in favour of the assessee by holding that the capital gain has to be considered for the assessment year 2006-07 and not for the assessment year 2005-06 and Revenue has not challenged the order of the Id. CIT(A) dated 29.12.2008 in the case of namely Mr. Mohd. Mian. Even the decision of the Id. CIT(A) for the assessment year 2005-06 in case Mohd. Mian has

not been challenged by the Revenue. He has supported the order of the Id. CIT(A).

5. We have considered the rival submissions as well as relevant material on record. At the outset we note that the assessee declared long term capital gain from sale of the land in question for the assessment year 2006-07 and also claimed deduction u/s 54F of the Income Tax Act. The Assessing Officer while passing the assessment order u/s 143(3) of the Act held that the capital gains were assessable for the assessment year 2005-06 and not for the assessment year 2006-07. On appeal, the Id. CIT(A) decided this issue in favour of the assessee vide order dated 30.06.2010 and also allowed the claim of deduction u/s 54F of the Act for the said assessment year 2006-07. It is not in disputed that the Revenue has not challenged the said order of the Id. CIT(A) for the assessment year 2006-07. The Id. CIT(A) after considering all these facts has given the concluding finding in para 6.3 as under:-

" I have considered the the contentions of the appellant as well as assessment order. It is seen that it has been pointed out by the appellant that assessee has shown the capital gains in sale of the property in question in A.Y. 2006-07. The AO held that capital gains were assessable in A.Y. 2005-06 and not in A.Y. 2006-07. The matter went to the CIT(A) who decided vide Appeal No'

509/2008-09 by order dated 30.06.2010 that long term capital gains arising from sale of the property would be taxed in A.Y. 2006-07 and not in A.Y. 2005-06. The operative part of the decision is as under:

" In given facts and circumstances, I hold that 665, Pratap Nagar, Dadabari was a residential property and that the correct date for its transfer was 19.03.2006, when through a samarpan nama the appellant transferred unconditional possession and full rights after receiving entire payment from the purchaser. Consequently, long term capital gains arising from such sale would be taxed in AY 2006-07, and not AY 05-06 as proposed by the assessing officer. As the appellant had invested the proceeds from sale of 665, Pratap Nagar, Dadabari in 113, Shakti Nagar, Kota purchased from Rajendra Kumar Mittal and Nawal Kishore Mittal as stipulated in section 54 of the Act, 1961 were satisfied, the appellant was entitled for benefit of section 54 of the IT Act, 1961. Grounds No. 2 and 3 of the appeal are accepted."

From above, it is apparent that the order of the AO has merged with that of Id.CIT(A). It has been also pointed out by the assessee that this matter has attained finality as no appeal has been filed against the said order though on tax effect. However, it is a fact that as far as assessee is concerned this matter has attained finality in A.Y. 2006-07.

In view of above discussion, the same income cannot be brought to tax again in A.Y. 2005-06 as it has already been held to be assessable in A.Y. 2006-07 as discussed above.

Further, it has been pointed out by the appellant that in the similar circumstances in case of husband of appellant Mr. Mohd. Mian, capital gains were assessed in A.Y. 2005-06 by the AO after reopening the case while the Hon'ble CIT(A) in order dated 29.12.2011 has held that long term capital gains from the sale of the property would be taxable in A.Y. 2006-07.

In view of above discussion, both the above grounds of appeal are allowed."

Thus, it is clear that the Id. CIT(A) for the assessment year 2006-07 has decided this issue by holding that the capital gain was to be considered for the assessment year 2006-07 and not for the assessment year 2005-06. Similarly in the case of Mohd. Mian the husband of the assessee the Id. CIT(A) held that the long term capital gain from the sale of the property would be taxable in the assessment year 2006-07. Neither in the case of the assessee nor in the case of the husband of the assessee the Revenue challenged the order of Id. CIT(A) for the assessment year 2006-07. Therefore, the appeal of the Revenue is not maintainable on this ground alone.

6. We further note that when the assessee has claimed deduction u/s 54F of the Income Tax Act for the assessment year 2006-07 which was allowed by the Id. CIT(A) then the said claim is also allowable for the assessment year under consideration particularly in view of the fact that the investment in the new house has been made by the assessee within time prescribed under the provisions of Section 54F of the Act. It was brought to our notice that the assessee purchased the new property on 26.12.2005 and therefore the investment in new property

was made within prescribed time under the provisions of section 54F of the Act. Though the Revenue can raised an objection about the allowability of deducting u/s 54F of the Act as the assessee has not deposited the net consideration in the capital gain account however, when the assessee has not received the entire sale consideration during the year under consideration then the question of depositing the same does no arise. The condition of depositing the amount in capital gain accounts scheme presupposes that the assessee has already received the entire sale consideration. In the case in hand when the assessee did not receive the sale consideration during the year under consideration then, the said condition cannot be thrust upon the assessee. Further, the assessee has invested the amount within the time period provided u/s 54F of the Act and we find that the Hon'ble Karnataka High Court in case of Principal CIT vs. C. Gopaldaswamy 384 ITR 307 has held that the condition precedent for claiming the benefit u/s 54/54F of the Act is that capital gain realized from capital asset should have been invested either in purchase of residential house or in constructing the residential house. If it is established that the consideration was received on alienation property has been invested for purchase of residential house, the assessee would be entitled to benefit of section 54F of the Act

irrespective of the fact that the transfer was not completed in all respect. In case of CIT vs. Sambandam Udaykumar 345ITR 389 the Hon'ble High Court has in para 10 and 11 as under:-

"10. *A reading of the aforesaid provision makes it very clear that if a capital gain arises from the transfer of any long term capital asset, not being a residential house and the assessee has within the period of one year before or two years after the date on which transfer took place purchased or has within a period of three years after that date constructed a residential house, if the cost of the new asset is not less than the net consideration in respect of the original asset the whole such capital gain shall not be charged under section 45 of the Act. However, 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 be 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 of the Act.*

11. *Section 45 of the Act makes it very clear that any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save or otherwise provided in sections 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H is chargeable to income tax under the head 'capital gains' and shall be deemed to be income of the previous year in which the transfer took place. The aforesaid sections which form part of section 54 of the Act are cases where capital gain on transfer of capital asset not to be charged in those cases. Section 54F of the Act is a beneficial provision of promoting the construction of residential house. Therefore, the said provision has to be construed liberally for achieving the purpose for which it was incorporated in the statute. The intention of the Legislature was to encourage investments in the acquisition of a residential house and completion of construction or occupation is not the requirement*

of law. The words used in the section are 'purchased' or 'constructed'. For such purpose, the capital gain realized should have been invested in a residential house. The condition precedent for claiming benefit under the said provision is the capital gain realized from sale of capital asset should have been parted by the assessee and invested either in purchasing a residential house or in constructing a residential house. If after making the entire payment, merely because a registered sale deed had not been executed and registered in favour of the assessee before the period stipulated, he cannot be denied the benefit of section 54F of the Act. Similarly, if he has invested the money in construction of a residential house, merely because the construction was not complete in all respects and it was not in a fit condition to be occupied within the period stipulated, that would not disentitle the assessee from claiming the benefit under section 54F of the Act. The essence of the said provision is whether the assessee who received capital gains has invested in a residential house. Once it is demonstrated that the consideration received on transfer has been invested either in purchasing a residential house or in construction of a residential house even though the transactions are not complete in all respects and as required under the law, that would not disentitle the assessee from the said benefit."

Therefore, in view of the facts and circumstances of the case when the investment was made within the time period even counted from the date of transfer to be considered on the date of agreement dated 13.09.2004 then the assessment of capital gain tax either for the assessment year 2006-07 or for the assessment year 2005-06 would be Revenue neutral as the benefit of section 54F is available to the

assessee. In view of the above discussion, we do not find any reason to interfere with the impugned order of the Id. CIT(A).

In the result, the Revenue appeal is dismissed.

Order pronounced in the open court on 31/01/2018

Sd/-
(विक्रम सिंह यादव)
(Vikram Singh Yadav)
लेखा सदस्य / Accountant Member

Sd/-
(विजय पाल राव)
(Vijay Pal Rao)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 31/01/2018.

*Santosh.

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- ACIT, Circle-1, Kota.
2. प्रत्यर्थी / The Respondent- Smt. Zahida Bano, Kota.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 579/JP/2013}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar