

3, IN THE INCOME TAX APPELLATE TRIBUNAL

“A” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, JUDICIAL MEMBER AND
SHRI ARUN KUMAR GARODIA, ACCOUNTANT MEMBER

ITA No.712/Bang/2014
Assessment Year :2011-12

The Assistant Commissioner of Income Tax, Circle – 2 (1), Mangalore.	Vs.	Shri J. Krishna Palemar, Prop: Land Links, D.No. 5-7-708/1, No. 9, City Point, Kodialbail, Mangalore – 575 003. PAN: ACZPP0444N
APPELLANT		RESPONDENT

Appellant by	:	Shri C.H. Sundar Rao, CIT (DR-I)
Respondent by	:	Smt. Sheetal Borkar, Advocate

Date of hearing	:	05.04.2018
Date of Pronouncement	:	24.04.2018

ORDER

Per Shri A.K. Garodia, Accountant Member

This appeal is filed by the revenue which is directed against the order of Id. CIT(A), Mysore dated 17.03.2014 for Assessment Year 2011-12.

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

“(1) Based on the facts and circumstances of the case, the Ld. CIT (A) has erred in allowing the Assessee's claim of deduction U/s 54F by not appreciating the fact that the assessee owned more than one residential house other than the new asset on the date of transfer of the original asset.

(2) Based on the facts and circumstances of the case, the Ld.CIT(A) ought to have appreciated that the assessee's case is clearly covered by the proviso to Section 54F of the IT Act as he owned more than one residential house other than the new asset on the date of transfer of the original asset.

(3) Based on the facts and circumstances of the case, the Ld.CIT(A) has failed to appreciate that the assessee owned the following properties on the date of transfer of original asset which were residential in nature.

- a. a residential property at Chilimbi
- b. property situated at "Palemar" Bejai, Mangalore, survey No.117-A, 142/2A, Kodialbail, Mangalore
- c. property at Katipalla Village, Mangalore
- d. an Apartment of 1112 sq.ft. at 1st floor with one covered Car Parking Space at Basement Floor, marked as No.10, situated at 1st Main Road, Kalidas Lane, Gandhi Nagar, Bangalore
- e. a residential property at 90B, Bolor Village, Mangalore

(4) Based on the facts and circumstances of the case, the Ld. CIT(A) ought to have appreciated that all the above properties are residential in nature as per the purchase deed of the property. These properties are owned by the assessee on the date of transfer of the original asset.

(5) Based on the facts and circumstances of the case, the Ld.CIT(A) has failed to appreciate that the properties shown at Sl. No.3 (a, b, c, e) are shown as investment by the assessee and disclosed in the fixed asset schedule of the Balance sheet. The purchase deed of the properties clearly shows that the properties are residential in nature.

(6) Based on the facts and circumstances of the case, the Ld. CIT (A) ought to have appreciated that the properties at Sl.No.3 (a,b,c,e) are owned by the assessee and part of fixed asset schedule of the Balance Sheet and residential in nature. The assessee might be using these properties for different purposes but it does not make the properties as non residential.

(7) Based on the facts and circumstances of the case, the Ld.CIT(A) has failed to appreciate that the section 54F does not talk about the use of the property. It just says that the assessee should not **own more than one residential house other than the new asset**. The assessee may use the residential house for any other purpose like storing the building material for the business purpose but it does not mean that the house property purchased by the assessee as per the purchase deed is not a residential property.

(8) Based on the facts and circumstances of the case, the Ld.CIT(A) ought to have appreciated that the use of residential property for any other purpose does not make the property as non residential. Hence the proviso to section 54F is clearly hit in this case and the assessee is not entitled for deduction U/s 54F of the IT Act.

(9) Based on the facts and circumstances of the case, the Ld.CIT(A) has erred in allowing the assessee's claim that the Apartment of 1112 sq.ft. at 1st floor with one covered Car Parking Space at Basement Floor, marked as No.10, situated at 1st Main

Road, Kalidas Lane, Gandhi Nagar, Bangalore has been sold by the assessee and the assessee is no longer the owner of the same when no capital gain whatsoever has been shown in the return of income for the A.Y.2009-10 by the assessee on sale of this flat. It means, the assessee himself has not recognized the sale on 6-1-2009.

(10)Based on the facts and circumstances, the Ld. CIT (A) ought to have appreciated that the assessee has not sold the flat situated at No.10 First Main Road, Kalidas Lane, Gandhinagar, Bangalore on 06.01.2009 as it was not registered in the name of the purchaser and the assessee has not recognized any long term/ short term capital gain on this transaction and the property is shown in the Balance Sheet of the assessee for AY 2010-11 as his asset. Hence the assessee has not recognized the transaction on 06.01.2009. Hence he is the owner of the flat which is a residential unit.

(11)Based on the facts and circumstances of the case, the Ld. CIT (A) has erred in allowing the assessee's claim that the unoccupied residential properties are not residential properties and should not be treated as residential units for the purpose of allowance of deduction U/s 54F of the IT Act.

(12)Based on the facts and circumstances of the case, the Ld. CIT(A) ought to have appreciated that the completed, unsold flat in the construction project of the assessee, are also residential properties, which are owned by the assessee, hence may be included for the purpose of disallowance of deduction U/s 54F of the IT Act.

(13)Based on the facts and circumstances of the case, the Ld.CIT(A) has failed to appreciate that the assessee's claim for deduction U/s 54F is totally not admissible as he owned more than one residential house other than the new asset on the date of transfer of the original asset.

(14)Based on the facts and circumstances of the case, the Ld.CIT(A) has erred in deleting the notional rent from the unoccupied residential properties. These properties are owned by the assessee and have not been let out to anybody during the year. Hence notional rent U/s 23 of the IT Act should have been offered for taxation by the assessee.

(15)Based on the facts and circumstances of the case, the Ld.CIT(A) ought to have appreciated that the notional rent from the unoccupied residential properties owned by the assessee are to be taxed U/s 24 by calculating the rent U/s 23 of the IT Act.

(16)For the above and further grounds that may be urged at the time of hearing of the appeal, your appellant prays that the appeal may be allowed and justice rendered.”

3. It was submitted by Id. DR of revenue that although several grounds are raised by the revenue but the issue involved is only one i.e. allowability of deduction claimed by assessee u/s. 54F and the main dispute is this as to whether the assessee was having more than one residential house other than new asset on the date of the original transfer of asset. He pointed out that it is noted by the AO in Para 3 on page 17 of the assessment order that the assessee owns an apartment of 1112 sq.ft. at 1st Floor with one covered Car Parking Space at Basement Floor, marked as No.10, situated at 1st Main Road, Kalidas Lane, Gandhi Nagar, Bangalore. He also pointed out that the AO has noted that this flat was transferred by him on 06.01.2009 vide unregistered sale agreement to Sri. Manoj Kalya but this flat has been shown in the balance sheet of Assessment Year 2010-11 and there is no capital gain whatsoever shown in the return of income for the Assessment Year 2009-10 by the assessee on sale of this flat and therefore, the AO came to the conclusion that the assessee himself has not recognized the sale on 06.01.2009 and therefore, it is clear that this flat was still in the ownership of the assessee on the date of transfer of the land at Mysore during the Financial Year relevant to the Assessment Year 2011-12. Thereafter the Id. DR of revenue drawn our attention to Para 4 of the assessment order where AO has noted that in addition to the self occupied residential property, the assessee has a residential property at 90B, Bolor Village, Mangalore purchased on 26.02.2010. He pointed out that the AO considered the assessee's explanation that this property is part of Chilimbi property owned by the assessee but the AO has noted that as per the purchase deed of the property. it is a separate property situated on the land of 9.5 cent with residential building bearing D.No. 2-1-42&2-1-42/1. The AO has noted that this might be adjacent to the Chilimbi property, which is shown in the Fixed Assets Schedule of the Balance Sheet of the assessee and the assessee might have clubbed all the land in the properties, which is called as Chilimbi property in the Balance sheet for the purpose of

development of residential complex but it does not take out the individual status of this property, which shows that it was a residential property at the time of sale of original asset during the F.Y. 2010-11. Hence for the purpose of this assessment order, this property is also treated as residential house in the ownership of the assessee. Thereafter the Id. DR of revenue pointed out that in Para 5 of the assessment order, the AO has noted that the assessee is also having a property at Katipalla Village, Mangalore described in the gift deed dated 12.01.2009 as a property consisting of 10.2 acres of land with a building bearing No. Katipalla 9-27A, 27A-1 & 27B. The AO has noted that the assessee has explained it as an Agricultural property in the Balance Sheet. As per the AO, it does not change the character of the property that the agricultural land was having a building inside, which was fit to be used for residential purposes and this is also considered as a residential house on the relevant date. He further pointed out in Para 6 of the assessment order, the AO has noted that in addition to these, the assessee has also one unsold flat of 955 sq.ft. in 5H Project which is also a residential flat and agreement for sale was entered only on 28.04.2011 and hence, this flat was also there in the ownership of the assessee on the date of transfer of the original asset on 30.11.2010. On this basis, the AO has come to the conclusion that assessee owned more than one residential house on the relevant date and therefore, the assessee is not eligible for deduction u/s. 54F of IT Act.

4. Regarding the decision of CIT(A) as per which the CIT(A) has decided the issue in favour of the assessee, he submitted that CIT(A) has considered the various facts in Para 6.2 and 6.3 of his order and thereafter, in Para 6.4, he decided the issue in favour of the assessee by holding that the property which the AO has treated as residential property are not residential properties, which are business assets of the assessee and therefore, the assessee is eligible for deduction u/s. 54F of IT Act. He submitted that CIT (A) has not given cogent reasons for rejecting the finding of AO that the assessee owns various residential houses on the date 30.11.2010 and therefore, the order of CIT (A) should be reversed and that of AO should be restored. His ultimate

argument was this that even if order of CIT (A) is not reversed, the order of CIT (A) is cryptic and therefore, it should be set aside and the matter be restored back to the file of CIT (A) for fresh decision by way of a speaking and reasoned order. As a third argument, he also submitted copy of Wealth Tax return filed by the assessee for Assessment Year 2011-12 on 27.12.2011 and he pointed out that in the last page of Wealth Tax return, the assessee has considered Chilimbi property at Mangalore as self occupied house property and claimed exemption from the Wealth Tax in respect of that property also and therefore, the assessee himself is accepting that Chilimbi property is self occupied house property in addition to self occupied house property at `Palemar at Bejai Church Road, Mangalore which has been considered as self occupied property by AO in Para no. 1 on page 17 of the assessment order and therefore, it is clear that on 30.11.2010, the assessee was owning more than one residential house. Learned AR of the assessee supported the order of CIT (A). Regarding the wealth tax return for AY 2011 — 12 brought on record by the DR of the revenue, she submitted that this property at Chilimbi is exempt from wealth tax for some other reason but by mistake, it is stated in the wealth tax return that it is self occupied house property and therefore, because of a mistake in wealth tax return, the issue in income tax cannot be decided against the assessee.

5. We have considered the rival submissions. First, for the sake of ready reference, we reproduce various relevant paras from pages 17 to 19 of assessment order. The same read as under.

“1) Assessee has a house property, which is self occupied, called 'Palemar' at Bejai Church Road, Mangalore. The address of this property is survey No.117-1A, 142/2A, Kodialbail, Mangalore. This has also been declared in the affidavit filed by the assessee before the Assembly Election of Karnataka 2013.

2) The assessee has a residential property at Chilimbi, which is shown in the schedule of fixed assets and explained by the AR as used for storing construction materials. The section 54F does not speak anything about the use of residential property. Moreover, assessee has not produced any evidence to prove his claim that the above property is used by him for storing construction material. This property has been demolished by the

assessee and a multi-storied complex is coming up on the land of this property. Hence, it is not possible to verify the use of the property as on to-day by the assessee as claimed by him. A residential property can be used by the owner for any purpose, but it should be a residential property. There is no doubt from the description of the property in the purchased deed that it is a residential property which has subsequently been demolished by the assessee to use the land for constructing multi-storied residential building vide licence issued by the MCC dt.21-5-2012.

3) The assessee owns an Apartment of 1112 sq.ft. at 1st floor with one covered Car Parking Space at Basement Floor, marked as No.10, situated at 1st Main Road, Kalidas Lane, Gandhi Nagar, Bangalore. It is claimed by the assessee that this flat has been transferred on 6-1-2009 vide unregistered sale agreement to Sri. Manoj Kalya. This flat has been shown in the balance sheet of A.Y.2010-11. There is no capital gain whatsoever shown in the return of income for the A.Y.2009-10 by the assessee on sale of this flat. It means, the assessee himself has not recognized the sale on 6-1-2009. Hence it is assumed that this flat was still in the ownership of the assessee on the date of transfer of the land at Mysore during the financial year relevant to this assessment year.

4) In addition to the above residential properties, the assessee has a residential property at 90B, Bolor Village, Mangalore purchased on 26-2-2010. This property has been explained as part of Chilimbi property by the assessee. As per the purchase deed of the property, it is a separate property situated on the land of 9.5 cent with residential building bearing D. No.2-1-42 & 2-1-42/1. This might be adjacent to the Chilimbi property, which is shown in the Fixed Schedule of the Balance Sheet of the assessee. The assessee might have clubbed all the land in the properties, which is called as Chilimbi property in the Balance-sheet for the purpose of development of residential complex. But, it does not take out the individually status of the property, which shows that it was a residential property at the time of sale of original asset during the F.Y.2010-11. Hence, for the purpose of this order, this property is also treated as a residential house in the ownership of the assessee.

5) The property at Katipalla Village, Mangalore is described in the Gift Deed dt. 121-2009 as a property consisting of 10.2 acre of land with a building bearing No. Katipalla 9-27A, 27A-1 & 27B. The assessee has explained it as an Agricultural Property in the Balance-sheet. It does not change the character of the property that the agricultural land was having a building inside, which was fit to be used for residential purposes.

6) In addition to this, the assessee also has one unsold flat of 955 sq.ft. in 5H Project which is also a residential flat and agreement for sale was entered only on 28-4-2011. Hence, this flat was also there in the ownership of the assessee on the date of transfer of the original asset on 30-11-2010.

All the above properties are residential properties and the assessee might be using for some other purposes, but it does not make these properties as nonresidential properties. The proviso to Section 54F reads as under:

"Provided that nothing contained in this sub-section shall apply where the assessee owns more than one residential house, other than the new asset, on the date of transfer of the original asset....."

6.11 It is very clear from the above discussions that the assessee has more than one residential house other than the new asset on the date of transfer of the original asset. Hence, he is not entitled for the deduction u/s.54F of the LT.Act, 1961. Accordingly, the claim of deduction u/s.54F is disallowed and no deduction u/s.54F is given in the income computation sheet while calculating long-term capital gain."

6. The first proviso to section 54F is relevant for deciding this issue and therefore, the same is also reproduced hereinbelow for the sake of ready reference.

"54F. Capital gain on transfer of certain. capital assets not to be charged in case of investment in residential house.—(1) Where, in the case of an assessee being an individual, 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 after the date on which the transfer took place purchased, or has within a period of three years after that date constructed, a residential house (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 the assessee owns on the date of the transfer of the original asset, or purchases, within the period of one year after such date, 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.

Explanation.—For the purposes of this section,—

- (i) "long-term capital asset" means a capital asset which is not a short-term capital asset;*
- (ii) "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."*

7. Now we reproduce the relevant paras from the order of CIT(A) as per which the issue was decided by CIT(A). These paras are paras 6,6.1 to 6.4 on pages 4 to 7 of the order of CIT(A). These paras are as under.

“6. Ground No. 1 - Disallowance of exemption claimed u/s.54F:

The first grounds of appeal of the appellant is disallowance of exemption claimed u/s.54F amounting to Rs.5,88,69,688/- on long term capital gain on sale of property. As seen from the statement of facts and assessment order, brief facts of the case are that, the appellant had sold a property measuring 10 acres 2 guntas during the year for a consideration of Rs.11.70 crores to M/s. Shobha Developers. After reducing the indexed cost of Rs. 2,01,19,289/- capital gain from the sale of said property was worked at Rs.9,68,80,711/-. The appellant has invested a sum of Rs.7,10,95,200/- in the purchase of new residential property. On the basis of this investment proportionate deduction u/s 54F was claimed amounting to Rs.5,88,69,688/- and balance capital gain of Rs.3,80,11,023/- was offered for tax as long term capital gain in the return of income filed.

6.1 During assessment proceedings the AO observed that, appellant has following house properties apart from what he has claimed exemption u/s.54F and his dwelling unit 'Palemar', situated at Kodialguthu East, Bejai Church Road, Mangalore - 575 003.

- 1. Property at Chilimbi.*
 - 2. Apartment at Bangalore*
 - 3. Property at 90B, Bolor Village Mangalore*
 - 4. Property at Katipalla Village Mangalore*
 - 5. Flat at Ashoka Majestics and 5H project of M/s. Landlinks*
- Proprietary concern of the Appellant*

AO has observed that, as per the proviso to section 54F, if assessee owns more than one residential house, other than the new asset purchased, on the date of transfer of the original asset deduction u/s.54F could not be allowed. Since, the appellant owns more than one residential house as stated above, deduction u/s.54F could not be allowed. Accordingly, the AO disallowed deduction u/s 54F.

Also, in the course of assessment proceeding, AO has observed that, appellant has shown cost of improvement incurred at Rs.1,00,06,853/-for the financial year 2003-2004 to 2009-2010 and in the chart submitted by the appellant on 24.12.2013 the cost of improvement has been shown at Rs.1,16,44,801/-. Hence, the appellant was asked to produce the details of cost of improvement. The Appellant has filed the bills and vouchers for Rs.80,15,683/- in support of his claim, out of the cost of improvement claimed in the return of income Rs.1,00,06,853/-. The detailed submissions were made by the appellant in support of his claim. Finally, the appellant has voluntarily agreed for 40% of the disallowance of said expenditure, since additions made in the cost of improvement to the land has been done in the various years from 2003-2004 onwards, appellant is not sure, if the department makes any further investigation, then the contractors will confirm the transactions at a particular point of time. Accordingly, on the basis of the admissions done by the appellant, 40% of the cost of improvement claimed in the return of income is disallowed and cost of improvement is allowed only to the extent of 60% of Rs.1,00,06,853/-, which is equal to Rs.60,04,112/-.

6.2 The AR has argued that, the property at Chilimbi and property situated at survey No.90B Bolor Village are adjoining properties and is used for storing building construction materials. The same is later converted for development purposes and necessary licence has been obtained from the Mangalore City Corporation. A copy of the licence obtained from Mangalore City Corporation is produced before me. Hence, he has argued that, it is not at all residential house property.

He further argued that, apartment at Bangalore, which has been transferred to Mr.ManojKalya vide sale agreement dated 6.1.2009.

The same could not be registered in the name of said Mr. Manoj Kalya since, there is a claim on the property by State Bank of Mysore. The said property is used for Appellant's office use at Bangalore. The same is disclosed in the Balance Sheet as on 31.3.2010 as stock-in-trade and as advance received in the Balance Sheet for the year under question. Copies of the Balance Sheets are submitted before me.

AR has also stated that, the property at Katipalla Village is an agricultural property and there is no residential house in the said property. The Agricultural property is disclosed in the Balance Sheet of the Appellant under the Fixed Assets Schedule. He has pleaded before me that, flat at Ashoka Majestic has been agreed to be sold vide agreement dated 23.2.2010 and unsold flat 5H project has been sold vide sale deed dated 28.4.2011. The unsold flats are kept as stock-in-trade in the Balance Sheet of the Appellant as business assets. Copies of the agreement for sale and sale deed are placed before me.

Further AR has also brought to my notice that, in the grounds of appeal exemption u/s.54F has been wrongly quantified as Rs.5,88,69,688/-. In fact it ought to have been Rs.6,22,75,258/- after disallowing of 40% of cost of improvement.

6.4 I have considered the rival contentions carefully, there is force in the arguments put forth by the AR. After going through the material facts placed before me, I hold that, the properties which the AO has treated as residential property are not residential properties, which are business assets of the appellant. Appellant has only one residential house other than one investment made in new assets as on date of sale. Therefore, I direct the AO to allow the appellant deduction claimed under Section 54F. Further, I direct the AO to verify the quantum of exemption claimed u/s.54F amounting to Rs.6,22,75,258/- after restricting the cost of improvement at 60%”.

8. From the above paras reproduced from the order of CIT(A), it is seen that although the order of CIT (A) appears to be very cryptic as contained in only in Para 6.4 as reproduced above but this is also seen that in Para 6.2 of his order, he has noted all the arguments of the learned AR of the assessee before him and thereafter, in Para 6.4, he has stated that he finds force in these arguments and on that basis, he has decided the issue in favour of the assessee and it means that he has accepted those contentions and therefore, we have to examine the acceptability of those

arguments and decide the present appeal of the revenue. One more new relevant fact has been brought on record before us by the learned DR of the revenue i.e. Wealth Tax return filed by the assessee for Assessment Year 2011-12 as per which, the assessee himself has claimed that Chilimbi property is a self occupied house property and the same is in addition to residential house property at Mangalore considered by the AO as per Para 1 on page 17 of his order as reproduced above. Regarding this, the argument of the learned AR of the assessee is this that this property at Chilimbi is exempt from wealth tax for some other reasons but by mistake, it is stated in the wealth tax return that it is self occupied house property and therefore, only because of a mistake in wealth tax return, the issue in income tax cannot be decided against the assessee. This may be true that there is a mistake in Wealth tax return but this aspect has to be examined as to what is correct position. Hence, we feel it proper that this matter should be restored back to CIT (A) for a fresh decision after examining this factual aspect.

9. We also find that in Para 6.1 of his order, it is noted by CIT (A) that there are five properties which are residential houses in addition to one self occupied house property as per AO and assessee. The said Para 6.1 is reproduced above and the names of those five properties are available in that. In Para 6.2 of his order, learned CIT (A) has noted that this is the argument of the learned AR of the assessee that the property no. 1 & 3 are same property. This aspect was discussed by the AO also in the assessment order and the AO held that since property at Bolor village, Mangalore is purchased separately, it has to be considered that these are two properties even if the assessee is using these two as one property. In our considered opinion if two or more adjacent properties are combined together by the assessee and is being used in a combined manner, than even if these properties are acquired separately, these should be considered as one property. We hold so. But for examining this factual aspect as to whether these two properties being used together in a

combined manner during relevant period, we restore the matter to CIT (A).

10. Now the question is this that whether this combined property is residential house or not. In this regard, the basis adopted by the AO in the assessment order is this that if the description of the property in the purchase deed is a residential property, it is a residential house for the purpose of section 54F even if it is actually being used for a different purpose. In our considered opinion, a house property can be considered as a residential house property only if it is being used for residential purpose by the assessee or the tenant. For example, if a flat which is constructed for residential purpose is used for office or for godown, it cannot be taken as a residential house property for the purpose of section 54F. This view of us is supported by the tribunal order rendered in the case of Sanjeev Puri vs. DCIT as reported in 160 ITD 213 (Del) on which reliance is placed by the learned AR of the assessee and copy submitted by her on pages 66 & 67 of the paper book filed on 05.04.2018. In that case, the property was shown as residential house in municipal records but was actually used by the assessee as office. Under these facts, it was held by the co ordinate bench that this property cannot be considered as a residential house for determining eligibility of the assessee to claim deduction u/s 54F. As per the assessee in the present case, this property is being used for storing construction material. About this claim of the assessee that this property is being used for the purpose of storing construction material, the AO has stated on page 17 of the assessment order as reproduced above that the assessee has not produced any evidence to prove this claim. The AO has also noted that this property is demolished by the assessee and a multi storied complex is coming up on the land of this property and hence, it is not possible to verify the use of this property at the relevant point of time. Under these facts, we feel it proper to restore this aspect of the matter also to CIT (A) for fresh decision with the direction that the assessee should produce evidence in support of this claim that this property is being used for storing construction material during relevant period and if the assessee is able to do so than this

property should not be considered as a residential house property owned by the assessee on the relevant date for deciding the eligibility of the assessee for deduction u/s 54F.

11. Now we examine the claim of the assessee about Apartment at Bangalore. As per pages 17 & 18 of the assessment order, the entire discussion is about sale to Sri Manoj kalya on 06.01.2009 and the finding of the AO is this that the transfer did not take place and hence, this property is owned by the assessee only on the relevant date. After giving this finding, the AO has to show that this property is used for residential purposes but there is no such finding of the AO in the assessment order. We have already discussed above that as per the AO, actual user is not relevant and we have held in Para 10 above that a house property can be considered as a residential house property only if it is being used for residential purpose by the assessee or the tenant and this decision of us is supported by the tribunal order rendered in the case of Sanjeev Puri vs. DCIT (Supra). In Para 6.2 of his order, learned CIT (A) has noted the claim of the assessee that this property is being used as assessee's office at Bangalore and learned DR of the revenue could not bring any material before us to even create some doubt about this claim of the assessee that this property is used as office and is disclosed in balance sheet as stock in trade. Hence we hold that this property cannot be considered as a residential house property owned by the assessee on the relevant date.
12. Regarding the Property at Katipalla village out of remaining two properties, we find that about this Property, the AO says on page 18 of the assessment order that this property has 10.2 acres of land with building with a number and he has noted the explanation of the assessee that this is an agricultural property but the AO concluded that since the agricultural land has a building inside and this building is fit to be used for residential purposes, it is a residential house but there is no finding of the AO that it is actually used for residential purposes. In the absence of this finding of the AO that this

property was actually used for residential purposes and the failure of the learned DR of the revenue to bring any evidence before us in this regard to dislodge the claim of the assessee and finding of CIT (A) that this property is not a residential property, we hold that this property also cannot be considered as a residential house property owned by the assessee on the relevant date.

13. Regarding the remaining property i.e. Flat at Ashoka Majestic, we find that about this property, the AO says on pages 18 & 19 of the assessment order that this flat is a residential flat and it is in the ownership of the assessee on the relevant date because it was sold by the assessee only on 28.04,2011 and therefore, on the relevant date, it was owned by the assessee. As against this, it is noted by CIT (A) on page 6 of his order that it was pleaded by the assessee before him that this flat was agreed to be sold vide agreement dated 23.02.2010 and sale deed was executed on 28.04.2011. This was also pleaded that the unsold flats were kept as stock in trade in the balance sheet as business asset. We find that about this flat, there is no finding of the AO that this was actually used as a residential house and in spite of this finding of CIT (A) that this property is not used for residential purposes, the learned DR of the revenue did not bring any evidence before us in this regard to dislodge the claim of the assessee and finding of CIT (A) that this property is not a residential property and it is a business asset shown in the balance sheet as stock in trade. Hence, we hold that this property also cannot be considered as a residential house property owned by the assessee on the relevant date.
14. As per above discussion, it is seen that out of five properties in dispute, except for first and third properties, we have held that none of these three properties can be considered as a residential house property owned by the assessee on the relevant date. But for two properties i.e. first and third properties, we have restored the matter back to CIT (A) for fresh decision. Hence, this issue is partly decided in favour of the revenue for statistical purposes.

15. Regarding Ground No. 14 & 15, learned DR of the revenue supported the assessment order and learned AR of the assessee supported the order of CIT (A). In Para 7 of his order, learned CIT (A) has decided this issue in favour of the assessee on this basis that this addition of Rs. 252,000/- as notional rent was made by the AO for those five properties, for which he held that these properties are residential house properties while deciding the issue about allowability of the assessee's claim for deduction u/s 54F. Learned CIT (A) held that since it is held by him that none of these five properties is a residential house property owned by the assessee in the relevant year, this addition is deleted. We also find that on page 20 of the assessment order, the AO has noted the contentions of the assessee that these five properties are used for business purposes and therefore, no addition u/s 22/23 is called for. On page 21 of the assessment order, the AO concluded that since these properties are not let out, addition of notional rent of these properties is to be made but he has not given any finding about the claim of the assessee that these properties are used for business purposes. As per section 22 of I. T. Act, for any property occupied by the assessee for the purpose of any business carried on by him, Annual value is not to be computed for taxing under the head Income from house Property. Since, we have upheld the order of CIT (A) on this aspect in respect of three properties out of five properties, we uphold the order of CIT (A) on this issue also in respect of those three properties but for remaining two properties, we have restored the matter back to CIT (A) for a fresh decision in respect of allowability of assessee's claim under section 54F. Hence on this aspect i.e. taxability u/s 22/23 also, in relation to these two properties, the matter is restored to CIT (A) for fresh decision with the direction that if it is found that these two properties are actually used for business or agricultural purposes than no addition can be made u/s 22/23. Ground No. 14 & 15 are partly allowed for statistical purposes.

16. In the result, the appeal filed by the revenue is partly allowed for statistical purposes.

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

Sd/-
(N.V. VASUDEVAN)
Judicial Member

Sd/-
(ARUN KUMAR GARODIA)
Accountant Member

Bangalore,
Dated, the 24th April, 2018.
/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

Senior Private Secretary,
Income Tax Appellate Tribunal,
Bangalore.