IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B", HYDERABAD

BEFORE SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER
AND
SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER

I.T.A. No. 1951/HYD/2017
Assessment Year: 2009-10

G. Bhoopathi Reddy, HYDERABAD **[PAN: AFBPG1964R]**	Vs	The Income Tax Officer, Ward-13(5), HYDERABAD
(Appellant)		**(Respondent)**

For Assessee : Shri C.V. Narasimham, AR
For Revenue : Smt. N. Swapna, DR

Date of Hearing : 17-07-2018
Date of Pronouncement : 20-07-2018

O R D E R

PER B. RAMAKOTAIAH, A.M. :

The issues in this appeal by assessee are with reference to levy of capital gain tax and against the order of Ld. Commissioner of Income Tax (Appeals)-10, Hyderabad dated 07-08-2017.

2. Brief facts of the case are that assessee along with Shri N. Vidya Prasad who are the owners of open plots admeasuring 355.55 square yards each at Madhurawada, Visakhapatnam, entered into a development agreement coupled with power of attorney dated 11-08-2008 with

M/s. Lorven Builders, a developer for construction of residential apartments on these two plots. AO noticed that no capital gains were offered on this transfer of plot of land for AY. 2009-10. Notice u/s. 148 of the Act dated 20-12-2013 was issued by invoking the provisions of sec.147 on the reason that capital gains chargeable to tax has escaped assessment. During the course of assessment, it was claimed that return of income in the status of HUF was filed claiming exemption u/s. 54F for AY. 2013-14. It was observed by AO that after issue of notice u/s. 148 on 20-12-2013 in the status of individual, application for PAN was filed by the HUF on 22-10-2014. Therefore it was concluded that there was no HUF, prior to the issue of notice and return of income was filed only subsequently. It was also noticed that the property was purchased by assessee in his individual status as evidenced from the purchase deed. After rejecting the claim of HUF status, AO analyzed the development agreement dated 11-08-2008 which was elaborately discussed in the assessment order and came to a conclusion that the provisions of Section 53A of the Transfer of Property Act were fulfilled on 11-08-2008 as per the provisions of Section 2(47)(v) and (vi). AO also relied on the following decisions:

(i) Chaturbhuj Dwaraka Kapadia Vs. CIT (260 ITR 491) (Bom);
(ii) Jasbir Singh Sarkaria (Advance Ruling) (294 ITR 196);
(iii) Dr.T.Achutha Rao Vs. ACIT (106 ITD 388) (Hyd);
(iv) K.Jeelani Basha Vs. CIT (256 ITR 0282) (Mad-HC);

2.1. AO held that transfer took place in the financial year relevant to AY. 2009-10 and worked out the capital gains as under:

	Rs.
Value of development agreement	1,77,61,100
land owner's share	88,80,450
Assessee's share 50%	44,40,275
Less: Indexed cost of acquisition	78,445
Taxable Long Term Capital Gains	43,61,830

3. Before the Ld.CIT(A) assessee has raised grounds that the capital gains are not taxable in the individual hands, not taxable in the year of assessment, the computation was not correct as the value of property of assessee was also taken as sale value and claimed deduction u/s. 54F of the Income Tax Act [Act]. Ld.CIT(A) admits (vide para 15) the additional grounds and additional information which was forwarded to AO by his predecessor but on reason of objection by AO (after two remand reports) rejected the additional grounds and evidence. Ld. CIT(A) rejected all the contentions. Hence the present appeal.

4. Ld. Counsel referred to the facts of the case, the additional grounds raised and additional information filed before the Ld.CIT(A), the remand reports extracted in the impugned order and findings of the Ld.CIT(A). He relied on various case law, which we consider at the appropriate place.

5. Ld.DR reiterated the stand of AO and CIT(A) and stated the facts and relevant law on the issues.

6. We have considered the issues and perused the orders of AO and Ld.CIT(A). At the outset, we have to state that the order of Ld.CIT(A) rejecting the additional evidence and additional grounds is not correct as the same are admitted and sent to AO for remand. Under Rule 46A, there are four circumstances prescribed and as seen Ld CIT(A) (predecessor) has admitted the additional grounds and evidence and that is the reason why the same are referred to AO under Rule 46A(3). Having obtained the remand reports (twice), it is not correct on the part of the present CIT(A) to reject the same, that too without assigning any reasons, as can be seen from para 15 of the order.

7. Be that as it may, in the present appeal, four issues are for consideration:

a. In what status, the capital gains is to be taxed;
b. In which assessment year the same is to be taxed;
c. Whether the calculation by AO is correct or not;
d. Whether assessee is entitled for deduction u/s. 54F;

These are adjudicated as under:

a. In what status, the capital gains is to be taxed:

8. It is admitted that assessee claimed and filed the returns of capital gains in HUF status. However, the fact is

that the impugned land was allotted by the VUDA to assessee as 'Judicial Officer', when he was serving. The allotment is for individual for his service as a 'Judicial Officer' but not in HUF capacity. The same could not be allotted to HUF as the application was made as a serving officer in a particular Quota. The source of funds cannot be a basis, when the original allotment itself is on a different basis/category. Therefore, we are of the firm opinion that the impugned land is in individual status (must have reported to the Govt. as such). So, the assessment of capital gains in the individual status is appropriate. The grounds on this issue are rejected.

b. In which assessment year the same is to be taxed (i.e., year of taxability):

9. It was the contention that assessee has 'exchanged' the half portion of land for 2½ apartments he received, so the taxability of capital gains is in the year of handing over of flats. This argument cannot be accepted as the jurisdictional High Court in the case of Potla Nageswara Rao Vs. DCIT [365 ITR 249 (AP)] has considered the development agreement of similar nature and upheld the levy of capital gain in the year of entering into the development agreement. Ld.CIT(A) also approved the same, stating as under:

"15.1 It is further seen that the municipal plan was approved and building permission was issued on 06.01.2009 which is falling in the financial year 2008-09 relevant to assessment year 2009-10. Further, Hon'ble High Court of Andhra Pradesh in the case of Shri P.Nageswara Rao considered the issue and held that capital gains is

to be assessed in the year of development agreement. The relevant portion of the order is reproduced hereunder:

> *"Therefore, we are of the view, while upholding the learned Tribunals application of law on this fact, that payment of consideration on the date of agreement of sale is not required, it may be deferred for future date.*
>
> *The element of factual possession and agreement are contemplated as transfer within the meaning of the aforesaid section. When the transfer is complete, automatically, consideration mentioned in the agreement for sale has to be taken into consideration for the purpose of assessment of income for the assessment year when the agreement was entered into and possession was given. Here, factually it was found that both the aforesaid aspects took place in the previous year relevant to the assessment year 2003-04. Hence, the learned Tribunal has rightly held that the appellant is liable to pay tax on the capital gain for the assessment year. Accordingly, we do not find any element of law to admit this appeal."*

9.1. As the order of AO/CIT(A) is in tune with the principles laid down by the Hon'ble Jurisdictional High Court, we confirm this part of the order of AO and CIT(A). The grounds on this issue are rejected.

c. Whether the calculation by AO is correct or not:

10. The contention on this issue was that AO has taken the value of land at Rs. 71,11,100/- also in the cost of the building, whereas only structure value has to be considered. AO in the remand report dt. 05-06-2017 has accepted the contention and furnished revised computation as under:

	Rs.	Rs.
Total sale consideration		1,06,50,000
Sale consideration for the transferors (for both the owners)		53,25,000
Assessee's share of 50%	26,62,500	
Less: Indexed cost of acquisition	78,445	
Long Term Capital Gains	25,84,055	

10.1. The above computation was also objected to as the following mistake has occurred as stated by assessee:

".....Even the computation made in the Remand Report is not correct since actual area handed over to the appellant is 3687 sft. and multiplied by the cost of construction taken by the builder at Rs. 675.25, the value comes to Rs. 24,89,650/-. From this indexed cost of acquisition Rs. 78,445/- has to be reduced and the net long term capital gains is Rs. 24,11,205/-.....".

10.2. The issue was not adjudicated by Ld.CIT(A). *Prima-facie,* the contention of assessee is correct. Therefore, while directing the exclusion of land value which was accepted by AO, we further direct the AO to verify and consider the correct area and the rate in the computation of capital gains. These grounds are allowed.

d. Whether assessee is entitled for deduction u/s. 54F:

11. As assessee obtained residential flats in lieu of transfer of 50% of land, assessee is entitled for claim u/s. 54F. Ld.CIT(A) has rejected the additional grounds on this issue which is a legal ground. In fact assessee was objecting to levy of capital gains itself, but AO brought the capital gains to this year in individual status. The claim was made in HUF status.

Therefore, when the levy is shifted to this assessment year in Individual status, AO is bound to consider the claim of 54F also. Ld.CIT(A) is not correct in rejecting the claim. We are of the opinion that this issue is crystallised, in favour of assessee, by not only jurisdictional High Court but also by the judgment of Hon'ble High Court of Madras. The issues were elaborately discussed in the Co-ordinate Bench decision in the group of appeals of ITO Vs. Late K. Jaipal, L/R. of Smt. K. Manjula and other in ITA Nos. 1188 to 1194/Hyd/2015, dt. 20-11-2015, wherein it was held as under:

"7. We have considered the issue and perused the various orders placed on record. The dispute is whether 'a residential house' stated in S.54/S.54F for allowing deduction means a single residential house or one consisting of multiple units. As for the facts involved herein, the assessee has received five flats in different floors of the same building. The Assessing Officer restricted the deduction to one such unit/flat, whereas the assessee claimed deduction for all the flats received in terms of development agreement. Therefore, the question to be decided is whether a 'residential house' would include multiple flats/residential units as well. This issue was decided by the Hon'ble High Court of Maras In Its decision In CIT V/s. Smt. V.R.Karpagam (supra), wherein the amendment brought to 5.54 and 54F was also considered and held as under-

"8. We have heard the learned Standing counsel appealing for the Revenue at length and perused the materials placed before this Court and the decision relied on by the Tribunal in the case of CIT V. Smt. K.G.Rukminiamma reported in 331 ITR 211. We find that the relevant provision is this case is Section 54F of the Income Tax Act, which reads as follows:

54F. Capital gain on transfer of certain capital assets not to be charged in case of investment in residential house. --

(1) Subject to the provisions of sub-section (4J), 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 two years 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-
(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'

9. It is relevant to note herein that an amendment was made to the above-said provision with regard to the word 'a' by the Finance (No.2) Act, 2014, which will come into effect from 01.04.2015. The said amendment reads as follows:
"32a. Words "constructed, one residential house in India" shall be substituted for "constructed, a residential house" by the Finance (No.2) Act, 2014, with effect from 01.04.2015."

10. The above-said amendment to Section 54F of the Income Tax Act, which will come into effect only from 01.04.2015, makes it very clear that the benefit of Section 54F of the Income Tax Act will be applicable to constructed, one residential house in India and that clarifies the situation in the present case; i.e, post amendment, viz., from 01.04.2015, the benefit of Section 54F will be applicable to one residential house in India. Prior to the said amendment, it is clear that a residential house would include multiple flats/residential units as in the present case where the assessee has got five residential flats. We may also mention here that all the Authorities below have clearly understood that the agreement signed by the assessee with M/s.Mount Housing Infrastructure Ltd., is that the assessee

will receive 43.75% of the built-up area after development, which is construed as one block, which maybe one or more flats. In that view of the matter what was before the Assessing Officer is only equivalent of 56.25% of land transferred, equivalent to 43.75% of built up area received by the assessee. This built up area got translated into five flats. Hence, we are of the opinion that the transaction in this case was not with regard to the number of flats but with regard to the percentage of the built up area, vis-a-vis, the Undivided Share of Land.

11. In similar circumstances, this Court, by order dated 04.01.2012 in T.C.(A)No.656 of 2005 held as follows:

"The above provision refers to a residential house meaning thereby that even if there are four different flats and if it is considered for the property assessed as one unit and one door number is given, it should be construed as a residential unit, namely, one unit. In that sense, the said provision is available to the assessee. "

12. In the decision reported in (2012) 75 DTR 56 (Dr. (Smt.) P.K. Vasanthi Rangarajan, this Court, while dealing with the benefit of exemption under Section 54F, followed the above-said decision of this Court in T.C.(A)No.656 of 2005 and granted the benefit to the assessee under Section 54F of the Income Tax Act on the investment made in the four flats.

13. Hence, the above-said decisions of this Court make it clear that the property should be assessed as one unit, even though different flats are available……"

8. The jurisdictional High Court in the case of CIT V/s. Vittal Krishna Conjeevaram (supra), following the decision in the case of CIT VIs. Syed Ali Adil (supra) and the decision of the Delhi High Court in the case of CIT V/s. Gita Duggal (supra) dismissed the appeal of the Revenue, confirming the order of the ITAT. The above judgments lay down a principle that merely because a residential house consists of several independent residential units, deduction under S.54/S.54F could not disallowed. Respectfully following the decision of the Hon'ble jurisdictional High Court in the case of CIT Vis. Syed Ali Adil (supra) as approved in the case of CIT V/s. Vittal Krishna Conjeevaram (supra) and the principles laid down by the Hon'ble High Court of Delhi and Madras discussed above, we have no option than to confirm the order of the CIT(A), which is in consonance with the principles laid down on the issue in dispute.

9. We are also aware that the Hon'ble Punjab and Heryana High Court in the case of Pawan Arya V/s. CIT (supra) has not approved the above proposition, but the binding decisions of the jurisdictional High Court in the cases discussed above are in favour of the assessee, and therefore, the contentions raised by the Revenue in this appeal cannot be accepted".

Respectfully following the same, we are of the opinion that assessee is entitled for deduction u/s. 54F on all the flats given in lieu of transfer of land. We are satisfied that the claim is maintainable. However, the claim was not examined by AO. Therefore, in the interest of justice, we set aside the order of Ld.CIT(A) and restore the issue to the file of AO for fresh examination of claim and allowance thereof after due verification. Assessee should be given due opportunity. The grounds on this issue are allowed for statistical purposes.

12. In the result, appeal of assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 20th July, 2018

Sd/-	Sd/-
(CHALLA NAGENDRA PRASAD)	**(B. RAMAKOTAIAH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Hyderabad, Dated 20th July, 2018

TNMM

Copy to :

1. Shri G. Bhoopathi Reddy, 2-2-1075/22, Bagh Amberpet, Hyderabad.

2. The Income Tax Officer, Ward-13(5), Hyderabad.

3. CIT (Appeals)-10, Hyderabad.

4. Pr.CIT-4, Hyderabad.

5. D.R. ITAT, Hyderabad.

6. Guard File.