आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई।

IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH: CHENNAI

श्री अब्राहम पी. जॉर्ज, लेखासदस्य एवं

श्री धुव्वुरु आर.एल. रेड्डी, **न्यायिक सदस्य के समक्ष**

BEFORE SHRI ABRAHAM P.GEORGE, ACCOUNTANT MEMBER AND SHRI DUVVURU RL REDDY, JUDICIAL MEMBER

आयकर अपील सं./**ITA No.1929/Chny/2018**

निर्धारण वर्ष **/Assessment Year: 2012-13**

The Asst. Commissioner of – Income Tax, Corporate Circle-4(1), Chennai.	**Vs.**	Smt.Deepa Vijay, C-4, Golden Schonburn Apartments, No.29, Cenotaph Road, 2nd Lane, Chennai-600 028. **[PAN: ACJPV 8425 H]**
(अपीलार्थी**/Appellant)**		**(**प्रत्यर्थी**/Respondent)**

Department by	:	Mr.S.Bharath, CIT
Assessee by	:	Ms.Bharathi Krishnaprasad, CA
सुनवाई की तारीख/Date of Hearing	:	30.10.2018
घोषणा की तारीख /Date of Pronouncement	:	31.10.2018

आदेश **/ O R D E R**

PER ABRAHAM P.GEORGE, ACCOUNTANT MEMBER:

This appeal has been filed by the Revenue with delay of 3 days. Condonation petition is on record. Reasons shown are acceptable. Delay is condoned. Appeal is admitted.

2. Grounds raised are as follows:

1. The order of the ld.CIT(A) is contrary to law and facts of the case.

2. The ld.CIT(A) erred in treating the receipt of Rs. 16.49 crores by the assessee by way of settlement deed for transferring the Intangible asset-Trade Mark- as Long Term Capital Gain.

2.1 The ld.CIT(A) erred in allowing deduction u/s.54F of Rs.3.50 crores when the capital asset transferred was not a long term capital asset.

2.2 The ld.CJT(A) erred in holding that there is no legal difference between the settlement & gift.

2.3 The ld.CIT(A) erred in holding that explanation 1(b) below section 2(42A) is applicable and the period of holding of the asset by the previous owner also needs to be considered even though the assessee did not receive the asset through gift or will as mentioned in section 49(1)(ii) but by settlement deed.

2.4 It is submitted that the order of the ITAT in ITA No. 2074 & 2075/Mds/2015 dated 11.05.2016 relied on by the CIT(A) was not accepted by the Department and appeal filed before the Hon'ble High Court of Madras and thus the issue has not reached a finality.

3. For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the learned CIT(A) may be set aside and that of the Assessing Officer restored.

3. Ld.Counsel for the assessee, at the outset, pointed out that the nature of receipt on transfer of intangible asset, namely trade mark, stood already decided by this Tribunal in its order dated 11.05.2016 in ITA Nos.2704 & 2705/Mds/2015, which related to the other co-owners of the very same trade mark. Ld.DR fairly agreed with this. However, as per the Ld.DR, the question of deduction claimed by the assessee u/s.54F of the Income Tax Act, 1961 (in short "the Act") was not covered by the above order and therefore, required adjudication. As per the Ld.DR, assessee owned more than one residential property and therefore, could not have been allowed the claim for deduction made u/s.54F of the Act. Contention of the Ld.DR was that one of these properties was considered by the Ld.CIT(A) to be a commercial one, though, it was specifically mentioned in the Conveyance Deed as a residential flat. As per the Ld.DR, just

because, a flat was given for rental to a company would not mean that it was a commercial property. On the other hand, Ld.AR supporting the order of the Ld.CIT(A) submitted that the latter authorities had verified the purchase document of the flat and found it to be a commercial property and not a residential property. Thus, according to him, the Ld.CIT(A) has justified in allowing the claim made by the assessee u/s.54F of the Act, holding that assessee was not having more than one residential property on the date of sale of the trade mark, giving rise to the capital gains.

4. We have heard the rival contentions and perused the orders of the authorities below carefully. The issue whether the gains arising on transfer of trade mark was long term or short term had come up before this Tribunal in the case of Shri T.T.Siddharath and Smt.Maya Varadarajan (in ITA Nos.2074 & 2075/Mds/2015). Assessee had become one of the co-owners of the trade mark through a settlement done by one Smt.Malathy Rangaswami & one Shri T.T.Ashok. The other co-owners were Shri T.T.Siddharath and Smt.Maya Varadarajan. The AO had considered the gains arising on transfer of the trade mark to be short term in nature, whereas the Tribunal found it otherwise. In its order dated 11.05.2016 in the case of Shri T.T.Siddharath and Smt.Maya Varadarajan (supra), it was held by the Tribunal at Para Nos.4.1 to 4.2 as under:

4.1 We have heard both the parties and perused the material on record. The main contention of the ld.A.R is that there is no difference between Gift and Settlement and the Explanation-1(i)(b) to Sec.2(42A) r.w.s.49(1)(ii) of the Act is applicable. As such while computing the period of holding capital assets, the period of holding all that asset by the previous owner to be considered. According to him, once we consider the the period of holding of previous owner of the impugned capital asset, then the holding period byte present assessee is more than three years and which resulted in computation of long term capital gains and consequently, the assessee is entitled for deduction u/s.54F of the Act. For this purpose he has relied on the order of Tribunal in the case of ITO Vs. Shri Abdul Hameed Khan Mohammed,Chennai in ITA No.1782/Mds./2015 for assessment year 2011-12 vide order dated 29.12.2015. We find force in the argument of the ld.A.R. In these two cases, the assets got the right, title and interest in the Registered Trade Mark , namely "PREETT" through Settlement Deed dated 19/12/2010 from Settlor namely Mrs.Malathy Rangaswami & Mr.T.T.Ashok. According to AO, date of acquisition of the right / title/ interest over the said registered Trade Mark is only from 19/12/2010, as this is a Settlement Deed and not it is a Gift or Will as mentioned in Sec.49(1)(ii) of the Act.

4.2 In our opinion, the distinction made by the lower authorities is not correct. The Tribunal in the case of Shri S.Krishnan Vs. DCIT in ITA No.2075/Mds./2014 vide order dated 15.05.2015 observed that though the assessee got the landed property while settlement dated 23.01.2004 from his mother for the purpose of computation of indexed cost of acquisition from 01.04.1981 by following the judgment of Bombay High Court in the case of Manjula J. Shah reported in (2012) 204 Taxman 691. Further the Co-ordinate Bench in the case of Mr.Abdul Hameed Khan Mohammed (supra), it is categorically held that transfer of property made voluntarily and without consideration by way of Settlement Deed, all within the definition of Gift and there is no difference between the Gift and Settlement u/s.49(1)(ii) of the Act. While adjudicating this, the Tribunal placed reliance on Sec.122 of the Transfer of Property Act, 1882 and also from the Cochin Bench of Tribunal in the case of ACIT Vs. Anjana Mohan (2013) 36 CCH 0008(Cochin) and also Redington (India) Ltd. Vs. JCIT reported in 40 CCH 527 (Chennai).

Ld.CIT(A) had followed the above order while allowing the claim of the assessee that the gains arising on transfer of the trade mark was long term in nature. We do not find any reason to interfere with the order of the Ld.CIT(A) in this regard.

5. Vis-à-vis the question whether assessee was eligible for deduction u/s.54F of the Act, we find that such claim was denied by the AO, considering the assessee to be owning more than one residential property, when he transferred the trade mark. The Ld.CIT(A) had, on the other hand, found that one of the two properties was a commercial one and hence assessee was justified in claiming deduction u/s.54F of the Act. As

per the Ld.CIT(A) though this property was a flat, it had to be construed as commercial flat. Ld.CIT(A) has relied on the following preamble appearing in the Sale Deed dated 24.03.2015, through which the said flat was acquired by the assessee.

> *WHEREAS, the Vendor Nos. 1 and 2, have obtained permission from construction of Ground + 3 Floors, from the Commissioner, Municipal Corporation of Hyderabad, Hyderabad Vide its Permit No.239/I, Letter No.214/TP5/SD/88, Dated. 12-9-1989.*
>
> *WHEREAS, the Vendors No.1 & 2, have entered into an Construction Agreement Dated.3-7-1989, with Vendor No.3, i.e., Builder to Develop and construction of commercial Apartments, in the above said property.*
>
> *WHEREAS, the Builder have constructed a Commercial Complex, on the above said property known as "DIAMOND TOWRS" Apartments.*
>
> *AND WHEREAS, the Vendors herein offered to sell a Shop/Office No.201/PART, on IInd Floor, Plinth Area 343 SFT., with Undivided Share of Land admeasuring 15.51 SQ.YARDS. OR 12.96 SQ.MTS., (Out of 2050 SQ.YARDS.) (Built Up Area 343 SFT), with Part of Premises bearing Nos.1-1-37 & 1-1-38, Situated at Sarojini Devi Road, Secunderabad, more particularly described in the schedule hereunder and specifically delineated in the Plan annexed hereto, hereinafter referred to as the "SCHEDULE PROPERTY", for a total sale consideration of Rs.1,41,000/- (Rupees One Lakh Forty One Thousand Only) to the Vendee(s) and the Vendee(s) herein has agreed to purchase the schedule mentioned property for the said sum.*

6. What we find is that neither the Ld.AO nor the Ld.CIT(A) had carefully not gone through the conveyance deeds through which the assessee had acquired the residential houses. AO had simply stated that letting out of a flat to a company for conducting its business did not change the nature of the flat. Ld.CIT(A) on the other hand, went by the pre-amble of the Conveyance Deed. We are, therefore, of the opinion that the question whether the assessee owned more than two residential properties and whether one of such property could be considered as commercial flat and could be excluded, for application of Sec.54F of the Act, requires a fresh look by the AO. We set-aside the order of the lower authorities and remit the question whether assessee was eligible to claim

deduction u/s.54F of the Act, back to the file of the AO for fresh consideration in accordance with law.

7. In the result, the appeal filed by the Revenue is partly allowed for statistical purposes.

Order pronounced on the 31st day of October, 2018, in Chennai.

Sd/-	***Sd/-***
(ధువ్వురు ఆర్.ఎల్. రెడ్డి)	**(अब्राहम पी. जॉर्ज)**
(DUVVURU R.L. REDDY)	**(ABRAHAM P.GEORGE)**
न्यायिक सदस्य**/JUDICIAL MEMBER**	लेखा सदस्य**/ACCOUNTANT MEMBER**

चेन्नई/Chennai,
दिनांक/Dated: October 31, 2018.
TLN

आदेश की प्रतिलिपि अग्रेषित**/Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF