

**IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' B ' Bench, Hyderabad**

**Before Smt. P. Madhavi Devi, Judicial Member
AND
Shri S. Rifaur Rahman, Accountant Member**

ITA No.241/Hyd/2017
(Assessment Year: 2013-14)

Smt. Padma Pinnamaneni Vs Income Tax Officer
Hyderabad Ward 6(4)
PAN: AOKPP7195M Hyderabad
(Appellant) (Respondent)

For Assessee : Shri K.C. Devdas
For Revenue : Shri Nilanjan Dey, DR

Date of Hearing: 19.02.2019
Date of Pronouncement: 17.05.2019

ORDER

Per Smt. P. Madhavi Devi, J.M.

This is assessee's appeal for the A.Y 2013-14. This appeal is filed by the assessee against the order of the learned CIT (A)-6, Hyderabad, dated 25.11.2016. The assessee has raised the following grounds of appeal:

- 1. The order of the Hon'ble CIT(A) is erroneous in law as well as facts of the case.*
- 2. The Hon'ble CIT(A) ought to have observed that the A.O interpreted the provisions improperly and arrived at an improper conclusion that the assessee was not eligible for deduction u/s 54 of the Act and ought to have directed the A.O for allowing the same.*
- 3. The Hon'ble CIT(A) ought to have observed that the facts of the judicial decisions relied upon by A.O were distinguishable from the facts of the case of the appellant*

and therefore, ought not to have upheld the decision of the A.O.

- 4. In the facts and circumstances of the case, the Hon'ble CIT(A) ought to have held that the appellant was eligible for deduction u/s 54 of the Act.*
- 5. Any other ground will be raised at the time of hearing.*

Further vide letter dated 08.11.2018, the assessee has raised the following additional grounds of appeal:

- 1. The Ld. CIT(A) failed to note that the property at Vijayawada was sold for a sum of Rs. 1,11,00,000/- and the entire consideration was received in four instalments by 12.02.2011 at Rs. 1,11,00,000/- and the Appellant having constructed a residential property at Kukatpally, Hyderabad by 29th March, 2012 the appellant was not exigible to any capital gains for the A.Y 2013-14.*
2. Brief facts of the case are that the assessee, an individual, deriving income from salary, capital gains and other sources, e-filed her return of income for the A.Y 2013-14 on 25.7.2013 declaring a gross total income of Rs.3,07,225. During the assessment proceedings u/s 143(3) of the Act, the information called for was filed by the assessee. The AO observed that the assessee has sold a house property for a consideration of Rs.1,11,00,000 on 26.04.2012 and computed the Long Term Capital Gains at Rs.93,96,000 which was claimed as a deduction u/s 54 of the Act by claiming that investment of Rs.1,13,01,130 has been made in a house property. On verification of the registered sale deed filed during the scrutiny proceedings, the AO

observed that the market value of the property for the purpose of stamp duty as taken by the Sub Registrar was Rs.1,35,83,000 and registration charges were collected accordingly.

3. Further, on examination of the claim of investment in the house property, the AO observed that on 10.12.2011, the assessee has purchased 300 sq.yards of open plot for a consideration of Rs.32.40 lakhs (including registration charges) through a registered sale deed and thereafter entered into a construction agreement with M/s. Accor Buildcon Pvt Ltd on 11.02.2011 for construction of a villa thereon. He observed that the assessee has made payment of a total of Rs. 69,80,130/- vide cheques from 10.02.2011 to 29.3.2012 and that apart from the above payment, the assessee has borrowed an amount of Rs.10,81,000 and paid to KLK Builders on 15.03.2011 for interior works of the villa. Thus, he observed that the assessee has invested a total sum of Rs.1,13,01,130 in the new house property by 29.03.2012.

4. The AO observed that in order to claim deduction u/s 54 of the Act, the assessee has to construct the villa after the sale of the original asset, whereas the assessee has purchased the plot

and also constructed a villa thereon by 29.03.2012 i.e. before the transfer of the original asset. Therefore, he issued a show-cause notice to the assessee as to why the capital gains should not be recomputed as per section 50C of the Act and as to why the deduction u/s 54 should not be disallowed.

4.1 The assessee, vide letter dated 19.12.2016, agreed to adoption of the consideration as per section 50C of the Act and filed revised computation of capital gain by considering the SRO value as deemed consideration received. However, with regard to the disallowance of deduction u/s 54, the assessee submitted that the whole of the consideration of Rs.1,11,00,000 was received by the assessee within the period of 13.1.2011 to 12.2.2011 i.e in the earlier financial year and that the possession of the property was also handed over to the vendees during the financial year 2010-11 and therefore the transfer of the property had taken place on the date of receipt of the total consideration. It was submitted that the sale deed was however, registered on 26.4.2012 after a gap of 1 year and 2½ months because the assessee had inherited the property and that the purchaser had insisted that all the other legal heirs also be made party to the transaction. Therefore, the assessee's contention was that the transfer took place in the F.Y 2010-11 relevant to the A.Y. 2011-12 while the villa was

constructed in the F.Y 2011-12 relevant to the A.Y 2012-13 i.e after transfer of the original asset and therefore, she satisfied the condition for claim of deduction u/s 54 of the Act.

4.2 AO however, was not satisfied with the assessee's contentions. He perused the recitals in the registered sale deed dated 26.04.2012 wherein it was mentioned that the possession of the property was handed over on that day only. He also observed that since the assessee has completed the construction of the house prior to the sale of the property on 26.04.2012, she is not entitled to the benefit u/s 54 of the Act. AO placed reliance upon the decision of the ITAT, Hyderabad Benches in the case of Smt. Nimmagadda Sridevi vs. DCIT 3(3) Hyderabad in ITA No.183/Hyd/2012 and also the decision of the Hon'ble Gujarat High Court in the case of Smt. Shantaben P. Gandhi vs. CIT reported in 129 ITR 218 (Guj.) for coming to this conclusion. He accordingly brought the capital gains to tax. Aggrieved, the assessee preferred an appeal before the CIT (A), who confirmed the order of the AO and the assessee is in second appeal before us.

5. The learned Counsel for the assessee, while reiterating the submissions made before the authorities below, submitted

that the assessee was a Dietician at Star Hospital in Hyderabad and has declared her salary income of Rs.2,42,430 for the relevant financial year. He submitted that the assessee was owner of the residential house at Vijayawada and that she had entered into an oral agreement of sale, on account of which she has received the entire sale consideration by cheques, but she could not execute the registered sale deed till 26.04.2012 because the purchaser had insisted that all the other family members also be made parties to the transaction and be included as consenting parties to the sale deed. He submitted that because of this reason registration of the sale deed took place on 11.2.2011, but since the entire consideration was received, the possession of the property was given to the vendee. Thus, according to him, the transfer had taken place as on that date u/s 2(47)(v) of the Act and the capital gains also would arise only in the A.Y 2011-12 and not in the A.Y 2013-14. He submitted that the assessee was advised by her Advocate that she need not pay the capital gains tax as the assessee has invested the amount in a residential property and therefore, the assessee has not offered the capital gain to tax in the A.Y 2011-12 and since the document was registered during the A.Y 2012-13, the assessee had declared the income and has claimed exemption u/s 54 of the Act. She has

also drawn our attention to the recitals in the sale deed to demonstrate that the entire sale consideration has been received on or before 11.2.2011 and also that the vendor had insisted that other parties be included as consenting parties and hence the document has been registered subsequently. In support of the contention that the assessee has not been offering income from house property from A.Y 2012-13 it self, the assessee has filed the copy of her return of income for the A.Y 2012-13. The learned Counsel for the assessee has also filed the affidavit of the assessee wherein it is stated that the assessee has received the entire sale consideration from the vendees and possession was given to them on 12.2.2011. Therefore, according to him, the capital gain has arisen in the A.Y 2011-12 and the assessee having completed the construction after the transfer of the original asset, she is entitled to the deduction u/s 54 of the Act. In support of his contentions, he has placed specific reliance upon the following case law amongst many other case laws filed by him in the form of a paper book:-

- a) Shri Sanjeev Lal vs. CIT Chandigarh reported in 365 ITR 389 (S.C)
- b) Commissioner Of Income-Tax vs Podar Cement Pvt. Ltd. Etc reported in 226 ITR 625 (SC) on 27 May, 1997
- c) Smt. Raj Rani Devi Ramna Vs. CIT [1993] 201 ITR 1032.

6. The learned DR, on the other hand, supported the orders of the authorities below and submitted that the assessee by herself has declared the capital gains in the A.Y 2013-14, after execution of the registered sale deed and therefore, she cannot now turn around and say that she has transferred the property in financial year relevant to A.Y 2011-12. She submitted that when there is a registered document, the contention of the oral agreement cannot be recognized. She relied upon the decision of the Hon'ble Punjab & Haryana High Court in the case of Paramjit Singh vs. Income-Tax Officer, (2010) 323 ITR 588 (P&H) and also on the Supreme Court judgment in the case of 266 ITR 521 in the case of Ipca Laboratory in support of her contentions. As far as the reliance upon the decision of the Supreme Court in the case of Sanjeev Lal vs. CIT (Supra) by the assessee is concerned, she submitted that the facts of the said case law are distinguishable and are not applicable to the case before us.

7. Having regard to the rival contentions and the material on record, we find that the additional grounds raised by the assessee goes to the root of the matter and all the facts necessary for adjudication of the issue are on record. Therefore, in the

interest of justice, we are inclined to admit the same and adjudicate as under:

4.1 Admittedly, there is no written agreement of sale between the assessee and the purchaser for the sale of the assessee's property at Vijayawada. However, the fact that the assessee has received the sale consideration from the vendee by way of cheques in the financial year 2010-11` is not in dispute. Therefore, the assessee's contention of existence of an oral agreement attains importance and credence. The Department has also not disputed the sale consideration received by the assessee. Further, admittedly, the total consideration for the sale of the property is Rs.1,11,00,000. The AO has enhanced the sale consideration by applying the provisions of section 50C but not because the assessee has received any sum other than what is mentioned in the registered sale deed executed on 26.4.2012. As seen from the dates of receipt of the sale consideration, we find that by 11.2.2011, the assessee has received the entire sale consideration by cheques. It is now the case of the assessee that she has handed over the possession of the property also to the vendee on receipt of the entire sale consideration and in support of her contention, has filed her affidavit. The Revenue is relying

upon the recitals in the registered sale deed to hold that the possession has been handed over on the date of execution of the registered sale deed i.e 26.04.2012. If the assessee's contention of transfer of the property in the financial year 2010-11 is to be accepted, then the assessee cannot offer the income from such property under the head "income from house property" from the A.Y 2011-12 onwards. From the perusal of the return of income filed by the assessee on 25.07.2013 the assessee has not offered any income from house property for the A.Y 2012-13 which is prior to the date of execution of registered sale deed. Further, we find that the first date on which, the assessee has received sale consideration is 13.1.2011 and the date on which the assessee has made the investment in the plot is 10.2.2011 for Rs.32.00 lakhs. Thereafter, the assessee has received the sale consideration by way of cheques on 18.1.2011, 11.2.2011 and 12.2.2011 and the assessee has been making the payments accordingly to the contractor for construction of the villa. Therefore, it is evident that the assessee has utilized the sale consideration received from the sale of her property at Vijayawada for construction of the property at Hyderabad. Since the entire consideration has been received by the assessee during the F.Y 2010-11, it is improbable that the purchaser would not take possession of the property till

the registered sale deed was executed a year thereafter i.e in F.Y 2012-13. Therefore, on the basis of preponderance of probabilities, we are inclined to accept the contentions of the assessee that the possession was also given on receipt of entire sale consideration and therefore transfer has taken place in the F.Y 2010-11 and that the recitals in sale deed that the possession was handed over on the day of execution of registered sale deed, was only pro-forma recitals. Since the transfer has taken place in the F.Y 2010-11, the capital gains arise in the A.Y 2011-12 and not in the A.Y 2013-14 as declared by the assessee herself in her return of income. Even if the assessee offered the same to tax in the A.Y 2013-14, the A.O is required to examine the year of transfer when the assessee claims so during the assessment proceedings. The A.O has gone by the year of registration than by the substantial payment of consideration on agreement of sale i.e payments of entire sale consideration. The legal precedents relied upon by the Ld. Counsel for the assessee also confirm this view. In the case of Shri Sanjeev Lal Vs. CIT, Chandigarh (supra), the Hon'ble Supreme Court was considering the case of an assessee who had acquired a residential property in terms of will and thereafter had entered into an agreement to sell and received certain amount by way of earnest money. The assessee thereafter

decided to purchase another residential house and accordingly new residential house is purchased well within one year from the date on which the agreement to sell has been entered into by the assessee. Meanwhile, the validity of the will had been questioned by another legal heir of the assessee's grand father and due to pendency of the suite the assessee could not execute the sale deed till the suit was dismissed. The A.O had disallowed the claim of deduction u/s 54 of the Act for the reason that the assessee has purchased new residential house more than one year prior to the transfer of the asset. The Hon'ble Supreme Court, in peculiar facts of the said case, held as under:

18. In the instant case, the following three dates are not in dispute. The residential house was transferred by the appellants and the sale deed had been registered on 24th September, 2004. The sale deed had been executed in pursuance of an agreement to sell which had been executed on 27th December, 2002 and out of the total consideration of Rs.1.32 crores, Rs. 15 lakhs had been received by the appellants by way of earnest money when the agreement to sell had been executed and a new residential house/new asset had been purchased by the appellants on 30th April, 2003. It is also not in dispute that there was a litigation wherein the Will of late Shri Amrit Lal had been challenged by his son and the appellants had been restrained from dealing with the house in question by a judicial order and the said judicial order had been vacated only in the month of May, 2004 and therefore, the sale deed could not be executed before the said order was vacated though the agreement to sell had been executed on 27th September, 2002.

19. If one considers the date on which it was decided to sell the property, i.e. 27th December, 2002 as the date of transfer or sale, it cannot be disputed that the appellants would be entitled to the benefit under the provisions of Section 54 of the Act because long term capital gain earned by the appellants had been used for

purchase of a new asset/residential house on 30th April, 2003 i.e. well within one year from the date of transfer of the house which resulted into long term capital gain.

20. *The question to be considered by this Court is whether the agreement to sell which had been executed on 27th December, 2002 can be considered as a date on which the property i.e. the residential house had been transferred. In normal circumstances by executing an agreement to sell in respect of an immovable property, a right in personam is created in favour of the transferee/vendee. When such a right is created in favour of the vendee, the vendor is restrained from selling the said property to someone else because the vendee, in whose favour the right in personam is created, has a legitimate right to enforce specific performance of the agreement, if the vendor, for some reason is not executing the sale deed. Thus, by virtue of the agreement to sell some right is given by the vendor to the vendee. The question is whether the entire property can be said to have been sold at the time when an agreement to sell is entered into. In normal circumstances, the aforesaid question has to be answered in the negative. However, looking at the provisions of Section 2(47) of the Act, which defines the word "transfer" in relation to a capital asset, one can say that if a right in the property is extinguished by execution of an agreement to sell, the capital asset can be deemed to have been transferred. Relevant portion of Section 2(47), defining the word "transfer" is as under:*

'2(47) "transfer", in relation to a capital asset, includes,-

*(i)***

(ii) the extinguishment of any rights therein; or.'

21. *Now in the light of definition of "transfer" as defined under Section 2(47) of the Act, it is clear that when any right in respect of any capital asset is extinguished and that right is transferred to someone, it would amount to transfer of a capital asset. In the light of the aforesaid definition, let us look at the facts of the present case where an agreement to sell in respect of a capital asset had been executed on 27th December, 2002 for transferring the residential house/original asset in question and a sum of Rs. 15 lakhs had been received by way of earnest money. It is also not in dispute that the sale deed could not be executed because of pendency of the litigation between Shri Ranjeet Lal on one hand and the appellants on the other as Shri Ranjeet Lal had challenged the validity of the Will under which the property had devolved upon the appellants. By virtue of an order passed in the suit filed by Shri Ranjeet Lal, the appellants were restrained from dealing*

with the said residential house and a law-abiding citizen cannot be expected to violate the direction of a court by executing a sale deed in favour of a third party while being restrained from doing so. In the circumstances, for a justifiable reason, which was not within the control of the appellants, they could not execute the sale deed and the sale deed had been registered only on 24th September, 2004, after the suit filed by Shri Ranjeet Lal, challenging the validity of the Will, had been dismissed. In the light of the aforesaid facts and in view of the definition of the term "transfer", one can come to a conclusion that some right in respect of the capital asset in question had been transferred in favour of the vendee and therefore, some right which the appellants had, in respect of the capital asset in question, had been extinguished because after execution of the agreement to sell it was not open to the appellants to sell the property to someone else in accordance with law. A right in personam had been created in favour of the vendee, in whose favour the agreement to sell had been executed and who had also paid Rs.15 lakhs by way of earnest money. No doubt, such contractual right can be surrendered or neutralized by the parties through subsequent contract or conduct leading to no transfer of the property to the proposed vendee but that is not the case at hand.

22. *In addition to the fact that the term "transfer" has been defined under Section 2(47) of the Act, even if looked at the provisions of Section 54 of the Act which gives relief to a person who has transferred his one residential house and is purchasing another residential house either before one year of the transfer or even two years after the transfer, the intention of the Legislature is to give him relief in the matter of payment of tax on the long term capital gain. If a person, who gets some excess amount upon transfer of his old residential premises and thereafter purchases or constructs a new premises within the time stipulated under Section 54 of the Act, the Legislature does not want him to be burdened with tax on the long term capital gain and therefore, relief has been given to him in respect of paying income tax on the long term capital gain. The intention of the Legislature or the purpose with which the said provision has been incorporated in the Act, is also very clear that the assessee should be given some relief. Though it has been very often said that common sense is a stranger and an incompatible partner to the Income Tax Act and it is also said that equity and tax are strangers to each other, still this Court has often observed that purposive interpretation should be given to the provisions of the Act. In the case of Oxford University Press v. CIT [\[2001\] 247 ITR 658/115 Taxman 69](#) this Court has observed that a purposive interpretation of the provisions of the Act should be given while considering a claim for*

exemption from tax. It has also been said that harmonious construction of the provisions which subserve the object and purpose should also be made while construing any of the provisions of the Act and more particularly when one is concerned with exemption from payment of tax. Considering the aforesaid observations and the principles with regard to the interpretation of Statute pertaining to the tax laws, one can very well interpret the provisions of Section 54 read with Section 2(47) of the Act, i.e. definition of "transfer", which would enable the appellants to get the benefit under Section 54 of the Act.

23. *Consequences of execution of the agreement to sell are also very clear and they are to the effect that the appellants could not have sold the property to someone else. In practical life, there are events when a person, even after executing an agreement to sell an immovable property in favour of one person, tries to sell the property to another. In our opinion, such an act would not be in accordance with law because once an agreement to sell is executed in favour of one person, the said person gets a right to get the property transferred in his favour by filing a suit for specific performance and therefore, without hesitation we can say that some right, in respect of the said property, belonging to the appellants had been extinguished and some right had been created in favour of the vendee/transferee, when the agreement to sell had been executed.*

24. *Thus, a right in respect of the capital asset, viz. the property in question had been transferred by the appellants in favour of the vendee/transferee on 27th December, 2002. The sale deed could not be executed for the reason that the appellants had been prevented from dealing with the residential house by an order of a competent court, which they could not have violated.*

25. *In view of the aforesaid peculiar facts of the case and looking at the definition of the term "transfer" as defined under Section 2(47) of the Act, we are of the view that the appellants were entitled to relief under Section 54 of the Act in respect of the long term capital gain which they had earned in pursuance of transfer of their residential property being House No. 267, Sector 9-C, situated in Chandigarh and used for purchase of a new asset/residential house.*

4.2 In the case before us also, the assessee did not execute the registered sale deed because the purchaser insisted on all the family members to be made parties to the sale deed and bringing all the family members together could not be said to be in the exclusive control of the assessee. Thus, as held by the Hon'ble Apex Court, the execution of registered sale deed and transfer of legal title was due to reasons beyond the control of the assessee, the transfer of some right in the property is to be considered as transfer u/s 2(47)(v) of the Act. In the case of Podar Cement Pvt Ltd., (supra), the Hon'ble Supreme Court had considered and interpreted the words 'owner' in terms of Sec. 22 and 27 of Income Tax Act of 1922 to hold that the owner is a person who is entitled to receive income from the property in his own right and requirement of registration of the sale deed in the context of Sec. 22 of the Act is not warranted. In the other case of Shahajada Begum, reported in [1988] 38 Taxman 311 (AP), the Hon'ble Jurisdictional High Court held that where a person has made substantial payment of consideration and also secured possession of the property, but there was some procedural delay in formal registration of the sale deed, the registration is immaterial and the assessee was eligible for Sec. 54(1) of the Act deductions. If the decision is applied in reverse to the case before us, the vendee has

obtained the right over the property and there is a transfer of the property. Similar view was expressed in the cases of CIT Vs. G. Venkat Laxmi, reported in [2015] 59 taxmann.com 216 (AP & T), Bahaj Vs. CIT [2002] 123 taxman 290 (Delhi), Mysore Minerals Ltd Vs. CIT [1999] 106 Taxman 166 (SC), CIT Vs. RL Sood [2000] 108 taxman 227 (Delhi) and other decisions relied upon by the Ld. Counsel for the assessee. Thus, the importance of subject over form is given and it has been held that the registration of a document is immaterial where other substantial conditions are satisfied. Respectfully following all the above judgments, we hold that assessee has transferred the property in the F.Y 2010-11 relevant to the A.Y 2011-12. The capital gains therefore cannot be brought to tax in A.Y 2013-14. The Ld. DR had argued that the assessee has declared the income in the A.Y 2013-14 and also claimed the deduction u/s 54 of the Act and therefore it has to be brought to tax in A.Y 2013-14 only. As already held by us in the above paragraphs, the A.O is required to determine the year of transfer and if the assessee has offered income by mistake, the same cannot be treated as sacrosanct and brought to tax. Therefore, we accept the additional ground of appeal raised by the assessee and hold that the transfer has taken place in the F.Y 2010-11 relevant to the A.Y 2011-12 and the same cannot be

brought to tax in the A.Y 2013-14. Further, since the assessee has constructed the house after the said transfer, the assessee is entitled to deduction u/s 54 of the Act. In view of the same, the other grounds of appeal raised along with Form – 36 need no adjudication.

7. In the result, assessee's appeal is partly allowed.

Order pronounced in the Open Court on 17th May, 2019.

Sd/-
(S. Rifaur Rahman)
Accountant Member

Sd/-
(P. Madhavi Devi)
Judicial Member

Hyderabad, dated 17th May 2019.

Vinodan/sps / K Ravi Kumar Ps

Copy to:

- 1 Smt. Pinnamaneni Padma, No. 8-3-961/A, Srinagar Colony
Hyderabad - 500073
- 2 ITO, Ward – 6(4), Hyderabad.
- 3 CIT (A)-6, Hyderabad.
- 4 Pr. CIT – 6, Hyderabad.
- 5 The DR, ITAT Hyderabad
- 6 Guard File

By Order