

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES : "C", BANGALORE**

**BEFORE SHRI A.K.GARODIA, ACCOUNTANT MEMBER
AND
SMT.BEENA PILLAI, JUDICIAL MEMBER**

**ITA No.3381(Bang)/2018
(Assessment Year : 2011-12)**

Smt. P.K. Vijayalakshmi.
M/s Pamadi Ramachandra
513, Avenue Road,
Bangalore-560 002
PANNo.AAGPV9692M

Appellant

Vs

The Income tax Officer,
Ward-5(2)(2),
Bangalore

Respondent

**Appellant by : Shri B.S.Balachandran, Advocate
Revenue by : Dr. P.V.Pradeep Kumar, Addl. CIT**

Date of hearing : 24-06-2019

Date of pronouncement :28-06-2019

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER :

Present appeal has been filed by assessee against order dated 13/08/18 passed by Ld. CIT (A)-5, Bangalore route for assessment year 2011-12 on following grounds of appeal:

" 1. The order of the lower authorities are erroneous, illegal and unjustified and not sustainable in law and on facts and evidences.

2. *The AO has erroneously assumed jurisdiction u/s 147 without any post assessment tangible material evidence coming into the position of the AO as can be seen from the reasons recorded u/ 148(2) wherein there is absolutely no reference to any such post assessment tangible material.*
3. *Without prejudice to the other ground the lower authorities brought to tax entire capital gains in the hands of the appellant without properly understanding the implication of the WILL, in the right perspective.*
4. *Without prejudice to the other ground the lower authorities has erred in taking a view that the appellant has created a smoke screen on suspicion, assumptions and presumptions without bringing on record any evidence in support of such a view.*
5. *Without prejudice to the other ground the lower authorities failed to consider and appreciate the law on facts in view of the WILL in the right perspective and this in their approach and conclusions have thus come to an erroneous decision which viewed from any angle is liable to be reversed.*
6. *For these or any other ground that may be urged during the hearing of the appeal with the permission of the Hon'ble ITAT is prayed that this appeal may be allowed by cancelling the re-assessment in the interest of equity and justice”.*

2. Brief facts of the case are as under:

Assessee filed its return of income on 03/09/10 declaring total income of Rs.67, 430/-. Return was processed under section 143 (1) of the Act. The case was reopened under section 147 for following reasons:

“ The assessee has declared long time capital gain on her share of receipt of consideration on transfer of the property, in the return of income for the assessment year 2011-12. The assessee has declared long term capital gain of Rs.20,06,082/- after claiming indexed cost of acquisition and exemption u/s 54EC of Rs.50,00,000 (RCEIC Bond) The other two nephews of the

assessee have also declared long time capital gains after claiming indexed cost of acquisition and exemption u/s 54EC for Rs.50,00,0000(REIC Bond) in their respective returns of income.

The property mentioned above was acquired by the assessee upon death of her husband. Page 5 of the sale deed of the property which was sold inter alia mentions that "Whereas the vendor at Sl.No.1 had acquired the schedule property in pursuant to her husband death vide M R No.20/2005-06 who in turn had acquired the same through registered partition deed dated 16/03/2002, in the office of the Sub-Registrar, Basavanagudi, Bangalore, through the Katha and all other revenue records as stand in the sole name of vendor at Sl.No.1, the children of her husband's brothers who are vendor at Sl.No.2 & 3 have been arrayed s party to this sale deed as the schedule property is the ancestries property of the vendor at sl.no.1.

It is clear that Mrs.P.K.Vijayalakshmi had acquired the property which was sold vide sale deed dated 2/8/2010 by way of WILL of her husband and all the revenue records were in her name on the date of transfer of the property. However, the sale consideration was divided into three hands along with her nephews and the capital gains have been declared in three hands after claiming exemption of Rs.50.00 lakhs each in three hands. In view of the fact that on the fact that on the date of transfer of property she is the owner of the hands and thereby exemption u/s 54EC is to be restricted to Rs.50.00 lakhs. It is very clear that the assessee has declared the capital gains in three hands to create smoke screen for claim of exemption u/s 54EC in three hands to the extent of Rs.1,50,00,000/-.

The assessee was asked to explain as to why the entire sale consideration should not be taxed only in her hands. In reply the assessee has filed a submission mentioning that as per WILL, he was given LIFE INTEREST in the property and subsequent to her death all properties devolve on the nephews had right title and interest over the property. However, in view of the facts mentioned in above paras, it is clear that as on the date of transfer

of the property nephews were not the owner of the property and Mrs.P.K.Vijayalakshmi was the only owner, the entire sale consideration needs to be taxed in the hands of Mrs.P.K.Vijayalakshmi. Accordingly, I have reason to believe that the income of Rs.1,00,00,000/-claimed exemption u/s 54EC has escaped assessment for the AY: 2011-12 with the meaning of section 147 of the IT Act, 1961 and needs to be brought to Tax.

3. Ld.AO was of the opinion that, income chargeable to tax escaped assessment, as entire sale consideration should have been taxed in the hands of assessee only, and therefore, there was a reason to believe that income to extent of Rs.1Crore, claimed exempt under section 54 EC, by her nephews, escaped assessment, within the meaning of section 147 of the Act. Accordingly, notice under section 142 (1) was issued followed by which authorized representative of assessee appeared before Ld. AO and filed requisite details as called for. Assessee in response to notice under section 148 filed the copy of original return. On receipt of reasons recorded, assessee responded to notice by submitting that, assessee along with 2 nephews are legatees to the WILL dated 08/09/99 registered with Sub Registrar, Basavanagudi Bengaluru, bearing registration No. 181/99-2000. It was submitted that as per last WILL and Testament of assessee's husband, assessee only had a "right to life interest" and entire property was bequeathed to her two nephews being, Niranjana S.Pamadi and Kiran S. Pamadi. It was submitted that, said property was sold by an indentured dated 02/08/2010, for a sum of Rs.2,45,02,500/- by assessee along with 2 nephews, against which assessee received share for relinquishing her "right to life interest" in property for which, nephews did not object.

Subsequently, assessee in her return of income for year under consideration, declared her share, and claimed exemption under section 54 EC to the extent of Rs.50 Lacs as per law. It has been submitted that, similar is the position with 2 nephews, who were parties to the sale deed.

4. Ld.AO, upon going through submissions advanced by assessee, was of the opinion that, as on the date of transfer of property nephews were not the owner but, assessee was the only owner and hence the entire sale consideration of Rs.2,45,02,500/- is to be taxed in the hands of assessee. He also held that exemption under section 54 EC Rs. 50 Lacs was available only to assessee and not to her nephews. Accordingly, addition of Rs.1,83,41,082/- was made in the hands of assessee towards long term capital gains.

5. Aggrieved by addition made by Ld. AO assessee preferred appeal before Ld. CIT (A) who upheld the view of Ld. AO.

6. Aggrieved by order of Ld. CIT (A), assessee is in appeal before us now.

7. At the outset, it is submitted that, there is a delay of 34 days in filing of appeal, as assessee was not well and was undergoing treatment during relevant period. Certificate of Doctor dated 27/09/18 has been annexed to application, for condonation of delay filed by assessee. It has been submitted that it was under these circumstances that appeal could not be filed on time. Ld.Sr.DR though opposed application for condonation of delay, appreciated the fact that right of being heard must be granted to assessee.

8. We have perused submissions advanced by both sides in the light of records placed before us. It is observed that assessee is a

senior citizen of age 68 years and was not well during the relevant period she had undergone surgery on her legs and due to hospitalisation and persistent sickness, appeal could not be filed on time. We are therefore, of the considered opinion that delay of 34 days deserves to be condoned.

Accordingly we allow application for condonation of delay.

9. Ld.Counsel submitted that **Ground numbers 2 and 3** are effective grounds regarding legal issue raised by assessee and on merits. We are therefore, inclined to consider only these two grounds and rest of the grounds are considered to be narrative and in support of main grounds argued by Ld.Counsel.

10. **Ground No. 2** raised by assessee is in respect of assumption of jurisdiction under section 147, without there being any tangible material/evidences for reopening. Ld. Counsel argued that Ld.AO held exemption claimed by nephews under section 54 EC escaped assessment, which is discernible from return of income and there is no other fresh material based upon which a reason to believe, of income having escaped assessment has been formed. He submitted that assessing officer do not have any jurisdiction since no tangible material came to his possession except return of income filed by assessee. He submitted that even the reasons recorded do not contain any whisper of any independent tangible material, based upon which, it is discernible that income escaped assessment.

11. On the contrary, Ld.Sr.DR submitted that assessee's original return was processed under Section 143 (1) and therefore, having regards to sale deed that subsequently came to the notice of Ld.AO, there was reason to believe that, income has escaped assessment. He submitted that legal ground raised by assessee

would not stand the test of law as return of income filed by assessee during the year under consideration did not contain details of sale proceeds, which required further investigation.

12. We have perused submissions advanced by both sides in light of records placed before us. In our considered opinion, we agree with submissions advanced by Ld.Sr.DR. Original return filed by assessee was processed u/s 143(1) of the Act and therefore, Assessing Officer had not verified the details at that stage. It was later on that sale deed came to notice of Assessing Officer, which was sufficient for formation of belief. The issue regarding claim of long term capital gains definitely required further verification, and therefore, we cannot subscribe to the argument advanced by Ld.Counsel that notice under section 148 was bad in law.

Accordingly, we dismiss ground No. 2 raised by assessee.

13. **Ground No. 3** is on disallowance made by Ld.AO.Ld.Counsel submitted that assessee's husband, late P.R.Kuppuramasetty owned several movable and immovable properties during his life time and executed a WILL dated 08/09/99, according to which he had given "right to life interest" to assessee, in respect of all his movable and immovable properties, without any power to mortgage, encumber or alienate the same. The WILL, further clearly mentions that all his properties should go to his 2 nephews, after death of assessee. He referred to in clause 5, 6, 7 of the WILL placed at page 70-77 of paper book which reads as under:

" 5. I declare that my wife Smt. P.K.Vijayalakshmi aged about 57 years shall have only life interest in respect of all the movable and immovable properties mentioned in the

schedule provided hereunder. That all the immovable properties and any share, interest, rights and titles in any of the immovable properties which are not specifically mentioned herein and to which I am entitled to during my life time or after my life or which may fall to me after my death shall also be enjoyed by said wife. That she has no power absolutely to encumber, mortgage or alienate an o the movable or immovable properties.

6. I declare that after the death of my life all the movable and immovable properties which are mentioned in the schedule shall go to my nephews (brothers sons) namely Sri Nirnjan S Pamadi s/o Sri P.R.Sampangirama Setty and Sri Kian S.Pamadi /o Sri P.R. Sathyanarayana Setty to these whom I have got great love and affection as I have or we have no children or my own or our own. That these children of my brothers have always shown and showered on me that any son or daughter may have the love and affection towards the natural parents. I am delighted with their upcoming in the society as the good citizen. That in the event of death of my wife before my death i.e. pre-deceasing me, all the movable and immovable which are standing in my name and to those which I am entitled to, shall immediately go to my said nephews namely Kiran S Pamadi and Sri Niranjan S Pamadi in equal shares.

7. I declare that after my death, my nephews shall have got absolute right in the properties and that they shall be entitled to enjoy the same without any let or hindrance and that they shall lo be entitled to change the Khata in their nm in the records of the Bangalore Mahanagara Palike. That they shall have the absolute right and interest/power to alienate the said properties in any manner they like during their life time”.

14.Ld.Counsel vehemently submitted that, assessee only had “right to life interest” in the property, and 2 nephews were actually having right to transfer the immovable property which was sold jointly by all 3 of them vide sale deed dated 02/08/2010, for total consideration amounting to Rs.2,45,02,500/-, in support of his contentions he placed reliance upon decisions of;

- *Hon’ble Supreme Court in case of Karmi vs Amru & others dated 05/01/71;*
- *Hon’ble Supreme Court in case of CGT vs Anusuya Sarabhai dated 13/03/97;*
- *Calcutta High Court in case of CWT vs K. A. G.Aratoon reported in (1994) 210 ITR 346*

15. Ld. Counsel placing reliance upon above decisions, submitted that, actual beneficiaries to all immovable and movable properties owned by assessee’s husband were two nephews, and assessee was only holding “right to Life Interest”. It was submitted that, the beneficiaries paid assessee her share of sale proceeds in lieu of assessee relinquishing her “right to life interest” in the property.

16. On the contrary, Ld.Sr.DR referring to relevant clauses of WILL submitted that, assessee transferred property for which she did not have any right to do so. However, assessee is the owner after her deceased husband, and entire sale proceeds should have been declared in the hands of assessee. Referring to section 54 EC of the act Ld.Sr.DR submitted that, section very specifically categorizes exemption available only to the extent of 50 lakhs, and in present case, assessee along with two nephews claimed

exemption under section 54 EC to the extent of Rs. 50 Lacs each, which is not permissible as per law. He thus supported view taken by authorities below.

17. We have perused submissions advanced by both sides in light of records placed before us.

There is no dispute that property sold is a long term capital asset. In present facts, as we analyze it threadbare, what needs to be determined is whether “right to life interest” in a property would constitute ‘capital asset’ or not. In the present facts of case assessee relinquished her “right to life interest” in the immovable property while the two nephews transferred the right to title, they possessed by virtue of WILL of their deceased uncle in the property. In our opinion each of them possessed a kind of right in the property which was transferred by virtue of sale deed dated 02/08/2010, which constitutes capital asset within the definition of section 2 (14) of the Act. In our opinion, word, “property” does not mean, merely physical property, but also means right for any kind, title or interest in it. If a person is an absolute owner of the property, it can be said that he has all rights and interest in that property. In the present facts of case, assessee owns “right to life interest”, and two nephews possess right to transfer the title in the property, as per last WILL and Testament of deceased husband of assessee. In our view, “right to life interest” possessed by assessee is a *right in personam* that has to be relinquished, in order to absolutely transfer the property, with a clear title to the buyers. In our view unless assessee transfers “right to life interest”, property sold will not be transferred to buyers in entirety, free of all/any encumbrances. The WILL executed by deceased husband of assessee, very categorically

mentions that, assessee do not possess any right to transfer, encumber, mortgage or alienate any of the immovable properties, and power to transfer vests only with two nephews, to whom the property have been bequeathed by deceased husband of assessee. Assessee before us and two nephew posses different kinds of rights in the property sold. In order to transfer clear title, free from all encumbrances to the buyer, assessee also has to relinquish her “right to life interest” in the property for which the two nephews have given a share of sale proceeds. This has to be seen as an understanding between assessee and two nephews Assessee thus rightly, claimed exemption u/s 54EC against the her share of sale proceeds on sale of “right to life interest” in the property, which she declared as LTCG. There cannot be any dispute that each of the three vendors have received their respective shares for sale of rights possessed by each one of them to the buyers against which each one of them can claim exemption u/s 54ECs independently.

18. On the basis of aforesaid discussions and analysis, we are of considered opinion, that the receipts have been rightly declared by assessee. Accordingly, we are of the opinion that the addition deserves to be deleted on the basis of above discussions.

Accordingly, Ground No.3 raised by assessee stands allowed.

In the result appeal filed by assessee stands partly allowed.

Order pronounced in the open court on

(A.K.GARODIA)
ACCOUNTANT MEMBER

Dated: the

***am**

(BEENA PILLAI)
JUDICIAL MEMBER

Copy of the Order forwarded to:

- 1.Appellant;
- 2.Respondent;
- 3.CIT;
- 4.CIT(A);
5. DR
6. ITO (TDS)
- 7.Guard File

By Order

Asst.Registrar

		Date	
1.	Draft dictated directly on computer system		
2.	Draft placed before author		
3.	Draft proposed & placed before the second member		
4.	Draft discussed/approved by Second Member.		
5.	Approved Draft comes to the Sr.PS/PS		
6.	Kept for pronouncement on		
7.	File sent to the Bench Clerk		
8.	Date on which file goes to the AR		
9.	Date on which file goes to the Head Clerk.		
10.	Date of dispatch of Order.		
11.	Draft dictation sheets are attached		

