IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI B. R. BASKARAN, ACCOUNTANT MEMBER

ITA No.3240/Bang/2018
Assessment Year : 2015-16

Shri. Hemanth Puttannachetty Viswanath, No. G-2, Brigade Hill View Apartment, Gavipuram, K. G. Nagar, Behind Rama Krishna Ashram, Bengaluru – 560 019. **PAN : ADSPV 5271 H**	Vs.	The Income Tax Officer, Ward - 5(2)(4), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri. Rajeev Nulvi, Advocate
Respondent by	:	Shri. Sankar Ganesh, Sr. DR(ITAT), Bengaluru

Date of hearing	:	06.09.2021
Date of Pronouncement	:	08.09.2021

O R D E R

Per N. V. Vasudevan, Vice President:

This is an appeal by the assessee against the Order dated 28.09.2018 of CIT(A)-5, Bengaluru, relating to Assessment Year 2015-16.

2. The only issue that arises for consideration in this appeal is as to whether the Revenue authorities were justified in bringing to tax long term capital gain (LTCG) at Rs.1,50,35,192/- on a protective basis in the hands of the assessee.

3. The assessee is an individual. The assessee is a son of one Shri. P. S. Vishwanathappa. The assessee also has a brother by name Shri. P. V. Sumanth. The assessee, his father and brother owned land at BBMP, Katha

No.33 at 5th Main Road, K P Puttana Chetty Road, Ward No.142, Chamrajpet, Bengaluru. The assessee's father Shri. P. S. Vishwanathappa obtained the aforesaid property under a registered partition deed dated 05.05.195. The total area of the land was 8840 sq.ft.

4. On 15.07.1983, by a registered partition deed, the land area of 8840 sq.ft. was partitioned between the assessee, his father and his brother as follows:

		Sy.No.
1. P.S. Vishwanathappa	*6120 sq.ft.*	*33*
2. P.V. Sumanth	*1360 sq.ft.*	*34 & 34*
3. P.V. Hemanth	*1360 sq.ft.*	*35 & 35*
Total	***8840 sq.ft***	

5. On 10/04/2014, all the above joint owners entered into Joint Development Agreement with M/s. Dhammanagi Developers Pvt. Ltd. With a terms that 56.65% of the land and developed area will go to the developer and 43.35% to the landlords. In view of Joint Development Agreement, the Developer amalgamated all three pieces of land belongs to the above owners on 12/02/2014.

6. In view of Sharing Agreement dated 8.2.2017 entered between the above three owners, the Assessee got 2 flats bearing no.204 of area 2569.50 sq.ft. and bearing no.302 of area 1284.14 sq.ft.

7. In the return of income filed, the assessee filed a revised computation of long term capital gain as follows:

Sale consideration	
Total constructed area received 3853.64 x 3200 (cost of construction per sq.ft.)	*1,23,31,648*
Add: Non refundable deposit received	*25,00,000*
Total consideration	*1,48,31,648*
Less: cost of acquisition	*13,88,390*
Land foregone in favour of developers 40% of 1/3rd of 8840 The cost of land foregone on 01/04/1981 is Rs. 1,35,585/-. Hence Index ***cost of***	
Capital gain	*1,34,43,258*
Less: 54F Transfer of property other than house property	*1,23,31,648*
Long term capital gain	*11,11,610*

8. The AO identified 3 issues that arose for consideration before him as follows:

a. *Whether the transaction involved results in capital gain in the hands of the assessee as one of the co-owner or his father Sri. P.S. Vishwanathappa as the kartha of HUF*

b. *If the transaction involved results in capital gain in the hands of the assessee, what should be deemed sale consideration received or receivable by the assessee.*

c. *If the transaction involved results in capital gain in the hands of the assessee, whether he is entitled for deduction u/s. 54F.*

9. On the first issue, the AO came to the conclusion that the property in question was a joint family property and therefore capital gain should be assessed in the hands of the HUF and not in the hands of the assesee in his individual capacity. On the issue of what should be the sale

consideration received or receivable by the assessee, the AO adopted the rate of 4158 per sq.ft of constructed area received by the assessee, his father and his brother and arrived at the full value of consideration received on transfer at a sum of Rs.5,16,02,889/- as against the value adopted by the assessee at Rs.1,23,31,648/- which was worked out by the assessee by adopting the value at Rs.3,200/- per sq.ft. With regard to the deduction under section 54F of the Act, the AO held as follows:

> *"9.4 In order to claim deduction u/s. 54F, the assessee has to fulfill all the five conditions (other than capital gain saving scheme which is irrelevant in the assessee's case) listed above. In the case of the assessee, the assessee does not fulfill the last condition that is section 54(2) of the I.T. Act, 1961. The assessee's contention to claim 54F was that he was in receipt of two flats in return of transfer of his share in 43.5% of the immovable property held by the HUF. Without prejudice to the fact that the capital gain has to be taxed in hands of the HUF, even if it is considered in the hands of the assessee he is not entitled for deduction u/s. 54F since he has received two flats. Though one of the flat is entitled for deduction u/s. 54F of the Income tax Act, section 54F(2) prohibits any assessee claiming deduction u/s. 54F to acquire any other residential property liable to be taxed under the head income from house property other than the new asset which is used for claiming the deduction u/s. 54F. In the case of the assessee, he has acquired another flat within the specified time than the one claimed deduction u/s. 54F. Hence, he is not eligible for deduction u/s. 54F of the I.T. Act, 1961."*

10. Finally, the AO brought the capital gain computed by him in the hands of the assessee in his individual capacity protectively and reserved his right to tax the capital gain in the hands of the HUF on the substantive basis.

11. Before the CIT(A), the assessee submitted that the Assessing Officer (AO) did not pass any order in the hands of the HUF assessing LTCG substantively in the hands of the HUF and hence protective order in the

hands of the Appellant for the entire property even though at paragraph 11 of the order, the Assessing Officer has stated that the capital gain is protectively assessed at the hands of the assessee with respect to his share in the joint property. It was submitted that the Assessing Officer erred in treating the ancestral property as HUF property though the property is partitioned in the year 1983. It was submitted that Assessing Officer erred in disallowing the claim u/s 54F of the Income Tax Act, 1961 by misinterpreting the provisions of section 54F(2) of the Income Tax Act, 1961. By way of additional ground raised the assessee submitted that the Assessing Officer erred in adopting market value of constructed area, to be received by the landlord in view of Joint Development Agreement, instead of fair market value of the said asset on the dated of transfer, shall be deemed to be the full value of consideration received or accrued in view of Joint Development Agreement, as per section 50D of the Income-tax Act, 1961.

12. The CIT(A) however confirmed the order of the AO. Hence this appeal by the assessee before the Tribunal. It was submitted by the learned counsel for the assessee that the CIT(A) though admitted that there was a Partition Deed in the year 1983 and also the capital gains is assessed for the entire property in the hands of the assessee as against only the share of the assessee, there was no substantive order preceding the protective order. On this aspect the order of CIT(A) is silent, had not expressed any opinion by speaking order. The learned counsel therefore prayed that the tribunal be pleased to set aside the assessee's case to the Assessing Officer with the direction to the Assessing Officer that Capital Gains should be computed at the rate of cost of construction of flats, on the assessee's share only and

allow the exemption claimed by the Appellant u/s 54F of the Income Tax Act, 1961. The learned DR relied on the order of the CIT(A)/

13. After hearing the rival submissions, we are of the view that the issue of computation of capital gain has to be remanded to the AO for consideration de novo, in the light of the conclusion that the AO might arrive at in the case of assessment of the HUF on substantive basis. Without a substantive assessment, protective assessment will have no meaning. We make it clear that all the issues with regard to computation of capital gain viz., computation of full value of consideration received on transfer and deduction under section 54F of the Act will also be considered de novo by the AO depending on the outcome of proceedings in the case of the HUF. With these observations, we set aside the order of the AO and direct the issue to be examined afresh by the AO.

14. In the result, appeal by the assessee is treated as allowed for statistical purpose.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-	Sd/-
(B. R. BASKARAN)	**(N. V. VASUDEVAN)**
ACCOUNTANT MEMBER	**VICE PRESIDENT**

Bangalore,
Dated : 08.09.2021.
/NS/*

Copy to:
1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.