

**IN THE INCOME TAX APPELLATE TRIBUNAL  
BENCH : COCHIN**

**BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT AND  
MS. PADMAVATHY S, ACCOUNTANT MEMBER**

ITA Nos.613, 566/Coch/2022
Assessment Year : 2015-16

Smt. Maries Joseph, Flat No.5A, Skyline Infinity Apartment, Carmel Park Road, Mundupalayam, Thrissur – 680 001. <b>PAN : AZNPJ 5373 M</b>	Vs.	DCIT, International Taxation, Kochi.
ASSESSEE		RESPONDENT

Assessee by	:	Shri. Arun Raj S, Advocate
Revenue by	:	Smt. J M Jamuna Devi, Sr AR

Date of hearing	:	06.12.2022
Date of Pronouncement	:	02.01.2023

**ORDER**

*Per Padmavathy S, Accountant Member*

These appeals are against the orders of CIT(A) - 12, Bengaluru, for the Assessment Year 2015-16, dated 28.02.2022 passed u/s.250 and u/s.271(1)(c) of the Income Tax Act (the Act)

2. We will first take up the appeal **ITA Nos.566/Coch/2022** which is against the order u/s.250 of the Act in which the assessee raised the following grounds of appeal

1. The order dated 28-2-2022 passed by the Commissioner of Income Tax (Appeals)-12 Bengaluru disallowing the exemption claimed under section 54F of the Act by the assessee to the tune of Rs 86,24,063/- being investment in residential house property at 'Skyline Infinity', Thrissur for the AY 2015-16.; is illegal, arbitrary and unjustified.
2. The CIT (Appeals), in the appeal filed by the assessee, thoroughly went wrong in disallowing the alternate relief of Rs 73,80,778/- granted by the assessing officer to the assessee. (i.e 50% of investment in Shobha, Thrissur which was disallowed in the case of her husband Dr. Jose Josph Vempilly holding that the said property is jointly owned by assessee and her husband; was granted as alternate relief to the assessee after rejecting the claim of the assessee under section 54F of the IT Act in respect of Skyline Infinity).
3. The CIT (Appeals) failed to note that in the appellate proceedings, the CIT (Appeals) does not have the jurisdiction to disallow the relief already granted by the assessing officer in favour of the assessee and therefore the said action of the CIT (Appeals) in rejecting the alternate claim of the assessee which was allowed by the assessing officer, is illegal, arbitrary and unjustified.
4. The CIT (Appeals) erred in issuing notice for enhancing the assessment and thereby disallowing the alternate claim of Rs 73,80,778/- granted by the assessing officer in respect of residential property at Shobha.
5. The CIT (Appeals) thoroughly went wrong in holding that the assessee is not entitled for relief under section 54F of the Act for the reason that the assessee owns two residential properties ABROAD. The finding of the CIT (Appeals) that the conditions in the proviso to section 54F of the IT Act are not satisfied by the assessee as she was owning two residential properties abroad during the relevant assessment year and therefore not entitled for exemption under section 54F of the IT Act
6. The CIT(Appeals) failed to understand, in the right perspective, the legislative intend in bringing the amendment to section 54F of the Act by the Finance Act, 2014 with effect from AY 2015-16 onwards. The CIT (Appeals) ought to have held that properties held abroad shall not be considered for deciding a claim under section 54F of the Act with effect from AY 2015-16 onwards. The interpretation given by the CIT (Appeals) contrary to the above is totally illegal, arbitrary and against the legislative intention and the provisions of section 54F of the IT Act.

7. The assessing officer disallowed the claim under section 54F of the Act in respect of Skyline Infinity, Thrissur, solely for the reason that the assessee's name was also shown as purchaser along with her husband in the agreement for sale in respect of property at Shobha, Thrissur. The CIT (Appeals) got convinced of the fact, from the evidence on record, that the assessee/assessee has not made any investment in Sobha City and is not the owner of the residential house at Sobha City, Thrissur and having got further convinced of the fact that the reason stated by the assessing officer in disallowing the claim of deduction in respect of Skyline Infinity, Thrissur will not factually and legally stand, then proceeded to confirm the disallowance of the claim of the assessee u/s 54F on a totally different reason that the assessee was owning two residential properties ABROAD during the relevant assessment year. The said finding of the CIT (Appeal) to disallow the claim of deduction under section 54F of the Act is illegal, totally unsustainable and perverse.
8. The CIT (Appeals) has thoroughly failed to consider the matter in the right perspective.

3. The assessee is a Non-Resident, filed her return of Income for the AY 2015-16 on 24-8-2016 admitting a total income of Rs.54,18,340/ and claiming exemption under section 54F of the Income Tax Act (herein after referred to as 'the Act') in relation to the investment made in 'Skyline Infinity' apartment, Thrissur. The case was selected for scrutiny and a notice under section 143 (2) dated 20-9-2016 was issued. The assessee along with her husband had sold total extend of 25.59 acres of land with building at Thrissur for total consideration of Rs 7,69,26,880/-through a common sale deed registered on 25-9-2014. Out of the above total extent the assessee's portion admeasuring 4.98 acres of land was sold for Rs 1,49,50,575/- The portion admeasuring 20.61 acres of land belonging to the assessee's husband was sold for consideration of Rs 6,19,76,305/-. After claiming indexed cost of acquisition by the assessee, the long

team capital gain was worked out to Rs 1,40,42,400/-. The assessee initially claimed Rs 86,24,063/- being investment in residential house property at "Skyline Infinity", Thrissur and Rs 54,18,377 has been admitted as taxable Long Term Capital Gains. In the course of assessment proceedings, the Assessing officer issued notice stating that the assessee is not eligible to claim exemption under section 54F of the Act as according to the AO, the assessee has acquired a residential house (apartment in Sobha City), other than the New Asset and therefore the conditions under section 54F is not satisfied and accordingly it was proposed to disallow the entire claim under section 54F.

4. The assessee filed reply dated 29-8-2017 to the notice stating that the conditions under section 54F is satisfied and that the entire payments towards cost of the Apartment in Sobha City was paid by assessee's husband Dr. Jose Joseph Vempilly completely out of his fund and the name of the assessee was shown in the agreement with intention of being a nominee and the assessee has no beneficial or actual ownership is held by the assessee. Further it was stated that the possession of the apartment in the Sobha City was transferred only on 6th May, 2017 and the registration of the property is yet to be completed. Therefore it was contended that the claim in relation to the investment in 'Skyline Infinity' is not hit by the proviso to section 54 F of the Act.

5. It was further contended that the entire cost for the purchase of Skyline Infinity apartment was paid by the assessee to Skyline builders and it was submitted that Rs 91,81,814/- may be taken as cost

of apartment. The assessee thereafter submitted another letter dated 5-12-2017 specifically contending that the assessee has not purchased a second house within one year from the date of transfer of the original asset. The inclusion of the assessee's name in the agreement in connection with Sobha City Apartment was only for a Shagun (a sign. of Happy future) to avoid litigation on a contingency and no beneficial or actual ownership is held by the assessee. It was again brought to the notice of the assessing officer that the entire purchase value for the apartment in Sobha City was paid by the assessee's husband, the details of which was produced before the Assessing Officer. Without prejudice to the above submissions, it was alternatively, submitted that if mere mention of the name of the assessee in the agreement for construction of the house property in Sobha City is treated as joint investment and if only 50% of the total investment is allowed in the hands of assessee's husband, then 50% balance of the total investment may be allowed in the hands of the assessee. However, the assessing officer without considering, the explanation offered by the assessee regarding the investment in the Skyline Infinity apartment based on which the claim under section 54F was made held that the above claim is hit by clause (a) (ii) of the proviso to section 54F of the Act. Accordingly the AO allowed the deduction u/s.54F towards the property in "Shobha City" and granted exemption of Rs 73,80,778/- under section 54 F of the Act.

6. Aggrieved the assessee filed the appeal before the CIT(A). The assessee submitted before the CIT(A) the property in "Shobha City" is bought fully out of the funds of assessee's husband and the assessee

has invested the sale proceeds of the land in property at "Skyline Infinity'. The AO for both assessee and her husband is the same and while rejecting the 100% claim of assessee's husband for investment in property in "Shobha City" allowed 50% in assessee's husband's case and 50% in assessee's case. The assessee submitted that assessee is entitled for deduction u/s.54F for investment in property at "Skyline Infinity' only since her husband is entitled for 100% of the amount invested in the property in "Shobha City". The assessee further submitted that the property in "Shobha City" is registered on 13.3.2019 in the name of assessee;s husband and submitted the copy of the registered sale deed before the CIT(A). The assessee therefore prayed that the deduction u/s.54F be allowed against the entire capital gain since she has paid an amount of Rs 91,81,814/- for investment in property at "Skyline Infinity'.

7. During the course of hearing the CIT(A) called on the assessee to furnish the details of all the properties owned by the assessee including those owned in abroad. The assessee furnished the details as required from which the CIT(A) noticed that the assessee is jointly owning two residential houses in USA. The CIT(A) held that the assessee is not entitled to deduction u/s.54F at all since the assessee owns more than one residential house, other than the new asset, on the date of transfer of the original asset. Accordingly the CIT(A) enhanced the assessed income of the assessee and also initiated penalty u/s.271(1)(c). Aggrieved the assessee is in appeal before the Tribunal

8. The Id AR submitted that prior to the AY 2015-16 ( prior to the amendment made by the Finance Act, 2014 to section 54 and 54F of the Income Tax Act), when a claim was made by an assessee under section 54 or 54F of the Income Tax Act in respect of investment made in a residential house ABROAD, the Courts have held that such claim in respect of investment in a residential house ABROAD has to be allowed under section 54/ 54F of the Income Tax Act as the sections 54/ 54F of the IT Act did not specify whether the investment in a residential house should be in India or Abroad. This led to the amendment of section 54 and 54F by the Finance Act, 2014 with effect from 1-4-2015 i.e., from AY 2015-16 and onwards, and the legislature made it clear that the investment of residential house that is to be considered and eligible for deduction under section 54/ 54 F of the IT Act is the investment of residential house in INDIA. It is submitted that the exemption u/s 54F sought in this case is only in respect of residential house in INDIA. The interpretation that is now attempted to be given to deny the exemption claimed in respect of an investment of residential house in India, on the reasoning that no exception is made towards residential properties owned abroad and therefore the assessee having residential houses abroad is not eligible for exemption in respect of residential house in INDIA, is illegal and totally contrary to and against the spirit and intention of the legislature. It is further submitted that the intention of the legislature is very clear that from AY 2015-16 and onwards, the investments of an assessee in residential house abroad shall not be considered while deciding the deduction under section 54 or 54F of the Income Tax

Act. When the legislature has made it clear that exemption u/s 54/ 54F is available only to residential house owned in India, the investments made in residential houses owned abroad is outside the scope of consideration while deciding the eligibility/allowability of exemption u/s 54/54F of the Income Tax Act with effect from 1-4-2015 i.e., from AY 2015-16 onwards.

9. The learned AR also submitted that the proviso needs to be read along with the main section where as per the amended provisions, the investments in residential house in India is only eligible for deduction under section 54F of the Act. The learned AR argued that what applies to the main section should apply to the proviso also wherein there is a restriction of ownership of the asset other than the new asset. The learned AR further submitted that the intention of the legislature while introducing section 54F of the Act is that to promote real estate in India and therefore the proviso cannot be invoked for an asset owned by the assessee abroad.

10. The learned DR relied on the order of the CIT(A).

11. We heard the rival submissions and perused the material on record. The assessee has sold a land jointly owned along with her husband and made an investment in a residential house property and claimed that the conditions given under section 54F of the Act. The AO allowed the deduction u/s.54F to the assessee not towards what she has claimed in the return of income but towards another property which is in the joint name of the assessee and her husband. This had resulted in reduction in the deduction u/s.54F and therefore the

assessee preferred an appeal before the CIT(A). The CIT(A) took into account the residential property owned by the assessee in USA and denied the entire benefit under section 54F of the Act by stating that the assessee is hit by the proviso (i) to section 54F of the Act. Before proceeding further we will look at section 54F(1) which reads as follows –

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

**54F.** (1) Subject to the provisions of sub-section (4), 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 or two years after the date on which the transfer took place purchased, or has within a period of three years after that date constructed, **one residential house in India** (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".

*Explanation.*—For the purposes of this section,—

"net consideration", in relation to the transfer of a capital asset, means the full value of the consideration received or accruing as a result of the transfer of the capital asset as reduced by any expenditure incurred wholly and exclusively in connection with such transfer.

12. The contention of the revenue is that the proviso to section 54F(1) states that the deduction under the subsection (1) is available provided the assessee does not own more than one residential house other than the new asset and that the proviso does not specify that the existing residential house in India alone should be considered for this purpose. Accordingly the two houses in USA owned by the assessee had been considered by the CIT(A) for denying the deduction. Subsection (1) of section 54F was amended by The Finance Act (No 2) 2014 where for the words "constructed, a residential house" was substituted to with "constructed, one residential house in India" to bring in clarity that the deduction is allowable only if the investment in the new residential house is made in India and not abroad. The proviso which puts conditions for claiming exemption however states that the assessee should not own more than one residential house other than the new house but does not explicitly say whether in India or abroad. The argument of the ld AR is that section 54F in its entirety is brought in to promote the real estate industry in India and therefore the proviso should be read in conjuncture with the main section where the deduction is allowable only for investment in property in India and therefore the condition restricting the deduction also should be applied

only for existing properties in India and not abroad. It is to be noticed that what is provided through subsection (1) of section 54F to the assessee is a benefit which is granted towards making an investment whereas what is contained in the proviso is a condition/restriction towards existing ownership of the asset and therefore it cannot be categorically said that the same interpretation should be applied to both. At the same time the proviso is not to be taken absolutely in its strict literal sense but is of necessity limited to the ambit of the section which it qualifies and cannot be permitted by construction to defeat the basic intent expressed in the substantive provision. In our view it is important that a proviso must be construed harmoniously with the main statute so as to give effect to the legislative objective and the section should be read as a whole inclusive of the proviso in such manner that they mutually throw light on each other and result in a harmonious construction. The legislative intent behind granting relief to the assessee through section 54F is investments in residential house in India and therefore the proviso imposing the conditions cannot be read in isolation and should be construed harmoniously with the main section. Accordingly the proviso to section 54F which contains the condition that the deduction is not available if the assessee owns more than one residential house, other than the new asset, should be interpreted to mean ownership of residential houses in India. Therefore the ground on which the deduction u/s.54F is denied that the assessee owns two residential houses in USA in our considered view is not tenable. We accordingly hold that the assessee is entitled for claiming deduction u/s.54F for investments made in

India in one residential house within the time limit stipulated under the said section.

13. It is submitted by the Id AR that the AO had allowed the deduction u/s.54F with respect to the Apartment in Sobha City which is not correct since the payments towards cost of the Apartment was paid by assessee's husband Dr. Jose Joseph Vempilly completely out of his fund. It is submitted that the assessee has invested the funds out of the sale proceeds in a property in 'Skyline Infinity' and therefore the deduction u/s.54F should be given for this property. The Id AR further submitted that assessee's husband had filed an appeal against the order of the AO allowing deduction only for 50% of investment in Apartment in Sobha City and the CIT(A) after considering the evidences had allowed the deduction towards 100% of the investments in the hands of assessee's husband. Therefore the Id AR prayed for direction that the deduction u/s.54F shall be granted for investment in the property in 'Skyline Infinity' to the assessee.

14. We hear the parties. We see merit in the submissions of the assessee. In this regard we notice that the Hon'ble Karnataka High Court in the case of DIT (International Taxation) v. Mrs. Jenifer Bhide [2011] 15 taxmann.com 82 has considered a similar issue and held that to attract section 54 and section 54EC of the Act, what is material is the investment of the sale consideration in acquiring the residential premises or constructing a residential premises or investing the amounts in bonds set out in section 54EC and once the sale consideration is invested in any such manner out of the entire sale

consideration that had flown from the assessee, then the assessee would be entitled to the benefit conferred under this provision. In our view the facts of assessee's case needs to be examined based on evidences. We accordingly remit the issue back to the AO with a direction to verify the documents and evidences and allow the claim of the assessee with respect to the property acquired by the assessee out of sale consideration keeping in mind the ratio laid down by the Hon'ble Karnataka High Court.

15. The appeal against the initiation of penalty proceedings in ITA No.613/Coch/2022 has become infructuous as a result of our decision in appeal No.566/Coch/2022 and therefore dismissed accordingly.

16. In the result, appeal in ITA No.566/Coch/2022 is allowed and ITA No.613/Coch/2022 is dismissed.

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

**Sd/-**  
**(N. V. VASUDEVAN)**  
**Vice President**

**Sd/-**  
**(PADMAVATHY S)**  
**Accountant Member**

Bangalore,  
Dated: 02.01.2023.  
/NS/\*

Copy to:

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|-------------|---------------|
| 1. Assessee | 2. Respondent |
| 3. CIT      | 4. CIT(A)     |
| 5. DR       | 6. Guard file |

By order  
Assistant Registrar,  
ITAT, Bangalore.