

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

Before Shri Sanjay Arora, Accountant Member and
Dr. Seethalakshmi, Judicial Member

ITA No. 118/Coch/2021
(Assessment Year: 2010-11)

Hema Ramnath 35/2968, Laxmi Villa Church Road, Palarivattom Kochi - 682025 [PAN:AAVPR8682G]	vs.	Dy. CIT, Corporate Circle 1(1) Ernakulam 682018
(Appellant)		(Respondent)

Appellant by:	Shri R. Krishnan, CA
Respondent by:	Smt. J.M. Jamuna Devi, Sr. D.R.

Date of Hearing:	21.12.2023
Date of Pronouncement:	15.03.2024

ORDER

Per: Sanjay Arora, AM

This is an Appeal by the Assessee, agitating the dismissal of her appeal contesting her assessment under section 143(3) of Income Tax Act, 1961 (the Act) dated 07.03.2013 by the Commissioner of Income Tax (Appeals), Income Tax Department [CIT(A)], vide order dated 18.7.2021 for Assessment Year 2010-11.

2.1 The brief facts of the case are that the assessee booked a flat in a residential complex being developed by M/s. L&T Arun Excello Reality Pvt. Ltd. (L&T) at Chengalpet Taluk, Tamilnadu on 14.07.2007, claiming deduction in its respect u/s. 54F of the Act at Rs.53,18,000, i.e., *qua* the capital gain arising to her for AY 2007-08. The construction was, however, delayed, and the flat agreed to be delivered by 13.7.2009, or with a grace period of one month, was finally delivered only on 22.6.2010. The Assessing Officer (AO) accordingly invoked the provisions of section

54F(4) of the Act, which reads as under, to disallow, for the current year, the deduction allowed u/s. 54F(1) for AY 2007-08 to the extent of Rs. 25,58,075:

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

(2) & (3)

(4) The amount of the net consideration which is not appropriated by the assessee towards the purchase of the new asset made within one year before the date on which the transfer of the original asset took place, or which is not utilised by him for the purchase or construction of the new asset before the date of furnishing the return of income under section 139, shall be deposited by him before furnishing such return [such deposit being made in any case not later than the due date applicable in the case of the assessee for furnishing the return of income under sub-section (1) of section 139] in an account in any such bank or institution as may be specified in, and utilised in accordance with, any scheme which the Central Government may, by notification in the Official Gazette, frame in this behalf and such return shall be accompanied by proof of such deposit ; and, for the purposes of sub-section (1), the amount, if any, already utilised by the assessee for the purchase or construction of the new asset together with the amount so deposited shall be deemed to be the cost of the new asset:

Provided that if the amount deposited under this sub-section is not utilised wholly or partly for the purchase or construction of the new asset within the period specified in sub-section (1), then,—

(i) the amount by which—

(a) the amount of capital gain arising from the transfer of the original asset not charged under section 45 on the basis of the cost of the new asset as provided in clause (a) or, as the case may be, clause (b) of sub-section (1), exceeds

(b) the amount that would not have been so charged had the amount actually utilised by the assessee for the purchase or construction of the new asset within the period specified in sub-section (1) been the cost of the new asset,

shall be charged under section 45 as income of the previous year in which the period of three years from the date of the transfer of the original asset expires; and

(ii) the assessee shall be entitled to withdraw the unutilised amount in accordance with the scheme aforesaid.

2.2 The assessee's invocation of the doctrine of impossibility of performance, inasmuch as the delayed construction was out of her control, did not find favour with Revenue authorities. In the view of the Id. CIT(A), the purchase period of two years from the date of transfer of the capital asset on 23.8.2006 in fact expired on

22.8.2008. The assessee could have accordingly opted for a ready-to-purchase flat, or one that was near completion. She could have, in view of the construction being delayed, opted out, and purchased another flat. Aggrieved, assessee is in appeal.

3. Before us, the assessee reiterated her case, placing on record letters dated 07.5.2009 and 01.9.2009 from the Builder, M/s. L&T Arun Excello Ralty (P.) Ltd., stating it's inability to deliver the possession of the flat by the date envisaged, allotting to her in fact a different flat, not once, but twice, i.e., from Apartment 5082 in Tower 5 to # 3132 in Tower 3, and then again to # 2162 in Tower 2, citing reasons of recession and slackness of demand, necessitating change in the building plan, and was finally delivered only on 22.6.2010. On it being pointed out by the Bench to Shri Krishnan, the ld. counsel for the assessee, that given that the time initially agreed upon for delivery of the flat was 13.7.2009, i.e., much later than the period statutorily allowed for purchase of a new residential unit, he would clarify that this was a case, not of purchase, but of construction by the assessee, even as accepted by the AO, which had been altered, without notice to the assessee, as one of the purchase, by the ld. CIT(A). This, he claimed, is not valid in law inasmuch as it amounts to an enhancement, which could only be upon the assessee being heard in the matter. Accordingly, in the alternative, the assessee be allowed to represent before the ld. CIT(A) on this aspect of the matter; his order being in contravention of the principles of natural justice.

4. We have heard the parties, and perused the material on record.

4.1 There is nothing on record to show that the ld. CIT(A) allowed opportunity of hearing to the assessee, whose case has been considered as one of construction by the assessing authority, to explain as to why it should not be considered as one of purchase. And neither has the Revenue brought anything on record to show opportunity toward this being allowed by the ld. CIT(A). This is clearly an irregularity, and the matter shall necessarily have to travel to the stage where the

irregularity had intervened (viz. *ITO v. M. Pirai Choodi* [2011] 334 ITR 262 (SC); *Guduthur Bros. v. ITO* [1960] 40 ITR 298 (SC)). The matter, accordingly, goes back to the file of the ld. CIT(A) for the purpose. In fact, we also observe that both, i.e., the finding by the AO and that by the ld. CIT(A), modifying the former, are without statement of any reason/s informing the same and, thus, not sustainable on that ground alone inasmuch as they do not satisfy the test of a judicial order. The matter accordingly goes back to the ld. CIT(A), who shall adjudicate afresh in the matter after hearing the parties before him.

4.2 Even as the matter is principally one of fact, to be determined on the basis of the agreement, on its terms, and the conduct of the parties, the following are among the issues that in our view arise for consideration and, accordingly, being addressed:

a). There appears to be a clear dichotomy between the assessee's claim of having entered into an agreement for construction, i.e., through a contract, even if with materials, implying a prior title over the underlying land over which a housing unit, *as per her specifications*, is to be built, with a Builder, and the fact of non-delivery of the said unit, *or its substitution* – which was twice over, by the Builder, with different units, not to speak of it being, as stated, due to the delay in construction due to slackness in demand for housing units. *Where, one may ask, is the question of slackness of demand for housing units causing the delay where the construction is being carried on for and on behalf of the assessee?* Further, the construction being admittedly in term of buildings, each containing several such independent units over a specified piece of land, this would apparently imply that several such people had come together to, first, purchase a parcel of land and, then, agree for a common design and price of the housing unit, a Flat and, further, for it being constructed by the concerned builder-contractor. Apart from the fact that this would require being proved with materials, the construction being, as stated, for and on behalf of a group of people, pooling-in their joint land, how could the delay therein arise due to

slackness of demand, or occasion a change in building plan by the Builder, much less necessitating, in turn, a change in the housing units being constructed, as in the assessee's case, constraining 'her' to take another unit, being ostensibly built by the Builder for another person. Payment to the contractor, needless to add, would only be for the superstructure. Related questions in this respect would be as to when and from whom the land, on which the assessee is thus constructing her flat, was purchased, and why is the land cost, as it appears, not included in the claim for deduction u/s. 54F? The housing project, as it appears from the letter dated 07.5.2009 supra, is a self-contained locality, including a School, an IT Building; STP; standby power; car park, etc. Further, insofar as the building complex has common areas, viz. common roads, park, etc., i.e., along with other towers being built within the residential complex, christened 'Estancia', the common purchase of land, and agreement for construction, would include 'allottees' or, as the case may be, 'buyers' of units in other building towers as well.

b). the second related question would be that where, then, is the question of doctrine of impossibility of performance; the builder being only an agent of the assessee, retained for construction purposes by her.

c). independent of the questions raised vide paras (a) & (b) above, it would need to be answered if the doctrine being invoked by the assessee is that of impossibility of performance or of equity? The former, sanctified by law, is that the law cannot cast an impossible burden. *Would that extend to include a private contract between two parties?* Further, considering that law itself allows an assessee relief to the extent of the amount invested during the statutorily allowed period, the law, though not necessarily required to, meets the possible charge of inequity.

4.3 On the legal side, the issue would be the scope of the terms 'purchase' and 'construction', particularly considering that the provision refers to both, providing

different time lines for the same in s. 54F(1). Both undefined, the meaning thereto would perhaps have to be understood as in common parlance.

4.4 All contentions are open, even as the burden to prove her claims would be on the assessee. Further, we may not be, in view of the foregoing, construed as having expressed any final opinion in the matter, even as we have, without doubt, sought to bring forth the relevant aspects of the matter, and which would therefore need to be considered in adjudication on the matter by the first appellate authority.

4.5 We decide accordingly.

5. In the result, the assessee's appeal is allowed for statistical purposes.

Order pronounced on March 15, 2024 under rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963

Sd/-
(Dr. Seethalakshmi)
Judicial Member

Sd/-
(Sanjay Arora)
Accountant Member

Cochin, Dated: March 15, 2024
n.p.

Copy to:

1. The Appellant
2. The Respondent
3. The Pr. CIT concerned
4. The Sr. DR, ITAT, Cochin
5. Guard File

By Order

Assistant Registrar
ITAT, Cochin