# <u>आयकर अपीलीय अधिकरण, कटक न्यायपीठ,कटक</u>

**IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK**

**BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER**
**AND**
**SHRI MANISH AGARWAL, ACCOUNTANT MEMBER**

आयकर अपील **सं/ITA No.21/CTK/2024**

(**निर्धारण वर्ष /** Assessment Year : 2017-2018)

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| Kanak Bhanj Deo,<br>Plot No.2093/3341, Lane-5,<br>Jaydev Vihar, Bhubaneswar,<br>Odisha-751013 | Vs | ITO, Ward-5(3), Bhubaneswar |
| **PAN No. :ANGPB 4721 Q** | | |
| (**अपीलार्थी /Appellant**) | .. | (**प्रत्यर्थी / Respondent**) |

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| **निर्धारिती की ओर से** /Assessee by | : | Shri N.R.Biswal, CA |
| **राजस्व की ओर से** /Revenue by | : | Shri S.C.Mohanty, Sr. DR |
| सुनवाई की तारीख **/ Date of Hearing** | : | 10/07/2024 |
| घोषणा की तारीख**/Date of Pronouncement** | : | 10/07/2024 |

## <u>आदेश / O R D E R</u>

***<u>Per Bench</u>*** :

This is an appeal filed by the assessee against the order of the ld. CIT(A), National Faceless Appeal Centre (NFAC), Delhi, dated 16.11.2023, in DIN & Order No.ITBA/NFAC/S/250/2023-24/1058002817(1) for the assessment year 2017-2018.

2. Brief facts of the case are that the assessee has entered into Joint Development Agreement (JDA) with the builder on 13.01.2012 and further executed a distribution agreement on 05.11.2014 according to which the land of the assessee was given to the developer for construction of multistoried building and as per distribution agreement, in consideration the assessee is entitled for 26% area in the constructed building. During the impugned year the assessee has got four flats having total area of 4220.23 sq.ft. (including 92.85 sq.ft. additional area) as the sale consideration being 26% of the newly constructed building. Out of the said

four flats the assessee had sold two flats and while filing the return of income had claimed deduction u/s.54F of the Act out of the capital gains computed on the transfer of the land and capital gain of Rs.3,00,480/- was declared on the sale of two flats out of the four flats allotted to her towards sale consideration. The case of the assessee was taken up for limited scrutiny for two reasons, such as, (i) capital gain/loss on sale of property and (ii) cash deposit during demonetization period and the assessment was completed wherein the AO allowed the deduction u/s.54F of the Act on one flat and also computed short-term capital loss on sale of two flats against the capital gain declared by the assessee and not allowed the set off of such loss against the capital gains. In the first appeal, the ld. CIT(A) allowed part relief in the appeal of the assessee, therefore, the present appeal has been filed by the assessee before us.

3. During the course of hearing, the ld.AR of the assessee has taken one additional ground as Ground No.4 and requested to admit the same being legal ground, which reads as under :-

> ***Ground No.4***
>
> *For that, on the facts and circumstances of the case, the Ld.A.O. has erred in law by travelling to the issues beyond the issues for which the case was selected for scrutiny i.e. Capital Gain/Loss on sale of property and converted the limited scrutiny into a complete scrutiny without any approval from the administrative Pr.CIT. Therefore conversion of limited scrutiny into a complete scrutiny is beyond jurisdiction. Therefore Capital gain in relation to the transfer of capital asset to the developer during the Asst. Year 2017-18 is null and void and the same should be deleted in full.*

4. Before deciding the appeal of the assessee on the ground taken in the appeal memo, we first decide the additional ground taken by the assessee. From the perusal of the additional ground, it is seen that in this

ground the assessee has challenged the action of the AO in making the addition on the issues which were outside the scope of limited scrutiny without having administrative approval from the Pr.CIT for conversion from limited scrutiny to complete scrutiny. As this ground is purely legal in nature, therefore, by following the judgment of the Hon'ble Supreme Court in the case of NTPC Ltd. Vs. CIT, reported in 229 ITR 383 (SC), the additional ground taken by the assessee is hereby admitted.

5. On merits of this ground, it is seen that one of the reason of the limited scrutiny is "capital gain/loss on sale of property" and from the perusal of assessment order it is found that the AO has made addition on account of long term capital gain declared by the assessee by disallowing the deduction claimed u/s.54F of the Act, therefore, the said issue is very well within the ambit of the reason for limited scrutiny in the case of the assessee. Therefore, this ground of the assessee that the addition has been made beyond the issue for which the case was selected for limited scrutiny is devoid of any merit and accordingly the additional ground No.4 as taken is hereby dismissed.

6. Now, coming to the other grounds taken by the assessee in appeal memo, during the course of hearing, ld. AR of the assessee submitted that the assessee has entered into a Joint Development Agreement in the Financial Year 2011-2012 relevant to A.Y.2012-2013 and handed over the physical possession of the property to the developer for construction and also executed the Power of Attorney in its favour for further formalities in this regard. He, therefore, contended that capital gain, if any, has to be

calculated and subject to tax in the assessment year 2012-2013 and not in the year under appeal, as the transfer was taken place at the time of execution of the development agreement when the assessee had handed over the physical possession of the property to the builder. He further submitted that against such transfer the assessee is entitled for 26% of the constructed area comprising of four flats, which was received in the impugned year, therefore, he is eligible for deduction u/s.54F of the Act for all the four flats received by her and the AO has wrongly disallowed deduction claimed u/s.54F of the Act with respect to three flats.

7. He also placed reliance on the judgment of Hon'ble Supreme Court in the case of Seshasayee Steels (P.) Ltd. Vs. ACIT, Chennai, reported in [2020] 115 taxmann.com 5 (SC) and in the case of CIT Vs. Balbir Singh Maini, reported in [2017] 86 taxmann.com 94 (SC), in support of the contention that where the Joint Development Agreement was executed, for the purpose of capital gain, incidence of tax arisen in the same year thus in the present case since the transfer of immovable property took place in the year when it was executed i.e. in 2012-2013, the incidence of tax would be A.Y.2012-2013 and not in A.Y.2017-2018. He further placed reliance on the judgment of ITAT Chennai 'A' Bench of the Tribunal in the case of Smt. V. Kalpagam Vs. ITO, Chennai, passed in ITA No.3034/Chny/2018, order dated 19.07.2023, where the incidence of tax in respect of the land transferred through Joint Development Agreement is explained by the Chennai Bench.

8. *Per Contra*, ld. Sr. DR supports the order of the lower authorities and submits that the assessee has received the constructed property in the year under appeal as per the Joint Development Agreement; therefore, the transfer took place in the year 2017-18 and not the assessment year 2012-13 as claimed by the assessee. He further submits that the assessee has claimed deduction u/s.54F on the four flats which are separate units and as per Section 54F, the assessee is entitled to deduction for only one new asset, therefore, the lower authorities has rightly disallowed the claim of the assessee u/s.54F of the Act and he prayed for the confirmation of the order of the lower authorities.

9. We have heard rival submissions. From the records, it is seen that the assessee has entered into a Joint Development Agreement on 13.01.2012 whereby it has authorized the builder to construct a building on the said piece of land and as per Distribution Agreement out of the constructed area, the assessee is entitled for 26% area in the constructed building. During the year i.e. in A.Y.2017-18 when the construction got completed as decided between the parties in terms of Joint Development Agreement and Distribution Agreement, consideration has been transferred to the assessee in the shape of four flats having following areas :-

Land Owner Share (assessee)

| Flat No. | S.B.Area | Location |
|---|---|---|
| 201 | 1024.28 | Second Floor |
| 202 | 1041.81 | Second Floor |
| 203 | 1131.60 | Second Floor |
| 204 | 1052.54 | Second Floor |

**Total : 4220.23 Sq.Ft.**

Excess (4220.23-4127.38) = 92.85 Sq.Ft.

10. From the table above, it is clear that the assessee has received four flats having super built up area total ad measuring 4220.23 sq.ft. wherein the assessee has received excess share of 92.85 sq.ft. for which the payment was made by the assessee to the builder. Out of the said four flats the assessee has sold two flats to two different parties vide sale deed in the year under appeal. It is clear that these four flats are four different independent units and also treated by the assessee as four independent houses out of which two are sold by her in the year under appeal. The claim of the assessee that against the transfer of the land to the builder in terms of development agreement the capital gain, if any, is to be charged to tax in the assessment year 2012-2013 when the Joint Development Agreement got executed is not acceptable for the reason first that no capital gain was declared by the assessee herself in the assessment year 2012-2013 as a result of the development agreement. Secondly, the contentions for completion of transfer in terms of Section 53A of the Transfer of Property Act, all the conditions for transfer were not met out since the assessee had not received the sale consideration in the shape of her share of 26% area in constructed building. The Hon'ble Supreme Court in the case of Balbir Singh (supra), has held that the incidence of tax for capital gain on the transfer of capital asset has arisen when Joint Development Agreement is executed between the parties. However, the tax has to be paid in the year when all the conditions of Section 53A of the Transfer of Property Act were completed i.e. in the present case, when the assessee has got possession of the 26% of her share as a

consideration towards the handing over of the land to be builder for construction of the building. Accordingly, the capital gain from the transfer of the land is to be computed on the date when Joint Development Agreement was executed between the parties treating the prevailing circle rate of the land as on that date as the sale consideration and out of the said amount of sale consideration, deduction towards the indexed cost of acquisition and indexed cost of improvement is to be allowed. Thereafter the said sale consideration become the cost in the hands of the assessee and if the assessee has sold any portion of her share in the developed property, the difference between the proportionate cost of such shares sold and the final sale consideration received from the sale of such share would be the business income of the assessee as it construed adventure in the nature of the trade and, therefore, construction activity is termed as the business income in the hands of the assessee. In the case of Smt. V. Kalpagam (supra), the ITAT Chennai Bench of the Tribunal has also explained this tax treatment and explained the incidence of the tax when the property is transferred in terms of the Joint Development Agreement and certain area received by the transferor against such development agreement. In view of the above fact since in the present case the assessee has not declared any capital gain in the assessment year 2012-2013, when it has entered into the Joint Development Agreement no relief could be granted on this score to the assessee for taxation of capital gain in that year, however, it is also a matter of fact that the assessee has received the constructed portion of her share in the developed property in

the year under appeal, therefore, the same has to be taxed in the hands of the assessee when the transfer as per Section 53A of the Transfer of Property Act is completed. Accordingly, the action of the AO in taxing the capital gain in the year under consideration is held as correct.

11. Unfortunately in the present case, neither the assessee nor the AO nor even the ld. CIT(A) has computed the income of the assessee in this manner which has been prescribed by the Hon'ble Apex Court in the cases cited supra. Thus, we left with no option but to examine the taxability of capital gain based on the return of income filed by the assessee and as assessed/decided by lower authorities. Since the assessee herself has declared capital gains from the transfer of land in the impugned year, the capital gains is charged to tax in AY 2017-18 only.

12. With regard to deduction u/s.54F of the Act, we first examine the provision of Section 54F(1) of the Act, which reads as under :-

> ***Section 54F. [ Capital gain on transfer of certain capital assets not to be charged in case of investment in residential house.***
>
> *(1) [Subject to the provisions of sub-section (4), where, in the case of an assessee being an individual or a Hindu undivided family] [ Substituted by Act 18 of 2005, Section 18, for sub-Section (3) (w.e.f. 1.4.2006).], 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] [ Inserted by Act 11 of 1987, Section 23 (w.e.f. 1.4.1988).] after the date on which the transfer took place purchased, or has within a period of three years after that date constructed, a residential house (hereafter in this section referred to as the new asset), the capital gain shall be dealt within 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 three years 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,-*
*[ (i) omitted by Act 11 of 1987, Section 23 (w.e.f. 1.4.1988).]*

*[* * *] 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.*

13. In the present case, the assessee has purchased four flats on which she had claimed deduction u/s.54F of the Act but as per proviso (a)(ii) to Section 54F(1) of the Act, if the assessee has purchased another residential house other than new asset within a period of one year from the transfer of original asset, she will not be entitled for deduction u/s.54F of the Act on new assets. In the instant case as has been observed above, the assessee has accepted four flats in consideration which are four different residential units thus the deduction u/s.54F of the Act as

allowed is also under question, however, the lower authorities have already allowed deductions u/s.54F of the Act to assessee on one flat and no appeal is filed by revenue against such findings. Therefore, we are not interfering into the allowability of deduction as allowed to assessee u/s.54F of the Act on one flat only.

14. As discussed above, the assessee is entitled for deduction u/s.54F of the Act on one flat only out of the four allotted flats looking to the fact that the assessee herself had sold two flats out of such four flats, therefore, all the four flats are to be considered as separate residential units. Accordingly, all the grounds taken by the assessee in appeal memo are dismissed.

15. In the result, appeal of the assessee is dismissed.

Order dictated and pronounced in the open court on 10/07/2024.

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|---|---|
| **Sd/-** | **Sd/-** |
| **(GEORGE MATHAN)** | **(MANISH AGARWAL)** |
| **न्यायिक सदस्य / JUDICIAL MEMBER** | लेखा सदस्य/ **ACCOUNTANT MEMBER** |

**कटक** Cuttack; दिनांक Dated 10/07/2024

*Prakash Kumar Mishra, Sr.P.S.*

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant-
   Kanak Bhanj Deo,
   Plot No.2093/3341, Lane-5,
   Jaydev Vihar, Bhubaneswar,Odisha-751013
2. प्रत्यर्थी / The Respondent-
   ITO, Ward-5(3), Bhubaneswar
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कटक** / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

**आदेशानुसार/** BY ORDER,

(**Assistant Registrar**)
**आयकर अपीलीय अधिकरण, कटक/ITAT, Cuttack**