

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D", MUMBAI**

**BEFORE JUSTICE (RETD.) C.V. BHADANG, PRESIDENT AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

ITA NO. 3865/MUM/2024 : A.Y : 2013-14

Dhirajkumar Sohanlal Thukral
33/34, Garden View Apartment,
Road No. 29, Sion (E),
Mumbai 400 022.
PAN : AABPT5208Q (Appellant)

Vs. Asst. Commissioner of Income
Tax, Circle 17(1) Mumbai.
(Respondent)

Appellant by : Ms. Kinjal Bhuta
Respondent by : Shri R.R. Makwana, Sr. DR

Date of Hearing : 12/12/2024
Date of Pronouncement : 12/12/2024

ORDER

PER JUSTICE (RETD.) C.V. BHADANG, PRESIDENT :

By this appeal, the appellant/assessee is challenging the order dated 05.06.2024 passed by the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi ('CIT(A)' for short) and the appeal relates to assessment year 2013-14. By the impugned order, CIT(A) has confirmed the order of assessment dated 30.03.2016 passed by the Assessing Officer thereby making an addition of Rs.2,53,56,690/- under Section 54F of the Income Tax Act, 1961 ('Act' for short) and as to disallowance of the unabsorbed depreciation.

2. The assessee is an individual engaged in the business of transport under the name and style as M/s. Dhiraj Roadlines. The appellant filed the original

Rol on 30.10.2013 declaring a total income of Rs.2,28,09,257/-, which included Long Term Capital Gains (LTCG) of Rs.2,33,31,286/-. The return was processed under Section 143(1) of the said Act. Subsequently, the case was taken up for scrutiny.

3. The record discloses that the appellant had entered into a Development Agreement dated 14.11.2011 under which the appellant had received a consideration of Rs.1,10,00,000/- and was entitled to receive 50% of the built-up area comprising of five units out of which three were residential flats and two commercial shops. The assessee initially claimed that the construction cost of the five units was also part of the consideration alongwith the cash consideration of Rs.1,10,00,000/- and calculated the total sale consideration at Rs.5,72,84,000/-. After making an allowance for the indexed cost of improvement and the indexed cost of acquisition, the capital gains were calculated at Rs.4,87,83,497/-. The assessee claimed deduction under Section 54F of the Act of Rs.2,54,52,211/- and the balance amount of Rs.2,33,31,286/- as LTCG was offered as income for the purposes of taxation.

4. The Assessing Officer called for certain details which were furnished by the appellant vide letter dated 22.12.2015 alongwith copy of the Development Agreement.

5. It appears that during the assessment proceedings, the assessee by his letter dated 21.03.2016 gave further particulars. Before the Assessing Officer, the appellant restricted the claim of deduction under Section 54F of the Act to only one residential flat which was valued at Rs.70,42,384/-.

6. Be that as it may, the Assessing Officer disallowed the claim of cost of land as made by the assessee and also further disallowed the deduction under Section 54F of the Act as claimed by the assessee and by restricting the deduction under Section 54F of the Act to Rs.70,42,384/- has recomputed the capital gains as under :-

“5.9 Hence the Capital Gain that should have been offered for taxation is calculated as below :

<i>Sale Consideration</i>	<i>Rs. 5,72,84,000/-</i>
<i>Less Cost of Acquisition with indexation</i>	<i>Rs. 15,53,640/-</i>
<i>Less Deduction under Section 54F</i>	<i>Rs. 70,42,384/-</i>
<i>Total Taxable Capital Gain=</i>	<i>Rs. 4,86,87,976/-</i>

As the assessee has already offered Rs. 2,33,31,286/- as LTCG for purpose of taxation, addition of Rs.2,53,56,690/- is made to the total income under the head Income from Capital gain.

Penalty proceedings u/s. 271(1)(c) are separately initiated for furnishing inaccurate particulars of income and for concealing the income.

(Addition : Rs.2,53,56,690/-)”

7. The Assessing Officer also directed initiation of penalty proceedings alongwith interest, etc.

8. The CIT(A) has concurred with the finding as recorded by the Assessing Officer, including on the disallowance of set off and carry forward of unabsorbed depreciation of Rs.8,67,420/-. Insofar as disallowance of unabsorbed depreciation is concerned, CIT(A) has observed that appellant had failed to provide adequate evidence to substantiate the claim for set off and in the absence of said evidence, the set off cannot be granted under Section 32 of the said Act.

9. We have heard the learned counsel for appellant and the learned DR. With the assistance of the parties, we have gone through the record.

10. It is submitted by the learned counsel for the appellant that under the Development Agreement, apart from cash consideration of Rs.1,10,00,000/-, the appellant also got 50% of the constructed property comprising of five units out of which three were residential and two commercial units. It was submitted that the appellant had furnished a Valuation Certificate by an Architect for the construction cost of the said five units. It is thus submitted that according to the appellant the total consideration would be the cash consideration alongwith the construction cost of the five units. It is submitted that the Assessing Officer was in error in disallowing the said claim.

11. It is further submitted that although before the Assessing Officer the appellant had restricted the claim of deduction under Section 54F of the said Act to only one residential unit, the law permits the appellant to claim such deduction in respect of the three residential units/flats which are incidentally part of the same building. The learned counsel pointed out that sub-section (1) of Section 54F of the Act was amended w.e.f. 01.04.2015 by which the provision was restricted to "construction of one residential house" instead of "a residential house". It is pointed out that the amendment cannot apply to the present case, which arises out of assessment year 2013-14. Reliance in this regard is placed on the decision of Madras High Court in *Commissioner of Income Tax, Coimbatore vs Smt. V.R. Karpagam, 373 ITR 127 (Madras)*. It is submitted that this being a pure question of law, can be raised at any stage of the proceedings. It is, therefore, submitted that the appellant is entitled to

deduction under Section 54F of the Act in relation to all the three residential units.

12. The learned DR submitted that the appellant under the terms of the Development Agreement got 50% of the built-up area, which ought to be considered alongwith 50% of the undivided share in the land underneath. It is submitted that the Assessing Officer was justified in recomputing the claim under Section 54F of the Act restricting it to only one residential unit, which was also the claim of the appellant before the Assessing Officer. It is submitted that the appellant cannot now claim the said deduction in relation to three residential units which was not a claim made before the Assessing Officer.

13. We have considered the submissions made. The terms on which the development rights were given to the builder, which is on a 'principal-to-principal' basis, is a matter of record in the form of Development Agreement. It is a matter of record that the appellant, apart from the cash consideration of Rs.1,10,00,000/-, is entitled to receive 50% of the built-up area as sanctioned by the Municipal authorities, which comprises of three residential units and two shops. In such circumstances, there are twin issues which would arise, viz. about the consideration which the appellant got (which includes the cash consideration and the part of constructed area) and the second issue about whether the appellant would be entitled to claim deduction under Section 54F of the Act in respect of three residential units. It is not disputed and, in fact, it is a matter of record that all the three residential units are part of the same building. Sub-section (1) of Section 54F of the Act was amended w.e.f. 01.04.2015 wherein the portion "constructed a residential house" has now been substituted by "constructed one residential house in India". The

present appeal arises out of an assessment order prior thereto when the relevant provision required assessee having constructed 'a residential' house in India. The said provision fell for consideration of the Madras High Court in *Smt. V.R. Karpagam (supra)*. The Madras High Court taking note of decision of Karnataka High Court in *CIT vs K.G. Rukminiamma, 331 ITR 211 (Kar)* by referring to Section 13 of the General Clauses Act has, *inter alia*, held that the word "a" appearing in Section 54F of the Act should not be construed in singular and should be understood in plural. The Madras High Court has reproduced the following observations of Karnataka High Court with approval:

"8. Their Lordships has clearly held in the above judgment that 'residential house' in the context could not be construed as a singular. In the said case also, claim for exemption was with regard to four flats in lieu of share in land, but the claim was under section 54 of the Act and not under section 54F of the Act. However, in our opinion the meaning given to the expression "a residential house" will apply paripassu to Sec.54F also, since the expression used here is also 'a residential house'. New asset defined in the sec.54F, as 'a residential house' has also to be understood in the plural. It is not necessary that all residential units should have a single door number allotted to it as argued by the Ld. D.R. No doubt Hon'ble jurisdictional High Court in the case of G. Saroja (supra) did consider the fact that different flats were having one door number. However, this alone was not the reason why assessee was held to be eligible for claiming of exemption under section 54F of the Act. Their Lordships took cue from the decision of Hon'ble Karnataka High Court in the case of Smt. K.G. Rukminiamma (Supra). Similar exemption was given by the Hon'ble jurisdictional High Court again in the case of Dr. Smt. P.K. Vasanthi Rangarajan (supra) wherein there was no claim that flats allotted in lieu were having single number. We are therefore of the opinion that assessee was eligible for claiming exemption under section 54F of the Act on the five flats received by her in lieu of the land she had parted with."

14. It can thus be seen that this being a pure question on construction/interpretation placed on the relevant provision, as was existing at the relevant time, can be given effect to in favour of the assessee. We, therefore, hold that the appellant would be entitled to deduction under Section 54F of the Act in relation to the three residential units. Albeit this will be subject to the Valuation thereof. We, therefore, find that the valuation issue can be remitted back to the Assessing Officer for determination of the consideration which the appellant received on the basis of cost of construction incurred by the builder and thereafter to give the benefit of Section 54F of the Act on the basis of the valuation of three residential units. This exercise the Assessing Officer can conduct on the basis of material already on record and any other material which the appellant would produce.

15. Insofar as the second issue about disallowance of unabsorbed depreciation is concerned, the learned counsel for appellant on instructions submits that the appellant is not pressing the said ground. It is, therefore, not necessary to adjudicate the same and the same is dismissed as not pressed.

16. In the result, the appeal is partly allowed. The matter is remitted back to the file of the Assessing Officer in the light of the observations made in para 13 and 14 above. The appellant shall co-operate with the Assessing Officer for expeditious disposal of the issue.

Order pronounced in the open court on 12th December, 2024.

Sd/-
(B.R. BASKARAN)
ACCOUNTANT MEMBER

Sd/-
(JUSTICE (RETD.) C.V. BHADANG)
PRESIDENT

Mumbai; Dated : 12/12/2024

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Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(Judicial)
4. PCIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai