

IN THE INCOME TAX APPELLATE TRIBUNAL
BENGALURU BENCH 'C', BENGALURUBEFORE SHRI. VIJAY PAL RAO, JUDICIAL MEMBER
AND

SHRI. S. JAYARAMAN, ACCOUNTANT MEMBER

I.T.A No.667/Bang/2016
(Assessment Year : 2011-12)Shri. Kadambi Narahari,
No.1605, 16th floor, Marygold Block,
The Gardens, Magadi Road,
Bengaluru 560 025
PAN : AAKOB1690K

.. Appellant

v.

Income Tax Officer,
Ward - 15(2), Bengaluru

.. Respondent

Assessee by : Shri. Bharath L, ACS
Revenue by : Smt. Swapana Das, JCITHeard on : 27.09.2016
Pronounced on : 09.12.2016**ORDER****PER S. JAYARAMAN, ACCOUNTANT MEMBER :**

This is an appeal filed by the assessee against the order of the CIT (A)-5, Bengaluru, dt.10.02.2016, for the assessment year 2011-12.

02. The facts in brief are that the assessee earning income from salary, e-filed his return for a y . 2011-12 on 29-07-2011 declaring a total income of Rs. 12,70,550/- . On 25-05-2010, he sold a residential property of 10477 sq.ft. situated at No.7/232/415, Doddakallasandra village, Uttarahalli Hobli, Bangalore South Taluk,

together with a building measuring about 500 sq.ft. having RCC roofing, mosaic flooring with jungle wood doors and windows, together with all rights, appurtenances, for a consideration of Rs. one crore to Shri P.R. Singhvi, Bangalore. He purchased this property through two registered sale deeds, one on 03-06-2006 , wherein 50% of the undivided share, right, title and interest in the schedule property working out to 5238.50 sq.ft. of land & 150 sq.ft. of building and the another one by the sale deed dated 01-07-2006 wherein the remaining 50% of the undivided share i.e. 5238.50 sq.ft. of land & 150 sq.ft. of building, thus, the entire 10477 sqft. of land & 300 sq ft of building was purchased for a consideration of Rs.15,00,000/- excluding stamp duty & registration charges.

03. During the assessment proceedings, the assessee filed a computation of total income dated 24-10-2013, claiming deduction U/s.54 in respect of the investments made in two apartments, one at residential flat D-1407, Brigade Gateway, Cygnus Wing, Bangalore, through a sale deed dated 16-10-2009 (long before the sale of the original asset dt 25-05-2010) for a consideration of Rs.20,62,740/- & the another residential flat at F 1605, 16th floor, "Marigold" Block, The Gardens, Binnyston Garden, Magadi Road, Bangalore, through a sale deed dated 16-06-2010 for a consideration of Rs 57, 77, 137/- and arrived the long term capital gains at Nil.

04. When the AO by his letter dated 03-12-72013 , inter alia, informed him that the wordings used in Section 54 (1)(i) & (ii) is a singular house, i.e. "new asset" and 'a residential house' and as such the benefit of section 54 will have to be restricted to only one house etc, then on 20-01-2014 , the assessee made a fresh claim of deduction u/s 54 on only one residential flat i.e. at D 1407, Brigade Gateway, Bangalore, on an investment at Rs.99,28,616 while its registered sale deed had shown the value at Rs.16,40,000/- only. The assessee has stated that the flat was originally booked by Ms. Priya Bhat , an NRI and through a memorandum of understanding entered with her on 01-09-2009, the right over the flat was assigned to him for a consideration of Rs.74,49,359/-and furnished the break up for the total investment at Rs.99,28,616/- as under:

Paid to Ms. Priya Bhat:

Premium charges	Rs.23,90,304/-	
Reimbursement of amount paid by first party	Rs.45,87,046/-	
Club membership	Rs. 82,650/-	
Transfer fee	<u>Rs. 3,89,359/-</u>	
		Rs.74,49,369/-

Paid to Brigade Enterprises Pvt. Ltd.

Electrification, water and sanitary charges	Rs.4,16,507/-	
Sale consideration as per sale deed		
Including stamp duty and registration charges	<u>Rs.20,62,740/-</u>	<u>Rs.24,79,247/-</u>
Total:		Rs.99,28,616/-
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05. The AO , inter alia , held that the assessee admitted that no rental income from the property sold. The assessee contended that the original asset transferred at Uttarahalhi had a 500 sq.ft. of

building, it was habituated by a family, enclosed two Xerox copies of photographs taken evidencing therein the electricity meter, filed copies of property tax receipts paid for the F.Ys. 2004-05, 2005-06 and 2006-07 wherein it is mentioned that tax has been paid for building and land also. When the assessee's attention was invited to fact that the original sale deeds by which he had acquired 10477 sqft. of land & with 300 sq ft of building only, he stated that the house was renovated. However, he has not shown any cost of improvement in the computation nor filed any evidence for any plan approval for demolition and reconstruction or modification of the existing building from the BBMP. There is no rental income declared from the said property also. The BBMP tax paid receipts pertain to the financial years before which the assessee purchased the asset, wherein a 300 sq.ft. building is said to have existed. The latest tax paid receipt is related to F.Y. 2010-11 which specifies the land tax alone. In order to qualify for deduction U/s.54, the transferred asset should be a residential house. Generally a house means a dwelling unit, abode which is in a habitable condition where people can live, i.e. with a compound wall, a washroom, kitchen, sewerage connection etc., in which an ordinary person can make a living. When these bare minimum facilities are not provided in a building, then it is considered that it is not fit for human habitation. The language of section 54 comprehends that the asset transferred should be predominantly residential building which may have land appurtenant thereto, but not an open plot of land having some insignificant

structure which might under some constraints be used for residence, or which might actually be used by some caretaker or watchman for taking care of the plot. The assessee has not produced evidence to show that the impugned house was in a habitable condition and it was occupied by someone. Hence, the AO held that the asset originally transferred at Uttarahalli cannot be treated as a 'residential house' for the purpose of claiming benefit u/s. 54 but it could be treated as 'land' which qualifies for deduction u/s.54F .

06. Thereafter, the AO examined as to whether the assessee is eligible for deduction U/s 54F as under :

The assessee has purchased a flat at Brigade Gateway on 16-10-2009 i.e. long before the date of sale of the original asset dt 25-05-2010. For claiming deduction u/s.54F , the assessee should not purchase any residential house other than the new asset for a period of two years from the date of transfer of the original asset , i.e. since the original asset is transferred on 25-05-2010 , no residential house has to be purchased within two years i.e. within 25-05-2012. In this case, the assessee has violated the proviso stipulated U/s. 54F(1) proviso (a)(ii) & (iii) by purchasing the apartment at F 1605, 16th floor, "Marigold block", The Gardens, Magadi Road, Bangalore, on 16-06-2010. Hence he held that the assessee is not eligible for the deduction claimed U/s.54F also.

07. On an appeal, the CIT (A) -5, Bengaluru, inter alia , held that during the appellate proceedings the appellant furnished the

very same documents and alternatively pleaded that assuming but not admitting what the appellant sold was a residential plot and not a residential building, the appellant should be given the benefit of Sec. 54F in respect of the investment made in the Magadi Road flat. Since the original asset sold is not found to be a residential house, because the mere production of bills for electricity bills for connection and water connection will not be a proof to show that the property is residential building. Further, no rent was admitted from the property stated to be a residential building in the return of appellant. Therefore, it is very clear that the appellant is not eligible to claim deductions u/s.54. After the perusal of the restrictive clause specified in section 54F, the CIT(A) held that the appellant should not have purchased another residential property within 2 years from the date of sale of the original asset. Thus, the CIT (A) dismissed the appellant's appeal. Aggrieved, the assessee filed this appeal with following grounds of appeal :

1. The order of the Learned Appellate Authority is bad in law.
2. The Learned Appellate Authority and LAO erred in bringing to tax the capital gains arising on the sale of residential property situated at 7/232, Doddakalasangra Village, Uttarahalli Hobli, Bangalore South Taluk (**Property 1**) to tax.
3. The Learned Appellate Authority and the LAO erred in denying benefit under section 54, as the building sold was a proper residential building in a habitable condition.
4. Without prejudice to Ground No.3, the Learned Appellate Authority and the LAO erred in not granting, alternatively benefit under Section 54F.
5. The LAO erred in levying interest under section 234B of the Act.

08. The AR submitted that the A O denied relief under section 54 incorrectly for the reason that the property sold is not 'predominantly' a residential building, but a land. He did not consider that:

- a. Section 54 provides exemption on profit on sale of property used for residence. The property was (and still is) used for residence by a family.
- b. Photographs in p. 64 and p. 65 of the paper book show that the house is habitable with a permanent structure, roofing and furniture.
- c. Section 54 contemplates transfer of building and lands appurtenant thereto, with the same being a residential house. The property transferred was a building used as a house and the lands appurtenant thereto.
- d. Merely because the house was 'small' vis-à-vis the entire property did not render the residential property as a *land'. The entire property was used as a residential property. The LAO did not furnish any evidence to show that the property was used as a vacant land.
- e. Property tax paid as a residential house not as land tax and electricity bills indicate that the property was used for residential purposes; nothing in these bills indicated that the same was for a land.
- f. Water connection and electricity connection was provided by the utility authorities for residential use.

2. The AO incorrectly notes that assessee has paid land tax and not any tax on building; the AO has not considered that the same amount of tax has been paid in prior years as being towards building tax and the facts have not changed (see p. 40-p. 45 of the paper book).

3. The AO also incorrectly notes that no utility bills have been shown; the same were duly shown to the AO. The AO also

alleges that the assessee has not shown any proof towards occupancy of the house, when the Appellant had shown the photographs (as above) and had mentioned that a family is residing in the house.

4. The AO incorrectly indicates that for a claim under section 54, income from house property should be declared. There is no such requirement specified in section 54. Without prejudice, the right course of action for the AO was to determine income, if any, that was chargeable under the head 'Income from house property'.

5. The AO notes that there is no cost of improvement; nor any plan approval for demolition and reconstruction. It is submitted that none of these aspects are relevant when the Appellant states that the property transferred is a house which is used for residential purpose and not any other purpose or even left vacant. The family that is residing is not that of a watchman or security guard. The AO has mentioned these aspects without any factual evidence.

6. The Hon. CIT (A) has also erred in holding that the Appellant is not eligible for relief under section 54 since:

a. Mere production of electricity bills will not be proof of a residential house being situated;

b. There was no rental income offered to tax.

7. The Hon. CIT (A) did not take cognizance of the fact that there was a family using the property for residence and the property tax and utility bills paid only evidence the use of the property for residential purposes, such that its transfer is eligible for relief under section 54.

8. The AO and Hon. CIT (A) also erred in facts and in law denying relief under section 54F by holding that the Appellant has purchased a new residential property, i.e., the Magadi Road property within 2 years from the date of transfer of the original asset which violated the stipulation under section 54F.

9. The Appellant submits that the AO and the CIT (A) have misconstrued the facts and the provisions of section

54F. The Appellant claimed relief under section 54F for having purchased the Magadi Road property itself (p. 5 of the paper book). The AO and the CIT (A) have erroneously considered that as if the claim is made in respect of the property at Brigade Gateway . The AO and the CIT (A) have erroneously stated that the Appellant owns 2 residential houses. On the other hand, the claim of exemption is made on the Magadi Road property. After the purchase of the Brigade property, the Appellant owns 2 residential houses, thereby satisfying the clause (a) to Proviso to section 54F of the Act.

Thus, the AR submitted an alternate plea that assuming but not admitting that what the appellant sold was a residential plot and not a residential building, the appellant put forth the argument that he should be given the benefit of section 54F in respect of the investment made the residential flat at Magadi Road, Bangalore vide written submission dt.27.03.2014, Annexure -3. Surprisingly, the AO completely ignored the submissions made in Annexure-3. He not only concluded that it is not a residential building thus denying the benefit of section 54. But also mistook the investment made in Brigade Gardens as the one for the purposes of section 54F although the assessee clearly made the claim on the investment made at Magadi Road property u/s 54F.

08. We heard the rival submissions and perused relevant material. The facts remain that as on 01.4.2010, the assessee had the residential property situated at No.7/232/415, Doddakallasandra village, Uttarahalli Hobli, Bangalore South Taluk which was purchased on 03.6 & 01.7.2006 and a flat at Brigade Gateway which was purchased on 16-10-2009. He sold the residential property situated at

No.7/232/415, Doddakallasandra village, Uttarahalli for a consideration of Rs. one crore on 25-05-2010. The AO has held that the building at Uttarahalli cannot be treated as a 'residential house' for the purpose of claiming benefit u/s. 54 but the property could be treated as 'land' which qualifies for deduction u/s.54F. The assessee purchased another residential flat at F 1605, 16th floor, "Marigold" Block, The Gardens, Binnyston Garden, Magadi Road, Bangalore, on 16-06-2010 for a consideration of Rs.57,77,137/-. Thus, as on 16.06.2010, other than the new asset at Magadi Road, the assessee has a flat at Brigade Gateway. So, he is entitled for a deduction u/s 54F on the investment made at Magadi Road property . Although, the assessee claimed such benefit before the AO & also before the CIT (A), as mentioned supra, his claim is not considered. Thus, his alternate plea is found meritorious and accordingly, the AO is directed to grant deduction on the investment made at Magadi Road property u/s 54F. The appeal is allowed to that extent.

09. In the result, the assessee's appeal is treated as allowed.

Order pronounced in the open court on 9th day of December, 2016.

Sd/-
(VIJAY PAL RAO)
JUDICIAL MEMBER

Sd/-
(S. JAYARAMAN)
ACCOUNTANT MEMBER

MCN*

Copy to:

1. The assessee
2. The Assessing Officer
3. The Commissioner of Income Tax
4. The Commissioner of Income Tax (A)
5. DR
6. GF, ITAT, Bangalore

By Order

Assistant Registrar