

IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH 'C', BANGALORE

BEFORE SHRI. ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

AND

SHRI. VIJAYPAL RAO, JUDICIAL MEMBER

I.T.A No.511/Bang/2013
(Assessment Year : 2005-06)

Smt. Hema Krishnamurthy,
19, Orchard View Apartments, Bellary Main Road,
Sadashivanagar, Bangalore 560 080 .. Appellant
PAN : AFJPP6996A

v.

Income-tax Officer,
Ward -15(3), Bangalore .. Respondent

Assessee by : Shri. D. Devaraj, CA
Revenue by : Shri. Sunil Kumar Agarwal, JCIT

Heard on : 23.07.2015
Pronounced on : 31.07.2015

ORDER

PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER :

In this appeal filed by assessee, it assails an order dt.21.02.2013, passed by the CIT –AX, Bangalore-V, u/s.263 of the Income-tax Act, 1961 ('the Act' in short).

02. Facts apropos are that assessee had filed a return of income on 20.07.2005 declaring income of Rs.2,20,829/-. Thereafter on

14.08.2007, notice u/s.142(1) of the Act, was issued to the assessee requiring the assessee to file a return, which notice was issued based on Annual Information Return information. In response to such notice filed a reply stating that the return filed on 20.07.2005 should be deemed as the return filed in response to such notice. Thereafter on 24.06.2009 a notice u/s.148 was issued to the assessee. Said notice was issued for verifying the claim of the assessee for exemption u/s.54F of the Act on long-term capital gains arising to the assessee from sale of an immovable property situated at 571, HSR layout, Bangalore and another property at 883, Vijaya Bank Colony, Bangalore. For this notice also assessee gave a reply requesting the AO to treat the return filed by her on 20.07.2005 as one filed in pursuance to notice u/s. 148 of the Act. Thereafter, number of hearings were held by the AO and as per the AO, assessee had furnished all relevant particulars called for, such as sale deeds, bank statements and proof for reinvestment in capital gains account in support of her claim u/s.54F of the Act. Assessment was completed on 15.12.2010, u/s.143(3) r.w.s.147 accepting the income returned by the assessee.

03. On 01.11.2012, CIT-AV, Bangalore-V issued notice u/s.263 of the Act which inter alia mentioned as under :

“It is seen from records that on the dates of the transfer of the properties i.e., on 1.7.2004 and 8.9.2004 as you were owning more than one residential house property you are not entitled for claiming exemption u/s.54F. You had also purchased another property (flat)

jointly with your son at Sadashivanagar in addition to the alleged acquisition of new asset. Hence, I am of the opinion that the assessment order passed by the ITO, Ward -15(3), Bengaluru u/s.143(3) r.w.sec.147 dated 15.12.2010 has resulted in short assessment for the AY 2005-06, which is prejudicial to the interest of revenue. Therefore, I propose to cancel the aforesaid assessment u/s.263 of the Income-tax Act, 1961 and direct the Assessing Officer to redo the assessment.”

To this notice assessee filed a reply dt.16.01.2013. In the said reply assessee pointed out that the capital gains arising on sale of the two properties were invested in a residential property in J. P Nagar within the period mentioned in Section 54F of the Act, and therefore, she was eligible to claim exemption under the said section. Assessee also mentioned that at the time of sale of the sites she had a house at Sulthanpalya which was self-occupied and another house at High Point, which was let out as an office space. As per the assessee, all these facts were borne on record and considered by the AO in the course of assessment proceedings. Argument of the assessee was that one of the two houses had been let out for office use, hence assessee could be deemed to be owning only one residential house at the time of sale of the property giving rise to the capital gains, thereby satisfying the conditions set out in the proviso to Section 54F of the Act. Assessee also pointed out that for a property held by her along with her son Shri. Lohit, latter was filing IT return owning up the property in full. Further contention of the assessee was that AO had reopened the assessment for examining assessee's claim for exemption of long-term capital gains. As

per the assessee, AO had found assessee to be eligible for exemption claimed u/s.54F of the Act. In other words, as per the assessee AO had taken a possible view and Section 263 of the Act could not be invoked for substituting a lawful view taken by the AO. Assessee also pointed out that the reopened assessment was completed by the AO without furnishing the reasons for reopening rendering the proceedings null and void.

04. However, CIT (A) was not impressed by the above reply. According to him, on the date of transfer of the properties giving rise to the capital gains viz., 01.07.2004 and 08.09.2004, assessee was the owner of more than one residential property, in addition to one she held jointly with her son. Thus according to him, assessee was not entitled for exemption 54F of the Act.

05. In so far as the claim of the assessee that the order sought to be revised was null and void for want of furnishing reasons for reopening, CIT (A) was of the opinion that no such objection was taken by the assessee before the AO. He set aside the assessment passed by the AO directing him to redo the assessment afresh.

06. Now before us, Ld. AR strongly assailing the order of CIT submitted that the order sought to be revised by the CIT was one passed u/s.143(3) r.w.s.147 of the Act, pursuant to a reopening. As per the Ld. AR reasons for the reopening mentioned by the AO was available at

paper book page C-5. Reopening was solely for the purpose of verifying the claim of deduction u/s.54F of the Act and to verify whether assessee had satisfied the conditions mentioned therein. In the assessment order passed u/s.143(3) r.w.s.147 of the Act, it was clearly mentioned by the AO that the reopening was done only for verifying its claim for exemption from capital gains. Thus as per the Ld. AR, AO had applied his mind and taken a lawful view. AO was aware that out of the two residential properties, one was let out for office space and therefore, assessee could be deemed as owning only one residential house property at the time of transfer of the properties giving rise to capital gains. As per the Ld. AR, CIT had invoked Section 263 of the Act only to substitute a lawful view taken by the AO, and this action of Ld. CIT was not sustainable.

06. Per contra, Ld. DR supported the order of the CIT.

07. We have perused the orders and heard the rival contentions. There is no dispute that the order sought to be revised by the CIT is one passed by the AO u/s.143(3) r.w.s.147 of the Act. Letter dt.21.10.2010 issued by the AO to the assessee placed at paper book, page C5, clearly mentions the reasons for which the reopening was resorted to. This letter is reproduced hereunder :

Smt. Hema Krishnamurthy
 No.19, Archid View Apartment
 Bellary Main, Sadashivanagar
 Bangalore.

Madam,

Sub: I.T Asst. u/s143(3) of the IT Act-A.Y 2005-06
 –calling for your clarification – reg.

Please refer to your return of income filed on 28.07.2005.

Under calculation of Capital Gain:- Exemption claimed u/s 54F

1. It is seen that, your share of capital gain including minors share total capital gain of Rs.51,39,872/-aroses out of sale consideration received in respect of sale of propertis at site No.571, HSR Layout Sector-6, Bangalore & No.883, Vijaya Bank Housing society, Bangalore You have claimed exemption u/s54F of the IT Act1961, since you have not satisfied the conditions as per sec.54F, the conditions reads as under:

“Under Sec.54F, exemption is available only if on the date of transfer of the original assets, the taxpayer does not own more than one residential house property (other than the new house).”

Therefore, exemptions u/s 54F will be disallowed and added back to your returned income.

You are hereby requested to file your objections, if any, to the above additions by 25.02.2010, failing which the order u/s.143(3) will be passed

It is amply clear from the above that reopening was resorted only to verify whether the assessee was owning more than one residential house on the date of transfer of original assets. In fact the relevant portion has been under lined by the AO. Assessment order also is vivid on this aspect. Relevant part of the assessment order is reproduced here under :

“Subsequently in order to verify the assessee’s claim towards exemption of Long Term Capital Gains in respect of Capital gains arising from sale of immovable properties situated at No. at 571, HSR layout, Bangalore and another property at 883, Vijaya Bank House Building Co-Operative Society, Bilekahalli, Bangalore, necessary approval for re-opening the assessment was obtained from the Additional Commissioner of Income-tax. Accordingly Notice u/s.148 read with section 147(b) dt.24/6/2009 was issued and duly served on the assessee. In response to the said Notice u/s.148 the assessee’s

Authorised Representative filed a reply stating that the Return of Income originally filed on 20.07.2005 may be treated as Return of Income filed in response to notice u/s.148. “

Thus there cannot be any doubt that AO had all information and had made enquiries with regard to the claim of exemption u/s.54F of the Act, on the capital gains arising to the assessee from the sale of two immovable properties. The only question that remains is whether the view taken by the AO was one permissible under law. Claim of the assessee was that out of the two houses owned by her, one was rented out for office space and could not have been deemed as a residential house at all. Assessing Officer perceived such use to be good enough for being excluded as not a residential house. Then assessee was left with only one residential house. Admittedly, the third one was jointly held by the assessee along with her son who was showing the entire income therefrom in his personal IT return, which was accepted by the Department. This being the case, in our opinion, the view taken by the AO that assessee was eligible for deduction u/s.54F of the Act was a possible one which could not be termed as unlawful or illegal. Proceedings u/s.263 of the Act can be initiated only when there is an error in the order of the AO and such order causes prejudice to the interests of Revenue. Once AO has taken a view which is lawfully permissible under the Act, we cannot say that there is an error in the order of AO. Unless the twin conditions namely error and prejudice are satisfied, in our opinion, CIT cannot invoke the powers u/s.263 of the Act. These conditions were not fulfilled here. We set aside the order passed by the CIT u/s.263 of the Act.

08. In the result, appeal of the assessee stands allowed.

Order pronounced in the open court on 31st day of July, 2015.

Sd/-

(VIJAYPAL RAO)
JUDICIAL MEMBER

Sd/-

(ABRAHAM P GEORGE)
ACCOUNTANT MEMBER