

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE**

**BEFORE SHRI ARUN KUMAR GARODIA, AM
AND
SHRI PAVAN KUMAR GADALE, JM**

ITA No. 584/Bang/2018
Assessment Year : 2012 – 13

Shri Prathap Kumar N, No. 32/2, 5 th Main Road, Chamrajpet, Bangalore – 560018. PAN: ADZPK5497K	vs.	ACIT, Circle – 5 (2) (1), Bangalore
APPELLANT		RESPONDENT
Assessee by	:	Shree Prasanth G. S., C. A.
Revenue by	:	Shri M. K. Biju, Addl. CIT DR
Date of Hearing	:	09.01.2020
Date of Pronouncement	:	17.01.2020

ORDER

PER SHRI A.K. GARODIA, AM:

This appeal is filed by the assessee and it is directed against the order of CIT(A) – 10 Bengaluru dated 30.01.2018 for A. Y. 2012 – 13.

2. The assessee has raised as many as 11 Grounds of appeal but the grievance is only one about disallowance of assessee's claim for deduction of Rs. 248,35,658/- u/s 54F of I. t. Act, 1961. The assessee has also raised 3 additional grounds but in course of hearing, it is submitted by the learned AR of the assessee that these additional grounds are not pressed and accordingly, the same are rejected as not pressed.

3. In course of hearing, learned AR of the assessee submitted that this is the case of the AO and CIT (A) that the assessee is also owning 9 flats out of total 24 flats received by the assessee from the developer because remaining 15 flats were already sold and even if the assessee has not received possession of those 9 flats, the assessee is owner of the same and therefore, deduction u/s 54F is not allowable to the assessee. He pointed out that before

the AO, reliance was placed by the assessee on the Judgment of Hon'ble Karnataka High Court rendered in the case of CIT vs. Rukminamma, 331 ITR 211 as noted by the AO on page 7 of the assessment order but he has not properly considered this judgment and held that this judgment does not help the case of the assessee. He placed reliance on this judgment and submitted that the amendment in section 54F is by Finance (No. 2) Act, 2014 w.e.f. 01.04.2015 and hence not applicable in the present year. Learned DR of the revenue supported the assessment order and the order of CIT (A).

4. We have considered rival submissions. We find that as per page 7 of the assessment order, this is the finding of the AO that even if said 9 unsold flats are considered to be one residential property as held by Hon'ble Karnataka High Court in the case of CIT vs. Rukminamma (Supra), the assessee still owns more than one residential house, other than the new asset on the date of transfer of the original asset and therefore, proviso a (i) to section 54F (1) becomes applicable and the assessee is not eligible for deduction u/s 54F. Now we examine applicability of this proviso in light of unamended section 54F as well as subsequent amendment in section 54F in the light of the facts of the present case. The relevant brief facts are that the assessee entered into a JDA as per which the assessee agreed to surrender 58% of undivided share in land to the developer and the assessee was to get 32,840 Sq. Feet of Built up area in the apartment complex which ultimately resulted in 24 flats coming to the share of the assessee. In the present year, 15 flats were sold by the developer on behalf of the assessee and as on 31.03.2012, 9 flats were lying unsold. The assessee deposited an amount of Rs. 250 Lacs on 30.07.2012 under Capital gains Account Scheme i.e. within the due date of filing the Return of Income and claimed deduction of Rs. 248,72,991/- u/s 54F. Later on, the assessee used this money to buy a property in koramangla. The objection of the AO is this that the assessee owns a self-occupied house property and these nine unsold flats and therefore, as per proviso a (i) to section 54F (1), the assessee is not eligible for deduction u/s 54F. Now, we reproduce the relevant proviso below sub section (1) to section 54F for ready reference. The same reads as under:-

“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;”

It is seen from this proviso that holding of residential house other than new asset as on the date of transfer of the original asset is relevant and not on 31.03.2012. Copy of JDA is available on pages 12 to 41 of the paper book and as per the same, JDA is dated 16.09.2008. As per Para 7 of this JDA, possession is given by the assessee to the Developer and as per Para 8 of JDA, the Developer has paid various amounts to the assessee. As per Para 13 of JDA, the assessee is eligible for 42% of Super Built-up Area. As per Para 13.6 of JDA, the Owner's Constructed Area has to be delivered by the Developer to the assessee being land Owner in one lot and internal bifurcation is to be done by the owner. As per the Judgment of Hon'ble Karnataka High Court rendered in the case of CIT vs. T K Dayalu, 202 Taxman 531, Capital gain on sale of land as per JDA is taxable in the year of JDA if possession is given in that year. This is admitted position of law that capital gain arises on transfer of capital asset. Hence, in the present case, date of transfer of the original asset i.e. land is the date of JDA on 16.09.2008 and on this date, none of 24 flats was owned by the assessee as these flats were not in existence and therefore, in our considered opinion, this proviso is not applicable in the present case. At this juncture, we would like to observe that in view of the facts of the present case and this Judgment of Hon'ble Karnataka High Court rendered in the case of CIT vs. T K Dayalu (Supra), the capital gain should have been taxed in A. Y. 2009 – 10 being the assessment year relevant to the year of JDA but the assessee has also offered the capital gain for taxation in the present year (not in A. Y. 2009 – 10) and the revenue has also accepted this and this issue is not open before us. But for the purpose of this proviso, date of transfer of original asset is important which is 16.09.2008 being the date of JDA. Even if we take 01.04.2011 (i.e. First Day of the Previous year relevant to present assessment year 2012 – 13) as the date of transfer because Capital gain is being taxed in the present year, this is not a finding of the AO that on this date, these flats

were owned by the assessee because ownership of flats will be there only when the construction is completed. As per letter dated 04.03.2015 submitted by the Developer to the AO, copy on page 44 of the paper book, the construction of 24 flats was completed in April 2011 and the Developer started selling these flats from July 2011. Hence, on 01.04.2011, these flats were not in existence and hence, it cannot be said that the assessee was owner of these flats on the date of sale of the original asset being date of JDA or 01.04.2011 being the first day of the previous year relevant to the present assessment year.

5. The whole issue can be examined from a different angle also. As per unamended provisions of section 54F, the assessee has to invest in a residential house by way of purchase within two years or by way of construction within three years after the date of transfer of the original asset and such acquisition of new residential house can be more than one as per unamended provisions of section 54F and as per the Judgment of Hon'ble Karnataka High Court rendered in the case of CIT vs. Rukminamma (Supra) because it was held in this case that more than unit of residential house is also eligible for deduction u/s 54F. Para No. 12 of this judgment is relevant and hence, this para is reproduced hereinbelow for ready reference:-

"12. In the instant case, the facts are not in dispute. On a site measuring 30'x110', the assessee had a residential premises. Under a joint development agreement, she gave that property to a builder for putting up flats. Under the agreement eight flats are to be put up in that property and four flats representing 48 per cent is the share of the assessee and the remaining 52 per cent representing another four flats is the share of the builder. So, the consideration for selling 52 per cent of the site is four flats representing 48 per cent. All the four flats are situate in a residential building. These four residential flats constitute "a residential house" for the purpose of s. 54. Profit on sale of property is used for residence. The four residential flats cannot be construed as four residential houses for the purpose of s. 54. It has to be construed only as "a residential house" and the assessee is entitled to the benefit accordingly."

6. Out of these 24 flats, 15 flats are already sold in the present year and remaining 9 flats are likely to be sold within the period of three years from the date of its purchase but the assessee is not claiming deduction u/s 54F in respect of any of these 24 flats but since even these 9 unsold flats can be considered as a part of new asset for deduction u/s 54F, the proviso (a) (i) to section 54F is not applicable because in addition to these 9 flats and one residential house purchased by the assessee for which the assessee is claiming deduction u/s 54F, the assessee is owning only one residential house being self-occupied house and hence, this proviso is not applicable. As per page 7 and 8 of the paper book where the Revised Computation of Income and Original Computation of Income is available, the assessee is showing Income from Let Out House Property but the objection of the AO that the assessee is owning more than one residential house as per Para 9 of the assessment order is based on ownership of one self-occupied house property and 9 unsold flats and hence, it appears that this let out house property is not a residential house property and therefore, this proviso is not invocable and not invoked by the AO because of ownership of this house property. Therefore, there is no justification of disallowing this claim of the assessee. Hence, we delete this disallowance.

7. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on the date mentioned on the caption page.

Sd/-

(PAVAN KUMAR GADALE)

Judicial Member

Bangalore,

Dated, the 17th January, 2020.

/NS/_{AKG}

Sd/-

(ARUN KUMAR GARODIA)

Accountant Member

Copy to:

- | | |
|---------------|------------------------|
| 1. Appellant | 4. CIT (A) |
| 2. Respondent | 5. DR, ITAT, Bangalore |
| 3. CIT | 6. Guard file |

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Bangalore.