IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH: BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT AND
SHRI A.K. GARODIA, ACCOUNTANT MEMBER

ITA No.1047/Bang/2016
Assessment Year: 2012-13

Dr. Devika Gunasheela No.1, Dewan N Madhava Rao Road Basavanagudi Bangalore-560 004 **PAN NO : AASPG4385Q**	**Vs.**	Joint Commissioner of Income-tax Range-2(3) Bangalore
APPELLANT		**RESPONDENT**

Appellant by	**:**	Shri Narendra Sharma, A.R.
Respondent by	**:**	Shri S. Sundar Rajan, D.R.

Date of Hearing	**:**	25.08.2020
Date of Pronouncement	**:**	26.08.2020

O R D E R

PER N.V. VASUDEVAN, VICE PRESIDENT:

This is an appeal by the assessee against the order dated 11.03.2016 of CIT(A)-2, Bengaluru relating to assessment year 2012-13. The dispute in this appeal is with regard to computation of Long term Capital Gain and allowing exemption u/s 54F of the Income Tax Act, 1961 (hereinafter called as 'the Act') to the assessee.

2. The assessee is an individual. She is a doctor by profession. The property measuring 3600 sq.ft. in ward

No.49 Gandhi bazar, Bengaluru-4 (hereinafter referred to as “the property”) belonged to one Shri M. Gunasheela, he having obtained the same under partition deed dated 10.09.1970 between his brothers and his father. Shri M. Gunasheela died intestate on 30.11.2004 leaving behind his wife Dr. Sulochana Gunasheela and two daughters Dr. N. Madhavi Gunasheela & Dr. Devika Gunasheela (the assessee in this appeal) as legal heirs entitled to succeed to 1/3rd share each of the property. On 30.09.2009, Dr. Sulochana Gunasheela, the mother of the assessee, through a registered release deed, released her /3rd share of right and title in the property in favour of her two daughters Dr. Madhavi N. Gunasheela and Dr. Devika Gunasheela (the assessee in this appeal). Thus, the assessee and Dr. Madhavi N. Gunasheela became owners of 1/2 share each of the property. On 29.09.2011 the assessee and her sister Dr. Madhavi N. Gunasheela sold the property for a sale consideration of Rs.3,02,40,000/-. The assessee received a sum of Rs.1,51,20,000/- as her share in the sale consideration for sale of ½ share of right title and interest over the property.

3. For assessment year 2012-13, the assessee filed a Return of income, declaring Long term Capital Gain on

sale of her share of the property. The computation of long term capital gain given by the assessee was as follows:

"Computation of Capital Gains on transfer of commercial property at Basavanagudi jointly held by Dr. Madhavi & Dr. Devika

Sale Consideration - Devika share				*1,5120000*
Less: Expenses on transfer @ 2%				*302400*
Net Sale consideration				*14817600*
Less: Cost of Acquisition				
Property inherited by the predecessor before 1st April 1981				
Fair Market value of the property as on 1st April 19 *As per valuation report Rs.50 per sq.ft*				
Total area - 1800 Sq.ft			*270000*	
Index value	*1981*	*100*		
	2011-12	*7.85*	*2119500*	
Index cost of acquisition				*2119500*
Long Term capital gains				*1,2698100*
Less: exemption u/s 54 *For reinvestment in capital gains account scheme*				*1,4900000*
Net capital gains				*Nil"*

4. It can be seen from the aforesaid computation that the assessee had claimed deduction u/s 54 of the Act. The scheme of taxation of capital gain under the Act needs to be seen to decide the issues in this appeal. Under Section 45 of the Act, any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections 54, 54B,54D, 54E, 54EA, 54EB, 54F, 54G and 5

4H, be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place. **Under Section 48 of the Act,** income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing[66] as a result of the transfer of the capital asset the following amounts, namely :—

(*i*) expenditure incurred wholly and exclusively in connection with such transfer[67];

(*ii*) the cost of acquisition of the asset and the cost of any improvement[67] thereto:

Second Proviso to Section 48 provides that where long-term capital gain arises from the transfer of a long-term capital asset, other than capital gain arising to a non-resident from the transfer of shares in, or debentures of, an Indian company referred to in the first proviso, the provisions of clause (*ii*) shall have effect as if for the words "cost of acquisition" and "cost of any improvement", the words "indexed cost of acquisition" and "indexed cost of any improvement" had respectively been substituted. Explanation (*iii*) to section 48 defines "indexed cost of acquisition" to mean an amount which bears to the cost of acquisition the same proportion as Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the first year in which the asset was held by the assessee or for the year beginning on the

1st day of April, 1981, whichever is later; Long term capital are recorded at cost price in books. Despite increasing inflation, they exist at the cost price and cannot be revalued. When these assets are sold, the profit amount remains high due to the higher sale price as compared to purchase price. This also leads to a higher income tax. The cost inflation index is applied to the long-term capital assets, due to which purchase cost increases, resulting in lesser profits and lesser taxes to benefit taxpayers. The intention of the legislature is to tax the real gain on transfer of the capital asset not the profit due to inflation. In order to achieve this objective, the "Indexation" is introduced in capital gain taxation. The indexation benefit is meant to take into account the inflationary trends between the year of purchase and the year of sale.

5. Under Section 54 of the Act, if capital gain arises from the transfer of a long-term capital asset, **being buildings or land appurtenant thereto, and being a residential house, the income of which is chargeable under the head "Income from house property"** (hereafter in this section referred to as the original asset), and the assessee has

(i) within a period of one year before or

(ii) two years after the date on which the transfer took place (a) purchased, or (b) has within a period of three years after that date constructed, a residential house,

then,

capital gain will be exempt to the extent of Long-Term Capital Gains **OR to the extent of a**mount invested in the purchase or construction of the new residential house. whichever is **less.** Long term capital gain means gain on transfer of a long term capital asset. In case of capital asset being Immovable property consisting of land or building or both, the period of holding is 24 Months to qualify as a long-term capital asset.

6. Under Section 54F of the Act, if capital gain arises from the transfer of any long-term capital asset, **not being a residential house** (hereafter referred to as the original asset), and the assessee has,

(i) within a period of one year before or

(ii) two years after the date on which the transfer took place (a) purchased, (b) or has within a period of three years after that date constructed, a residential house (hereafter referred to as the new asset),

the Assessee will get exemption proportionately i.e., Exemption = (Capital Gain X Amount Invested) ÷ Net Sale Consideration

7. Exemption u/s/54F of the Act is not available 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 one year 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".

8. For Exemption u/s.54 & 54F, the assessee is given 2 years to purchase the house property or 3 years for construction of the house property, but the capital gain on the transfer of original house property is taxable in the previous year in which transfer took place. Hence, the assessee will have to take a decision for the purchase/construction of the house property till the date of furnishing of the return otherwise the capital gain would become taxable. The amount of capital gain, which is not utilized by the assessee for the purchase or construction of the new house before the date of furnishing of the return of income, shall be deposited by him under the Capital Gains Account Scheme, before the due date of furnishing the return. In the present case the Assessee deposited the unutilized capital gain in capital

gains Account Scheme before the due date for funishing the return of income.

9. The A.O. pointed out to the assessee that exemption u/s 54 of the Act would be available only if the property that was transferred was a residential house and since as per the schedule of property as found in the sale deed, the property was a vacant land. The A.O. expressed his view that the assessee would not be entitled to the benefit u/s 54 of the Act. In this regard, the A.O. issued notice u/s 133(6) of the Act to Bruhat Bengaluru Mahanagar Palike (BBMP) and obtained the information that the property that was sold was a vacant land and not a residential house.

10. Before the A.O., the assessee claimed exemption u/s 54F instead of section 54 of the Act. Deduction u/s 54F of the Act is available on sale of any capital asset other than residential house. The assessee's request for allowing claim of exemption u/s 54F of the Act was denied by the A.O. for the reason that the assessee owned more than one residential house other than the new asset on the date of the transfer of the original asset. We have already seen that u/s 54F of the Act, exemption will not be available, if the assessee owns more than one residential house. According to the A.O., the assessee

owned three properties and therefore, the deduction u/s 54F of the Act was also denied by the A.O. Another dispute between the assessee and the A.O. was with regard to the computation of cost of acquisition of the capital asset for the purpose of computing capital gain. The assessee claimed cost of acquisition at Rs.150/- per sq.ft. as on 01.04.1981 and computed the indexed cost of acquisition as follows:

(a) Cost of acquisition:
Year of acquisition: Before 01.04.1981
Estimation value/Sq.ft.:Rs.150/- as on 01.04.1981
Area (3600/2) = 1800 sq.ft.
Cost of acquisition is - Rs.2,70,000/-
(b) Commission Paid:
Transfer expenses - Rs.3,02,400/-
(c) Indexed cost of acquisition:
270000 x 785/100 - Rs.21,19,500/-

11. The assessee filed report of a Registered Valuer in support of the claim for the cost of acquisition. The A.O., however, was of the view that the Engineer had not given the basis for his estimation. The A.O., therefore, computed the indexed cost of acquisition as follows:

Indexed cost of acquisition:

For 2/3rd of property from F.Y. 2004-05	*1,20,000x785/480*	*= 1,96,250*
For 1/3rd of property from F.Y. 2009-10	*60,000 x 785/632*	*= 74,525*
Total indexed cost of acquisition		*= 2,70,775*

12. The A.O. also did not allow the claim of the assessee for commission as a deduction in computing capital gain for want of proof. Finally, the A.O. computed the Long term Capital Gain as follows:

> *"The above analysis of facts and law necessitates the re-computation of taxable LTCG as under:*
>
> 1. *Sale consideration: Rs.1,51,20,000/-*
> 2. *Cost of acquisition: Rs. 1,80,000/-*
> 3. *Indexed cost of Acquisition: Rs. 2,70,775/-*
> 4. *Commission paid: Rs.0/-*
> 5. *Long term capital gain: Rs.1,48,49,225/-"*

13. Aggrieved by the order of the A.O., assessee preferred appeal before the CIT(A). The CIT(A) formulated the following issues as arising for consideration before her:

> *"2.4 The issues which arise from the grounds raised by the appellant therefore are:-*
>
> *(a) Whether the appellant is entitled for deduction u/s 54?*
>
> *(b) Whether the appellant is entitled to the alternative claim for deduction u/s 54F?*
>
> *(c) Whether cost of acquisition as on 01.04.1981 is to be taken at Rs.150/- per sq.ft. as worked out by the appellant or Rs.100/- per sq.ft. as worked by the Assessing Officer.*
>
> *(d) Whether the appellant is eligible to indexation w.e.f. 01.04.1981 being the cost of acquisition in the hands of the previous owner."*

14. In this appeal, we are concerned only with the issues (b), (c) & (d). As far as issue (b) is concerned, the CIT(A) held as follows:

"2.6.3 After considering the facts of the case and the arguments forwarded by the appellant, it is seen that the appellant has 3 properties as per Return of Income for A.Y. 2011-12 on which income from House Property is declares. These are:-

(i) Flat No.001,Kumar Paradise – Rental Income Nil declared being self-occupied property

(ii) Immovable property at Dobhi Ghat, Thalgatpura - Rental income declared u/s 22 as House property income

(iii) Immovable property at Nagadevanahalli - Rental income declared u/s 22 as House property income.

In respect of (i) above, there is no dispute. However, in respect of (ii) & (iii), these are claimed to be vacant land only. Considering that for A.Y. 2011-12, these have been declared as income from House property and not ground rent, and also benefit u/s 24 have been claimed, which have not been withdrawn till now, the appellant's claim that these are mere vacant lands cannot be entertained. It is not open to the appellant to make contradictory claims in the two successive years to suit her requirement. Before reiterating this claim in appeal, the minimum the appellant should have done was to withdraw the benefits claimed on House Property in respect of these two properties to pursue its claim that these are vacant lands for the purpose of deduction u/s 54F. This has not been done till now. I hold that under such facts, the appellant's claim u/s 54F cannot be entertained and I am unable to interfere with the findings of the Assessing Officer."

15. As far as issues c & d are concerned, the CIT(A) held as follows:

> *"2.7.3 However, in this case, since land in the said locality is valued at Rs.100/- as detailed in the Assessment order based upon the guidance value intimated by the sub-registrar, and under findings of the Assessing Officer that the valuation certificate had certain flaws as brought in the Assessment order itself, the appellant is unable to justify the cost at Rs.150/- per sq.ft. as on 1.4.1981. Moreover, this is a case of estimation, and not a case of an actual transfer of property on 1.4.1981, at a rate higher than that intimated by the sub-registrar that a rate higher than the guidance value should be accepted without any evidence thereof. Under such facts, I hold that the Assessing Officer has been reasonable and fair in adopting the value at Rs.100/- per sq.ft. The same is upheld.*
>
> *3. However, as regards indexation, I agree with the appellant that in the light of judicial decisions cited by the appellant, particularly in the case of Karnataka High Court in the case of Smt. Kaveri Thimmaiah and others reported in 369 ITR 81, the appellant is eligible to indexed cost of acquisition from date of holding by previous owner. Therefore, indexation is allowed w.e.f. 1.4.1981 itself in respect of 2/3rd share of the property inherited from father in 2004-05. However, in respect of 1/3rd share inherited/gifted from mother in 2009-10, indexation is to be worked out from the time the same was held by the mother, i.e. on the death of father of the appellant in 2004-05 when the previous owner acquired it. The Assessing Officer is directed to re-compute Long Term Capital Gains accordingly."*

16. Aggrieved by the order of the CIT(A), the assessee is in appeal before the Tribunal.

17. We have heard the rival submissions. As far as the issue with regard to the exemption u/s 54F of the Act is concerned, In respect of claim of exemption u/s.54F of the Act, the CIT(A) denied the claim for deduction for the reason that the Assessee owned more than one residential house, other than the new asset, i.e., the Assessee owned three residential house and that as per the requirements of Sec.54F of the Act, if the Assessee owns owns more than one residential house, other than the new asset, then exemption will not be allowed. Before CIT(A) Assessee pointed out that out of the three properties listed by the CIT(A) in the impugned order, two properties were only vacant land not residential house and that that received in respect of the two properties listed as (ii) & (iii) in paragraph 2.6.3 of the impugned order, these were claimed to be vacant land only and the rent received from letting out these two properties were only rent for lease of land and not land together with building. The CIT(A) did not accept the claim of the Assessee for the reason that in A.Y. 2011-12, these have been declared as income from House property and not ground rent, and also benefit u/s 24(a) have been claimed, which have not been withdrawn. The CIT(A) therefore refused to accept the claim of the Assessee that rent received for the two properties were for mere letting out of land.

18. Before us the Ld. Counsel for the assessee drew our attention to an order of assessment dated 12.10.2015 passed by the A.O. in the case of the assessee for assessment year 2011-12. It is seen from the aforesaid order that the assessment for assessment year 2011-12 was re-opened by issue of a notice u/s 148 of the Act for the reason that in the original return of income, the assessee had declared income from three house properties and that two out of the three house properties were not buildings that were sold out by the assessee but were only a lease of land over which, the tenants had put up construction. The following table and the reasons recorded for reopening as set out in the aforesaid order of assessment were brought to our notice:

"2. In the original return of income the assessee has declared income from House Property as under:

Particulars	House Property 1	House Property 2	House Property 3	Total
Rent Received	2,69,345	1,00,000	3,79,125	7,48,470
Less: Rent not realized	11,215	--	--	11,215
Annual value	2,58,130	1,00,000	3,79,125	7,37,255
Less: Deduction u/s 24(a)	77,439	30,000	1,13,738	2,11,177
Income from House Property	1,80,691	70,000	1,13,738	5,16,078

3. The case was reopened for the following reason:

> *"During the assessment proceedings of A.Y. 2012-13 the A.R. has admitted that the Rent received from properties of Dobhi & Nagadevanahalli is nothing but lease rent and not the rent received against the house properties under Chapter VI-C of the Income-tax Act, 1961. Based on the Ars admission, it is inferred that the assessee during the AY 2011-12 has wrongly declared the land rent of Rs.7,37,255/- which is received from Dobhi & Nagadevanahalli as income from House Property. By doing so, the assessee has claimed 30% deduction u/s 24(a) amounting to Rs.2,11,177/-."*

19. Ultimately, in the order of assessment, the assessee accepted that the property at Dhobi Ghat of Thalgatpura and Nagadevanahalli property were not buildings that were let out and the rent received was only in respect of land and therefore, the assessee was not entitled to deduction of 30% of the rent received u/s 24(a) of the Act. The assessment was accordingly completed assessing the rent received by the assessee from the aforesaid two properties as income under the head "Income from other sources". Ld. Counsel, therefore, submitted that the very basis on which the CIT(A) denied the benefit of deduction u/s 54F of the Act to the assessee, no longer survives and the assessee should be allowed the benefit of deduction u/s 54F of the Act. Ld. D.R. relied on the order of the CIT(A).

20. After considering the rival submissions, we are of the view that the only basis on which the assessee was denied the benefit of deduction u/s 54F of the Act was that the assessee owned more than two residential houses, other than the new asset on the date of transfer of the original asset. From the order of assessment passed u/s 147 of the Act for assessment year 2011-12 dated 12.10.2015, it is clear that the Dhobi Ghat, Thalgatpura and Nagadevanahalli properties were in fact not residential houses owned by the assessee and that the assessee had only given the lease of vacant land and obtained rent for land and not for any building. Therefore, it is clear that the assessee did not own more than one residential house, other than the new asset on the date of transfer of the original asset. Therefore, deduction u/s 54F of the Act should be allowed to the assessee. We hold and direct accordingly.

21. As far as the FMV as on 01.04.1981 is concerned, the assessee had adopted the value as on 01.04.1981 at Rs.150/- per sq.ft. on the basis of a report of a registered valuer. It is not disputed by the A.O. and the right that the guideline value of the property as on 01.04.1981 was Rs.100/- per sq.ft. It is the plea of the assessee that fair market value and guideline value are two different values

and generally, the fair market value is higher than the guideline value. In this regard, our attention was drawn to a decision of the Hon'ble Karnataka High Court in the case of Late Smt. Krishna Bajaj Vs ACIT 267 CTR 172 (Karn.), wherein it was laid down by the Hon'ble Karnataka High Court that in the context of fair market value for the purpose of computing capital gain, that market value of property is generally far more than higher than the guideline value. Keeping in view the law laid down as above and also having note of the fact that the claim of the assessee for FMV as on 01.04.1981 is supported by a report of the registered valuer and factsw of the present case, we are of the view that the claim of the assessee for adopting FMV as on 01.04.1981 at Rs.150/- per sq.ft. is reasonable and the same is directed to be accepted.

22. The third issue that needs to be adjudicated is with regard to allowing benefit of indexation to the assessee. We have already seen that the property was acquired by M. Gunasheela on 10.09.1979 and that on his death on 30.11.2004, wife of Gunasheela released her 1/3rd share in favour of her two daughters and thereby, the assessee and his sister got half share each of the property. This deed of release was dated 30.09.2009. The assessee claimed indexation benefit from 01.04.1981 itself. The

CIT(A) allowed the benefit of indexation from 2004-05 for 1/3rd share, which the assessee inherited from Gunasheela on his death on 30.11.2004. As far as indexation for half share in the 1/3rd share which the Assessee got by way of release from her mother is concerned, the AO allowed indexation only from 2009-10 because the release deed was dated 30.09.2009. In our view, the assessee should be allowed the benefit of indexation right from 01.04.1981. In this regard, the provisions of section 55(2)(b)(ii) of the Act are relevant and the same provides that if the capital asset becomes property of the assessee by way of succession, the cost of acquisition of the capital asset would be the cost of the capital asset to the previous owner or the FMV as on 01.04.1981 at the option of the assessee, if the capital asset was acquired by the previous owner prior to 01.04.1981. In the present case, neither the assessee nor her mother acquired the property. They acquired the property only by way of inheritance. The share released by mother of the Assessee in her favour also had not cost to her and therefore the cost to the previous owner has to be adopted. The property was acquired by Gunasheela prior to 01.04.1981 and the assessee in the computation of capital gain has opted to adopt the FMV as on 01.04.1981 for computing capital gain. In such circumstances, we are of the view that the assessee would

be entitled to the benefit of indexation from 01.04.1981 in respect of her half share in the property on sale of which, the assessee derived capital gain. We hold and direct accordingly. The other grounds of appeal being academic are not adjudicated.

23. In the result, the appeal by the assessee is partly allowed.

Order pronounced in the open court on 26th Aug'20.

Sd/- **(A.K. Garodia)** **Accountant Member**	**Sd/-** **(N.V. Vasudevan)** **Vice President**

Bangalore,
Dated 26th Aug, 2020.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.