IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA

BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA No.1845/Kol/2018
Assessment Year: 2014-15

Income Tax Officer, Ward-34(1), Kolkata.	Vs.	Bejoy Kumar Chirimar 49, Stephen House, 4, B.B.D. Bag, Dalhousie Square, Kolkata-700001. (PAN : ACCPC4066C)
(Appellant)		**(Respondent)**

Present for:

Appellant by : Shri Vijay Kumar, Addl. CIT
Respondent by : Shri Ravi Tulsiyan, FCA

Date of Hearing : 17.01.2023
Date of Pronouncement : 17.03.2023

O R D E R

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the revenue is against the order of Ld. CIT(A)-10, Kolkata vide Appeal No. 490/CIT(A)-10/W-34(1)/2014-15/2016-17/Kol dated 12.06.2018 against the order of Ld. ITO, Ward-34(1), Kolkata passed u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the "Act") dated 20.12.2016.

2. The solitary grievance of the Revenue is that the ld. CIT(Appeals) has erred in law in allowing the benefit of deduction under section 54F of Rs.2,26,37,500/-.

3. Before adverting to the facts and adjudicating the dispute involved in this appeal, it is pertinent to note that this appeal was presented before the Tribunal on 28.08.2018. It was listed for hearing on 17.12.2019. Thereafter it was adjourned from time to time. Ultimately, hearing was concluded on 05.01.2021. The Bench, while dictating the order, came to know that the assessee had expired on 08.11.2020. His death certificate has been placed on record. Department was required to bring the legal heir of the deceased assessee on record and file a fresh Form 36. The file was released for enabling the Revenue to complete the formalities. However, Department failed to bring any material in this connection on the record inspite of repeated adjournments. It is an appeal pending more than four & half years and one amongst oldest appeals of the Kolkata Benches, and we have already been given more than 18 months time to the Revenue to complete the formalities.

3.1. Rule 26 of the Income Tax (Appellate Tribunal) Rules, 1963 (the ITAT Rules) provides a procedure for adjudication of such appeals where appellant or respondent expired during the pendency of appeal. The said Rule reads as under:-

> *"26. Where an assessee whether he be an appellant or the respondent to an appeal dies or is adjudicated insolvent or in the case of a company being would up, the appeal shall not abate and may, if the assessee was the appellant, be continued by, and if he was the respondent be continued against, the executor, administrator or other legal representative of the assessee or by or against the assignee, receiver or liquidator, as the case may be:*
>
> *Provided that:*
>
> *(i)The assessee files a revised Form No. 36 duly filled up giving revised name of the party duly verified in the same manner as required by rule 47 of the Income Tax Rules, 1962;*
>
> *(ii) The revised Form No. 36 shall specify the appeal number as originally assigned or, in the event of non-availability of such number on the date of filing the appeal shall be mentioned in the*

covering letter to enable the Registrar to place fresh Form No. 36 in the original file.

3.2. Though Rule 26 of ITAT Rules provides for continuation of appeal inspite of death of the appellant or the respondent, but the proviso contemplates that Revised Form 36 has to be placed on record exhibiting the details of appellant-assessee or the respondent. Before us, the respondent-assessee has already expired and we do not have any mechanism to ascertain the details of the legal representative of the assessee except seeking help of the Assessing Officer for which we are waiting from last more than 18 months. Under these compelling circumstances, we do not have any other choice except-

(a) Dismiss this appeal for want of proper prosecution at the end of the Revenue; or

(b) Decided this appeal on the relevant material available be-fore us.

3.3. After due deliberation, we adopt course (b) noted above because all the pleadings are complete i.e. paper books are on the record, required evidence is on the record, the ld. Counsel, who was authorised as the representative by the deceased, is ready to argue the matter in order to help the Bench. It is also pertinent to note that paper book was filed before the death of the respondent by the assessee. We accordingly, proceed to adjudicate on the present appeal.

4. Brief facts of the case as noted by the Ld. CIT(A) which he has discussed in para 7 are that Ld. AO noted that the capital account of the assessee got increased by Rs.3,81,61,500/- which was a result of capital increase in the form of a new flat of Rs.2,26,37,500/- and receivable of Rs.l,55,24,000/- as ref1ected in asset side of the Balance Sheet. According to Ld. CIT(A), the AO found that in terms of an award dated 30.10.2013 passed by Hon'ble (Retd.) Justice Chittatosh

Mukherjee that the assessee and his wife were entitled to jointly receive two flats viz. flat Nos. A-3 and B-4 in the newly constructed property (in lieu of relinquishment of their respective tenancy right in the flats of the old building). The Ld. CIT(A) notes that the assessee's share of 50% in flat No. A-3 was reflected by way of flat of Rs.2,26,37,500/- in the Balance Sheet and the flat No. B-4 which was yet to be handed over was shown by way of Receivable of Rs.1,55,24,000/- from the Developer Concrete Developers Pvt. Ltd. (CDPL).

4.1. Assessee in his return had claimed the benefit of exemption u/s. 54F Act in respect of flat of Rs.2,26,37,500/- and, therefore, the Long Term Capital Gains (LTGC) was not offered to tax. However, according to AO, the assessee was not legally entitled to the benefit of exemption u/s. 54F of the Act and the entire amount of Rs.2,26,37,500/- was taxed by the AO. Aggrieved by the aforesaid action of the AO, assessee preferred an appeal before the Ld. CIT(A) who gave relief to the assessee and directed the AO to allow the claim of deduction of Rs.2,26,37,500/- u/s. 54F of the Act. Aggrieved by the aforesaid decision of the Ld. CIT(A), the revenue is in appeal before the Tribunal.

5. We have heard the rival contentions and gone through the facts and circumstances of the case. We note that the assessee and his spouse were residing on monthly tenancy for more than thirty years in a building situated at 8/4, Alipore Road, Kolkata-700027 owned by M/s. Gyaniram & Sons Pvt. Ltd. (GSPL). In order to prove the tenancy which the assessee and his wife enjoyed, they produced evidence in the form of monthly rentals paid by cheque fact of which is corroborated by the bank statement of the assessee and his wife.

Thus, according to the assessee, the genuineness of the tenancy right over the old flat of the GSPL was brought to the notice of the AO.

5.1. In the year 1995, GSPL had entered into a development agreement with the developer CDPL to develop/construct building on its said property, which paid Rs.1 crore as security deposit to the land owner i.e. M/s. GSPL. As per the tripartite agreement between M/s. GSPL (owner), M/s. CDPL (Developer) and the tenants (assessee included) of the old building/flat the said security deposit of Rs. 1 crore had to be bifurcated by the owner M/s. GSPL by way of deposit to various tenants of the property to persuade them to vacate the premises. The assessee Shri Bejoy Kumar Chirimar and his spouse Smt. Shakuntala Chirimar were tenants of two separate flats and their son Shri Tushar Chirimar his wife Smt. Anju Chirimar also had tenancy rights in the said old property/flats. For convenience, the appointed amount receivable by the assessee, his wife, his son and daughter in law was deposited in the Bank account of the HUF in which the assessee, his wife, son and daughter in law were coparcener i.e. of M/s. B. K. Tushar (HUF).

5.2. Thereafter, there was a dispute between the parties of the development agreement and the tenants and they unilaterally appointed an Arbitrator who was retired High Court Chief Justice Shri Chittatosh Mukherjee and as per the mutually settled agreement dated 28.10.2013, the tenants refunded the entire sum of Rs. 1 crore to M/s. GSPL for enabling it to repay the security deposit given by the developer M/s. CDPL in the year 1995. As per the settlement agreement, the assessee, his spouse and his family members who were tenants of the old property and M/s. GSPL had to allot flats respectively in the newly constructed property like other tenants for

relinquishing their respective tenancy rights over the said old property, it was agreed by the owner M/s. GSPL and the developer (M/s. CDPL) to allow two flats (A-3 and B-4) in the proposed newly constructed building to the assessee and his spouse.

5.3. Upon allotment of the flats A-3 and B-4 which were valued by a registered valuer and as per the valuation report the market value of flat No. A-3 worked out to Rs.4,52.75.000/- and the assessee's share being 50% was at Rs.2,26,37,500/- which was taken as consideration for the relinquishment of tenancy rights and the allotment of flat by the developer M/s. CDPL was taken to be investment of the sale proceeds in purchase of the new property. Therefore, on the transaction of the long term capital asset i.e. tenancy rights, assessee claimed the benefit of exemption u/s. 54F of the Act of Rs.2,26,37,500/- in respect of the cost of the flats allotted by the developer M/s. CDPL. As far as flat No. B-4 valued by the approved valuer was at Rs.l,55,24,000/- since it was not ready and no possession was given to the assessee during the year. Assessee credited Rs.3,81,61,500/- (Rs.2,26,37,500 + Rs.l,55,24,000) as accretion to its capital account.

5.4. The AO during the assessment proceedings noted that father of the assessee was the director of M/s. GSPL and hence, the tenancy claim of the assessee was a colourable device to evade capital gains tax. The AO noted that the sum of Rs.2,5l,000/- was received as deposit from M/s. GSPL not by the assessee or his spouse but M/s. B. K. Tushar, HUF of which the assessee was the Karta. Therefore, according to the AO, the actual tenant was M/s. B. K. Tushar, HUF and not the assessee. The AO was also of the opinion that spouse of the assessee could not be termed as tenant in the property because

the rent receipts were issued in both their names. On the aforesaid reasons, the AO rejected the claim of exemption u/s. 54F of the Act.

5.5. From the assessment order it is noted that the AO's decision for not allowing the exemption claimed by the assessee u/s. 54F of the Act was for the following reasons:

> (a) The tenancy of the assessee was nothing but a colourable device.
>
> (b) M/s. B. K. Tushar, HUF was the tenant of the property and not the assessee or his spouse and the assessee could not relinquish the tenancy rights which did not belong to him.

6. On the first issue wherein Ld. AO has stated that tenancy was nothing but a colourable device, Ld. Counsel submitted that father of the assessee was not a director at the relevant time, who had died way back in 1963 and thereafter the affairs of the said company were looked after by its Board of Directors. Further, Ld. Counsel submitted that GSPL had entered into an agreement with CDPL in 1995 for the development of properties which was after a gap of 32 years of the death of father of assessee. Thus, the allegation of colourable device for the transfer is the so-called planning qua transfers after more than 30 years is misplaced and erroneous on the part of the Ld. AO.

6.1. The observation given Ld. CIT(A) on this aspect as extracted from para 5 are reproduced as under:

> *"5. …… With regard to allegation (a), I find that the only basis given by the Ld. AO for holding the transaction to be a colorable device is that the father of the appellant was a director of M/s GSPL. In my considered view this fact is of no relevance. If the Ld. AO's premise is held to be valid, then any transaction between a company and persons related to its directors are to be disbelieved and doubted. It is well settled that a company is an artificial juridical entity and a separate person in the eyes of law. Merely because a relative of the appellant was on the Board of Directors of the company cannot be reason enough to allege that all the transactions between the appellant and the company were malafide. The facts on record clearly show that the property was at all times owned by M/s GSPL. The tenancy of the appellant and the*

fact that he was in occupation of the property since more than 30 years is also not in dispute. The rental receipts and the payment of rent through banking channels further established the monthly tenancy of the appellant. It is also quite unjustified to allege that a colorable device was enacted 30 years ago to avoid taxes. Taking into account the aforesaid facts, period of tenancy, pendency of disputes, litigation, arbitration etc. and human probabilities and circumstantial evidences, I am of the considered view that the transaction in question was not a colourable device."

6.2. In this respect, Ld. Counsel also referred to the sufficient evidence placed on record to prove the tenancy which the assessee and his wife enjoyed. These have already been stated in the facts above including payment of monthly rentals by cheque, corroborated by the bank statements. Ld. Counsel also referred to the terms of settlement dated 28.10.2013 between CDPL and GSPL as well as other tenants under the Arbitration Award to point out that tenants as third part to the said tripartite agreement includes Bejoy Kumar Chirimar and Shakuntala Chirimar at Sl. No. 11 and Shakuntala Chirimar and Bejoy Kumar Chirimar Sl. No. 12. Thus, the HUF as stated by Ld. AO is not a party to the said settlement agreement in respect of the tenancy rights.

6.3. On the second issue relating to allegation that M/s. B. K. Tushar, HUF was the tenant in the property in question and not the assessee or his spouse and, therefore, there could not be any relinquishment of tenancy rights by the assessee and his spouse which never belonged to him, it was submitted that Ld. AO had derived such a misplaced conclusion from Annexure 'F' of the Term Award of the Arbitrator wherein B. K. Tushar, HUF has been mentioned as the person of the assessee's group which shall refund the deposit of Rs.2,51,500/- received from GSPL in the year 1995. According to the Ld. Counsel, Ld. AO has ignored vital facts in respect of tenancies of the assessee and his spouse which has been recognised in the agreed terms of settlement as well as in the interim and final

awards. As already stated, rent receipt issued by GSPL also reflects the name of the assessee and his spouse as tenants and the rent payments were also admittedly made from the individual bank account of these two tenants.

6.4. In this respect, findings given by the Ld. CIT(A) are also noted, who had also held that conclusion of AO on B. K. Tushar, HUF being the tenant and not the assessee is erroneous and untenable on facts. The relevant extracts in this respect from the order of Ld. CIT(A) is reproduced as under:

> *"As regards the question of refunding security deposit, it is noted that since the appellant and his family members were occupying the property in question, the appellant had for the sake of convenience and to avoid dispute within his family, had received the security deposit in the name of his HUF of which he was the karta and his family members were also the members. The mere fact that the HUF had received the deposit and had agreed to refund it to M/s GSPL in terms of the settlement agreement did not change the factum of the case that it was the appellant and his spouse who were the actual users of the property for 30 years. For the reasons set out in the foregoing therefore, I hold that the Ld. AO's conclusion that the appellant was not the tenant of the property was erroneous and untenable on facts."*

7. Considering the facts on record, perusal of the settlement agreement dated 28.10.2013 along with evidence for payment of rentals by the assessee and his spouse, corroborated by individual bank statements and well reasoned findings given by the Ld. CIT(A), we do not find any reason to interfere with the findings given by the Ld. CIT(A) in this respect.

7.1. The conclusion drawn by Ld. CIT(A) on this issue is extracted below for ease of reference:

> *"Overall therefore, I hold that the appellant was indeed in occupation of the property at Alipore Road and enjoyed valuable tenancy rights therein. In the circumstances the appellant's act of relinquishing tenancy rights in lieu of allotment of a new flat is held to be lawful. In view of the foregoing I therefore hold that the conditions prescribed in Section 54F stood fulfilled and the appellant was legally entitled to claim benefit of exemption u/s 54F of the Act. The Ld. AO is therefore directed to allow the claim of deduction of Rs.2,26,37,500/- made u/s 54F of the Act. Ground Nos. 1 & 2 are therefore allowed."*

7.2. Accordingly, grounds of appeal taken by the revenue are dismissed.

8. In the result, appeal of the revenue is dismissed.

Order pronounced in the open court on 17th March, 2023.

Sd/-	Sd/-
(Rajpal Yadav)	(Girish Agrawal)
Vice President	Accountant Member

Dated: 17th March, 2023

JD, Sr. P.S.
Copy to:

1. The Appellant:
2. The Respondent:
3. CIT(A)-10, Kolkata
4. ITO, Ward-3(1), Kolkata
5. DR, ITAT, Kolkata Bench, Kolkata

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata