

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: August 24, 2015

Date of decision: September 11, 2015

11.

+

ITA 609/2014

COMMISSIONER OF INCOME TAX –V

..... Appellant

Through: Mr. N.P. Sahni, Senior Standing
counsel with Mr. Nitin Gulati, Advocate.

versus

KAPIL NAGPAL

..... Respondent

Through: Dr. Rakesh Gupta with Ms. Poonam
Ahuja and Mr. Rohit Kumar Gupta, Advocates.

CORAM:

HON'BLE DR. JUSTICE S. MURALIDHAR

HON'BLE MR. JUSTICE VIBHU BAKHRU

J U D G M E N T

11.09.2015

%

Dr. S. Muralidhar, J

1. This appeal under Section 260 A (1) of the Income Tax Act, 1961 ('Act') by the Revenue is directed against the impugned order dated 29th January 2014 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 5077/Del/2011 for the Assessment Year ('AY') 2007-08.

Background Facts

2. The background facts are that the Respondent-Assessee filed his return of income for the AY 2007-08 declaring his income of Rs. 2,78,53,090. The case of the Assessee was selected for scrutiny and notice under Section 143 (2) of the Act was issued. In the assessment order passed under Section 143 (3) of the Act on 30th December 2009 the Assessing

Officer ('AO') noted that in the computation of income for the AY 2006-07 the Assessee claimed deduction under Section 54 F amounting to Rs. 62,47,576 against the long term capital gains of Rs. 63,96,328 arising from the sale of share of M/s. Perfect Buildwell Pvt. Ltd., by investing an amount of Rs. 63 lakhs in the purchase of residential building at Village Fatehpur Beri, Tehsil Hauz Khas, New Delhi by an agreement to sell dated 22nd July 2006. The Assessee was also having a residential house property at Gadaipur, Mehrauli, value of which was shown as Rs. 60,000. The Assessee showed that he was earning less income from the said property.

3. For the AY 2007-08 the Respondent-Assessee again claimed deduction under Section 54F amounting to Rs. 2,21,69,090 against the long term capital gains of Rs. 3,74,47,787 on sale of shares of Valleyview Probuild Private Limited ('VPPL'). Copies of the agreement to sell dated 22nd July 2006 in respect of residential building at Village Fatehpur Beri and an unregistered sale deed (agreement to sell dated 10th April 2007) in respect of residential property at Gadaipur had been filed in support of the claim that the said properties were purchased on those respective dates, i.e., 22nd July 2006 and 10th April 2007.

Proceedings before the AO

4. From the above facts the AO concluded that in the AY 2007-08 the Assessee was having more than one residential house, i.e., both the property at Gadaipur and the property at Village Fatehpur Beri. Consequently, the Assessee was issued a questionnaire on 30th November 2009 in which Question No. 9 pointed out that the Assessee had sold 5,000 shares of VPPL on 8th November 2006 for a consideration of Rs. 3.75 crores; that the Assessee had claimed exemption under Section 54F of the

Act in respect of purchase of residential house property at Gadaipur for Rs. 2.20 crores on 10th April 2007 from Mr. Prem Nath Nagpal; from the examination of the balance sheet it appeared that the Respondent-Assessee had already two house properties (i) at Gadaipur, value of which was at Rs. 60,000 and one at Village Fatehpur Beri purchased on 22nd July 2006 from M/s. M.K. Developers P. Limited for Rs. 63 lakhs; the purchase of the property at Gadaipur on 10th April 2007 was within two years from the date of transfer from the long term capital assets, i.e. shares of VPPL on 8th November 2006; that the Assessee had therefore violated the conditions for claiming exemption under Section 54F of the Act and therefore, the Assessee was required to show cause why exemption claimed under Section 54F amounting to Rs. 2,21,69,090 should not be disallowed and why penalty under Section 271 (1) (c) should not be imposed.

5. The explanation offered by the Assessee was that on the date of the transfer of the shares of VPPL, i.e., 8th November 2006 the Assessee had one house at Village Fatehpur Beri which he had purchased on 22nd July 2006 and only 15% share in the house property at Gadaipur. It was clear that the Assessee had purchased 85% share in Gadaipur house on 10th April 2007, thus becoming the full owner of the said house. It is accordingly claimed on the sale of share, i.e., 8th November 2006 the Assessee did not have the full ownership of the residential house at Gadaipur and was only a co-owner along with his father. The ownership of 15% in the Gadaipur house would not constitute the exclusive ownership of a residential house under Section 54F of the Act. The Respondent-Assessee fulfilled the conditions stipulated in Section 54F as he had only one residential house at Village Fatehpur Beri. The Assessee filed the Abhibhog Certificate which had been issued in the joint name of the Assessee and his father Mr. Prem

Nath Nagpal by the Municipal Corporation of Delhi ('MCD') which showed that the house was built on Khasra No. 75, 76 and 90 in Gadaipur on the lands jointly owned by the Assessee and his father although for the sake of convenience, two separate purchase deeds were executed. It was stated that the mere fact that both the owners have purchased portions of land out of Khasra No. 75, 76 and 80 of Gadaipur by executing two different deeds did not change the character of the house at Gadaipur which was built on the undivided portion of land of both the co-owners. The Assessee would remain the owners of 15% shared interest in the house whether or not a consolidated purchase deed was executed or separate sale deeds were executed. In support of his contentions, the Assessee cited decisions of the Supreme Court in **CIT v. T.N. Aravinda Reddy (1979) 120 ITR 46**, **Banarasi Dass Gupta v. CIT (1987) 166 ITR 783 (SC)**, the decision of the Allahabad High Court in **Shiv Narain Chaudhary v. CWT 108 ITR 204** and two decisions of the Tribunal.

The order of the AO

6. The AO did not accept the above explanation. The AO observed that 5000 equity shares of VPPL were originally allotted to one Mr. Shyam Kumar Bagga on 25th October 2005 at the rate of Rs. 10 per share. VPPL itself was incorporated only four days earlier, i.e., on 21st October 2005, with Mr. Manoj Nagpal, one of the brothers of the Assessee as one of the directors, holding 50% of 10,000 equity shares issued. On the same date, i.e., 25th October 2005, the 5000 shares allotted to Mr. Shyam Kumar Bagga were shown transferred in the name of the Respondent-Assessee. The AO further observed that a document purporting to be a photocopy of the register of share transfers filed by the Respondent-Assessee on 26th November 2009 in order to substantiate the plea that the date of acquisition

of shares was 25th October 2005, was not perfectly legible but also no date found was mentioned against the entry in respect of the further sale of shares by the Assessee to one Mrs. Falguni Nayar. Further the document purporting to be a copy of share transfer deed (for the purchase of share by the Assessee from Mr. Shyam Kumar Bagga) did not contain the proper share transfer stamp. The stamp duty was found to have been paid by using revenue stamp. It appears that the date of purchase of shares by the Assessee from Mr. Shyam Kumar Bagga had been “manipulated to qualify the shares as long term capital asset.”

7. As regards the sale of the said shares sold to Mrs. Falguni Nayar on 8th November 2006 by the Assessee, the AO observed that the date of transfer of shares was not found mentioned in the Share Transfer Register. Further the duty on transfer was paid through revenue stamps rather than share transfer stamps. A perusal of the bank statement of the account held by the Respondent-Assessee, Vijaya Bank, showed that the Assessee had already received advance sale consideration of Rs. 50 lakhs on 22nd August 2006 and Rs. 1.75 crores on 27th September 2006 for the sale of the shares to Mrs. Falguni Nayar. Therefore, 60% of the sale consideration received by the Respondent-Assessee by 27th September 2006. It is only the balance 40% consideration that exchanged hands on 8th November 2006. The AO observed that no person would part with substantial amounts without the delivery of goods or at least without any agreement to sell to protect his rights. Thus, the AO concluded that the transfer of sale of shares had apparently taken place by 27th September 2006, i.e. within one year from the date of acquisition, i.e., 25th October 2005. Further it was unusual for the Respondent-Assessee to be in possession of the copies of share transfer form signed by the transferee unless in the light of the fact that the

Respondent and his brother, between them held by the entire shareholding in VPPL and “used their position to concoct the above evidence.”

8. The AO further concluded that no evidence had been produced by the Respondent-Assessee to show that he was only 15% co-owner of Gadaipur house. A copy of the building sanctioned plan/drawing had not been produced despite requests. It was not ascertainable whether the construction was on the parcel of land belonging to the Assessee or whether the land belonging to father remained vacant or vice versa or the structure occupied parts of the land belonging to both. The Abhibhog Certificate showed that there are two separate units on ground floor and first floor, meant for independent use/enjoyment by the Respondent-Assessee and his father. Therefore, the Assessee had already owned two residential houses, i.e., Fatehpur Beri and Gadaipur on the date of purchase of the residential property from his father. Consequently, the AO declined to grant the benefit to the Assessee under Section 54F of the Act and also directed penalty proceedings under Section 271 (1) (c) of the Act.

Additional evidence before the CIT (A)

9. The Assessee appealed to the Commissioner of Income Tax (Appeals) and sought to rely upon the following additional evidence in support of his contentions:

“(a) The copy of the sale deed dated 13th March 1996 in favour of the Appellant to prove the fact that the portion of the property purchased by the Appellant was only a piece of agricultural land bearing Khasra Nos. 75 & 90.

(b) The copy of balance sheet for the year ending 31st March 1996 which shows that the property purchased was agricultural land for a

consideration of Rs. 60,000.

(c) The copy of the balance sheet for the year ending 31st March 2007 to prove that there was no improvement made on this property by the Assessee since it is being shown consistently at Rs. 60,000. The copies of sale deeds in favour of Sh. Prem Nath Nagpal, the father of the Appellant to prove that the portion of land bearing Khasra Nos. 75, 76 and 90 were purchased by his father and the constructed portion existed on such land.

(d) The copies of Khasra Girdawri to prove the fact that the land bearing Khasra Nos. 75 and 90 was merely used for agricultural operation and further to prove that the constructed house was exclusively situated on the land bearing Khasra No. 76 which was wholly purchased by the father of the Appellant.

(e) The copy of the agreement dated 21st April 1999 between the Appellant and Sh. Prem Nath Nagpal, father of the Appellant to prove that both the parties agreed to let out the entire property belonging to them with the understanding that 15% of the rent would be given to the Appellant for use of the land belonging to him while 850/0 of the rent would be enjoyed by the father of the Appellant for use of his portion of the land and the constructed property belonging to him.

(f) The copy of the lease-deed dated 21st November 2000 to prove the fact that the entire land and constructed property was let out to Zerox Modi Corporation Ltd. against rent of Rs. 1,00,000 per

month which was to be apportioned between the Appellant and his father in the ratio of 15% and 85% respectively.”

10. The CIT (A) sent the evidence at Serial Nos. (d), (e) and (f) as furnished by the Assessee by way of additional evidence under Rule 46A of the Income Tax Rules, 1963 (‘Rules’) to the AO for his comments. By a remand report dated 19th July 2010 the AO objected to the admission of the additional evidence. The CIT (A), after considering objections, decided to admit the additional evidence in the interests of justice.

11. The CIT (A) then felt that some more evidences were required for coming to the conclusions and asked the Assessee to file the following documents:

- “(i) Annual returns filed with Registrar of Companies (ROC) for the year ending on 31st March 2006 and 31st March 2007 of Valley View Probuild Pvt. Ltd.
- (ii) Details filed with the ROC regarding sale of shares to Sh. Kapil Nagpal by Shyam Kumar Bagga.
- (iii) Complete Audited Balance Sheets as on 31st March 2006 and 31st March 2007 of Valley View Probuild Pvt. Ltd.
- (iv) Complete details of computation of Income of the appellant for the A.Y. 2007-08 and 2006-07 and his complete Balance Sheets as on 31st March 2006 and 31st March 2007.
- (v) Computation of Income of Prem Nath Nagpal and his balance sheets as on 31st March 2006 and 31st March 2007.
- (vi) Affidavit from Sh. Prem Nath Nagpal to prove that the constructed property was on the land exclusively owned by him.”

The order of the CIT (A)

12. The CIT (A) analysed the above additional documents/information furnished by the Assessee and came to the following conclusions:

(a) the sale of shares to the Assessee is evidenced by the entries in the share transfer register, the copy of transfer deed, the copy of share certificate and annual return filed with the ROC.

(b) since the share certificate by which the shares were transferred in the name of the Assessee was dated 25th October 2005, there could be no doubt that it was the date of acquisition notwithstanding that the duty was paid by using revenue stamps. While this may be a non-compliance with the requirements of the Companies Act, 1956, it was the relevant date of delivery in terms of the Sale of Goods Act, 1930.

(c) Considering that the transfer deed was executed by both the parties on 25th October 2005 and the shares were registered in the name of the Appellant on that date, it was established beyond doubt that the Assessee had purchased the shares on that date.

(d) As regards the sale of shares again the confirmation certificate showed that the shares were in fact delivered by the Assessee to Mrs. Falguni Nayar on 8th November 2006. In view of the decision of the Supreme Court in ***V.R. Shelat v. P.J. Thakar 1974 AIR 1728*** and certain other judgments of the High Courts and of the Tribunal, the conclusion was that the sale of shares took place only on 8th November 2006 and therefore, the nature of capital gain was long term capital gain.

(e) As regards the ownership of Gadaipur house in terms of the sale deed dated 13th March 1996 the property under transfer was only a small piece of agricultural land (1 bigha) in Khasra Nos. 75 and 90. There was nothing in the sale deed which suggested that any structure existed on the said land.

(f) The sale deed in favour of Mr. Prem Nath Nagpal, father of the Assessee showed that he had purchased land in Khasra Nos. 75, 76 and 90. The vendor had got the building plan for the farm house sanctioned on 2nd August 1989 and thereafter, it constructed the farm house on the said land. Therefore, the constructed portion was purchased only by the father of the Assessee and not the Assessee.

(g) The AO had not brought any evidence to disapprove such fact. Khasra Girdawri was additional evidence which showed that the land in Khasra Nos. 75 and 90 was used only for growing vegetables. It also showed that a 'kothi' (residential house) existed on the portion of land 'Khasra No. 76' exclusively owned by Mr. Prem Nath Nagpal, father of the Assessee.

(h) Consequently, the claim of the Assessee under Section 54F could not be rejected on the ground that he was an owner of more than one residential house as on 8th November 2006.

(i) In view of the decision of the Supreme Court in ***CIT v. Podar Cements (P) Limited [1997] 226 ITR 625 (SC)***, the Assessee could claim exemption on the basis of the agreement to sell only without it being registered. The agreement to sell showed that a substantial

payment of Rs. 2 crores was made on the date of the agreement itself. The balance payment of Rs. 22 lakhs was made on 17th April 2007 and the possession was simultaneously handed over to the Appellant.

(j) The share of 15% was determined mutually by the parties “just for sharing the rental income from the letting out of the entire property along with adjoining land.” The Abhibhog certificate issued by the MCD only showed that there were two independent units meant for use by the Appellant and his father. It did not prove the Appellant to be owner of any of these units.

The impugned order of the ITAT

13. The Revenue filed an appeal before the ITAT being ITA No. 5077/Del/2011. The ITAT has in its impugned order dated 29th January 2014 concurred with the decision of the CIT (A) that the transfer of shares resulted in long term capital gain and that CIT (A) was right in upholding that the Assessee was not a fractional owner of the property at Gadaipur and therefore, eligible for deduction under Section 54 F of the Act.

Questions of law

14. By an order dated 6th January 2015 the following questions of law were framed for consideration:

(i) Did the Income Tax Appellate Tribunal fall into error in law in holding that the exemption under Section 54 could be availed for by the Assessee in view of the fact that the Assessee owned a residential house and was also owner of another residential house?

(ii) Whether under the circumstance of the case Income Tax Appellate Tribunal was correct in holding that sale of shares constitute long term capital gain?

15. This Court has heard the submissions of Mr. N.P. Sahni, learned Senior standing counsel for the Revenue and Dr. Rakesh Gupta, learned counsel for the Assessee.

Question (ii)

16. The facts concerning the transfer of shares have been set out in considerable detail. It has been factually found by the CIT (A) and concurred with by the ITAT that the shares were held for more than 12 months and it was therefore long term capital asset. The fact of purchase of shares by the Assessee on 25th October 2005 and their sale to Mrs. Falguni Nayar on 8th November 2006 have been sufficiently proved by the Assessee by producing the requisite evidence. The conclusion of the AO was that sale of the shares took place at a time earlier 8th November 2006 since 60% of the consideration was already paid by them is inconsistent with the legal position. In **V.R. Shelat v. P.J. Thakar** (*supra*) it was emphasized that there was a distinction between ‘the title to get on the register’ and ‘the full property in the shares in a company.’ The first was acquired by mere delivery, with the required intention of the share certificate and a blank form signed by the transferor. The second was only obtained when the transferee, in exercise of his right to become a shareholder, gets his name on the register in place of the transferor.

17. In the present case, there was no actual transfer in the name of the

transferee, Mrs. Falguni Nayar, till her name was entered in the share register. Moreover, there is a receipt dated 8th November 2006 executed by Mr. Kapil Nagpal acknowledging the receipt of the balance consideration for the shares from Mr. Nayar and confirmation endorsed by Mr. Nayar on that date was not that “I have received the above original share certificate along with share transfer deed form for 5,000 shares from Shri Kapil Nagpal s/o Shri Prem Nath Nagpal r/o U-11, Green Park Extension, New Delhi on this day of 8th November 2006.”

18. After analysing the documentary evidence produced by the Assessee, the CIT (A) concluded that the actual transfer of the shares took place only on 8th November 2006 and that therefore, the Assessee had held shares for more than one year. The further consequential finding that long term capital gains resulted cannot be said to be perverse. Question (ii) is answered in favour of the Assessee and against the Revenue.

Question (i)

19. Turning to question (i) whether the exemption under Section 54F could be availed of by the Assessee, it requires to be first noticed that in light of the decision of the Supreme Court in **CIT v. Podar Cements (P) Limited** (*supra*), **CIT v. T.N. Aravinda Reddy** (*supra*) and **Balraj v. CIT (2002) 254 ITR 22 (Del)**, in order to constitute purchase for the purpose of Section 54 and Section 54F of the Act it is not necessary that there should be registered sale deed. This Court in **Balraj v. CIT** (*supra*) noticed the decisions in **Mysore Minerals Ltd. v. CIT (1999) 239 ITR 775 (SC)** and **CIT v. R.L. Sood (2000) 245 ITR 727 (Del)** and held that “for the purpose of attracting the provisions of Section 54 of the IT Act, it is not necessary that the Assessee should become the owner of the property. Section 54 of

the said Act speaks of purchase. Moreover, the ownership of the property may have different connotation in different statutes.” It was concluded that the Tribunal in that case “went wrong in holding that for the purpose of applicability of Section 54, registration of document is imperative.” In **Dr. P.K. Vasanthi Rangarajan v. CIT (2012) 252 CTR 336** the Assessee and her husband were co-owners to the extent of 50% share in a building that had a clinic and a residential house. It was held that since the entire property was not an exclusive residential property and 50% of the ownership was with reference to the clinic on the ground floor, the harshness of the proviso to Section 54 F cannot be applied “unless and until there are materials to show that the Assessee is the exclusive owner of the residential property.”

20. In the present case, as pointed out by the CIT (A), the sale deed dated 13th March 1996 does show that what was purchased by the Appellant (Assessee herein) is an agricultural land bearing Khasra Nos. 75 and 90.

Khasra Girdawri also clarifies that while there is a kothi, i.e., house on Khasra No. 76 (purchased by the Assessee's father), the land in Khasra Nos. 75 and 90 purchased by the Assessee was used only for agricultural purpose. The explanation by the Assessee that only the rental income from letting out the constructed portion property was being shared between him and the father in the ratio of 15%: 85% appears to be a plausible one. Unless there is document to show that the Assessee was a co-owner of the said building to the extent of even 15%, there cannot be an inference in that regard. As explained by **Umacharan Shaw & Bros v. CIT (1959) 37 ITR 271 (SC)** suspicion howsoever strong cannot partake the character of evidence. The evidence produced by the Assessee showed that the house was purchased by him on 10th April 2007 within the time allowed under

Section 54F of the Act, after making payment and by obtaining the possession thereof. A substantial part of the consideration of Rs. 2 crores was paid on the date of the agreement to sell itself. The balance payment of Rs. 22 lakhs was made on 17th April 2007 when the possession was handed over. The conclusion that the house was in fact purchased on 10th April 2007 within the time allowed under Section 54F of the Act stands supported by the documents placed on record by the Assessee. The Court is satisfied that prior to 10th April 2007 the Assessee was not the owner of another residential house and therefore the exemption under Section 54 read with Section 54F of the Act could not be denied to him.

21. In that view of the matter, Question (i) is answered in favour of the Assessee and against the Revenue.

22. The appeal is accordingly dismissed but with no orders as to costs.

S. MURALIDHAR, J

VIBHU BAKHRU, J

SEPTEMBER 11, 2015

Rk