

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.07.2012

CORAM:

THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN
and
THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

Tax Case (Appeal) No.1435 of 2005

Dr.(Smt) P.K.Vasanthi Rangarajan
828, Poonamallee High Road
Kilpauk, Chennai-600 010.

.. Appellant

versus

The Commissioner of Income Tax
Chennai.

.. Respondent

PRAYER: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Chennai Bench 'A' dated 25.7.2005 in I.T.A.No.1753/MDS/2004 relating to the assessment year 2000-2001.

For appellant : Mrs.Nalini Chidambaram
Senior Advocate
for Mr.C.V.Rajan

For respondent : Mr.T.Ravikumar
Standing Counsel for Income Tax

JUDGMENT

(Judgment of the Court was delivered by CHITRA VENKATARAMAN,J.)

The assessee is on appeal as against the order of the Income Tax Appellate Tribunal, raising the following substantial questions of law, relating to the assessment year 2000-2001:

(i) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in holding that handing over of possession of the property under consideration by the appellant to the developer in September 1999 for development of the property under the development agreement would fall within the purview of Section 2(47)(v) of the Income Tax Act, 1961 and therefore transfer for the purpose of assessment of capital gains took place in the previous year relevant to the assessment year 2000-01?

(ii) Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal is correct in law in holding that the appellant owned a residential property as on the date of transfer i.e., September 1999 and that therefore she is disqualified to claim exemption under Section 54F of the Income Tax Act, 1961?

2. The assessee is an individual, a doctor by profession. It is an admitted fact that the assessee owns a property situate in 828 and 828A, Poonamallee High Road, along with her husband. The said property consists of a clinic in the ground floor and a residential portion in the first floor. Even as early as 1989-90, in the wealth tax assessment as well as in her income tax assessment, the assessee had declared 50% of the share in the property, as owned by her.

3. It is seen from the facts pleaded before this Court as well as before the authorities below, that the assessee entered into an agreement for joint development of construction of 8 apartments in the property owned by the assessee situate at 45, M.G. Road, Sastri Nagar, with M/s.Ceebros Hotels Pvt. Ltd., Chennai, on 27th January 1999. As per the terms of the joint development agreement, the assessee had retained for herself, undivided share to the extent of 50% and the balance of the 50% of the undivided share was to be conveyed by the assessee in favour of the developer and/or his nominees. It is also stated therein that the assessee had desired to have the development of the land entrusted to the developer, who shall construct at its cost, new building consisting of residential apartments and give the assessee certain plinth area in the form of four residential apartments in the floors specified as per the specifications and the location given in the agreement itself in exchange for the undivided share of the land to be conveyed in favour of the developer and for its nominees. The consideration for parting with 50% of the undivided share thus consisted of the four floors of four flats as well as a sum of Rs.10,00,000/- payable by the developer i.e., Rs.5,00,000/- on signing the agreement and the balance of Rs.5,00,000/-, within the time stipulated therein. In terms of the agreement, the assessee had also parted with the possession in favour of the developer. It is further seen from the documents that the undivided shares were sold under four sale deeds viz., sale deed dated 19.11.2000 registered on 11.1.2000 in favour of R.Ramesh and R.Bhaskar, sale deed dated 10.2.2000, registered on 17.2.2000 in favour of M.Lakshmi pathi, sale deed dated 27.3.2000

registered in 6.4.2000 in favour of Ananthanarayanan and Ruchira Narayanan and sale deed dated 5.7.2000 registered on 12.7.2000 in favour of Kalaiarasi Udayashankar.

4. In the returns filed for the assessment year 2001-02, the assessee claimed the benefit of exemption as provided for under Section 54F of the Income Tax Act. The said claim was sought to be rejected by the Assessing Authority on the ground that persons who own a residential house as on the date of transfer, would not be entitled to the exemption under Section 54F. The assessee being the owner of the residential house already, the proviso to Section 54F, as it then stood, would disentitle the assessee from claiming the benefit for investing the capital gains in yet another house property. Apart from the denial of exemption in the assessment for the assessment year 2001-02, in the assessment for the assessment year 2000-01, the Assessing Officer viewed that as the assessee/appellant had parted with the possession of the property to the developer on 26.5.1999, the capital gains arising out of the transfer should be assessed for the assessment year 2000-01 and not 2001-02, as shown by the assessee. The assessee contended that going by the terms of the agreement, when the constructed flats were handed over to the assessee only in June 2000, the date of transfer should be taken and the claim considered in the assessment for the assessment year 2001-02 only. The Assessing Officer rejected this contention and made the assessment that the receipt of Rs.10,00,000/- was not invested as per the provision under Section 54E. Thus, the Assessee Authority held that since the assessee had used the property at 828, Poonamallee High Road and 828A, Poonamallee High Road, as residence and hospital, the conditions prescribed under Section 54F thus not being satisfied, she was not eligible for exemption.

5. Aggrieved by these assessments, the assessee went on appeal before the Commissioner of Income Tax (Appeals), who, once again, confirmed the view of the Assessing Authority that as far as the assessment for the assessment year 2000-01 was concerned, the assessee had handed over possession in the assessment year relevant to 2000-01. Thus going by the definition of "transfer" and in particular Section 2(47)(vii), long term capital gains were assessable under Section 45(1) in the assessment year 2000-01. Consequently, the assessment made in the assessment year 2001-02 was deleted. As far as the investment of Rs.10,00,000/- was concerned, the first appellate authority held that as the investments were made within a period of six months, she was entitled to the benefit of Section 54E(1). He however rejected the claim of exemption under Section 54F. Aggrieved by this, the assessee preferred a further appeal before the Income Tax Appellate Tribunal. A perusal of the order of the Tribunal shows that it rejected the assessee's case on exemption claimed under Section 54F on the ground that the assessee was owning a residential property on the date of transfer, namely, September, 1999. Even though the property was not owned fully, yet, as the assessee was having 50% share in the residential property, the conditions envisaged under Section 54F not fully satisfied, the assessee was not entitled to exemption under Section 54F. The Tribunal further held that the facts of the case satisfied the ingredients of Clause (v) of Section 2(47) and hence, the assessee was liable for capital gains as per Section 45(1) for the assessment year 2000-01 and the substantial performance of the contract by the handing over of the completed flats was relevant to decide the issue. Aggrieved by this, the present appeal has been preferred by the assessee.

6. Learned senior counsel appearing for the assessee, even though raised a ground with reference to Clause (v) of Section 2(47) of the Income Tax Act and Section 53A of the Transfer of Property Act as regards the part-performance of the agreement and the assessment of capital gains in the assessment year 2000-2001, however, she confined her arguments to the applicability of Section 54F only. Similarly, even though a question was raised that it was only a case of exchange; hence, Clause (v) of Section 2(47) would have no relevance herein, yet, in the course of arguments, she submitted that the case be considered as regards the grounds raised as to the compliance of the conditions under Section 54F alone and that the other grounds, particularly with reference to the transaction being an exchange and hence Section 2(47)(v) is not relevant, is not pressed. Recording the said statement, the present case is considered from the angle of applicability of the exemption provision contained in Section 54F, as it then stood prior to the amendment under the Finance Act of 2000, effective from 1.4.2001. Learned senior counsel submitted that irrespective of the amendment, the assessee would be entitled to exemption under Section 54F, she having satisfied the conditions under Section 54F. Secondly, the proviso disentitled the exemption contained in the parent provision only if and when the assessee had the exclusive ownership of a residential house as on the date of transfer of the asset.

7. Pointing out to the fact that the assessee is a joint owner, along with her husband, of the property situated in 828 and 828A, Poonamallee High Road, learned senior counsel submitted that it is an admitted fact that the assessee holds 50% undivided share alone in the property housing the clinic in the ground floor and the residential portion in the first floor. Under her wealth tax assessment, she had offered her 50% undivided share and the clinic and that she had also claimed depreciation on the clinic portion of the property under the income tax assessment as the property used by her for the profession. Thus, when her claim as to the ownership in the property situated in 828, Poonamallee High Road is with reference to the clinic portion alone and that the residential portion being in the name of her husband, the proviso denying the case of exemption under Section 54F has no application to the assessee's case. She further pointed out that for grant of exemption under Section 54F, the condition stipulated in the proviso to the Section is that the assessee being an individual or a HUF, should not own a residential house in the status as an individual or HUF as on the date of the transfer. Thus the condition in the proviso has to go with the understanding of the same status stipulated in the parent provision under Section 54F. In other words, the contemplation under Section 54F(1) viz., as regards the status of the assessee as an individual/HUF, would apply to the understanding of the condition in the proviso too. Hence, on a reading of Section 54F(1) and the proviso, to qualify for exemption, the assessee must be an individual/HUF not having any residential house as on the date of transfer, so that the individual/HUF assessee has the benefit of Section 54F. Thus when the individual assessee owns a residential house along with somebody else under a joint ownership or as a co-owner therein, the ownership in a status other than that of individual/HUF would not result in the denial of exemption. In this connection, she placed reliance on the decisions reported in [2011] 330 ITR 309 (Vipin Malik (HUF) v. Commissioner of Income-tax) and [2009] 312 ITR 40 (Prakash Vs. Commissioner of Income-tax), wherein, the Delhi High Court and Bombay High Court have taken the view that so

long as the assessee individual does not own a residential house in his name as on the date of transfer, the benefit of Section 54F could not be denied to the said individual assessee and the nature of holding of the property are important factors to be considered in the case.

8. As far as the findings of the Assessing Authority that investing in four flats would disentitle the claim of exemption, learned senior counsel placed reliance on the unreported decision of this Court in T.C.No.656 of 2005 dated 4.1.2012, which, in turn, followed the decision of the Karnataka High Court reported in [2011] 331 ITR 211 (Commissioner of Income-tax Vs. Smt.K.G.Rukminiamma) and [2009] 309 ITR 329 (Commissioner of Income-tax Vs. D. Ananda Basappa); the Special Leave Petition in S.L.P. (C) No. 20867 of 2009, filed against the decision reported in [2009] 309 ITR 329 (Commissioner of Income-tax Vs. D. Ananda Basappa) was also rejected, vide order dated 10.08.2009. In the background of the facts thus shown on the provision of law, she submitted that the assessee is entitled to succeed in this case. She further pointed out that the said position is accepted even in the amendment brought out to the provisions under the Finance Act of 2000 with effect from 01.04.2001.

9. Per contra, learned Standing Counsel appearing for the Revenue countered the submission of the assessee herein and pointed out that when the property in Poonamallee High Court is owned by the assessee's husband as well as by the assessee in equal share and the sale deed dated 25.1.1974 showed that the assessee had purchased the said property along with her husband, there was no determination of separate share of husband and wife. Thus, the assessee having a residential property as on the date of possession, even if it be in part, would go against the benefit of Section 54F and the proviso would be applicable to her case.

10. Heard learned counsel appearing on either side and considered the material placed on record.

11. Before going into the substantial questions of law, Section 54F needs to be considered:

" 54F. Capital gain on transfer of certain capital assets not to be charged in case of investment in residential house.--

(1) Subject to the provisions of sub-section (4), where, in the case of an assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of any long-term capital asset, not being a residential house (hereafter in this section referred to as the original asset), and the assessee has, within a period of one year or two years after the date on which the transfer took place purchased, or has within a period of three years after that date constructed, a residential house (hereafter in this section referred to as the new asset), the capital gain shall be dealt with in accordance with the following provisions of this section, that is to say,--

(a) if the cost of the new asset is not less than the net consideration in respect of the original asset, the whole of such capital gain shall not be charged under section 45:

(b) if the cost of the new asset is less than the net consideration in respect of the original asset, so much of the capital gain as bears to the whole of the capital gain the same

proportion as the cost of the new asset bears to the net consideration, shall not be charged under section 45:

Provided that nothing contained in this sub-section shall apply where the assessee owns on the date of the transfer of the original asset, or purchases, within the period of one year after such date, or constructs, within a period of three years after such date, any residential house, the income from which is chargeable under the head "Income from house property", other than the new asset."

12. A reading of the provisions contained in Section 54F(1), as it stood at the relevant point of time, shows that exemption from payment of tax on the capital gains arising on the transfer of any long-term capital asset not being a residential house is available to an assessee being a Hindu Undivided Family or an individual, if the long-term capital gain is invested in purchasing a residential house or constructing the residential house within the time stipulated therein. Proviso to sub section (1) states that the exemption contemplated under sub section (1) would not be available where an assessee owns a residential house as on the date of the transfer and that the income from the residential house is chargeable under the head "income from house property". The Finance Act, 2001 amended the proviso with effect from 2001-02 to permit exemption under Section 54F, even if the assessee has owned one residential house as on the date of transfer, other than the new asset, or purchase in investments any residential house other than the new asset within a period of one year or three years as the case may be, but after the date of transfer of the original asset and the income from such residential house other than the one owned on the date of transfer of the original asset is chargeable under the head "income from house property".

13. As far as the present case is concerned, contrary to the contention of the assessee, the assessee as well as her husband had offered 50% share each in the clinic in the income tax assessment and had claimed depreciation thereon. So too 50% share in the property in the wealth tax proceedings is offered by the assessee and her husband. The note submitted to the Assistant Commissioner of Income Tax, City Circle 5(1), Madras, by the assessee discloses that the assessee owned 50% of the property in 828, Poonamallee High Road, Chennai, for use as residential property and 50% as clinic; so too for the property at Door No.828A, Poonamallee High Road, Chennai. The facts thus reveal that as joint owners of the property, the assessee and her husband had shown 50% share with reference to the clinic and the residential portion in their respective returns. Thus, it is clear that as on the date of the transfer, the assessee did not own a residential house in her name only, the income from which was chargeable under the head "income from house property", to bring into operation, the proviso to Section 54F. The rejection of the claim for exemption would arise if only the property stands in the name of the assessee, namely, individual or HUF. Given the fact that the assessee had not owned the property in her name only to the exclusion of anybody else including the husband, but in joint name with her husband, we agree with the submission of the learned senior counsel appearing for the assessee herein that unless and until there are materials to show that the assessee is the exclusive owner of the residential property, the harshness of the proviso cannot be applied to the facts herein. Apart from that, 50% ownership is with reference to the clinic situated in the ground floor. As such, the entire property is not an exclusive residential property. Hence, we are

inclined to agree with the assessee's contention that the joint ownership of the property would not stand in the way of claiming exemption under Section 54F.

14. In the decision reported in [2011] 330 ITR 309 (Vipin Malik (HUF) v. Commissioner of Income-tax), the Delhi High Court considered a case of a claim for exemption under Section 54F. The facts are that the assessee, a Hindu Undivided Family, sold agricultural lands in September, 1995, giving rise to long-term capital gains. Vipin Malik, a member of the HUF, is stated to have purchased a flat in the joint names along with his mother and thus the assessee HUF claimed exemption under Section 54F. The Delhi High Court pointed out that the assessee had already invested in the flat much prior to the sale of the agricultural land; hence, the assessee could not be granted the benefit of exemption. Further, the assessee could not be said to have constructed a residential house within three years from the sale of the agricultural land, since the amount received from the sale of the land was not utilised for the purchase of the flat. Leaving this, the Delhi High Court further pointed out that the flat purchased was not in the name of HUF, but was in the individual name of Vipin Malik, along with his mother. The Delhi High Court pointed out that there was nothing to indicate the involvement of Hindu Undivided Family in membership of the Society or Vipin Malik holding membership as the Karta of Hindu Undivided Family. Thus, to claim the benefit under Section 54F, the Delhi High Court pointed out that the residential house, which is purchased or constructed, has to be of the name of the same assessee whose agricultural land was sold. In the light of the above, the assessee's case therein was rejected.

15. As far as the decision of the Bombay High Court reported in [2009] 312 ITR 40 (Prakash S/o Timaji Dhanjode Vs. Income Tax Officer) is concerned, the facts were that the assessee sold the property owned by him and purchased a new property in the name of his adopted son with a clear intention to transfer the property to his adopted son. In the context of the said facts, the Bombay High Court rejected the assessee's case.

16. As far as the present case is concerned, the purchase of the property was by the individual in her own name and the property held by her as on the date of transfer, stood in the joint names of the assessee and her husband. A reading of Section 54F clearly points out that the holding of the residential house as on the date of transfer has relevance to the status of the assessee as an individual or HUF. On the admitted fact that the assessee herein, as an individual, does not own any property in the status of an individual as on the date of transfer, we have no hesitation in accepting the case of the assessee, thereby allowing the appeal.

17. As far as the issue on the purchase of four flats is concerned, the unreported decision of this Court in T.C.No.656 of 2005 dated 4.1.2012 answers this issue. We do not find any inhibition in the assessee claiming the benefit on the investment made in the four flats, thereby gaining the benefit under Section 54F of the Income Tax Act.

In the circumstances, the Tax Case Appeal stands allowed. No costs.

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To

1. The Income Tax Appellate Tribunal, Chennai Bench 'A'.
2. The Commissioner of Income Tax (Appeals), Chennai-34.
3. The Deputy Commissioner of Income Tax, Circle XIV,
Chennai 6