

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES “A”, BANGALORE**

Before Shri Chandra Poojari, AM & Shri George George K, JM

ITA No.1351/Bang/2019 : Asst.Year 2009-2010

Sri.Maurice Patrick De Rebello 242/1G, IV Cross Borewell Road, Whitefield Bengaluru – 560 066. PAN : ABGPD2653M.	v.	The Income Tax Officer Ward 7(1) Bengaluru.
(Appellant)		(Respondent)

Appellant by : Sri.Ashok A.Kulkarni, Advocate

Respondent by : Ms.Neera Malhotra, CIT-DR

Date of Hearing : 05.01.2021	Date of Pronouncement : 06.01.2021
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ORDER

Per George George K, JM

This appeal at the instance of the assessee is directed against CIT(A)’s order dated 28.03.2019. The relevant assessment year is 2009-2010.

2. The brief facts of the case are as follow:

The assessee, an individual, admitted Long Term Capital Gains (LTCG) arising from Joint Development Agreement (JDA) amounting to Rs.74,09,736 for the assessment year 2012-2013, in respect of the shares of 35.35% of immovable property at Lavelle Road, Bangalore. For the above said assessment year, viz., 2012-2013, the assessee had also paid taxes thereon.

3. The Assessing Officer issued notice u/s 148 for reopening the assessment year 2009-2010, since the JDA was executed on 28.04.2008 (i.e. in A.Y. 2009-2010). During the course of reassessment proceedings, the A.O. observed that LTCG for

JDA should be taxed in assessment year 2009-2010. In response to the proposal by the A.O., the assessee submitted that since the possession of the property from JDA (5384.51 sq.ft. of built up area) was received during the assessment year 2012-2013, the resultant capital gain was admitted in assessment year 2012-2013 and tax was fully paid thereon. It was argued that the same cannot be taxed again in assessment year 2009-2010. It was further submitted that there is no transfer u/s 2(47)(v) of the I.T.Act. during the assessment year 2009-2010 and the question of capital gains does not arise for the above said assessment year. It was also submitted that the possession in assessment year 2009-2010 given to the builder was not in part performance of contract within the meaning of Sec.53A of the Transfer of Property Act, 1882 because the possession was only for the limited purpose to facilitate construction of the superstructure on the said site in terms of the JDA. Further, the builder cannot alienate his share of undivided interest in site before delivering the assessee / landlords their share of built-up area. In view of the above, the assessee submitted that there is no transfer in the assessment year 2009-2010.

4. However, the Assessing Officer rejected the objections raised by the assessee and brought to tax the long term capital gains in the year of execution of JDA, for the following reasons:-

(i) Irrevocable authority and empowerment to the developer for constructing residential apartment.

- (ii) Execution of power of attorney to enable the developer to apply for and secure plans and licenses.
- (iii) Authority to developer to make additions, deletions and alterations in the plans submitted.
- (iv) Parties entitlement to allotted built up area as per agreed ratio and proportionate undivided share, right, title and interest in the immovable property and developer's right to sell and super built-up area with all benefits and advantages and parties entitlement to deal with built up area with respect to third parties.
- (v) Developer's payment of taxes and Levis from the date of Joint Development Agreement.
- (vi) Developer's right to enter into agreements of sale and execute sale deeds in respect of prospective buyers.
- (vii) Developer's hold on original title deeds.
- (viii) Entitlement of developer to obtain loan facilities by depositing the original title deeds and on security of development rights.
- (ix) Advertising and marketing rights to developer.

5. The Assessing Officer further stated that all the six conditions laid down in Chaturbuj Dwarkadas Kapadia's case (2003) 260 ITR 491 are satisfied in this case and hit by sec.53A of the Transfer of Property Act, 1882. The A.O. concluded that the contract, read as a whole, indicates passing or transferring of complete control over the property in favour of the developer, then the date of the contract would be relevant to decide the year of chargeability and even arrangement confirming privileges of ownership without transfer of title could fall under

section 2(47)(v) of the I.T.Act. As such, assessment year 2009-2010 is the year of transfer and the income is chargeable in the said assessment year. The Assessing Officer also did not grant the benefit of exemption u/s 54 of the I.T.Act for the entire built up area except for the self-occupied flat of the assessee.

6. Aggrieved by the order of the Assessing Officer, the assessee preferred an appeal to the first appellate authority. Before the first appellate authority the assessee raised objections with regard to the reopening of assessment, the year of taxability of long term capital gains and also with regard to the claim of deduction u/s 54 of the I.T.Act in respect of the entire built-up area received from the builder as per the JDA. The CIT(A) rejected all the contentions of the assessee. As regards to the claim of deduction u/s 54 of the I.T.Act, the CIT(A) followed the Special Bench order of the Tribunal in the case of CIT v. Sushila M. Jhaveri [(2007) 107 ITD 327 (Mum.)] and rejected the claim of the assessee that he is entitled to benefit u/s 54 of the I.T.Act for the entire super built-up area received from the builder as per JDA.

7. Aggrieved by the order of the CIT(A), the assessee has filed this appeal before the Tribunal. The learned Counsel for the assessee submitted that the CIT(A) has committed great error in not following the judgment of the Hon'ble jurisdictional High Court and placing reliance on the order of the ITAT Special Bench for denying the claim of deduction u/s 54 of the I.T.Act. The learned AR submitted that if the assessee is allowed deduction u/s 54 of the I.T.Act for the entire flats received

under JDA, then all other issues raised in the appeal would become academic.

8. The learned DR placed reliance on the orders passed by the Income Tax Authorities.

9. We have heard the rival submissions and perused the material on record. The facts of the assessee's case are similar to the case of Smt.K.G.Rukminiamma reported in 331 ITR 221 (Kar.) In the case of K.G.Rukminiamma (supra) the assessee on a site measuring 30' x 110' had a residential premises. Under a joint development agreement the assessee gave that property to a builder for construction of residential units. Under the agreement, eight flats are to be put up in that property. Four flats representing 48% is the share of the assessee and the remaining 52% representing another four flats is the share of the builder. So the consideration for selling 52% of the site was four flats representing 48% of built up area and the four flats are situated in a residential building. The Hon'ble Court held that the four flats constitute 'a residential house' for the purpose of deduction u/s 54 of the I.T.Act. In that view of the matter, the Hon'ble Court concluded that the Tribunal as well as the appellate authority were justified in holding that there is no liability to pay Capital Gains tax as the case squarely falls under sec. 54 of the Income Tax Act, 1961.

9.1 The Hon'ble Madras High Court in the case of CIT Vs. Smt. V.R Karpagam reported in 373 ITR 127 (Mad.) on identical facts have decided the issue of deduction u/s 54F of the I.T.Act for five flats in favour of the assessee. The assessee in the case of

V.R.Karpagam (supra) entered into an agreement with M for development of a piece of land owned by it. As per agreement, assessee was to receive 43.75% of built-up area after development, which was translated into five flats. The Assessee claimed exemption u/s 54F on the value of five flats. The AO granted benefit of capital gains in respect of one flat and the CIT(A) affirmed findings of AO holding that claim of assessee u/s 54F of the I.T.Act for all five flats could not be admitted. However, the CIT(A) took the view that the assessee would be entitled to benefit of section 54F of the I.T.Act in respect of one single flat with largest area. In appeal, tribunal held that assessee was eligible for exemption u/s 54F on all five flats received by her in lieu of land she had parted with. It was held by the Tribunal that the word 'a' appearing in section 54F of the I.T.Act should not be construed in singular, but should be understood in plural. The Madras High Court upheld the order of the Tribunal. It was also held that amendment was made to s 54F of the I.T.Act with regard to word 'a' by Finance (No.2) Act, 2014 w.e.f only from 01.04.2015 withdrawing deduction for more than one flat (residential house). Post amendment, viz., from 01.04.2015, benefit of s 54F will be applicable to one residential house in India. However, prior to said amendment, a residential house would include multiple flats/residential units. Similar decisions were rendered by the Hon'ble Madras High Court in the case of CIT vs Gumanmal Jain reported in 394 ITR 666 (Mad.)

9.2 In the present case, all the flats for which the assessee is claiming exemption u/s 54 of the I.T.Act are situated in the

same premises. Therefore, the judgment rendered in the case of Smt.K.G.Rukminiamma (supra) will squarely apply. In the light of the above judicial pronouncements on identical facts, we are of the view that the assessee is entitled to deduction u/s 54 of the I.T.Act on the entire built-up area received from the builder as per the JDA dated 28.04.2008. Since we have decided the issue of claim of deduction u/s 54 of the I.T.Act, in favour of the assessee, the other issues raised by the assessee in the grounds of appeal are not adjudicated. It is ordered accordingly.

10. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced on this 06th day of January, 2021.

Sd/-
(Chandra Poojari)
ACCOUNTANT MEMBER

Sd/-
(George George K)
JUDICIAL MEMBER

Bangalore; Dated : 06th January, 2021.
Devadas G*

Copy to :

1. The Appellant.
2. The Respondent.
3. The CIT(A)-9, Bangalore.
4. The Pr.CIT-4, Bangalore.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore