

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 7TH DAY OF SEPTEMBER, 2016

PRESENT

THE HON'BLE MR. JUSTICE JAYANT PATEL

AND

THE HON'BLE MR. JUSTICE S.N.SATYANARAYANA

ITA NO.192 OF 2014

BETWEEN

1. COMMISSIONER OF INCOME TAX,
MANGALORE - 575 001.
2. THE ASSISTANT COMMISSIONER
OF INCOME TAX,
CIRCLE - 2(1),
MANGALORE - 575 001.

... APPELLANTS

(BY SRI.E.I.SANMATHI, ADV.,)

AND

SHRI.GREGORY MATHIAS
NO.14-1-74, CLASSIQUE APARTMENTS,
BUNTS HOSTEL ROAD,
MANGALORE - 575 001.

...RESPONDENT

(BY SRI.A.SHANKAR AND SRI.M.LAVA, ADVS.,)

THIS ITA IS FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, PRAYING TO SET ASIDE THE COMMON APPELLATE ORDER DATED 10.01.2014 PASSED BY THE ITAT, 'A' BENCH, BANGALORE, IN APPEAL PROCEEDINGS NO.ITA NO.1434/BANG/2012 FOR ASSESSMENT YEAR 2009-10.

THIS ITA COMING ON FOR ADMISSION THIS DAY, **JAYANT PATEL J.** DELIVERED THE FOLLOWING:

JUDGMENT

The Revenue has preferred the present appeal by raising the following substantial questions of law:

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in allowing the deduction under Section 54F to the assessee whether the assessee owns more than one residential house other than the new asset on the date of transfer of the original asset?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in upholding the deduction under Section 54F when the fact that the assessee owns seven flats on which income from House Property has been offered has been placed on record?

3. Whether, on the facts and in the circumstances of the case, was the Tribunal correct in granting relief to

the assessee on the ground that the residential house properties were held as stock in trade?

4. Whether, on the facts and in the circumstances of the case, was the Tribunal justified in allowing the deduction under Section 54F to the assessee when the income Tax Act does not specify the nature of ownership whether held as asset or stock in trade?"

2. We have heard Mr.E.I.Sanmathi learned counsel appearing for the appellants-Revenue and Mr.A.Shankar, learned counsel appearing for the respondent-assessee.

3. We may at the outset record that the Assessing Officer initially while considering the aspects as to whether the benefit of Section 54F of the Income Tax Act, 1961 (for short 'the Act') would be available to the assessee had observed at paragraph 5.5 and 5.6 as under:

"5.5. Considering the fact that the assessee is already a owner of more than one residential house, a show cause notice dated 20.12.2011 was issued to the assessee proposing to disallow the exemption claimed U/s.54F of Rs,1,72,00,000/-. In response to this, the assessee's AR vide his

letter dated 21.12.2011 stated that the income from house property offered is in respect of stock-in-trade. Hence, the assessee is entitled to deduction U/s.54F.

5.6. The Revenue's position is that exemption U/s.54F is not to be given in case of applicability of any of the conditions contained in proviso (a) or (b) of section 54F. The assessee's own declaration in his Return of Income is an admission of fact that he owned these residential houses at the time of sale of the original asset. The claim of these properties to be as stock in trade is an after thought and immaterial as the criterion laid down in Section 54F is **'should not be the owner of more than one residential house'**.

4. In the appeal before the CIT (Appeals) it has been held at paragraph 5 as under:

"I have considered the issue very carefully. The conditions stipulated in the proviso to Section 54F are as follows:

"Provided that nothing contained in this sub-section shall apply 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) 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"

5. In the further appeal before the Tribunal, the Tribunal found at paragraph-9 as under:

"9. We have given very careful consideration to the rival submissions. The first thing which we notice is that the expression 'residential house' has not been defined in the Act. We, therefore, have to go by the natural meaning which the term would assume in common parlance. In our view, the flats constructed by the assessee, which were the assessee's stock-in-trade of business carried on by the assessee, are meant for sale and cannot assume the character of 'residential house' owned by the assessee. There is no evidence on record to show that the stock-in-trade of the assessee was treated as residential house owned by the assessee. On the other hand, it is clear from the accounting treatment that all the seven flats were treated as stock-in-trade. The income from these flats is offered to tax under the head 'income from

house property' because of the specific provisions of Section 22 of the Act read with Sec.14 of the Act. Such treatment of income by the assessee cannot be treated as an act by which the assessee has considered the seven flats as residential house owned by him. We are, therefore, of the view that denial of the claim of the assessee for deduction U/s.54F of the Act is unassailable. The AO is, therefore, directed to give the deduction as claimed by the assessee. We, therefore, allow the appeal of the assessee."

6. Under the circumstances, the appellant-Revenue is before this Court.

7. The contention raised on behalf of the appellants-Revenue was that even if it is stock-in-trade of business, the same would also get included to apply proviso to Section 54F of the Act resultantly disentitling the person to get set off of the capital gain whereas the learned counsel appearing for the respondent-assessee submitted that stock-in-trade is not a capital asset and therefore, cannot be considered for the purpose of giving effect to the provisions of Section 54F of the Act much less

the proviso therein and in his contention the Tribunal has rightly held that the benefit under Section 54F of the Act would be available to the assessee.

8. We may record that there cannot be a second opinion on the point that the capital gain should arise out of the transfer of capital asset. Section 2(14)(a) of the Act defines capital asset as under:

"2(14) – Capital asset means -

(a) property of any kind held by an assessee, whether or not connected with his business or profession;

(b) xxxx

but does not include -

(i) any stock-in-trade meaning thereby consumable stores or raw materials held for the purposes of his business or profession;"

9. This shows that any stock in trade by profession is excluded from the definition of capital asset and in these circumstances the contention of the Revenue is that stock in trade is also included for applicability of Section 54F of the Act, in our view, cannot be accepted.

10. We may also add that under the heading of Capital gains, Section 45 of the Act provides that any profits or gains arising from the transfer of capital asset can be considered as capital gain. Therefore, when one considers the gain or exclusion from the set off of the gain it should be related to the capital assets. When the property was not shown as capital assets but was shown as stock in trade, naturally the view taken by the Tribunal cannot be said to be erroneous.

11. Under the circumstances, we do not find any substantial questions of law would arise for consideration as sought to be canvassed. The appeal is meritless. Hence, ***dismissed.***

**Sd/-
JUDGE**

**Sd/-
JUDGE**

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