IN THE ITAT COCHIN BENCH

Income-tax Officer, Ward -1, Kanpur

v.

Smt. Rosamma Korah*

N.R.S. GANESAN, JUDICIAL MEMBER
AND B.R. BASKARAN, ACCOUNTANT MEMBER
IT APPEAL NOS. 646 & 663 (COCH.) OF 2013
[ASSESSMENT YEARS 2005-06 & 2007-08]
MARCH 7, 2014

Smt. Latha V. Kumar *for the Appellant.* **T.M. Sreedharan** *for the Respondent.*

ORDER

N.R.S. Ganesan, Judicial Member - The revenue filed the appeal for the assessment year 2005-06 and the assessee filed the appeal for the assessment year 2007-08. Since the issue raised by the assessee and the revenue is identical in nature both the appeals were heard together and are disposed of by this common order.

2. The only issue arises for consideration is exemption u/s 54F of the Act.

3. Smt. Latha V Kumar, the ld.DR submitted that the assessee has not deposited the net sale consideration which was not appropriated/used in the capital gain account scheme within the due date for filing the return of income u/s 139(1) of the Act. Therefore, according to the ld.DR, the assessee is not eligible for exemption u/s 54F of the Act, as claimed. The CIT(A), however, found that the assessee has constructed the house within the period of three years. According to the ld.DR, for claim of exemption only the utilized portion of the sale consideration has to be considered for the year under consideration. The unutilized portion of the sale consideration is not eligible for exemption in case it was not deposited in the capital gain account scheme within the due date for filing of return of income. The CIT(A) confused the investment made by the assessee with the transfer of the capital asset which was under construction. What was referred by CIT(A) is with regard to sale of the flat which was allotted to the share of the assessee for which the assessee is liable to pay short term capital gain separately. This fact was not considered properly by the CIT(A). According to the ld.DR, the CIT(A) has completely ignored the provisions of section 54F(4) of the Act. The ld.DR placed reliance on the judgment of the Kerala High Court in the case of *CIT* v. *V.R. Desai*

4. On the contrary, Shri T.M. Sridharan, the ld.senior counsel for the assessee submitted that when the assessee constructed residential house within the period of three years, there is no necessity for depositing the amount in the capital gain account scheme. According to the ld.senior counsel, in fact, the assessee has constructed a house within the period of three years. Referring to the order of this Tribunal in*Muthuletchumi Janardanan* in ITA 372/Coch/2011 dated 07-12-2012, the ld.senior counsel for the assessee submitted that section 54F is a beneficial provision, therefore, the time limit provided u/s 139(4) for filing the return of income shall also be taken into consideration. In view of the decision of this Tribunal, according to the ld.senior counsel, the assessee is entitled for exemption u/s 54F of the Act.

5. We have considered the rival submissions on either side and also perused the material available on record. A bare reading of section 54F clearly shows that the assessee is entitled for exemption in case he/she constructs a residential house within a period of three years after the sale of the capital asset. However, sub clause (4) of section 54F clearly says that the unutilized portion of the net sale consideration which is otherwise liable for capital gain tax shall be deposited in the capital gain account scheme within the period of due date for filing return of income u/s 139. The question arises for consideration is whether the due date mentioned in section 54F(4) is the due date for filing the return u/s 139(1) or the due date for filing the return of income u/s 139(4) of the Act.

6. We have carefully gone through the decision of this Tribunal in the case of *Muthuletchumi Janardanan*(*supra*). This Tribunal, after referring to the judgment of the Punjab & Haryana High Court in the case of*CIT* v. *Ms. Jagriti Aggarwal* [2011] 339 ITR 610 found that the assessee can deposit the amount within the time limit provided for filing the return u/s 139(4) of the Act. We find that the Apex Court had an occasion to interpret the provisions of Income-tax Act, more particularly, the term "due date" in *Prakash Nath Khanna* v. *CIT* [2004] 266 ITR 1(SC). The Apex Court found that due date means the due date for filing the return u/s 139(1) and not 139(4). No doubt, the term "due date" was interpreted by the Supreme Court in the context of prosecution u/s 276CC of the Act. Normally, the court should take a liberal construction of the provisions in the case of criminal prosecution. The Supreme Court, after considering the scheme of the Income-tax Act and the Rule of Interpretation, more particularly, the Laws of Taxation has observed as follows at page 9 of the ITR:

> 'It is a well settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the Legislature. The language employed in a statute is the determinative factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the Legislature itself. The question is not what may be supposed and has been intended but what has been said. "Statutes should be construed, not as theorems of Euclid". Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them". (see *Lenigh Valley Coal Co.* v. *Yensavage* (218 FR 547). The view was reiterated in *Union of India* v. *Filip Tiago De Gama of Vedem Vasco De Gama*, AIR 1990 SC 981 and *Padma Sundara Rao* v. *State of Tamil Nadu* [2002] 3 SCC 533; [2002] 255 ITR 147 (SC)).
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> In *D.R. Venkatachalam* v. *Deputy Transport Commissioner* [1977] 2 SCC 273 it was observed that courts must avoid the danger of a priori determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. They are not entitled to usurp legislative function under the disguise of interpretation.
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> While interpreting a provision the court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the Legislature to amend, modify or repeal it, if deemed necessary. (see *Rishabh Agro Industries Ltd* v. *P.N.B. Capital Services Ltd.*[2005] 5 SCC 515; [2000] 101 Comp Cas 284). The legislative causus omissus cannot be supplied by judicial interpretative process.'

7. After referring to them "due date", the Apex Court has also observed as follows at pages 10 & 11 of the ITR:

> 'On of the significant terms used in section 276CC is "in due time". The time within which the return is to be furnished is indicated only in sub-section (1) of section 139 and not in sub-section (4) of section 139. That being so, even if a return is filed in terms of sub-section (4) of section 139 that would not dilute the infraction in not furnishing the return in due time as prescribed under sub-section (1) of section 139. Otherwise, the use of the expression "in due time" would lose its relevance and it cannot be said that the said expression was used without any purpose. Before substitution of the expression "clause (i) of sub-section (1) of section 142" by the Direct Tax Laws (Amendment) Act, 1987, with effect from April 1, 1989, the expression used was "sub-section (2) of section 139". At the relevant point of time the Assessing Officer was empowered to issue a notice requiring furnishing of a return within the time indicated therein. That means the infractions which are covered by section 276CC relate to non-furnishing of return within the time in terms of sub-section (1) or indicated in the notice given under sub-section (2) of section 139. There is no condonation of the said infraction, even if a return is filed in terms of sub-section (4). Accepting such a plea would mean that a person who has not filed a return within the due time as prescribed under sub-section (1) or (2) of section 139 would get benefit by filing the return under section 139(4) much later. This cannot certainly be the legislative intent.'

8. The Apex Court further found that had the intentions of the Legislature was to permit the assessee to file the return u/s 139(4) also, the use of the expression "section 139" alone would have been sufficed. The Legislature would not have said that it should be filed u/s 139(1). When the Legislature specifically refers to section 139(1), it cannot be the intention to permit the assessee to file the return u/s 139(4) also. The Supreme Court specifically observed that it cannot be said that the Legislature without any purpose or intent specified only the sub-sections (1) and (2) and the conspicuous omission of sub-section (4) has no meaning or purpose behind it. Sub-section (4) of section 139 cannot by any stretch of imagination control the operation of sub-section (1) wherein a fixed period for furnishing the return is stipulated.

9. This judgment of the Apex Court was not considered by the CIT(A). The assessee also had no occasion to bring this judgment to the notice of the CIT(A). When Legislature specifically refers only section 139(1) and omitted to refer section 139(4), this Tribunal is of the considered opinion that making a reference to section 139(4) cannot be proper. This judgment of the Apex Court in *Prakash Nath Khanna's* (*supra*) was also not brought to the notice of the bench of this Tribunal when the case of *Muthuletchumi Janardanan*(*supra*) was decided. Therefore, this Tribunal apparently followed the judgment of the Punjab & Haryana High Court in the case of *Ms. Jagriti Aggarwal* (*supra*). The judgment of the Kerala High Court in the case of *V.R. Desai* (*supra*) also was not considered by this Tribunal in the case of *Muthuletchumi Janardanan*(*supra*). Therefore, this Tribunal is of the considered opinion that the matter needs to be reconsidered by the assessing officer in the light of the judgment of the Apex Court in the case of *Prakash Nath Khanna*(*supra*) and the judgment of the Kerala High Court in the case of *V.R. Desai* (*supra*). Accordingly, the orders of the lower authorities are set aside and the issue of exemption u/s 54(F) is restored to the file of the assessing officer. The assessing officer shall reconsider the issue afresh in the light of the judgment of the Apex Court in the case *Prakash Nath Khanna* (*supra*) and the judgment of the Kerala High Court in *V.R. Desai*'s case (*supra*) and thereafter decide the same in accordance with law after giving reasonable opportunity of hearing to the assessee.

10. In the result, both the appeals of the assessee and the revenue stand allowed for statistical purpose.