IN THE ITAT BANGALORE BENCH 'C'

Vinay Mishra

v.

Assistant Commissioner of Income-tax

IT Appeal No. 895 (Bang.) of 2012

s.p. no. 124 (Bang.) of 2012

[ASSESSMENT YEAR 2009-10]

OCTOBER 12, 2012

ORDER

Jason P. Boaz, Accountant Member -This appeal and stay petition by the assessee are directed against the order of the Commissioner of Income-tax (Appeals)-III, Bangalore, dated June 26, 2012 for the assessment year 2009-10.

2. The facts of the case, in brief, are as under :

The assessee is a director of M/s. Marketics Technologies (India) P. Ltd., Bangalore and derives his income from salary, business, capital gains and other sources. The assessee filed his return of income for the assessment year 2009-10 on July 20, 2009 declaring total income of Rs. 1,53,44,940. The return was processed under section 143(1) of the Income-tax Act, 1961 (hereinafter referred to as "the Act") and subsequently taken up for scrutiny by issue of notice under section 143(2) of the Act. In the course of assessment proceedings, it was seen that in the relevant period, the assessee sold certain shares which resulted in long-term capital gains (LTCG). The assessee invested the entire capital gains in the acquisition of a house property in the United States of America and claimed exemption under section 54F of the Act. The Assessing Officer called upon the assessee to substantiate his claim for exemption under section 54F particularly in view of the fact that the asset purchased is outside India. The assessee submitted that he is eligible to claim deduction under section 54F of the Act notwithstanding the fact that the asset purchased is outside India, in the USA and relied on a decision of the Mumbai Bench of the Tribunal in the case of *Mrs. Prema P. Shah* v. *ITO* [2006] 100 ITD 60 (Mum.). The Assessing Officer did not agree with the contentions of the assessee on the ground that the Act is applicable only to the whole of India and therefore on a plain reading of the provisions, the purchase/construction of a residential house must necessarily be in India and not outside India and rejected the claim for exemption under section 54F of the Act. In come to this finding the Assessing Officer also relied on the decision of the Ahmedabad Bench of the Tribunal in the case of *Leena J. Shah* v. *Asst. CIT* [2006] 6 SOT 721 (Ahd).

3. Aggrieved by the order of assessment for the assessment year 2009-10 passed under section 143(3) of the Act on December 29, 2011, the assessee went in appeal before the Commissioner of Income-tax (Appeals), who vide his order dated June 26, 2012 confirmed the order of assessment. The learned Commissioner of Income-tax (Appeals) in his appellate order held that the order of the Income-tax Appellate Tribunal, Ahmedabad, relied on by the Assessing Officer, is to be preferred over the decision of the Income-tax Appellate Tribunal, Mumbai which was relied upon by the assessee. The learned Commissioner of Income-tax (Appeals) in his order was of the opinion that in both cases relied upon by the assessee, the claim for exemption was by a non-resident Indian (NRI) whereas the assessee is a resident tax payer who is also a director of a company located at Bangalore and that there are specific provisions of the Income-tax Act to regulate the income and grant exemptions to those assessees holding non-resident Indian status. The learned Commissioner of Income-tax (Appeals) has further opined that merely because the provisions of section 54F do not mandate that in order to be eligible to claim exemption under section 54F, the investment should be made in a house property in India, it cannot be construed that investment in a house property in a foreign country will make one entitled for exemption. In this view of the matter, the learned Commissioner of Income-tax (Appeals) dismissed the assessee's appeal.

4. Aggrieved by the order of the learned Commissioner of Income-tax (Appeals) dated June 26, 2012, the assessee is now in appeal, it has been contended as under :

"1. The order of the Commissioner of Income-tax (Appeals) is opposed to law, facts and circumstances of the case.
2. The Commissioner of Income-tax (Appeals) erred in confirming the denial of exemption from capital gains claimed under section 54F of the Act.
3. The Commissioner of Income-tax (Appeals) failed to appreciate that the appellant has fulfilled all the conditions to claim exemption under section 54F of the Act and hence the denial is unjustified.
4. The Commissioner of Income-tax (Appeals) is wrong in his interpretation of the provisions of section 54F that the intention of the Legislature is to allow exemption in respect of the houses bought or constructed in India only, and not if the investment is made in house property abroad.
5. The Commissioner of Income-tax (Appeals) erred in holding that the decision of the Mumbai Bench of the hon'ble Tribunal in the case of *Mrs. Prema P. Shah* [2006] 282 ITR (AT) 211 (Mumbai) is not applicable to the assessee's case and went wrong in further holding that the said decision is applicable only to the assessee's who are non residents.
6. The Commissioner of Income-tax (Appeals) is erred following the decision in Leena J. Shah [2006] 6 SOT 721 (Ahd) which is clearly distinguishable. Reliance placed by him on section 115F of the Act is not called for in the present facts of the case.
7. The Commissioner of Income-tax (Appeals) erred in not considering the

submissions made during the course of appellate proceedings in its entirety and in its proper perspective."

5. The grounds raised in this appeal require us to deal with the only issue of whether the assessee is eligible to avail of exemption under section 54F of the Act in the facts and circumstances of the case.

6. Learned counsel for the assessee submitted that section 45 of the Act is the charging section for taxing capital gains arising out of sale of a capital asset and it is pertinent to note that the charging section specifically excludes section 54F from its ambit. It was argued that the Assessing Officer proceeded on the wrong assumption that only when the property is situated in India, the exemption provisions would come into operation. A plain reading of section 54F of the Act would show that it nowhere contemplates that the new residential house should be situated only in India. It is submitted by learned counsel for the assessee that whenever the Legislature felt so, it had categorically spelt out the legislative intention as is the case in the provisions of sections 10(20A), 10(20B), 10(22), 10(24), 11(1)(a), 54E to 54ED and 115C(f) of the Act.

7. Learned counsel for the assessee submitted that it is settled law that if the words of the statute are precise and unambiguous, then nothing more would be required to explain those words in their ordinary and natural sense. It was also submitted that it is also settled law that the court cannot read anything into a statutory provision which is plain and unambiguous. To support this proposition learned counsel for the assessee relied on a number of decisions/judgments of the hon'ble apex court and various High Courts and more particularly on the decision of the hon'ble Karnataka High Court in the case of *DIT(International Taxation)* v. *Mrs. Jennifer Bhide* [2012] 349 ITR 80 in I. T. A. No. 169 of 2011 wherein, the hon'ble High Court, while considering the issue as to whether an investment in joint names of the assessee and her spouse would preclude the assessee from availing of exemption under sections 54 and 54EC of the Act, held that there is no specific condition in section 54 or 54CC that the investment/construction should be there in the name of the assessee only. He drew our attention to paragraphs 7 and 8 of the judgment, wherein the court held as under (page 84) :

"7. Once the sale consideration is invested in any of these manner the assessee would be entitled to the benefit conferred under this provision. In the absence of an express provision contained in these sections that the investment should be in the name of the assessee only any such interpretation were to be placed, it amounts to the court introducing the said word in the provision which is not there. It amounts to the court legislating when Parliament has deliberately not used those words in the said section. That is the view taken by the hon'ble Madras High Court and the hon'ble Punjab and Haryana High Court and we respectfully agree with the view expressed in the aforesaid judgments.

8. In the instant case the assessee has purchased the property jointly with her husband. She has invested the money in rural bonds jointly with her husband. It is nobody's case that her husband contributed any portion of the consideration for acquisition of the property as well as bonds. The source for acquisition of the property and the bonds is the sale consideration. It is not in dispute. Once the sale consideration is utilised for the purpose mentioned under sections 54 and 54EC, the assessee is entitled to the benefit of those provisions. As the entire consideration has flown

from the assessee and no consideration has flown from her husband, merely because either in the sale deed or in the bond her husband's name is also mentioned in law he would not have any right. In that view of the matter, the assessee cannot be denied the benefit of deduction of the aforesaid amount."

8. It is submitted by learned counsel for the assessee that the exemption under section 54F is granted to an individual or Hindu undivided family who does not own any house and the provision being beneficial, it has to be interpreted reasonably and liberally. In the case of *Bajaj Tempo Ltd.* v. *CIT* [1992] 196 ITR 188, the hon'ble apex court held that the beneficial provisions should be interpreted liberally in favour of the exemption/ deduction to the tax payer. In *CIT* v. *Ravinder Kumar Arora* [2012] 342 ITR 38, the hon'ble Delhi High Court held that section 54F of the Act being a beneficial provision should be interpreted liberally in favour of the exemption/deduction to the tax payer and deduction should not be denied on hypertechnical grounds.

9. It is contended by learned counsel for the assessee that the decision of the Ahmedabad Bench in the case of *Leena J. Shah* (*supra*) has been delivered without detailed reasons, in one paragraph, on the assumption that there is ambiguity in the provisions. It is submitted that the Mumbai Benches of the Tribunal chose not to follow the said decision in the *Leena J. Shah* case (*supra*) as there was no ambiguity on a plain reading of the provision of section 54/54F of the Act. It is contended by learned counsel for the assessee that the subsequent decision of the Mumbai Bench of the Tribunal in the case of *Mrs. Prema P. Shah and Sanjiv P. Shah* (*supra*) is a speaking order which goes to the genesis of the provisions, the purpose for which the provisions had been introduced and what is sought to be achieved by these provisions. It is submitted that the Mumbai Bench of the Income-tax Appellate Tribunal has categorically held that if all other conditions prescribed are complied with, exemption under section 54/54F cannot be denied for the reason that the residential house acquired is situated outside India. It was also pointed out by learned counsel for the assessee that another Bench of the Income-tax Appellate Tribunal, Mumbai in the case of *ITO* v. *Dr. Girish M. Shah* in I. T. A. No. 3582/Mum/2009, dated 19-2-2010 followed the decision in the case of *Mrs. Prema P. Shah and Sanjiv P. Shah* (*supra*).

10. It was submitted that the provisions of sections 54 and 54F of the Act are pari materia and on a parity of reasoning, the house property purchased by the assessee in the U. S. A. from out of the sale proceeds of the long-term capital asset satisfies the conditions under section 54F of the Act. Learned counsel for the assessee contended that when the Income-tax Act, 1961 taxes the income of a resident on the sale of house property situated outside India, then the logical consequence of such a power is to confer upon such a person all the benefits that flow from the provisions of the Act on investment in house property situated outside India unless specifically prohibited.

11. It is submitted by learned counsel for the assessee that in any event since there are two views possible on the interpretation of the provisions of section 54F of the Act, the one which is beneficial to the tax payer should be preferred. In support of this proposition, learned counsel for the assessee relied on the judgments in the decision of the hon'ble apex court in the case of *CIT* v. *Strawboard Mfg. Co. Ltd.* [1989] 177 ITR 431 and of the decision of the Ahmedabad Bench of

the Tribunal in the case of *Asstt. CIT* v. *Vodafone Essar Gujarat Ltd.* [2010] 38 SOT 51 (Ahd.). It was further submitted by learned counsel for the assessee that even in the Central Board of Direct Taxes Circular No. 346 dated June 30, 1982 referred to by the Assessing Officer, it is nowhere stated or required that the house construction should be in India and does not mandate that the construction of house sought to be promoted in India-specific. In other words a circular cannot make a provision which can put an assessee in a disadvantageous position than what the law provides. It was also argued that even in the external aid to interpretation, Notes on Clauses of the Finance Bill ([1982] 134 ITR (St.) 128), the word "India insistence is not found. In view of the above submissions, learned counsel for the assessee submitted that the assessee had correctly/rightly claimed the exemption under section 54F of the Act and prayed for the assessee's claim for exemption thereunder to be allowed.

12. Per contra, the Commissioner of Income-tax-Departmental representative, strongly defended and supported the orders of the authorities below and placed reliance on the order of the learned Commissioner of Income-tax (Appeals). He further argued that it is in-built in the provisions of section 54F of the Act that the investment in the new asset should be in "India". The learned Departmental representative in support of this proposition placed reliance on the decision of the hon'ble apex court in the case of *Oxford University Press* v. *CIT* [2001] 247 ITR 658 and *American Hotel and Lodging Association Educational Institute* v. *CBDT* [2008] 301 ITR 86. Written submissions in this regard were also filed by the learned Departmental representative.

13. In his rejoinder, learned counsel for the assessee submitted that the decisions relied upon by the learned Departmental representative are distinguishable. It was pointed out by learned counsel for the assessee that both these decisions of the hon'ble apex court (cited supra) interpreted the provisions of section 10(22) of the Act which was later on replaced by section 10(23C) of the Income-tax Act. Such an interpretation, learned counsel for the assessee argued, would not arise for consideration in the present case which dealt with the eligibility for exemption under section 54F of the Act.

14. We have heard both parties and carefully perused and considered the order of assessment, the impugned order of the learned Commissioner of Income-tax (Appeals) and the rival written submissions made. The provisions of section 54F of the Act reads as under :

". . . where in the case of an assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of a long-term capital asset, being buildings or lands appurtenant thereto, and being a residential house, the income of which is chargeable under the head 'Income from house property' (hereafter in this section referred to as the original asset), and the assessee has within a period of one year before 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, then, instead of the capital gain being charged to income-tax as income of the previous year in which the transfer took place, it shall be dealt with in accordance with the following provisions of this section."

15. According to the Assessing Officer, the assessee has complied with all the conditions stipulated in section 54F of the Act, except that the new asset, the residential house acquired, is situated outside India. The Ahmedabad Bench of the Tribunal while deciding the case of the

Leena J. Shah (*supra*) held that when the residential house is situated outside India, the assessee would not be eligible for exemption under section 54 of the Act. The Bench felt that there is some ambiguity in the wordings of section 54F of the Act and therefore the Tribunal resorted to taking the help of external aid to interpret the provisions.

16. Subsequently, the Mumbai Bench of the Income-tax Appellate Tribunal in the case of *Mrs. Prema P. Shah and Sanjiv P. Shah* (*supra*) relied on by the assessee which was subsequently followed by the another Bench of the Income-tax Appellate Tribunal, Mumbai in the case of *Dr. Girish M Shah* (*supra*), was of the view that the applicability of exemption under section 54 is not excluded in case new property is purchased in a foreign country, the assessee having acquired a residential property on lease in the U.K. after selling residential property in India exemption under section 54 was allowable since the lease is valid for 150 years and the assessee is as good as absolute owner of property ; claim for exemption could not be denied even on the ground that the assessee had utilised borrowed funds for investment in the said property. In accordance with this view, the hon'ble Tribunal in paragraph 27 of its order held as under (page 223) :

"27. In short, we are of the considered view, for the reasons stated hereinabove, the assessee is entitled to the benefit under section 54 of the Act. It does not exclude the right of the assessee to claim the property purchased in a foreign country, if all other conditions laid down in the section are satisfied, merely because the property acquired is in a foreign country."

17. Subsequently, another Bench of the Mumbai, Income-tax Appellate Tribunal in the case of *Dr. Girish M. Shah* (*supra*) following the decision in the case of *Mrs. Prema P. Shah and Sanjiv P. Shah* (*supra*) held that the assessee was not to be denied exemption under section 54F of the Act merely on the ground that the purchase/construction of the residential house must be in India and not outside India if all other conditions laid down in the section are satisfied. The latter decision of the Mumbai, Income-tax Appellate Tribunal in the case of Dr. Girish M. Shah noted the order of the Ahmedabad Bench of the Tribunal in the case of Leena J. Shah [2006] 6 SOT 721 (Ahd) but still preferred to follow the order of the Mumbai Income-tax Appellate Tribunal in the case of *Mrs. Prema P. Shah & Sanjiv P. Shah* (*supra*).

18. On a plain reading of the provisions of section 54F of the Act, we do not find anything therein to suggest that the new residential house acquired should be situated in India. The jurisdictional High Court in the case of *Mrs. Jennifer Bhide* (*supra*) has held that introducing a word which is not there into a section amounts to legislating when Parliament has not used these words in the said section. In view of this decision, we are precluded from reading the words "in India" into section 54F of the Act, when Parliament in its legislative wisdom has deliberately not used the word "in India" in section 54F of the Act. Therefore, in view of the discussion above, we follow the latter decisions of the Mumbai Benches of the Income-tax Appellate Tribunal in the cases of *Mrs. Prema P. Shah and Sanjiv P. Shah* (*supra*) and *Dr. Girish M Shah* (*supra*). The provisions of section 54 of the Act which was considered by the Mumbai Benches of the Income-tax Appellate Tribunal in the cases of *Mrs. Prema P. Shah and Sanjiv P. Shah* (*supra*) and *Dr. Girish M. Shah* (*supra*) are in pari material with section 54F of the Act and therefore these two decisions of the Mumbai Benches of the Tribunal are equally applicable while considering the exemption under section 54F of the Income-tax Act and hence would be

applicable to the present case of the assessee. In this view of the matter, we allow the assessee's claim for exemption under section 54F of the Act since all conditions laid down in this section are satisfied for availing of the said exemption.

19. In the result, the assessee's appeal is allowed.

20. In view of the assessee's appeal in I. T. A. No. 895/Bang/2012 being disposed of as above, the stay petition filed by the assessee in S.P. No. 124/ Bang/2012 becomes infructuous and is accordingly dismissed.