

**IN THE INCOME TAX APPELLATE TRIBUNAL**

HYDERABAD BENCH 'B', HYDERABAD

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER  
AND SMT. ASHA VIJAYARAGHAVAN, JUDICIAL MEMBER**

ITA No.1774/Hyd/12 : Asstt. Year 2003-04

Shri Shyamlal Tandon, V/s. Income Tax Officer  
Hyderabad Ward 7(4), Hyderabad

**( PAN - ADNPT 6180 A )**

(Appellant)

(Respondent)

*Appellant by : Shri P.Murali Mohan Rao*

*Respondent by : Shri Solgy J.Kottaram DR*

Date of Hearing	30.12.22013
Date of Pronouncement	21.1.2014

**ORDER**

**Per Smt. Asha Vijayaraghavan, Judicial Member:**

This appeal by the assessee is directed against the order of the Commissioner of Income-tax(Appeals) Vijayawada dated 18.7.2012 for the assessment year 2003-04.

2. Effective grievance of the assessee in this appeal relates to disallowance of assessee's claim for relief under S.54F of the Act. It is also the grievance of the assessee in this appeal that the Assessing Officer was not justified in treating the entire sale consideration for the transfer as the capital gains liable to be in the hands of the assessee.

3. Facts of the case in brief are that the assessee, an individual, has not filed his return of income for the assessment year 2003-04. From the information received from DDIT(Inv), it came to light that the assessee has earned capital gains, which were not disclosed, and consequently, within the meaning of S.147 of the Act, the Assessing Officer, held the view that there was escapement of income chargeable to tax, to the extent of such capital gains. Accordingly a notice under S.148 of the Act was issued on the assessee. In

response thereto, assessee filed return declaring 'nil' income. During the course of assessment proceedings, it was submitted that the assessee, alongwith his father Shri Pannalal Tandon, purchased a piece of land on 17.3.1978 admeasuring 1040 sq. yards, Plot No.6/A in Old Survey No.129/35/D2 at Road No.12, Banjara Hills, Hyderabad for Rs.34,320. The assessee and his son had demolished the house bearing No.8-2-682/3 standing on the above plot and gave the property for development. They have entered into development Agreement-cum-irrevocable General Power of Attorney on 12.7.2000 with M/s. Palace Constructions, Hyderabad. As per clause (4) of the development agreement, both the father and son were entitled to share the built up area on 50:50 basis in exchange of transfer of the land of 1040 Sq. yards. As M/s. Palace Constructions could not commence the construction work as per the agreement, the liability was transferred to Shri Ravi Kumar Ohri who had taken up the construction of the building, which later came to be known as 'Ohri's Banjara' and got registered 50% of the building with the undivided share in the land, in favour of his family members and himself for a total consideration of Rs.57.15 lakhs. According to the developer M/s. Palace Constructions, the possession of the built-up area had been handed over to the assessee on 29.4.2002. Subsequently, the assessee's father Shri Pannalal Tandon and brother Shri Rajesh Tandon have given their 50% share in the built up area to Shri Ravi Kumar Ohri on lease for 25 years by virtue of lease deeds dated 10.5.2002 and 6.7.2002. It was observed by the Assessing Officer that the name of Shri Rajesh Tandon figured only in the lease deeds, though his name was not appeared in the purchase deed dated 17.3.1978 in respect of land measuring 1040 sq. yards. However, neither the father nor the son have has declared any long term capital gains on transfer of the land of 1040 sq. yards in exchange for 50% of the built up area which is of the value of Rs.57,15,000 either in the year in which the development agreement was entered into, relevant to assessment year 2001-02 or in the relevant assessment year in which transfer of 50% of the land and building took place. According to the Assessing Officer, the long term capital gain worked out to Rs.55,75,661 of

which the assessee's share came to Rs.27,87,831, which was assessable to tax in the assessment year 2001-02. Since the assessee had not declared any capital gains in the returns of income filed for any of the assessment years, the Assessing Officer came to the conclusion that the income chargeable to tax has escaped assessment to the extent of Rs.27,87,831. The Assessing Officer, therefore, referring to the case-law in the form of decisions of the Tribunal on the point, and in the absence of any explanation from the assessee to the proposed action of assessing the capital gains in the year under appeal, completed the assessment, on a total income of Rs.27,87,831, which is the amount of capital gains worked out as above, vide order of assessment dated 10.12.2008 passed under S.143(3) read with S.147 of the Act.

4. On appeal before the CIT(A), the assessee raised various contentions, besides filing written submissions, to the effect that the Assessing Officer should have given due cognizance to the cost of acquisition of the land; cost of construction; cost of improvement and exemption under S.54 of the Act. The CIT(A) referred the various submissions of the assessee on these aspects to the Assessing Officer and called for a remand report. The Assessing Officer submitted his remand report on the above aspects, vide remand dated 24.3.2010. On consideration of the matter in the light of the contentions of the assessee and his Authorised Representative, remand report of the Assessing Officer and the further submissions of the Authorised Representative for the assessee on the said remand report, the CIT(A) upheld the Assessing Officer's action in not taking into cognizance the cost of the property demolished or the contentions with regard to cost of improvement as part of the cost of acquisition, on the ground that what was handed over by the assessee to the developer in terms of the development agreement was mere vacant land and nothing else; and also held that the assessee is not entitled to relief under S.54F, though he gave certain relief in the matter of rate to be adopted for estimation of the cost of the land, to be adopted as cost of acquisition by the assessee. Since we are concerned in this appeal only with regard to the action

of the CIT(A) in rejecting the assessee's claim for exemption, we reproduce below the reasoning given by the CIT(A) on that aspect in para 6.3.2 of the impugned order -

**"6.3.2. From verification of the address of the property in internet through the well known search engine Google Search and the well known website "Google Earth", it is seen that the property in D.No.8-2-682/3, Road no.12 Banjara Hills, Hyderabad is actually a commercial property and not a residential property. Though in the approval plan filed by the appellant, the property is shown as a residential house, in reality the same is actually a commercial property which houses the famous hotel by the name 'Ohris', which is opposite to the Income Tax Colony in Road No.12 Banjara Hills, Hyderabad. This is one of the most prominent commercial buildings in Hyderabad city and by no stretch of imagination, it can be termed as a residential house. The property has been given for development to M/s. Hotel Kamal Ltd., which is running the 'Ohris Hotel'. The commencement of the business of the hotel started in around 2002, just when the building was completed. In the 'Google Earth', one can get photographs/contours of various places as appearing in different periods of time. The co-ordinates of the site as in the approved plan match with the co-ordinates in the "Google Earth" relating to Ohris Hotel, Banjara Hills in D.No.8-2-682/3, during the impugned period when the appellant is supposed to have constructed the residential house. Since the property built is a commercial property and not a residential property, there is no justification for claiming deduction under S.54F on the ground that a residential house has been built within 3 years. Accordingly, the appellant's claim made during the appeal proceedings for allowance for exemption u/s. 54F of the Act, is hereby rejected."**

Aggrieved by the rejection of his claim for relief under S.54F of the Act, assessee is in this appeal before us.

5. The learned counsel for the assessee reiterating the contentions urged before the lower authorities submitted that the assessee is very much entitled for relief under S.54F of the Act. He submitted that the assessee has given land for development and got in return constructed residential property, which is eligible for relief under S.54F of the Act. He further submitted that the land was given by the assessee to the developer for construction of a residential building. In this behalf, he furnished before us a copy of the approved plan of the building. He also placed reliance on the decision of the Tribunal dated 27.12.2011 in ITA No.1014/Hyd/2009 and others in the case of Shri M.V. Subramanyeswara Reddy (HUF), Hyderabad and others and submitted that subsequent change in the usage of the property does not disentitle the assessee

to the relief under S.54F, if what was acquired was originally a residential property. He further submitted that the CIT(A) is not justified in relying on the information gathered from the internet, such as 'Google Earth' which not an authentic proof to hold that the property in question is a commercial property.

6. The Learned Departmental Representative, on the other hand, strongly supported the orders of the lower authorities and submitted that the property acquired, has clearly been demonstrated by the CIT(A) in the impugned order to be a commercial property and as such the assessee was clearly held to be not eligible for exemption under S.54F of the Act.

7. We have considered the rival submissions and perused the orders of the Revenue authorities. It is evident from the impugned orders of the lower authorities and other material on record that intention of the parties when the development agreement was entered into was to construct a residential property. Municipal permission has also been obtained only for construction of a residential complex. Ultimately, the assessee has received possession of such residential property. It may be true that the said property was put to use subsequently for commercial use. Merely because of change in the use of such property for non-residential purposes, it cannot be said that what was acquired by the assessee was not a residential property, but a commercial one. Subsequent change in the user of the property does not disentitle the assessee to relief under S.54F of the Act, as held by Hyderabad Bench B of this Tribunal in the case of Shri M.V.Subramanyeswara Reddy(HUF), Hyderabad (supra), wherein this Tribunal vide its order dated 27.12.2011, has held, vide para 48 thereof, as follows-

48. We have heard both the parties. We find that the CIT(A) has accepted the claims of the assessee for relief under the provisions of S.54F of the Act, keeping in view the following factual aspects of the matter-

- a) Perusal of the sale deed shows that the property was a residential property especially the narration at para 10 at Page 14 of the deed, which has been reproduced by the CIT(A) at page 4 at para 2.4 of his order.
- b) The plan attached to the sale deed shows the construction of bed room, Kitchen, study etc., showing that the property is residential one.
- c) The MCH permission dated 10.05.2000 has approved the property as “residential complex”
- d) The bank guarantee for security deposit given by State Bank of India to MCH also refers to the property as residential complex.
- e) Permission / No objection certificate given by the Fire Service Department also refers to the property as residential complex
- f) The memorandum of understanding dated 14.01.2001 entered for the joint development and construction of the said property also refers to the construction of residential complex.

We find no infirmity in the view taken by the CIT(A) as to the residential nature of the property purchased by the assessee, considering the factual aspects noted above. Even though the property was subsequently leased out to M/s.APP Lab Technology P Ltd, and it has been used for non-residential purposes, on that ground, the deduction u/s.54F cannot be denied. Mere non residential use subsequently would not render the property ineligible for benefit u/s.54F, if it is otherwise a residential property, as held by the Delhi Bench of the Tribunal in the case of Mahavir Prasad Gupta Vs JCIT (5 SOT 353). Respectfully following the said decision of the Tribunal, we are of the opinion that the CIT(A) had rightly allowed deduction u/s.54F.”

8. Facts and circumstances in the present case being similar to those considered by the Tribunal in the above case, consistent with the view taken in the above order, to which one of us, viz. the author member, is a party, we hold that notwithstanding the change in the user of a property, assessee is entitled to relief under S.54F of the Act, if what was sought to be acquired and originally acquired is a residential property. In that view of the matter, we set aside the impugned order of the CIT(A), and restore the matter to the file of the Assessing Officer, with a direction to consider the assessee’s claim for exemption under S.54F of the Act, subject to fulfillment of other conditions, in accordance with law and after giving reasonable opportunity of hearing to the assessee. Assessee’s grounds on this issue are partly allowed for statistical purposes.

9. In view of our decision on the aspect of relief under S.54F of the Act, we are not inclined to go into the other aspects of the matter, raised in other

grounds of the appeal before us, which are rendered to be only of academic nature. Any how, we find that neither the Assessing Officer nor the CIT(A) has dealt with the objection of the assessee, if any before them, that the entire sale consideration on transfer should not be treated as capital gains and taxed as such. In this view of the matter, we hold that if the Assessing Officer, on verification of the assessee's claim as to fulfillment of conditions laid down for that purposes, denies relief claimed by the assessee under S.54F of the Act, the Assessing Officer shall examine the contentions of the assessee against his action of treating the entire sale consideration received on transfer as the capital gains assessable in the hands of the assessee. Assessee's grounds on these issues are allowed for statistical purposes.

10. In the result, assessee's appeal is allowed for statistical purposes.

Order pronounced in the court on 21<sup>st</sup> January, 2014

**Sd/-**

**Sd/-**

**(Chandra Poojari )  
Accountant Member**

**(Asha Vijayaraghavan)  
Judicial Member**

Dt/- 21<sup>st</sup> January, 2014

Copy forwarded to:

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2. Income Tax Officer Ward 7(4), Hyderabad
3. Commissioner of Income-tax(Appeals), Vijayawada
4. Commissioner of Income-tax Vijayawada
5. Departmental Representative, ITAT, Hyderabad.

**B.V.S**