IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No.12 of 2015 (O&M)
Date of decision: 4.11.2015

Commissioner of Income Tax, Faridabad

……Appellant

Shri Kapil Kumar Agarwal

…..Respondent

CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE HARI PAL VERMA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr. Tejinder K.Joshi, Advocate for the appellant.
(ITA No.12 of 2015)
Mr. Denesh Goyal, Advocate for the appellant.
(ITA Nos.26 and 161 of 2015)
Mr. Sanjay Bansal, Sr.Advocate with Mr. B.M.Monga, Advocate for the respondent (in ITA No.12 of 2015).

Ajay Kumar Mittal,J.

1. This order shall dispose of ITA Nos.12, 26 and 161 of 2015 as learned counsel for the parties are agreed that the issue involved in all these appeals is identical. However, the facts are being extracted from ITA No.12 of 2015.

2. ITA No.12 of 2015 has been filed by the revenue under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 16.7.2013, Annexure-A.III passed by the Income Tax Appellate Tribunal, Delhi Bench 'D', New Delhi in ITA No.2975/DEL/2013 for the

assessment year 2009-10. The substantial question of law reads as under:-

> "Whether on the facts and in the circumstances of the case, the Tribunal was legally correct in reversing the finding of the CIT (A) and that of the Assessing Officer whereby the addition of ₹1.21 crores was made by disallowing the claim for exemption under section 54F of the Income Tax Act, 1961 as the same amount of sale consideration had not been utilized towards the purchase of property prior to the date of sale as per the said provisions?"

3. A few facts relevant for the decision of the controversy involved as narrated in ITA No.12 of 2015 may be noticed. The return declaring income of ₹ 1,27,04,920/- was filed by the assessee on 29.7.2009.Assessment was completed under Section 143(3) of the Act on 30.12.2011, Annexure A.1 at total income of ₹ 2,48,37,560/- after making an addition of ₹ 1,21,32,636/- on account of capital gain as the assessee had claimed benefit of section 54F of the Act even though he had not entirely sourced the amount invested in his new asset from capital gain receipts. On appeal by the assessee, the Commissioner of Income Tax (Appeals) [CIT (A)] vide order dated 11.3.2013, Annexure A.II, upheld the addition made by the Assessing Officer. Aggrieved thereby, the assessee filed appeal before the Tribunal. The Tribunal vide order dated 16.7.2013, Annexure A.III allowed the appeal relying upon decision of the Kerala High Court in ***Income Tax Officer vs. K.C.Gopalan,*** (1999) 107 Taxman 591 (Ker.) holding that section 54F of the Act did not put any restriction whether the investment was made out of loan amount or from the sale consideration. It was held by the Tribunal that for availing the benefit of Section 54F of the Act, amount invested in the new asset need not be entirely sourced from

capital gain. Hence the instant appeals by the revenue.

4. We have heard learned counsel for the parties.

5. Mr. Tejinder K. Joshi, learned counsel for the revenue in ITA No.12 of 2015 submitted that the shares were sold by the assessee on 8.11.2008 and 16.3.2009 and it was not from the said sale proceeds that the property worth ₹ 3.22 crores was purchased by the assessee. It was urged that in such circumstances, capital gains amounting to ₹ 1.3 crores were exigible to tax as benefit under Section 54F of the Act was not available to the assessee. Reliance was placed upon sub section 4 of Section 54F of the Act to support the contention.

6. Mr. Denesh Goyal, learned counsel for the appellant in ITA Nos.26 and 161 of 2015 submitted that the Tribunal was in error in giving the benefit of Section 54F to the assessee in view of judgment of the Kerala High Court in ***K.C.Gopalan's*** case (supra). It was contended by the learned counsel that the case of ***K.C.Gopalan'***s case (supra) was for the assessment year 1984-85 whereas the amendment was brought in the provisions of capital gains in Section 54F w.e.f 1.4.1988 whereby sub section (4) was inserted in the said provision. On the aforesaid premises, it was urged that no benefit could be derived by the assessee from Section 54F of the Act or any other provision which had followed the said judgment.

7. On the other hand, learned counsel for the respondent-assessee supported the impugned order and relied upon judgments in ***K.C.Gopalan's*** case (supra), ***CIT vs.Anandraj,*** (2015) 56 Taxmann.com 176 (Karn.), ***CIT vs. Rajesh Kumar Jalan,*** (2006) 286 ITR 274 (Gau.) and ***CIT vs. V.R.Desai,*** (2011) 197 Taxman 52 (Ker.).

8. The issue that arises for consideration relates to whether the assessee in order to avail benefit of Section 54F of the Act is required to utilize the amount for the purchase of the new asset from the sale proceeds of the original capital asset only.

9. It would be expedient to refer to Section 54F of the Act, the relevant portion thereof reads as under:-

> **"54F.** (1) Subject to the provisions of sub-section (4), where, in the case of an assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of any long-term capital asset, not being a residential house (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* (hereafter in this section referred to as the new asset), the capital gain shall be dealt with in accordance with the following provisions of this section, that is to say,—
>
> (*a*) if the cost of the new asset is not less than the net consideration in respect of the original asset, the whole of such capital gain shall not be charged under section 45 ;
>
> (*b*) if the cost of the new asset is less than the net consideration in respect of the original asset, so much of the capital gain as bears to the whole of the capital gain the same proportion as the cost of the new asset bears to the net consideration, shall not be charged under section 45:
>
> **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*) constructs any residential house, other than the new asset, within a period of three years after the date of transfer of the original asset; and

(*b*) 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" .

Explanation.—For the purposes of this section,—

"net consideration", in relation to the transfer of a capital asset, means the full value of the consideration received or accruing as a result of the transfer of the capital asset as reduced by any expenditure incurred wholly and exclusively in connection with such transfer.

(2) & (3) xx xx xx xx xx xx xx xx

(4) The amount of the net consideration which is not appropriated by the assessee towards the purchase of the new asset made within one year before the date on which the transfer of the original asset took place, or which is not utilised by him for the purchase or construction of the new asset before the date of furnishing the return of income under section 139, shall be deposited by him before furnishing such return such deposit being made in any case not later than the due date applicable in the case of the assessee for furnishing the return of income under sub-section (1) of section 139 in an account in any such bank or institution as may be specified in, and utilised in accordance with, any scheme which the Central Government may, by notification in the Official Gazette, frame in this behalf and such return shall be accompanied by proof of such deposit ; and, for the purposes of sub-section (1), the amount, if any, already utilised by the assessee for the purchase or construction of the new asset together with the amount so deposited shall be deemed to be

the cost of the new asset :

Provided that if the amount deposited under this sub-section is not utilised wholly or partly for the purchase or construction of the new asset within the period specified in sub-section (1), then,—

(*i*) the amount by which—

(*a*) the amount of capital gain arising from the transfer of the original asset not charged under section 45 on the basis of the cost of the new asset as provided in clause (*a*) or, as the case may be, clause (*b*) of sub-section (1),

exceeds

(*b*) the amount that would not have been so charged had the amount actually utilised by the assessee for the purchase or construction of the new asset within the period specified in sub-section (1) been the cost of the new asset,

shall be charged under section 45 as income of the previous year in which the period of three years from the date of the transfer of the original asset expires ; and

(*ii*) the assessee shall be entitled to withdraw the unutilised amount in accordance with the scheme aforesaid.

10. Under sub section (1) of Section 54F of the Act, the amount of capital gains exempt under this provision is equal to the difference between the cost of the new asset and the net consideration received from the transfer of the original asset. Where the cost of the new asset is equal to or exceeds the net consideration received, in that situation, the entire amount of capital gains is exempt under this section but if the cost of the new asset is less than the net consideration received, then the proportionate exemption is available to the assessee. The transfer has to be of long term capital asset not being a residential house and the assessee is required to purchase within a period of one year before or two years after the date on which the transfer takes place

or within three years after the said date, construct a residential house. In other words, where an assessee purchases a residential house within a period of one year before or two years after the date on which transfer takes place or has constructed a residential house within three years after the said date, the capital gains shall be computed as per clauses (a) and (b) of sub section (1) of Section 54F of the Act.

11. Finance Act, 1987 had inserted sub section (4) of Section 54F of the Act effective from 1.4.1988. According to sub section (4) of Section 54F of the Act where the amount of net consideration is not utilized for the purchase or the construction of a new residential house, it should be deposited in an account in a specified bank under the Capital Gains Account Scheme, 1988 notified by the Central Government in the Official Gazette. This is required to be deposited by the due date for filing return of income under Section 139(1) of the Act to avail benefit under this provision.

12. The scope and effect of the amendments made in Sections 54, 54B, 54D and 54F by the Finance Act, 1987 have been elaborated in the departmental circular No.495 dated 22nd September 1987 reported in (1987) 168 ITR (St.) 87. The relevant portion thereof reads thus:-

> "***New scheme for deposits in respect of exemption from capital gains*** – 26.1 Under the existing provisions of sections 54, 54B, 54D and 54F, long term capital gains arising from the transfer of any immovable property used for residence, land used for agricultural purposes, compulsory acquisition of lands and buildings and other capital assets are exempt from income tax if such gains are reinvested in new assets within the time allowed for the purpose. The original assessment needs rectification whenever the tax payer fails to acquire the corresponding new asset.
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> 26.2 With a view to dispense with such rectification of

> assessments, the amendments made to sections 54, 54B, 54D and 54F provide for a new scheme for deposit of amounts meant for reinvestment in the new asset. After the aforementioned amendments, where the amount of capital gains or the net consideration, as the case may be, is not appropriated or utilized by the tax payer for acquisition of the new asset before the date for furnishing the return of income, it shall be deposited by him on or before the due date of furnishing the return of income, under section 139(1) in an account with a bank or institution and utilized in accordance with a scheme framed by the Central Government in this regard. The amount already utilized together with the amounts of deposits shall be deemed to be the amount utilized for the acquisition of the new asset. If the amount deposited is not utilized fully for acquiring the new asset within the period stipulated, the capital gain relatable to the unutilised amount shall be treated as the capital gain of the previous year in which the period specified in these provisions expires. In such cases, the threshold deduction of ten thousand rupees as well as the deduction under section 53 will not be admissible. Further, the tax payer shall be entitled to withdraw such amount in accordance with this scheme. This scheme will be applicable in relation to the new section 54G also."

13. The combined reading of the aforesaid provisions shows that in order to avail benefit under Section 54F of the Act, the assessee is required to either purchase a residential house within a period of one year before or two years after the date on which transfer takes place or construct a residential house within a period of three years after that date. In such cases, the capital gains shall be computed as per clause (a) and (b) of sub section (1). In case, the assessee is not able to appropriate the sale proceeds of long term capital gain, then before filing of a return under section 139(1) of the Act, he is required to deposit the same under any Capital Gain Account

Scheme with a bank or institution specified by the Central Government in the official gazette. The assessee has to file proof of such deposit alongwith the return for claiming exemption under Section 54F of the Act.

14. The assessee has to purchase or construct a house property during the period specified under Section 54F of the Act in order to get benefit thereunder. Section 54F of the Act nowhere envisages that the sale consideration obtained by the assessee from the original capital asset is mandatorily required to be utilized for the purchase or construction of a house property. No provision has been made by the statute that in order to avail benefit of Section 54F of the Act, the assessee has to utilize the amount received by him on sale of original capital asset for the purposes of meeting the cost of the new asset. Once that is so, the assessee was entitled for benefit under section 54F of the Act.

15. It has been categorically recorded by the Tribunal that the assessee had made investment in between February 2008 upto August 2008 i.e. well within the stipulated period. The property was purchased for ₹ 3.32 crores whereas the shares which were sold had resulted in capital gain of ₹ 1.93 crores. The investment was more than the capital gain earned by him. The relevant finding reads thus:-

> "In the present case, the first date of capital gain is November 8, 2008. The assessee can acquire a house within a period November 8, 1997 upto November 2010 i.e. one year prior to transfer of original capital assets and two years after the transfer of capital assets. The assessee had made investment in between February 2008 upto August 2008 i.e. well within period. Learned Assessing Officer has also not disputed about the investment made by the assessee. His grievance is that

investment was made after taking loan from the employer and therefore, assessee cannot claim benefit under section 54F(1) qua the loan amount utilized for purchasing of the new house. Hon'ble Kerala High Court in the case of ITO vs. KC Gopalan (supra) has held that in section 54, there is no condition that assessee should utilize the sales consideration itself for the purpose of acquisition of new property. Similar are the other orders of the ITAT relied upon by the assessee. On perusal of section 54F(1) and sub section (4), it reveals that these sections do to put any restriction that only capital gain would be utilized for purchase of the new house. The law permits utilization of capital gain within the specified time, the assessee may use such funds for other purposes and may find resources from other source for investment in time. The section provides investment in a house prior to one year of the transfer of long term capital assets. It will make it clear that if the transfer has not taken place then from where the funds would come for making the investment. The investment must be from some other sources and when assessee would receive sales consideration on transfer of a long term capital assets, he will claim set off of the capital gains against the investment already made for the purpose of exemption under section 54F. Learned DR has relied upon an order of the ITAT reported in 27 SOT 61. In that case, the ITAT has held that if investment was made out of loan amount then exemption under section 54F(1) will not be available. In the opinion of the ITAT, the assessee has to demonstrate source of funds,if investment was made by the assessee from his own source and not from loan taken from the bank then exemption would be available. In our opinion, the section does not put any such restriction. Hon'ble Kerala High court has explained the position. Similarly, in a series of other orders, at the end of ITAT, it has been held that there is no condition that assessee should utilize the sales consideration only for the purpose of acquisition of new property. In view of

the above discussion, we are of the view that learned revenue authorities have erred in holding that assessee is not entitled for exemption under section 54F(1) of the Income Tax Act, 1961 for a sum of ₹ 121,32,636/-. The investment of the assessee is more than the capital gain earned by him. Therefore, we allow the appeal of the assessee and delete the addition of ₹ 121,32,636/- in the total income of the assessee under the head "long term capital gain".

16. Adverting to the judicial pronouncements, in ***K.C.Gopalan's*** case (supra), while considering identical issue, it was observed by the Kerala High Court as under:-

"xxxxxxxThe assessee has to construct or purchase a house property for his own residence in order to get the benefit of section 54. The wording of the section itself would make it clear that the law does not insist that the sale consideration obtained by the assessee itself should be utilised for the purchase of house property. The main part of section 54 provides that the assessee has to purchase a house property for the purpose of his own residence within a period of one year before or after the date on which the transfer of his property took place or he should have constructed a house property within a period of two years after the date of transfer. Clauses (i) and (ii) of section 54 would also make it clear that no provision is made by the statute that the assessee should utilise the amount which he obtained by way of sale consideration for the purpose of meeting the cost of the new asset.

6. A reading of sections 53 and 54 of the Act would make it clear that a special provision is made in respect of capital gains arising out of transfer of particular type of capital asset, namely, house property which was being used by the assessee or a parent of his for the purpose of their residence. Entitlement of the exemption under section 54 relates to the cost of the

acquisition of a new asset in the nature of a house property for the purpose of his own residence within the specified period."

17. Further, following the judgment of the Kerala High Court in ***K.C.Gopalan's*** case (supra), the Gauhati High Court in ***CIT vs. Rajesh Kumar Jalan,*** (2006) 157 Taxman 398 (Gau.) held as under:-

"11.....We are of the view that the assessee had already appropriated the entire capital gain for purchase of the new asset within the stipulated time. In this regard, we find support from the decision of the Kerala High Court in the case of K.C. Gopalan wherein it was held that the assessee is entitled to exemption under Section 54 even though for the construction of the new house, the amount that was received by way of sale of his old property as such was not utilised. It was held by the Kerala High Court that no provision is made by the statute that the assessee should utilise the amount which he obtained by way of sale consideration for the purpose of meeting the cost of the new asset. It was held that Section 54 only provides that the assessee has to purchase a house property for the purpose of his own residence within a period of one year before or after the date on which the transfer of his property took place or he should have constructed a house property within a period of two years after the date of transfer. It was further held that entitlement of exemption under Section 54 relates to the cost of acquisition of a new estate in the nature of a house property for the purpose of his own residence within the specified period.

18. In ***CIT, Bangalore vs. Anandraj,*** (2015) 56 Taxmann.com 176 (Karnataka), the relevant conclusion recorded by Karnataka High Court read thus:-

"6. It is not in dispute that the assessee sold the agricultural land and the consideration received is in the nature of a long term capital gain. Even before the sale of the property, he had

> borrowed housing loan and started construction on the site belonging to him. After the sale, the amount spent towards construction of the house is more than the consideration received by the sale of agricultural land and therefore, he is entitled to the benefit of section 54F of the Act."

19. In the present case, the investment made by the assessee being within the stipulated time and more than the capital gain earned by him, the addition of ₹ 1,21,32,636/- was rightly deleted by the Tribunal under the head long term capital gain. Learned counsel for the revenue has not been able to point out any error in the approach adopted by the Tribunal reversing the findings recorded by the CIT(A) and the Assessing Officer, warranting interference by this Court.

20. In view of the above, no substantial question of law arises. The appeals stand dismissed.

(Ajay Kumar Mittal)
Judge

November 4, 2015 **(Hari Pal Verma)**
'gs' **Judge**