

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 18.01.2017

DELIVERED ON : 02.06.2017

CORAM

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER

Writ Petition No.11596 of 2016

and

W.M.P.No.9995 of 2016

Shri.Abhijit Bhandari

... Petitioner

Vs

The Principal Commissioner of Income Tax-5,
Aayakar Bhavan,
Wanaparthi Block, 5th Floor,
121, Mahatma Gandhi Road,
Chennai-600 034.

... Respondent

Prayer : Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of Writ of Certiorari or any other appropriate writ, direction or other in the nature of writ, calling for the records in C.No.2(24)/263/PCIT-5/CR-5/2015-16, dated 26.02.2016 on the file of the respondent relating to Assessment Year 2008-09, quashing the same and pass such further or other order or orders that may deem fit and necessary in the circumstances of the case.

For Petitioner : Mr.M.R.Senthil Kumar
for M/s.G.Susheela and Anish Unni.K

For Respondent : Ms.Hema Muralikrishnan

O R D E R

1. This Writ Petition is directed against the order dated 26.02.2016, passed by the respondent. The said order pertains to Assessment Year (AY) 2008-09. This order has been passed by the respondent in exercise of his powers under Section 263 of the Income Tax Act, 1961 (in short "the Act").

1.1. The petitioner seeks to assail the order, inter alia, on the ground that it is contrary to the law, and has been passed in exercise of "assumption of jurisdiction" and is beyond the prescribed period of limitation.

2. In order to adjudicate upon the issues raised in the writ petition, one would require to notice the following broad facts :

2.1. The petitioner was, at the relevant point in time, the principal shareholder of a company by the name of Royal Images Direct Marketing Private Limited (in short referred to as "RIDM"). The petitioner, along with other shareholders, entered into a Share Purchase Agreement, dated 17.07.2006 (in short "SPA"), with another entity by the name Accor Services.

2.2. As per the SPA, the sale of shares held in RIDM was staggered. Accordingly, 70% of the shareholding in RIDM was to be sold, by way of tranche, followed by sale of second and third tranches comprising of 30% and 10% of the equity stake in RIDM. The said three tranches of shares were required to be sold in three consecutive years, i.e., 2007-2008, 2008-2009 and 2009-2010. It appears that the petitioner received an advance in the sum of Rs.15,82,86,273/-, in the previous year 2006-2007, relatable to AY 2007-2008 towards sale of shares. The record shows that 70% of the shareholding was sold by the petitioner on 05.05.2007, for a total consideration of Rs.22,42,72,478/-, which included the aforementioned sum received in the form of advance.

2.3. The petitioner, evidently, in order to avail of the benefit of Section 54F of the Act, took a decision to invest the amount received, in two residential flats located in the Olumpus building situate in Altamount Road, Cumbulla Hill, Mumbai (hereafter collectively referred to as "flats"). These were flats bearing No.607 and 612. The flats were, admittedly, adjacent to each other, in as much as they were located cheek to jowl.

2.4. In so far as flat No.612 was concerned, since, the original owner of the flat had passed away and the rights in the flat had devolved on the legal heir of the original owner by way of transmission under Section 29 of the Maharashtra Co-operative Societies Act, 1960 (in short "the 1960 Societies Act"), the sale could not be effectuated for a period of one year.

2.5. Having regard to this legal provision, a request was made to the housing society, in which, the said flat was located for issuance of a No Objection Certificate (in short "NOC"). Consequently, an NOC qua flat No.612, was issued on 11.04.2006.

2.6. The petitioner, thus, got executed two separate sale deeds with respect to the subject flats. In so far as flat No.607 was concerned, the sale was effectuated vide a deed dated 23.05.2006, while in respect of flat No.612, the sale deed was executed on 16.01.2007.

2.7. However, it is the petitioner's case that, since, his intention was to convert the two adjoining flats into a single residential unit, upon receipt of the NOC, he had commenced the modification and renovation works in and about June 2006.

2.8. It appears that upon the petitioner writing to qua the

flats to the housing society, he was informed vide a letter dated 08.02.2012, that, since, what he had in his possession was a single residential unit, he would be entitled to a single vote.

3. In the interregnum, the petitioner had filed his returns for AY 2008-2009, on 31.07.2008, in which, he had claimed deduction under Section 54F of the Act. Evidently, the petitioner's return was taken up for scrutiny, whereupon, an assessment order dated 22.12.2010, was passed.

3.1. The record also seems to suggest that after the assessment order had been passed, it was intimated to the petitioner that the Internal Revenue Audit had raised an objection to the acceptance of the claim made by the petitioner under Section 54F of the Act. Consequently, the petitioner's response was sought. The petitioner claims that he furnished all the details, which, he had filed, at the time of original assessment proceedings as well, whereupon, the Assessing Officer dropped the proceedings initiated, pursuant to the objection of the Internal Revenue Audit.

3.2. The record further shows that thereafter, the petitioner received a notice dated 20.03.2013, under Section 148 of the Act, in respect of the very same AY, i.e., AY 2008-2009, on the ostensible ground that income chargeable to tax for the said AY had escaped assessment.

3.3. Consequently, the petitioner asked for reasons for issuance of a notice under Section 148 of the Act; whereupon, the aspect pertaining to the claim made by him under Section 54F of the Act was, inter alia, brought to fore as the reason for issuance of the said notice.

3.4. The petitioner, filed his objections to the same. The Assessing Officer, after considering the objections, passed an assessment order, under Section 143(3) read with Section 147 of the Act, on 31.03.2014. In the said order, in so far as the claim under Section 54F of the Act was concerned, the Assessing Officer made the following observations, and sustained the claim made by the petitioner: सत्यमेव जयते

"..... With regard to the merits of the case the assessee vide letter dated 09.07.2013 submitted that the assessee had sold the shares of the Royal Images Direct Marketing Private Limited shares on 05.05.2007. Annual Return filed by the said company to the ROC reflecting the above fact has already been submitted at the time of assessment. A copy of the same has been attached with this letter for your reference. This being the case for purchase of the flats by the assessee on 23.05.2006 and 16.01.2007 is well within the limits of one year, as prescribed by the sub section Section (sic) 54F of the Income Tax Act, 1961. For the above reasons, the deduction allowed under

Section 54F cannot be withdrawn. The details provided by the assessee were verified and the assessee's claim is found to be in order."

4. While the aforesaid proceedings were on, the petitioner in the interregnum, filed his return for the AY 2009-2010, whereby, he declared the sale of the second tranche of shareholding in RIDM, for a total consideration of Rs.11,24,14,809/-.

4.1. To be noted, it is the petitioner's case that he had paid, out of the sum received, a sum of Rs.40 lakhs as advance for purchase of a immovable property situate in Alibaug in the District Rajgad, Maharashtra, to enable him to construct a residential property. In addition thereto, a sum of Rs.6.10 Crores was invested by the petitioner in the Capital Gains Account, maintained with the Bank of India.

4.2. The return for AY 2009-2010 was also subjected to scrutiny and an assessment order was passed under Section 143(3) of the Act. This assessment order was passed on 12.12.2011. While passing the assessment order, the Assessing Officer disallowed the claim made by the petitioner for a sum of Rs.6.50 Crores, under Section 54 of the Act. The reason given by the Assessing Officer, evidently, was that the flats purchased by the petitioner were two separate residential units and hence, the petitioner was not entitled to claim the benefit, which may otherwise have been available to him under Section 54F of the Act.

4.3. As would be evident from the narration of facts above, the view of the Assessing Officer in respect of this aspect of the matter, in A.Y. 2009-2010 was different to that, which had taken in AY 2008-2009.

4.4. The petitioner, being aggrieved, challenged the assessment order dated 12.12.2011, by preferring an appeal with the Commissioner of Income Tax (Appeals) [in short "CIT(A)"].

4.5. The CIT(A) vide order dated 29.07.2013, allowed the appeal, and thus, sustained the deduction claimed by the petitioner under Section 54F of the Act. It may be pertinent to note that by the very same order, the CIT(A) also dealt with the appeal preferred by the petitioner in respect of the AY 2008-2009, as some of the issues were common to the two appeals preferred by him. To be noted, though, the issue pertaining to deduction claimed by the petitioner, under Section 54F of the Act arose in the petitioner's appeal, as indicated above, only in the appeal preferred qua AY 2009-2010.

5. This time around, the Revenue, was aggrieved and hence, carried the matter in appeal to the Income Tax Appellate Tribunal, Chennai (in short "the Tribunal").

5.1. The Tribunal vide a common order dated 08.04.2015,

dealt with the two appeals filed by the Revenue, being Appeal Nos.ITA 1899/Mds/2013 and ITA 1900/Mds/2013. The Tribunal, by virtue of the said order, dismissed the appeal, bearing No.ITA 1899/Mds/2013, pertaining to AY 2008-2009 and, for statistical purposes, partly allowed the appeal, bearing No.ITA 1900/Mds/2013, pertaining to AY 2009-2010.

5.2. Interestingly, in the said order, the Tribunal, broadly, adverted to three aspects, in so far as the claim of the petitioner under Section 54F of the Act was concerned. The first aspect related to the investment made by the petitioner in the flats. The second aspect, which the Tribunal dealt with was the investment made by the petitioner in the sum of Rs.6.10 Crores in the Capital Gains Account, maintained with the Bank of India. The third aspect, which, the Tribunal referred to in the said order, was the sum of Rs.40 lakhs paid by the petitioner for purchasing an immovably property, in Alibaug, in District, Rajgad, Maharashtra (in short "Alibaug property").

5.3. A perusal of the observations made in the Tribunal's order would show that the Assessee had constructed a residential house on the aforementioned Alibaug property in and about July 2011, which was funded from the investment made in the Capital Gains Account. The petitioner appears to have claimed exemption under Section 54 of the Act, to the extent he utilized the funds, in purchasing the land and constructing the residential house thereon, albeit, within the prescribed time frame of three years of the moneys being invested in the Capital Gains Account Scheme.

5.4. The Tribunal's order, notes, that the amount available in the Capital Gains Account, as on 07.07.2011, had been utilized and that this fact stood disclosed in the income tax returns filed qua previous year 2011-2012, relatable to AY 2012-2013. Accordingly, the orders goes on to observe that a sum of Rs.49,24,780/- had been offered for taxation by the petitioner.

5.5. Therefore, having regard to the aforesaid three aspects, the Tribunal, as it is evident, remanded the matter to the Assessing Officer, with the following observations made in paragraph 10 :

"..... 10. After considering the remand reports and the order of the first appellate authority, we find that there is no discussion by the Assessing Officer about the issue of investment in capital gains accounts scheme amounting to Rs.6,10,000/- and Rs.40,00,000/- and advance paid for the purchase of property. It means that the Assessing Officer has not given any comments regarding this issue. Being so, in our opinion, it is appropriate to remit this issue. being so, in our opinion, it is appropriate to remit this issue back to the Assessing Officer, as there is violation of Rule 46A. Accordingly, we remit the issues for fresh consideration with regard to

investment in capital gains accounts scheme and the advance paid for the purchase of property totalling at Rs.6,50,00,000/- back to the Assessing Officer, as he has only considered the investment in flat Nos.607 and 612, Altamount Road, Cumballa Hills, for which the assessee has already claimed deduction u/w.54F for assessment year 2008-09 and allowed by the Assessing Officer in the assessment year 2008-09. Therefore, the same cannot be considered once again in the assessment year 2008-09 (sic 2009-2010). This issue to be decided afresh by the Assessing Officer."

(emphasis is mine)

5.6. A careful perusal of the observations of the Tribunal made in paragraph 9 of its order would show that in so far as the investment made by the petitioner in Alibaug property was concerned, a doubt was, perhaps, raised, as the said immovable property, on which, a residential unit had been constructed was described as pieces and parcels of agricultural land.

6. I must indicate herein that there has been much debate on the aspect as to whether or not the Tribunal had reopened the issue with regard to the flats, in which, the petitioner had made investment and claimed deduction under Section 54F of the Act. In other words, the debate centered around the point as to whether the Tribunal had closed the issue by sustaining the stand of the petitioner that two adjoining flats formed a single residential unit, and not two separate units, as contended by the Revenue.

6.1. The Revenue did not rest with the outcome of the Tribunal proceedings and accordingly, issued a Show Cause Notice dated 15.12.2015 (in short "SCN") to the petitioner under Section 263 of the Act. This SCN raised a red flag with regard to the petitioner's claim for deduction under Section 54F of the Act to the tune of Rs.4,88,78,900/, which was the amount invested by the petitioner in the aforementioned flats.

6.2. The petitioner filed a response to the same. The respondent, after considering the reply of the petitioner, proceeded to pass the impugned order on 26.02.2016, whereby, he set aside the assessment order dated 31.03.2014, pertaining to AY 2008-2009, passed under Section 143(3) read with Section 147 of the Act.

6.3. The petitioner, being aggrieved, has preferred the instant writ petition.

7. Mr. Senthil Kumar, who appears for the petitioner, submitted that the impugned order passed by the respondent amounted to an abuse of process of law, in as much as it was passed in disregard of the following facts and circumstances:

(i) The subject flats had been converted into a single

residential unit, after obtaining the approval of the concerned housing society.

(ii) The petitioner had one single vote as per the regulations put in place by the concerned housing society, based on the rationale that the subject flats formed one single residential unit.

(iii) A report of the Surveyor dated 20.02.2012, which was on record, confirmed that the flats comprised of one single residential unit.

(iv) The Revenue had undertaken a survey of the premises on 31.10.2013, whereupon, the stand taken by the petitioner that the flats comprised of one single residential unit had been affirmed.

(v) This aspect had been confirmed by the CIT(A) vide order dated 29.07.2013, and therefore, the contrary view taken by the Assessing Officer, in respect of the AY 2009-2010, with regard to the sustainability of the claim made by the petitioner under Section 54F of the Act had been set aside. Thus, the view taken by the CIT (A), in the said order was not only binding on the Assessing Officer, qua AY 2008-2009, but that upon an re-assessment having been carried out vis-a-vis AY 2008-2009, vide order dated 31.03.2014, passed under Section 143(3) read with Section 147 of the Act, the conclusion had been reached that the exemption claimed by the petitioner under Section 54F of the Act, was in order had been validated.

(vi) The Tribunal, in its order dated 08.04.2015, had not disturbed the finding that the subject flats formed of a single residential unit. Therefore, the direction of remand issued by the Tribunal qua other aspects, in respect of AY 2009-2010, would have no impact on the findings reached by the CIT(A), in its order dated 29.07.2013 that the subject flats should be treated as one single residential unit.

(vii) Lastly, in passing the assessment order dated 31.03.2014, under Section 143(3) read with section 147 of the Act, the Assessing Officer had taken a view, which was a possible view, and therefore, the proceedings taken out under Section 263 of the Act would not be sustainable, as it could not be held that the view taken by him was erroneous. In other words, according to the learned counsel, unless, the twin conditions provided in Section 263 of the Act, are fulfilled; which are : that the order passed by the Assessing Officer is, both erroneous and prejudicial to the interest of the Revenue, no order can be passed under the said provision.

7.1. In support of his submissions, learned counsel for the petitioner relied upon the following judgements :

- (i).Malabar Industrial Co. Ltd. V. CIT, [2000] 243 ITR 83 (SC);
- (ii).CIT V. Max India Ltd., [2007] 295 ITR 282 (SC);
- (iii).CIT V. Mepco Industries Ltd., [2007] 294 ITR 121 (Mad);

- (iv).CIT V. Sak Soft Ltd., [2008] ITR 63 (Mad);
- (v).CIT V. K.G.Denim Ltd., [2009] 180 Taxman 590 (Mad); and
- (vi).CIT V. PVP Ventures Ltd., [2014] 101 DTR 161 (Mad).

8. As against the aforesaid, Ms.Hema Muralikrishnan, made the following submissions :

(i). That an alternative remedy, by way of appeal, was available to the petitioner, and therefore, this writ petition ought not to be entertained.

(ii). That the order dated 22.12.2010, which was passed by the Assessing Officer, in respect of AY 2008-2009, under Section 143(3) of the Act, did not deal with the exemption claimed by the petitioner under Section 54F of the Act, and consequently, the assessment order passed the said AY, was reopened and a fresh assessment order under Section 143(3) read with Section 147 of the Act was passed on 31.03.2014. It was emphasized that though petitioner's claim for exemption under Section 54F of the Act was sustained, since, it was inherently flawed, the respondent chose to exercise his revisional power under Section 263 of the Act, by serving SCN dated 15.12.2015, on the petitioner.

(iii) The mistake made by the Assessing Officer in AY 2008-2009, as regards the petitioner's attempt to claim deduction under Section 54F of the Act was avoided by the Assessing Officer, while passing the assessment order dated 12.12.2011, vis-a-vis AY 2009-2010. Though, the Assessing Officer's view for AY 2009-2010, was overturned by the CIT(A), vide a common order dated 29.07.2013, passed qua AYs 2008-2009 and 2009-2010, the same was reversed by the Tribunal, vide its order dated 08.04.2015, by remanding the matter to the Assessing Officer to consider afresh the investment made in the Capital Gains Account Scheme by the petitioner in AY 2009-2010. Since, the Tribunal in its order dated 08.04.2015, did not deal with the issue as to whether or not the subject flats formed a single residential unit, even while setting aside the order for AY 2009-2010, the respondent had acted within the four corners of the jurisdiction vested in him, in exercising powers under Section 263 of the Act.

(iii)(a) In other words, learned counsel stressed on the fact that in so far as the Tribunal was concerned, in respect of AY 2008-2009, the issue before it, pertained to disallowance of expenditure under Section 14A of the Act, and not deduction claimed by the petitioner under Section 54F of the Act, while, in so far as AY 2009-2010 was concerned, even though, the issue pertaining to Section 54F arose for consideration, the Tribunal did not adjudicate upon the same.

9. I have heard the learned counsels for the parties and

perused the record.

9.1. Quite clearly, the preliminary objection taken with regard to the alternative remedy, by Ms.Hema, on behalf of the Revenue, will not require any discussion, if, I were to come to the conclusion that the respondent had the necessary leeway, in the given facts and circumstances, to exercise power under Section 263 of the Act. It is only if I come to a different conclusion, would I be required to deal with this objection. Accordingly, in order to adjudicate upon the matter, the following admitted facts are required to be noticed :

9.2. The petitioner had sold his shares held in RIDM, in three tranches over a period spanning between 2007-2008 and 2009-2010.

9.3. 70% of the shareholding in RIDM was sold on 05.05.2007, for a total consideration of Rs.22,42,72,478/-.

9.4. The petitioner had purchased the subject flats on two separate dates, Flat No.607 was purchased on 23.05.2006, while flat No.612 was purchased on 16.01.2017. These flats were purchased, quite clearly, within preceding one year of the sale of the shares, resulting in generation of capital gains. The record shows that flat No.607 was sold for a sum of Rs.1.67 Crores, while flat No.612 was sold for a sum of Rs.3 Crores.

9.5. The petitioner had claimed a deduction under Section 54F of the Act in the sum of Rs.4,88,78,900/-, against admitted long term gains of Rs.21,39,19,223/-, after adjusting the transfer expenses and indexed cost, against the aforesaid consideration in the sum of Rs.22,42,72,478/- received qua sale of shares.

9.6. Though, the return for AY 2008-2009 was taken up for scrutiny and an order dated 22.12.2010, was passed, it was reopened and a fresh assessment order under Section 143(3) read with Section 147 of the Act was passed on 31.03.2014. The record also shows that in so far as AY 2009-2010 was concerned, the Assessing Officer did not accept the petitioner's claim for deduction under Section 54F of the Act, with respect to the subject flats, on the ground that they did not form a single residential unit. Therefore, two inconsistent orders were on record, i.e., order dated 22.12.2010, pertaining to AY 2008-2009, whereby, the deduction claimed by the petitioner under Section 54F of the Act was accepted, and the order dated 12.12.2011, pertaining to AY 2009-2010, where, an opposite conclusion had been reached, i.e., the deduction claimed under Section 54F of the Act was not available.

9.7. This led to the filing of an appeal with the CIT(A). The CIT(A), vide a common order dated 29.07.2013, dealt with the petitioner's appeal pertaining to AYs 2008-2009 and 2009-2010.

9.8. As correctly submitted by Ms.Hema, in respect the appeal pertaining to AY 2008-2009, there was no grievance articulated by the petitioner, with regard to his claim for deduction under Section 54F of the Act, as the same stood

accepted by the Assessing Officer via his order dated 22.10.2010. The grievance of the petitioner, thus, with respect to the disallowance of deduction under Section 54F of the Act stood articulated only qua AY 2009-2010. The CIT(A), however, as noticed hereinabove, in his common order dated 29.07.2013, clearly, held that the petitioner should be allowed deduction under Section 54F of the Act, as the aspects pertaining to the claim had been considered in AY 2008-2009. This conclusion was reached by the CIT(A), after advertng to the entire history of the transaction and the material placed before him, which included, the Surveyors report, to which, I have made a reference above.

9.9. Moreover, in the proceedings carried under Section 143 (3) read with Section 147 of the Act, qua AY 2008-2009, after due scrutiny, the Assessing Officer vide order dated 31.03.2014, came to the very same conclusion, which is that the deduction allowed under Section 54F of the Act, via the order dated 22.12.2010, could not be withdrawn. The relevant observations made, in this regard, have already been extracted hereinabove by me.

9.10. While the Revenue preferred appeals to the Tribunal vide CIT (A)'s common order dated 29.07.2013, qua AY 2008-2009 and 2009-2010, it initiated proceeding under Section 263 of the Act, against the Assessing Officer's order dated 31.03.2014. Notably, the issue pertaining to the tenability of the petitioner's claim for deduction under Section 54F of the Act arose in both proceedings.

10. The Tribunal, therefore, while adjudicating upon the appeals preferred by the Revenue for both AYs, i.e., AY 2008-2009 and 2009-2010, was required to deal with the issue, which is, as to whether the subject flats formed one single residential unit.

11. The fact that this issue came before the Tribunal is quite evident, if, one were to peruse the paragraph 9 of the impugned order dated 08.04.2015. For the sake of convenience, the same is extracted hereafter :

"..... 9. In the remand report, it was stated by the Assessing Officer that the transfer of assets involving financial transactions took place on 7.7.2008. The assessee claimed ownership of Flat No.607 and 612 of Olympus Apartments. The Assessing Officer emphasized on the two conditions for claiming deduction u/s.54F. According to the Assessing Officer, the first condition is that the assessee should not own more than one residential property. The Assessing Officer is of the opinion that while claiming deduction u/s.54F of the Act, the assessee as

on date of transfer of long term capital gain, the assessee should possess only one residential house property. It is brought out by the Assessing Officer that the assessee has bought the properties on different dates, viz., flat Nos.607 and 612 on 23.5.2006 and on 16.1.2007 respectively and that the assessee produced copies of permission for renovation by Olympus Co-operative Housing Property Ltd., for sale of flat No.612 layout of combined Flat Nos.607/612 of Olympus Apartments and certificate from V.S.Modi Associates. The Assessing Officer's question is that on the date of capital gain transaction, i.e., on 7.7.2008, how many residential properties the assessee was holding. The Assessing Officer states that the submissions by the assessee did not support the assessee's contention of holding single residential unit on the date of transfer of capital gain and also no supporting documents were received from the assessee regarding completion of renovation and occupation of the assessee in the combined residential unit of flat Nos.607 & 612. Further, according to the Assessing Officer, the second condition for disallowance is that the assessee should have invested in a residential house. The Assessing Officer states that as per deduction of claim u/s.54F, the assessee could invest either in purchase of residential property one year prior to the date of transfer or 2 years after the date of transfer or construct house within 3 years after the date of transfer. In the assessee's case the Assessing Officer states that the assessee has utilized the amount in agricultural land located at Dhokawade Village, Alibag, Taluka of Rajgad District, which is evident from the document describing the property as 'pieces and parcels' of agricultural land. The Assessing Officer also pointed out that the assessee had not produced any proof like approval obtained from the Municipal Corporation of competent Authority for construction of residential property for treating the assessee's agricultural land as residential area."

(emphasis is mine)

11.1. A perusal of the aforesaid extract would show that the Tribunal was considering, not only the issue as to whether or not the subject flats formed one residential unit, but also, was looking at the investment made by the petitioner in the Alibaug property, on which, a residential structure had been built by him.

11.2. Furthermore, a perusal of paragraph 8 of the

Tribunal's order would also establish that it was also examining the petitioner's claim that he had invested Rs.6.10 crores in a Capital Gains Account scheme via the Bank of India. This aspect is evident from the perusal of the following extract of the Tribunal's order dated 08.04.2015 :

".... 8. We have heard both the parties and perused the orders of the authorities below. In our opinion, the Assessing Officer mixed up with the investment on two flats at Mumbai. the Commissioner of Income-tax (Appeals) observed that the assessee has earned capital gains on sale of shares during the year under consideration and deposited the same in capital gain account scheme in July 2007 with Bank of India vide A/c No.006610110001298 amounting to Rs.6,10,00,000/-. The amount paid as advance for the purchase of land at Alibagh Taluka, Dhokawde Village, Maharashtra for Rs.40,00,000/- totalling to Rs.6,50,00,000/-. The assessee has claimed exemption u/s.54F for the cost (sic cost) of land at Rs.4,46,26,000/- including registration charges for the land of 16940 sq.meters. The assessee has completed the construction on this land by July 2011, i.e., within 3 years from the date of investment made in capital gains accounts scheme. The total amount of cost of construction incurred by the assessee is at Rs.1,54,49,220/-. the amount utilized as on 7.7.2011 out of the investment made in capital gains accounts has been disclosed in the income tax return for the financial year 2011-12 relevant to the assessment year 2012-13 and offered for taxation at Rs.49,24,780/-. Since the assessee has constructed residential house within 3 years from the date of investment in capital against accounts scheme, he claimed exemption u/s.54F of the Act to the extent of capital gains utilized in purchasing of land and construction completed thereon. Regarding these facts, the Commissioner of Income Tax (Appeals) called for remand report and the same was submitted by the Assessing Officer vide remand report dated 31.07.2012. Later, a second remand report dated 13.8.2012 was also submitted by the Assessing Officer, which was considered by the Commissioner of Income-tax (Appeals)."

(emphasis is mine)

12. The Tribunal, thus, as indicated in my narration above, was dealing with three aspects via its order dated 08.04.2015. First, as to whether the subject flats formed a single residential unit. Second, the petitioner's claim that he had invested Rs.6.10 Crores in the Capital Gains Accounts Scheme was borne out. Third, the petitioner's claim that he had invested

money in the Alibaug property, on which, he had, purportedly, constructed a residential structure.

12.1. The Tribunal, after discussing these three aspects of the matter, confined the remand only to the last two aspects, that is, the claim of the petitioner with regard to investment of Rs.6.10 Crores in the Capital Gains Scheme; and the purported investment of Rs.40 lakhs made by him by way of advance towards purchase of Alibaug property.

12.2. The issue with regard to the claim of deduction under Section 54F of the Act, (which arose, as correctly argued on behalf of the Revenue, in its appeal filed qua A.Y. 2009-2010), was not remanded for reconsideration, as the same had already been considered in AY 2008-2009. This is quite evident upon perusing paragraph 10 of the Tribunal's order. The relevant observations made, in this regard, have already been extracted hereinabove by me.

12.3. Having regard to the aforesaid, in my view, the Tribunal in its wisdom, thought it fit not to entertain the appeal of the Revenue, with regard to its challenge laid to the deduction claimed by the petitioner vis-a-vis the subject flats under Section 54F of the Act.

12.3. Therefore, in my opinion, since, the Revenue did not assail the order of the Tribunal dated 08.04.2015, the respondent could not have exercised powers under Section 263 of the Act to revisit the issue once again, by setting aside the order dated 31.03.2014, passed by the Assessing Officer under Section 143(3) read with Section 147 of the Act.

13. Furthermore, according to me, as correctly argued by Mr.Senthil, on behalf of the appellant, the view taken by the Assessing Officer in its order dated 31.03.2014, was a possible view, and therefore, would not, necessarily, as it sought to be projected on behalf of the Revenue, be categorised as an erroneous view.

13.1. A perusal of the impugned order would show that the respondent has set aside the order and directed the Assessing Officer to revisit the issue, as he, according to him, had faulted to take into account the fact that the subject flats had been purchased via two separate sale deeds, and had separate electricity meter connections. According to me, it appears that the respondent was unnecessarily burdened by the fact that the subject flats were purchased by two separate sale deeds and had separate electricity meter connections. The issue at hand, before the Assessing Officer, in my opinion, was whether or not the subject flats form a single residential unit.

13.2. The size of the flat, or, that they had separate electricity meter connections would not, necessarily, lead to a conclusion that they were two separate residential units. The Assessing Officer was required to look at other attendant circumstances, which included the survey report, in reaching a

conclusion in the matter. Notably, what was available on record, was not only the survey report, but also the material provided by the concerned housing society. The survey report, as it appears, did advert to the fact that the subject flats formed a single residential unit.

13.3. The learned counsel for the Revenue has not assailed the survey report before me. Therefore, quite clearly, there was material available to the Assessing Officer to come to a possible view, if not, definite view that the subject flats formed a single residential unit.

13.4. If, that be the conclusion, then, clearly, the respondent had no jurisdiction to initiate proceedings under Section 263 of the Act and thereupon, proceed to pass the impugned order.

14. In view of the conclusion reached by me, the preliminary objection taken by Ms. Hema Muralikrishnan, that the writ petition ought not to be entertained, would have to be rejected. It would be trite to say that an order passed without jurisdiction can be interfered with in Writ proceedings.

14.1. Furthermore, relegating the petitioner, at this stage, to an alternative remedy in respect of an issue pertaining to AY 2008-2009, which has travelled by way of statutory remedies to the Tribunal, once before, would be unfair to parties. The existence of an alternative remedy, as is articulated time and again by Court is not an absolute bar. Superior courts often relegate parties to alternative remedy by way of self-limitation. As a matter of fact the law, as declared by the Supreme Court, now, clearly, sets out that in appropriate cases, the writ court has jurisdiction to entertain a petition, even involving disputed questions of fact, notwithstanding the fact that they arise out of contractual obligations. See observations of the Supreme Court in ABL International Limited and another V. Export Credit Guarantee Corporation of India Limited, (2004) 3 SCC 553 in Paragraphs 27 and 28 at page 572 and in Union of India V. Aravali Minerals and Chemicals (India) (P) Limited, (2000) 9 SCC 558.

15. For the foregoing reasons, the impugned order is set aside. The captioned writ petition is allowed. Resultantly, pending application shall stand closed. Given the facts and circumstances of the case, there shall, however, be no order as to costs.

Sd/-
Assistant Registrar (CS VI)

//True Copy//

Sub Assistant Registrar

gg

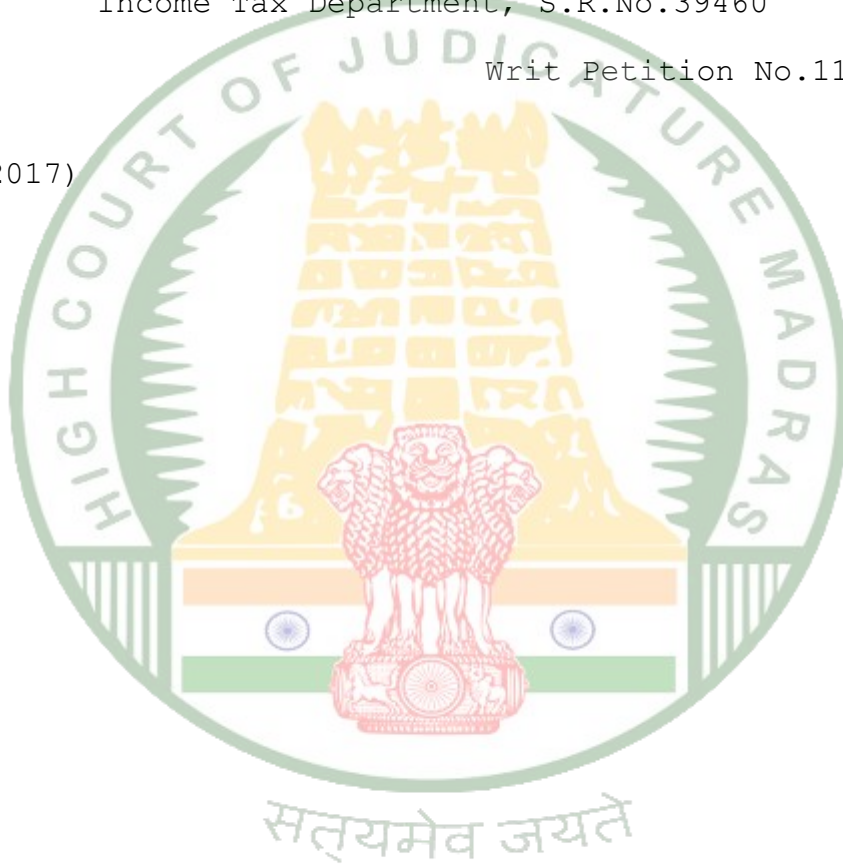
To

The Principal Commissioner of Income Tax-5,
Aayakar Bhavan,
Wanaparthi Block, 5th Floor,
121, Mahatma Gandhi Road,
Chennai-600 034.

+lcc to M/s.G.Susheela, Advocate, S.R.No.39480
+lcc to Mr.T.Ravi Kumar, Senior Standing Counsel for
Income Tax Department, S.R.No.39460

Writ Petition No.11596 of 2016

KGK(CO)
CA(28/06/2017)



WEB COPY