1. IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.11.2018

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Tax Case Appeal No.286 of 2012

Smt.Renuka Philip ...Appellant

-vs-

The Income Tax Officer,
Business Ward - XV (2)
Chennai. .... Respondent

Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal "D" Bench, Chennai dated 13.07.2012 in I.T.A.No.900/Mds/2012 for the assessment year 2005-06.

For Appellant : Mr.A.S.Sriraman
For Respondent : Mrs.R.Hemalatha

J U D G M E N T

(Judgment of the Court was delivered by T.S.SIVAGNANAM,J.)

This appeal by the assessee is directed against the order passed by the Income Tax Appellate Tribunal, "D" Bench, Chennai, dated 13.07.2012 in I.T.A.No.900/Mds/2012 for the assessment year 2005-06 against the order of the Commissioner of Income Tax, Chennai-X, dated:14/03/2012 made in C.No.10113/10/CIT-X/2011-12 against the Income -Tax, Officer (Business ward XV(2) Chennai-34. Dated:31/12/2009 made in PAN.NO. AAGPP9696M Assessment year-2005-2006.

2. The appeal has been admitted on 12.03.2013 on the following substantial questions of law:-

" 1.Whether the Appellate Tribunal is correct in law in sustaining the assumption of jurisdiction by the CIT under Section 263 of the Income Tax Act, 1961 for revising the re-assessment framed by the respondent in accepting

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the claim of exemption/deduction under Section 54F of the Act in the computation of long term capital gains even though there was apparent jurisdictional error in the attempt to review the order of assessment framed to bring to tax the escaped income within the scope of Section 147 of the Act?

2.Whether the Tribunal is correct in law in sustaining the assumption of jurisdiction by the CIT under Section 263 of the Income Tax Act, 1961 for revising the re-assessment framed by the respondent in accepting the claim of exemption/deduction under Section 54F of the Act in the computation of long term capital gains even though there was no requirement for further investigation into facts with regard to the said claim of exemption/deduction in view of the respondent's thorough enquiry into the relevant facts in relation thereto in the passing of the income escaping assessment?".

3. The assessee filed return of income for the assessment year under consideration viz., 2005-06 on 31.07.20015 admitting a total taxable income of Rs.1,11,107/-. In the said return of income, the Long Term Capital gains arising or accruing as a result of sale of the property situated at Chennai was reported to the extent of Rs.24,01,859/- and the assessable capital gains was invested in another property situated at Bangalore.

4. The said return of income filed by the assessee was initially proceeded under Section 143(1) of the Income Tax Act, 1961 (in brevity the "Act"). The assessment was re-opened by issuance of notice under Section 147 of the Act dated 06.05.2008 for bringing to tax escaped income and in response to the said re-opening notice, a letter dated 16.07.2008 was filed by the assessee in the office of the Assessing Officer requesting to complete the assessment in the re-opened proceedings as per the original return of income filed. The re-assessment was completed by order dated 31.12.2009 under Section 147 r/w 143(3) of the Act and while doing so, the Assessing Officer granted exemption under Section 54F of the Act to the extent of Rs.1,15,67,790/- and in the re-computation of Long Term Capital Gains accepting the claim of re-investment in house property. The assessee's case was that the property in question was inherited by her in the year 2007 pursuant to a Deed of Partition and the cost of construction of the building was to an extent of Rs.42 lakhs, which cost of construction formed the cost of acquisition was omitted to be taken into consideration in the re-computation of Long Term Capital Gains.

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5. The assessee filed appeal against the order of re-assessment dated 31.12.2009 and the appeal was numbered as I.T.A.No.58/2010-11 and was pending on the file of Commissioner of Income Tax (Appeals) XII, Chennai.

6. Simultaneously, the Assessing Officer initiated penalty proceedings under Section 271(1)(c) of the Act. Challenging the said penalty proceedings, the assessee preferred appeal before the CIT (A) III, Chennai on 23.07.2010.

7. While the facts stood thus, the Commissioner issued a notice under Section 263 of the Act dated 09.02.2012 stating that the grant of exemption under Section 54F of the Act for four residential units purchased by utilising the assessable capital gains is incorrect and the re-assessment order was erroneous and prejudicial to the interest of revenue. The assessee was directed to show cause and accordingly, a reply was sent by the assessee on 28.02.2012. The Commissioner passed an order dated 14.03.2012 rejecting the reply given by the assessee and confirmed the proposal in the show cause notice and set aside the re-assessment order dated 31.12.2009 and directed the Assessing Officer to enquire into the matter and accordingly, revised the proceedings. The assessee filed appeal before the Tribunal. The Tribunal by the impugned order has confirmed the order passed by the CIT(A) and this is how the assessee is before us.

8. We have heard Mr.A.S.Sriraman, learned Counsel for the assessee and Mrs.R.Hemalatha, learned Standing Counsel on behalf of the Revenue.

9. Before we consider as to whether the assumption of jurisdiction by the Commissioner under Section 263 of the Act was justified or not and before we proceed to answer the substantial questions of law, we may note the following developments which have taken place during the pendency of this appeal before this Court.

10. As noticed above, as against the re-assessment proceedings dated 31.12.2009, the assessee had filed appeal to the Commissioner in I.T.A.No.58/2010-11. The said appeal was pending when the Commissioner issued show cause notice dated 09.02.2012 under Section 263 of the Act. We will go into the aspect as to whether the assumption of jurisdiction by the Commissioner under Section 263 of the Act was justified and whether was permissible, especially when appeal against re-assessment proceedings was pending as on the said date.

11. The appeal which was filed by the assessee against re-assessment proceedings in I.T.A.No.58/2010-11 was re-numbered as

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ITA No.32/2010-11 on account of change of jurisdiction and the Commissioner, Income Tax (Appeals) XII have passed the final order dated 14.03.2013, wherein, it was held that the Assessing Officer's action of rejecting the assessee's claim of deduction under Section 54 of the Act is justified and as per law. However, taking note of the fact that notice under Section 263 of the Act was issued and orders have been passed, the Commissioner observed that the merits of allowing the deduction under Section 54F of the Act cannot be looked into, but however, directed the Assessing Officer to restrict the deduction under Section 54F of the Act on a proportionate basis rather than allowing the entire investment in the new property as such. Accordingly, the appeal was partly allowed.

12. The Revenue preferred appeal against the said order before the Tribunal, which was taken on file as I.T.A.Nos.1418 and 1419 of 2013. The Tribunal was aware of the fact that this appeal is pending before this Court and also about the proceedings initiated under Section 263 of the Act, where the Commissioner found fault with the Assessing Officer in granting relief under Section 54F of the Act. However, observed that pursuant to the orders passed under Section 263 of the Act, the Assessing Officer has passed consequential revision order dated 31.03.2013 giving effect to the direction excluding deduction under Section 54F of the Act and therefore, opined that the CIT (A) was correct in his order to make observations and accordingly, dismissed the ground raised by the assessee. As pointed out by the Tribunal, giving effect to order dated 31.03.2013 was also put to challenge and ultimately, the matter reached the Tribunal in I.T.A.No.1134/Mds/2017 dated 31.01.2018. The Tribunal while allowing the assessee's appeal for statistical purposes observed that in the interest of justice, it deems fit that the issue should be remitted back to the Assessing Officer for fresh examination and the assessee shall furnish the required documents obtained under the appropriate provisions or under the Right to Information Act, as the case may be. The Assessing Officer was directed to afford an opportunity to the assessee and determine the issue in accordance with law.

13. In the light of the above developments, we would have been well justified in closing this appeal stating that the same has become academic on account of the fact that re-assessment order dated 31.12.2009 does not exist in the same form. In this regard, we are supported by the decision of the Hon'ble Supreme Court in the case of Commissioner of Income Tax v. NTPC [2017 392 ITR 0426], wherein, the Hon'ble Supreme Court while considering the appeal arising out of a judgment of the Delhi High Court in the matter pertaining to exercise of revisional jurisdiction under Section 263 of the Act held that it is not

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necessary to go into the question whether at the relevant point of time exercise of jurisdiction under Section 263 of the Act by the Commissioner of Income Tax was justified in view of the subsequent events, which clearly demonstrated that there has been no leakage of revenue and the matter has become academic. However, considering the fact that the assessee is an individual and the assessment for the year under consideration, 2005-06, has not attained finality and matters have been repeatedly remanded to the authorities, we thought fit to take a decision on the merits of the appeal, that is, with regard to the assumption of jurisdiction of the Commissioner under Section 263 of the Act.

14. The leading case with regard to the exercise of powers under Section 263 of the Act is the decision of the Hon'ble Apex Court in Malabar Industries Vs. CIT(A) [2000 243 ITR 83]. This decision was referred to and clarified by the Hon'ble Supreme Court in the case of Commissioner of Income Tax Vs. Max India Limited [(2007) 295 ITR 0282]. The clarification was with regard to paragraph 10 of the judgement in the case of Malabar Industrial Company Limited Vs. Commissioner of Income Tax [(2000) 243 ITR 83] and it was held that every loss of Revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interest of the Revenue. By way of illustration, it was stated that when the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue; or where two views are possible and the Assessing Officer has taken one view with which the CIT(A) does not agree, it cannot be treated as an erroneous order prejudicial to the interest of Revenue, unless the view taken by the Assessing Officer is unsustainable in law.

15. The above decision was relied on in the case of Agasthya Vs. Assistant Commissioner of Income Tax in TCA No. 450 of 2007 dated 16.04.2018 and it was held that when two views existed, the Commissioner of Income Tax would not be justified to invoke the power under Section 263 of the Act, as the Assessing Officer had adopted one of the two views which was possible.

16. The assessee while filing return claimed exemption under Section 54 of the Act. Section 54 of the Act falls in Chapter IV of the Act, which deals with computation of income from Capital gains. There were several Sections in Section 54 namely Sub-Sections 54A to 54H. The assessee sought to invoke Section 54. The Assessing Officer was of the view that the assessee was not entitled to claim relief under Section 54 of the Act, but analysed the case and assigned reasons and held that the assessee was entitled to relief under Section 54F of the Act.

17. The Revenue raised an objection stating that the

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assessee never claimed relief under Section 54F of the Act, therefore, the Assessing Officer, transgressed his powers and granted the relief which was not asked for. The said submission made by the Revenue should be out rightly rejected. There is duty cast upon the Assessing Officer to compute the correct rate of tax to be collected under the correct head. Anything which is unauthorisedly levied and collected will be illegal and without sanction of law. Therefore, the Assessing Officer while completing the assessment is bound to grant relief to the assessee, if in his opinion, it is found that a particular provision of law can be applied in the assessee's case. Therefore, we cannot find fault with the Assessing Officer in the exercise of such jurisdiction. Nevertheless, the assessee was not satisfied with the relief granted in the re-assessment order dated 31.12.2009. Therefore, he filed regular appeal before the CIT(A). When the appeal was pending, notice was issued under Section 263 of the Act. We have perused the said notice dated 09.12.2012. The Commissioner was of the opinion that the re-assessment order granting claim of deduction under Section 54 of the Act was an order erroneous and prejudicial to the interest of the Revenue warranting invocation of Section 263 of the Act. The notice does not state as to how such an order is erroneous and prejudicial to the interest of Revenue. The show-cause notice does not explicitly state the same except quoting the words in the Section. The assessee filed a detailed reply dated 28.02.2012, questioning the assumption of jurisdiction under Section 263 of the Act on the ground that appeal against the re-assessment was pending. Secondly, it was contended that no prejudice has been caused to the interest of the Revenue and the assessment order was not erroneous.

18. Further, the assessee stated that the Assessing Officer has given reasons as to why the assessee is entitled to the relief under Section 54F of the Act. The Commissioner while passing the order dated 14.03.2012 under Section 263 of the Act opined that the deduction claimed under Section 54F of the Act was erroneously allowed in the re-assessment order and the Assessing Officer neither applied his mind nor had made any verification/enquiry on the statement made by the assessee. Thus, he was of the opinion that the Assessing Officer has to verify with evidence as to the nature of the property; whether it was commercial or residential.

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19. We have perused the re-assessment order dated 31.12.2009, wherein, the following reasons has been assigned by the Assessing Officer as to why he was of the opinion that the assessee is entitled for claim for deduction under Section 54F of the Act. The finding is as follows:

> "During the course of assessment proceedings the assessee authorised representative had claimed t

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hat the commercial property purchased converted into a residential property and approved by the Bangalore Development Authority. The said conversion was made within the stipulated time prescribed u/s 54F. For that, evidence by way of re-assessment order from the Brhat Bangalore Mahanagara Palika and the photos showing the property was utilised for residential purpose was also filed by the assessee."

20. On a reading of the above, it is evidently clear that the assessee had produced documents to show that the property was utilized for residential purpose. On being satisfied, the Assessing Officer has extended the benefit of deduction under Section 54F of the Act. The Assessing Officer is not expected to write a judgement and his order should reveal application of mind, which in our opinion is writ large on the face of the order. Therefore, we do not approve the finding rendered by the Commissioner in his order dated 14.03.2012 that the Assessing Officer did not apply his mind. Unfortunately, when the matter was taken up before the Tribunal, the Tribunal also failed to take into consideration, as to the claim made by the assessee and the exercise undertaken by the Assessing Officer.

21. With regard to the merits of the case, the learned counsel for the assessee referred to a decision of the Division Bench of this Court in Dr.P.K.Vasanthi Rangarajan v. Commissioner of Income Tax [(2012) 252 CTR 0336], wherein, the Hon'ble Division Bench held that there is no inhibition in the assessee claiming the benefit of investment made in four flats thereby gaining the benefit under Section 54F of the Act. The Court took note of the decision in TCA No. 656 of 2005 dated 04.01.2012. However, we are not examining the merits of the matter at this juncture since, we are only called upon to answer the Substantial Question of Law with regard to the assumption of jurisdiction of the Commissioner under Section 263 of the Act. The power under Section 263 of the Act is not exercisable under certain circumstances. In this regard, we refer to Section 263 (1) explanation 1(c), which reads as follows:

"Revision of orders prejudicial to revenue

263(1)...

(a)...

(b)...

(c)Where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal [filed on or before or after the 1st day of June, 1988], the powers of the Commissioner under this Sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in

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such appeal."

22. The above explanation makes it clear that when the appeal is pending before the Commissioner, the exercise of jurisdiction under Section 263 of the Act is barred. The Commissioner in the order dated 14.03.2012 states that the appeal pertains to the claim made by the assessee under Section 54 of the Act and it has got nothing to do with the order passed by the Assessing Officer under Section 54F of the Act. The said finding rendered by the Commissioner is wholly unsustainable, since the assessee went on appeal against the re-assessment order dated 31.12.2009 stating that his claim for deduction under Section 54 of the Act should be accepted.

23. Therefore, in the process of considering as to what relief the assessee is entitled to, the Assessing Officer held that the assessee is entitled to claim deduction under Section 54F of the Act and assigned certain reasons for that. Therefore, the larger issue was pending before the Commissioner of Appeals, and in such circumstances, the Commissioner could not exercise power under Section 263 of the Act on account of the statutory bar. Therefore, on this ground also, the assumption of jurisdiction under Section 263 of the Act was wholly erroneous.

24. As noticed above, the Assessing Officer while completing the re-assessment proceedings has assigned certain reasons for coming to a conclusion that the assessee is entitled for deduction under Section 54F and not under Section 54 of the Act. This reason assigned by the Assessing Officer has been found by us to show due application of mind. As observed, we cannot expect an Assessing Officer to write a judgment. In such circumstances, the view taken by the Commissioner in his order under Section 263 of the Act has to be termed as a change of opinion, or in other words, the Assessing Officer adopted one of the two views possible and in such circumstances, it cannot be stated that the order is prejudicial to the interest of the Revenue as well as erroneous. For the purpose of exercise of jurisdiction under Section 263 of the Act, the twin tests are to be satisfied and even assuming, the re-assessment order is to be held as erroneous, it cannot be stated to be prejudicial to the interest of Revenue as every erroneous order cannot be subject matter of Revision under Section 263 of the Act. Further more, if the order passed by the Commissioner under Section 263 of the Act as confirmed by the Tribunal is allowed to stand, then the very purpose of the remand order against the original re-assessment proceedings would become a fait accompli.

25. Thus, for the above reasons we are fully satisfied that the assumption of jurisdiction by the Commissioner under Section

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263 of the Act was wholly without jurisdiction as the twin tests have not been satisfied and consequently, the order dated 14.03.2012 as confirmed by the Tribunal by order dated 13.07.2012 calls for interference.

26. In the result, the appeal filed by the assessee is allowed and the order passed by the Commissioner dated 14.03.2012, under Section 263 of the Act as confirmed by the Tribunal by order dated 13.07.2012 are set aside, and it is left open to the assessee to pursue her claim before the Assessing Officer. Accordingly, the Substantial Questions of Law are answered in favour of the assessee. Since, the matter has been pending for a quite long number of years and there has been repeated orders of assessment, we direct the Assessing Officer to give effect to the re-assessment order dated 31.12.2009, wherein the Assessing Officer had granted the benefit of Section 54F of the Act to the assessee. No costs.

Sd/-
Assistant Registrar(CS IV)

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Sub Assistant Registrar

svki/mrm

To

1.The Income Tax Officer,
Business Ward - XV (2) Chennai-34

2.The Income Tax Appellate Tribunal "D" Bench,
Chennai.

3.The Commissioner of Income Tax,
X Chennai, New 13black VI, Floor,
121, Mahatma Gandhi Chennai-34

+1cc to Mr.T.RaviKumar, Advocate, S.R.No.77741

+1cc to Mr.S.Sridhar, Advocate, S.R.No.78125

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