

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.11.2019

Reserved on 01.11.2019
Delivered on 05.11.2019

C O R A M

THE HON'BLE Mr.JUSTICE K.RAVICHANDRABAABU

W.P.No.16249 of 2018

Venkata Dilip Kumar,
Karthi-HUF,
No.5, (Old No.3), Seshadri Road,
Alwarpet,
Chennai 600 018. ...Petitioner

vs

1.The Commissioner of Income Tax,
Chennai-5(i/c),
Office of the Principal Commissioner of Income Tax,
Aayakar Bhavan, Wanaparthi Block,
121, Mahatma Gandhi Road, Nungambakkam,
Chennai 600 034.

2.The Assistant Commissioner of Income Tax,
Non-Corporate Circle-3,
New Building, Aayakar Bhavan,
121, Mahatma Gandhi Road, Nungambakkam,
Chennai 600 034. ...Respondents

Prayer:Writ petition filed under Article 226 of the Constitution of India for issuance of a writ of Certiorari mandamus to call for the records of the Order No.C.No.1(3)/PCIT-5/264/CR-5/AIHV5089G/2017-18 dated 08.03.2018 passed by the first respondent in proceedings under Section 264 of the Income Tax Act, 1961 and to quash the same and consequently to direct the respondents to revise the assessment and allow additional exemption of Rs.57.25 lakhs due under Section 54 of the Income Tax Act, 1961 to the petitioner for the assessment year 2014-15.

For petitioner : Mr.Abdul Ravoof
For Respondents : Mrs.Hema Muralikrishnan
Senior Standing Counsel

O R D E R

This writ petition is filed challenging the order of the first respondent dated 08.03.2018, in rejecting the petition filed by the assessee under Section 264, wherein and whereby the assessee sought for enhancement of the deduction of Rs.1,02,13,527/- as the additional cost of construction under Section 54 of the Income Tax Act, 1961.

2. The case of the petitioner is as follows:

The petitioner is the Kartha of the Hindu Undivided Family (HUF), which is being assessed to income tax by the second respondent. The petitioner was the owner of a property situated in No.5 (Old No.3) Seshadri Road, Alwarpet, Chennai-18, wherein 1/4th share of the assessee is held on HUF account and the remaining 3/4th share is held on individual account. The individual and HUF accounts are being assessed separately with different PAN numbers. The petitioner had entered into a Development Agreement on 15.04.2013 with Sumanth & Co for the development of the above property. As per the Development Agreement, the petitioner would release 3/4th share in the ownership of the property on completion of its development in favour of the Developer or its nominees. The overall consideration for the release of 3/4th share of the property was fixed at Rs.1600 lakhs by cash and constructed area of 3850 Sq.ft. was valued at Rs.125 lakhs. As the owner of only 1/4th share in the property, the share of the petitioner HUF comes to Rs.431.25 lakhs. Accordingly, the petitioner HUF filed return for the assessment year 2014-15 after computing the capital gains for the 1/4th share i.e. cash consideration of Rs.400 lakhs and construction cost of Rs.31.25 lakhs only. The petitioner HUF deposited the amount of Rs.37.50 lakhs within the prescribed time in Capital gains Deposit Scheme with the State Bank of India and submitted a proof thereafter along with the income tax return. The income tax return filed by the petitioner was accepted under Section 143(1) of the said Act vide communication dated 29.06.2015. The petitioner requested the Developer to allow him to decide on the construction quality and type of material to be used for superstructure and promised to bear the additional costs involved and to pay to the suppliers/professionals directly. By the time, the above proposals incurring additional expenditure on petitioner's portion of the superstructure was accepted by the developer, the time for depositing the money into Capital Gains Deposit Scheme had lapsed. The petitioner subsequently submitted a petition on 29.12.2016 under Section 264 of the Income Tax Act, 1961, seeking revision of the above assessment dated 29.06.2015 after taking into

account the additional expenditure incurred by the petitioner towards acquiring the new Capital Asset within the prescribed time limit of 3 years. An overall expenditure of Rs.4,08,54,108 was incurred towards additional cost of construction in which 1/4th share of HUF comes to Rs.1,02,13,527. The petitioner submitted before the first respondent all the details and particulars of extra expenditure incurred towards the additional cost of construction to justify the above claim of deduction of Rs.1,02,13,527/-. However, the first respondent rejected the request of the petitioner through the impugned order. Hence, the present writ petition.

3. The respondent filed a counter affidavit, wherein it is stated as follows:

It is wrong to state that the first respondent had accepted that the total additional expenditure by the petitioner was Rs.379 lakhs. The first respondent has not accepted any additional cost of construction to be allowable under Section 54. Only a sum of Rs.150 lakhs was deposited into the Capital Gains Deposit Account within the stipulated time. Rest of the claim of the petitioner on additional cost of construction which was not claimed in the return, was rejected on the ground that the claim is not in accordance with the provisions of law. Though the construction might have been completed within the stipulated time of three years, as per Section 54(2), the unutilised portion of the capital gain shall have to be deposited in the notified Capital Gains Deposit Scheme within the time allowed under Section 139(1) so as to get away with the rigors of taxation. The petitioner has not complied with the conditions of Section 54(2) and accordingly cannot be granted the benefit of deduction under Section 54 on the additional cost of construction so claimed. It is well settled that a beneficiary to avail the benefit of a beneficial provision, the conditions prescribed therein is to be strictly followed. There cannot be any deviation or justification whatsoever, which can supersede non compliance of Section 54(2). In this connection, the decision of the Apex Court reported in 2018 SCC online SC 747, Commissioner of Customs v. Dilip Kumar and Company, is relied on.

4. A reply affidavit is filed by the writ petitioner, wherein it is stated as follows:

The order impugned in this writ petition was passed totally contra to the view expressed by the Hon'ble Division Bench of Karnataka High Court in the case of The Commissioner of Income Tax and Others vs. K.Ramachandra Rao dated 14.07.2014 and various Income Tax Appellate Tribunals

across India uniformly accepting the above decision of the Karnataka High Court. The petitioner complied with the mandatory conditions prescribed under Section 54(1) of the said Act by incurring the expenditure on acquiring the new residential property within the prescribed time limit of three years and submitted the relevant accounts for scrutiny and acceptance. The petitioner had also deposited Rs.37.50 lakhs into the capital Gain Bond Scheme prior to filing of the I.T. Return for the relevant assessment year towards the anticipated capital expenditure in acquiring the new residential assets. It is only due to the unforeseen nature of the additional expenditure that had to be incurred for the reasons stated in the affidavit that the petitioner could not comply with the directory provision under Section 54(2) while acquiring the new residential asset. Section 54(2) is only procedural requirements in the form of a directory provision to ensure that the mandatory condition under Section 54(1) is complied within the prescribed time limit of three years. The interpretation of exemptions to the benefit of Revenue does not mean that the rightful claims of assessee shall be denied to obtain unjust enrichment to the revenue. The non compliance of Section 54(2) has not caused any loss to the revenue. The respondents have not disputed that the petitioner have not complied with the conditions in Section 54(1). The capital gain transaction involves two legal entities namely the petitioner herein in his individual capacity as well as the Kartha of Venkata Dilip Kumar (HUF). The capital gain is accounted in the proportion of 75%:25% respectively of the above named legal entities. The Income Tax Appellate Tribunal by its order dated 24.01.2019 has set aside the Income Tax Officer's restriction on the cost overrun of Rs.229 lakhs to Rs.12.21 lakhs and has directed the Income Tax Officer to re-examine all documents. When the above order applies to 75% of the transaction, it must also apply to the balance HUF 25%. In the light of the above order passed by the Appellate Tribunal, it is imperative that the Income Tax Commissioner's rejection of extra cost overrun under HUF must also be annulled and the IT Department is directed to re-examine the cost overrun submission.

5. Learned counsel for the petitioner after reiterating the contentions raised in the writ petition submitted that merely because the deposit was not made under the capital gain account in respect of the amount for which the deduction is sought for under Section 54(2), the benefit of deduction which the petitioner otherwise entitled to cannot be denied. In this connection, the decision of Karnataka High Court made in ITA No.46 of 2014 dated 14.07.2014 is

relied on. The petitioner in fact deposited the said amount in bank account and invested the same for the construction of the petitioner's building. Therefore the said amount is not deviated to any other purpose. In respect of the very same issue insofar as the individual is concerned, the Tribunal considered the same and remitted the matter back to the Assessing Officer to redo the assessment. Therefore the Revenue cannot take a different stand in the case of HUF in respect of the same issue.

6. Per contra, the learned Senior Standing Counsel for the respondents submitted as follows:

In the case of the individual, where the matter was remitted to the Assessing Officer, the Tribunal has not considered the requirement of compliance of the condition stipulated under Section 54(2). Therefore, the said decision cannot be taken advantage by the petitioner. On the other hand, the decision to be made in this writ petition will have a bearing on the individual's case. The petitioner has not satisfied the mandatory requirement of Section 54(2), since the petitioner has not deposited the disputed amount under the Capital Gain Account. The impugned order has been rightly passed by stating the above reasons. The decision of the Karnataka High Court relied on by the petitioner is on different facts and circumstances and therefore, it will not help the petitioner in any manner. In support of the contention, the learned counsel relied on the decision of the Hon'ble Supreme Court reported in 2018 SCC online SC 747, Commissioner of Customs v. Dilip Kumar and Company.

7. Heard both sides.

8. The petitioner is the HUF. The HUF is an assessee under the Income Tax Department and its accounts are being assessed under PAN AAIHV5089G. The petitioner HUF and the Kartha of the HUF in his individual capacity owned a property situated at No.5 (Old No.3), Seshadri Road, Alwarpet, Chennai-18 with 1/4th share and 3/4th share respectively over the same. The said property was developed by entering into a development agreement on 15.04.2013 with the developer. While the 3/4th share of the property, on completion of its development, was agreed to be released in favour of the developer or his nominees, 1/4th share of the said property is agreed to be retained by the petitioner HUF. Accordingly, the petitioner HUF and the Kartha in his individual capacity deposited a portion of the amount received as consideration towards the above development project into capital gain deposit account. Insofar as the petitioner HUF is concerned, it is stated that

a sum of Rs.1.50 crores was deposited in the capital gain deposit account with State Bank of India. The Revenue allowed deduction of the said sum of Rs.1.50crores under Section 54 of the Income Tax Act. However, the petitioner claims further deduction to the tune of Rs.57.25 lakhs under Section 54 by contending that though such sum was not deposited in the capital gain deposit account, the same was utilised for the purpose of additional expenditure towards the construction cost and that the said sum was drawn out of capital gain deposited in the same bank branch, however, in a saving bank account. The Revenue refused to grant deduction under Section 54 towards the said sum of Rs.57.25 lakhs only on the reason that it was not deposited in the capital gain deposit account and thus, the petitioner having not satisfied the mandatory requirement under Section 54(2) of the Income Tax Act, is not entitled to deduction towards the said sum.

9. At this juncture, it is to be noted that insofar as the quantum for which the deduction is sought under Section 54 and rejected by Revenue, it appears that some confusion prevails between the pleadings made before the first respondent and before this Court. While the first respondent proceeded to decide the matter as if the HUF claims deduction towards the additional cost of construction of Rs.1,02,13,527/-, the petitioner before this Court projects the case as if the deduction sought for is only in respect of a sum of Rs.57.25 lakhs. Whatever the quantum may be, since the denial of deduction was made solely on the reason that the said disputed quantum was not deposited into capital gain account, this Court is inclined to proceed further and decide the matter, since the quantum in dispute will not have any impact or relevance in answering the issue involved in this matter.

10. Therefore, the point for consideration in this writ petition is as to whether the petitioner is entitled for benefit of deduction under Section 54 in respect of the disputed sum, even though the said sum was not deposited in the capital gain account as required under Section 54(2).

11. Section 54 of the Income Tax Act, 1961, deals with profit on sale of property used for residence. It contemplates that the capital gain arises from the transfer of a long term capital asset being buildings or lands appurtenant thereto and being a residential house, the income of which is chargeable under the head "income from house property" 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, one residential

house in India, then the capital gain shall be dealt with in accordance with the provisions made under Section 54(1) (i)(ii) instead of being charged to income tax as income of the previous year in which the transfer took place. In other words, to put it precisely, the capital gain so landed in the hands of the assessee, instead of being dealt with as income, will be dealt with by giving deduction to such capital gain, provided the assessee has satisfied the requirement contemplated under the above said provision. For seeking benefit of deduction under Section 54, the assessee should have purchased one residential house either one year before the transfer or two years after the date of such transfer or constructed a residential house within a period of three years after the date of such transfer. Therefore, it is evident that the intention of the legislature for granting deduction under Section 54 is that the assessee should be given the benefit of not taxing the capital gain so received by treating it as income, if he has purchased the house one year before or two years later or constructed the same within three years, from the date of transfer. Thus, this compliance is to be treated and construed as substantial compliance to consider the claim of the benefit under Section 54. Thus, it is clear that meeting out the expenses towards the cost of construction of the house within a period of three years entitles an assessee for claiming deduction under Section 54.

12. No doubt, Section 54 (2) contemplates that if the amount of the capital gain is not appropriated by the assessee towards purchase of new assets within one year before the date on which the transfer of original asset took place or which is not utilised by him for the purchase of new asset before the date of furnishing the return of income under Section 139, he has to deposit the said sum in an account in any such bank and utilised in accordance with any scheme which the Central Government may, by notification frame in that behalf. In other words, if the assessee has not utilised the amount of the capital gain either in full or part, such unutilised amount should be deposited in a capital gain account to get the benefit of deduction in the succeeding assessment years.

13. In this case, the only objection raised by the Revenue is that the disputed sum has not been deposited in the capital gain account. At the same time, it is not in dispute that the petitioner/assessee has deposited Rs.1.50 crores in the capital gain deposit account and the deduction was granted to the said sum under Section 54. The dispute is only with regard to the balance sum spent on additional construction cost, which according to the

Revenue, is not entitled for deduction under Section 54, since it was not deposited in capital gain account as required under Section 54(2).

14. In my considered view, the contention of the Revenue to deny the benefit of deduction to the petitioner/assessee cannot be justified for the following reasons:

Section 54(2) cannot be read in isolation and on the other hand, application of Section 54(2) should take place only when the assessee failed to satisfy the requirement under Section 54(1). While the compliance of requirement under Section 54(1) is mandatory and if complied, has to be construed as substantial compliance to grant the benefit of deduction, the compliance of requirement under Section 54(2) could be treated only as directory in nature. If the assessee with the material details and particulars satisfies that the amount for which deduction is sought for under Section 54 is utilised either for purchasing or constructing the residential house in India within the time prescribed under Section 54(1), the deduction is bound to be granted without reference to Section 54(2), which compliance in my considered view, would come into operation only in the event of failure on the part of the assessee to comply with the requirement under Section 54(1). Mere non compliance of a procedural requirement under Section 54(2) itself cannot stand in the way of the assessee in getting the benefit under Section 54, if he is, otherwise, in a position to satisfy that the mandatory requirement under Section 54 (1) is fully complied with within the time limit prescribed therein.

15. At this juncture, the Division Bench decision of the Karnataka High Court made in ITA No.47 of 2014 in the case of the Commissioner of Income Tax vs. Shri K.Ramachandra Rao, is relevant to be quoted, wherein while considering the scope of Section 54F(1) to 54F(4) of the Income Tax Act, it has been observed as follows:

"If the intention is not to retain cash but to invest in construction or any purchase of the property and if such investment is made within the period stipulated therein, then Section 54F(4) is not at all attracted and therefore, the contention that the assessee has not deposited the amount in the Bank account as stipulated and therefore, he is not entitled to the benefit even though he has invested the money in construction is also not correct."

16. Learned counsel for the Revenue relied on the

decision of the Supreme Court reported in 2018 SCC online SC 747, Commissioner of Customs v. Dilip Kumar and Company in support of her contention that exemption notification should be interpreted strictly and the burden of proof of its applicability would be on the assessee. I have already pointed out that the assessee, in this case, has claimed that it has utilised the disputed sum towards the cost of the additional construction within the period of three years from the date of the transfer and therefore, if such contention is factually correct, it is to be held that the assessee has satisfied the mandatory requirement under Section 54(1) to get deduction. Therefore, I find that the above decision relied on by the Revenue is not helping the case of the respondents under the facts and circumstances of the present case.

17. The claim of the assessee for deduction of the disputed sum towards the additional construction cost was rejected only on the ground that the said sum was not deposited in the capital gain account. In view of my findings rendered supra, the Revenue is not justified in making such objection. On the other hand, it has to verify as to whether the said sum was utilised by the petitioner within the time stipulated under Section 54(1) for the purpose of construction. If it is found that such utilisation was made within such time, the Revenue is bound to grant deduction. Therefore, this Court is of the view that the matter needs to go back to the first respondent for considering the issue as to whether the disputed amount, claimed by the assessee as deduction, has been utilised by the petitioner towards the additional construction within the time limit prescribing under Section 54(1) and thereafter, to pass fresh order accordingly in the light of the findings and observations rendered supra. Accordingly, the writ petition is allowed and the matter is remitted back to the first respondent to pass a fresh order accordingly. Such exercise shall be done by the first respondent within a period of eight weeks. No costs.

Sd/-

Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

vri

To

1.The Commissioner of Income Tax,
Chennai-5(i/c),
Office of the Principal Commissioner of Income Tax,
Aayakar Bhavan, Wanaparthi Block,
121, Mahatma Gandhi Road, Nungambakkam,
Chennai 600 034.

2.The Assistant Commissioner of Income Tax,
Non-Corporate Circle-3,
New Building, Aayakar Bhavan,
121, Mahatma Gandhi Road, Nungambakkam,
Chennai 600 034.

+1cc to Mr.Abdul Ravoof , Advocate SR.No. 91405

+1cc to Mrs.Hema Muralikrishnan , Advocate SR.No. 91422
W.P.No.16249 of 2018

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A.SK(20/11/2019)



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