www.taxguru.in

**IN THE INCOME TAX APPELLATE TRIBUNAL**
**Hyderabad ' B ' Bench, Hyderabad**

**Before Smt. P. Madhavi Devi, Judicial Member**
***AND***
**Shri S.Rifaur Rahman, Accountant Member**

| Appeal No | Appellant | Respondent | A.Y |
|---|---|---|---|
| 816/Hyd/2017 | Mrs. Adeebunnisa Begum, Hyderabad PAN:AGPPA5733P | Income Tax Officer Ward 5(3) Hyderabad | 2005-06 |
| 817/Hyd/2017 | Mrs.Rafia Hussain Hyderabad PAN:AJXPR 4536Q | -do- | 2005-06 |
| 818/Hyd/2017 | Sri Syed Maqdoom Mohiuddin, Hyderabad PAN:AMLPM 6602R | -do- | 2005-06 |
| 819/Hyd/2017 | Mrs. Najma Hussain, Hyderabad PAN: AJJPN 8340 G | -do- | 2005-06 |
| 820/Hyd/2017 | Sri Syed Azizuddin Ali Khan, Hyderabad PAN: AICPA 9160B | -do- | 2005-06 |

For Assessee : Shri Abu Akaram
For Revenue : Smt. N. Swapna, DR

Date of Hearing: 15.09.2017
Date of Pronouncement: 29.09.2017

**O R D E R**

**Per Smt. P. Madhavi Devi, J.M.**

All the appeals are filed by the respective assessees against the order of the CIT (A)-10, Hyderabad, dated 31.01.2017. Since all the assessees are co-owners of the property which is sold and common issues are involved in all these appeals, they were heard together and are disposed of by this common and consolidated order. For the sake of convenience, the grounds of appeals raised in the case of Mrs. Adeebunnisa Begum, in ITA No.816/Hyd/2017 are reproduced hereunder:

www.taxguru.in

*"1. The order of the learned Commissioner of Income-Tax is contrary to law and facts and circumstances of the case.*

*2. The Learned Commissioner of Income-Tax(Appeals) failed to appreciate the fact that the Learned Income- Tax officer erred in invoking the provisions of section 147 of the Income- Tax Act, on the facts and in the circumstances of the case.*

*3. The Learned Commissioner of Income-Tax (Appeals) erred in not appreciating the fact that the Learned Income- Tax officer could not have issued notice under section 148 of the Income-Tax Act after 31-03-2012 for this assessment year ,on the facts and in the circumstances of the case.*

*4. The Learned Commissioner of Income-Tax (Appeals) erred in not appreciating the fact that the assessment for the Assessment year got barred by limitation by 31- 03-2012 and such the Income-Tax Officer could not have issued a notice under section 148 on 14-03-2013, on the facts and in the circumstances of the case.*

*5. The Learned Commissioner of Income-Tax(Appeals) erred in not appreciating the fact that no direction was given by the Hon'ble Tribunal in this case for reopening the assessment for this year, on the facts and in the circumstances of the case.*

*6. The Learned Commissioner of Income-Tax(Appeals) erred in not appreciating the fact that the Hon'ble Tribunal could not have travelled beyond the assessment year which was being decided by it, i.e.- 2007-08 and give a direction for re- opening the assessment year for the A. Y. 2005-06, on the facts and in the circumstances of the case.*

*7. Without prejudice to the above contentions the Learned Commissioner of Income Tax (Appeals)*

www.taxguru.in

*erred in confirming the order of the Learned Income- Tax officer holding that the exemption under section 54F was not allowable to the appellant, on the facts and in the circumstances of the case.*

*8. The Learned Commissioner of Income-Tax (Appeals) erred in confirming the order of the Learned Income-Tax Officer holding that the provisions of the section 50C of the Income-Tax were applicable for determining at the consideration, on the facts and in the circumstances of the case.*

*9. The Learned Commissioner of Income-Tax (Appeals) erred in not appreciating fact that the Learned Income-Tax Officer did not afford an opportunity to the appellant before applying the provision of section 50C of the Income-Tax Act, on the facts and in the circumstances of the case.*

*10. Without Prejudice to the above the Learned Commissioner of Income-Tax (Appeals) erred in not appreciating the fact that the Learned Income-Tax Officer erred in arriving at the consideration based on value of the built up area agreed to be allotted to the appellant, on the facts and in the circumstances of the case.*

*11. The Learned Commissioner of Income-Tax (Appeals) erred in confirming the consideration at Rs.1,72,32,945 allegedly based on the value adopted by the Stamp Valuation Authority, on the facts and in the circumstances of the case.*

*12. The Learned Commissioner of Income-Tax(Appeals) erred in confirming the market value of the property transferred as on 01-04-1981 at Rs.200 per Square Yard, on the facts and in the circumstances of the case.*

*13. The Learned Commissioner of Income-Tax (Appeals) erred in not appreciating the fact that*

www.taxguru.in

*value as per the registrar as on 01-04-1981 cannot be taken as the market value of the property transferred.*

*14. The Learned Commissioner of Income-Tax (Appeals) erred in not appreciating that the appellant got the property value by an approved valuer who valued the property at Rs.500 per Square Yard and as such he ought to directed the Income Tax Officer to adopt the said value, on the facts and in the circumstances of the case.*

*15. The appellant craves leave to add to, alter or amend any of the aforesaid grounds as advised on or before the date of hearing".*

2. Grounds 1 and 15 are general in nature and need no adjudication.

3. Grounds 2 to 6 are against the reopening of the assessment u/s 143(3) r.w.s.147 of the Act.

4. Brief facts of the case are that the assessees did not file any return of income for the year under consideration. The AO issued notice u/s 148 of the Act on the ground that the assessee's father, Shri Syed Jamaluddin Ali Khan, who was the owner of the properties bearing No.9-1-128 and 9-1-128/1 situated at S.D. Road, Secunderabad had gifted certain portions of his property to his children and that the father and his children being joint owners and possessors of the above properties had entered into a development agreement with M/s. Sreeji Builders on 31.12.2004 by virtue of which all the assessees before us were to receive flats built on 44% of the super built up area, whereas the builder

www.taxguru.in

would have rights to sell 55% of the area. It was stated by the assessee that they had entered into an MOU with M/s. Sreeji Builders on 11.03.2008, on which date the flats were handed over but that the MOU was not a registered document and the assessees stated that no capital gain arose on that day. The AO, however, relied upon the sale deeds dated 27.12.2006 and 13.11.2006 whereby the constructed flats were sold and the sale consideration was received to charge the capital gain in the hands of the respective assessees for the A.Y 2007-08. Aggrieved, the assessees carried the matter in appeal before the CIT (A), who held that that the very fact that the assessee and the co-owners are the main vendors indicated that they have sold their share of flats and that the fundamental issue is whether the transfer took place in the financial year relevant to A.Y 2007-08 or in the later year. The CIT (A) directed the AO to verify the extent of square yards of land owned by the respective assessees and also to estimate the value of the land as on 1.4.1981 for the purpose of computing the capital gains and denied the exemption u/s 54F in respect of the flats allotted to the respective assessees.

5. Aggrieved, the assessee filed an appeal before the ITAT and the ITAT, after considering the decision of the Coordinate Bench in the case Potla Nageswara Rao vs. DCIT in ITA No.1519/Hyd/2011 and others dated 22.03.2012 held that as the development agreement was executed on 31.12.2004 by the assessees, the capital gain cannot be postponed to the A.Y 2007-08. Thus observing, the Tribunal directed the AO to decide the issue de novo in the light of the decisions relied upon by the Tribunal to come to the above conclusion.

www.taxguru.in

6. Pursuant thereto, to give effect to the order of the Tribunal, the AO issued notices u/s 148 of the Act to all the assessees for the A.Y 2005-06 being the year relevant to the previous year in which the development agreement was executed. The assessee took an objection that the notice u/s 148 was issued after expiry of more than six years and therefore, the same is not sustainable. The assessee also challenged the said notice in the Hon'ble jurisdictional High Court. The Hon'ble High Court vide order dated 10.4.2014 directed the Revenue to supply the reasons in writing to the assessee within a period of a fortnight from the date of communication of its order where the returns have already been filed and where the returns are not filed, directed the petitioners to submit the same and simultaneously the reasons in writing shall be supplied. Accordingly, the assessees filed their returns of income on 15.5.2014 and the reasons were communicated vide letter dated 18.7.2014. The assessees filed their objections for reopening of the assessments particularly stating that the Tribunal could not have travelled beyond the A.Y under consideration and also that under sub-section (2) of section 150 of the I.T. Act, the provisions of sub-section (1) shall not apply in any case where any such assessment, re-assessment or re-computation as it referred to, in that sub-section, relates to an assessment year in respect of which an assessment or recomputation could not have been made at the time, the order which was subject matter of appeal, reference or revision, as the case may be, was made by reason of any other provision limiting the time within which any action for assessment, re-assessment or recomputation may be taken.

www.taxguru.in

7. The objections of the assessees were, overruled by an order of the AO dated 5.5.2015 holding that the Tribunal has given a clear direction to assess the capital gain in the A.Y 2005-06 and if the assessee has any grievance against the order of the ITAT, he or she should have taken the matter with the appropriate authorities and the AO has to follow the directions of the Hon'ble Tribunal. Further, with regard to the objection that sub-section (1) of section 150 shall not apply as per section 150(2) of the Act, the AO held that in view of the directions of the Tribunal, notice u/s 148 shall be issued notwithstanding anything contained in section 149, and further that as per the provisions of section 148, a notice under that section can be issued on or before 31.3.2012 for the A.Y 2005-06 and an order u/s 143(3) r.w.s. 144 r.w.s. 148 can be passed within one year from the end of the financial year in which the notices were served. The AO held that he could have reopened the assessment for the A.Y 2005-06 at the time of passing the order by the CIT (A) i.e. on 28.11.2011 for the A.Y 2007-08, which was subject matter of appeal before the Income Tax Appellate Tribunal and hence according to him, the provisions of sub section (2) do not apply to the assessee's case.

8. Thereafter, the AO proceeded to consider the assessee's contention as to why the capital gain on development agreement shall not be brought to tax. He held that the ITAT has held that by virtue of the development agreement, the capital gain is liable to be taxed in the A.Y 2005-06 and cannot be postponed to the A.Y 2007-08. As regards the assessee's objection to adopting the sale consideration u/s 50C of the I.T. Act, the AO

www.taxguru.in

considered the constructed area to be allotted to the owners as per the MOU and valued the same as per the Stamp Duty Act and adopted it as fair consideration u/s 50C of the I.T. Act. He also worked out the cost of acquisition of the land as on 1.4.1981 and computed the LTCG. The assessee's claim of exemption u/s 54F was not accepted on the ground that the respective assessee's have received more than one residential units and therefore, were not eligible for exemption u/s 54F of the Act. Aggrieved, the assessee preferred appeals before the CIT (A) who rejected the same and the assessees are in second appeal before us.

9. The learned Counsel for the assessee has drawn our attention to the findings of the Tribunal in the earlier proceedings whereby the Tribunal has only held that the capital gains cannot be postponed to the A.Y 2007-08 and has directed the AO to consider the issue on merit de novo. This direction of the Tribunal, according to the learned Counsel for the assessee, cannot be considered as a finding or direction under sub section (1) of section 150 of the I.T. Act. He submitted that the A.Y before the Tribunal in the earlier proceedings was A.Y 2007-08 and the Tribunal could not have given any direction for the A.Y 2005-06 which was not before it. Therefore, according to him, the provisions of sub section (1) of section 150 are not applicable to the facts of the case before us. The learned Counsel for the assessee further submitted that even if the findings of the Tribunal is to be considered as a finding or direction under sub section (1) to section 150 of the Act, it is subject to the limitation prescribed u/sub section 2 of section 150 of the I.T. Act. He submitted that the assessment could not be reopened after the

www.taxguru.in

expiry of six years from the end of the relevant A.Y after 31.03.2012 and he submitted that in the case before us, the period of six years have lapsed before the AO issued notice u/s 148 of the Act on 14.03.2013. Therefore, according to the learned Counsel for the assessee, re-assessment notices are not valid.

10. The learned DR, on the other hand, supported the orders of the authorities below.

11. Having regard to the rival contentions and the material on record, we find that in the earlier proceedings, the Tribunal has held that the capital gain will arise in the year of executing the development agreement along with handing over of the possession of the property to the developer. Admittedly, the development agreement was entered on 31.12.2004 relevant to the A.Y 2005-06 and possession of the property was also handed over on the same day. Therefore, the AO has issued notice u/s 148 of the I.T. Act on 14.3.2013. Section 149 of the Act prescribes the time limit for issuance of notice u/s 148 while section 150 of the I.T. Act empowers the AO to issue a notice u/s 148, notwithstanding anything contained in section 149 of the Act, at any time, for the purpose of making an assessment, reassessment or recomputation in consequence or to give effect to any finding or direction contained in any order passed by any authority in any proceedings under the Act by way of appeal, reference or revision. However, this power is limited by sub section (2) of section 150 of the Act which provides that the provision of sub section (1) shall not apply where any such assessment, re-assessment or

www.taxguru.in

recomputation as is referred to in that sub section relates to any A.Y in respect of which an assessment, re-assessment or recomputation could not have been made at the time the order which was subject-matter of the appeal, reference or revision, as the case may be, was made by reason of any other provision limiting the time limit in which any action for assessment, re-assessment or recomputation may be taken. The ambit and scope of sub-section 2 of section 150 has been considered by the Hon'ble jurisdictional High Court in the case of CIT vs. G. Vishwanatham (172 ITR 401) and it has been held that initiation of re-assessment proceedings would be banned even when they are initiated in consequence or to give effect to any finding or direction contained in the appellate order, if such initiation of re-assessment proceedings is barred by any other provision of the Act on the date of the order which is subject-matter of appeal. Applying the said rationale to the facts of the case before us, it is seen that the notice u/s 148 was issued on 14.3.2013 and the order which was the subject-matter of appeal before the Tribunal was dated 30.06.2011. The A.Y before us is 2005-06 and as per section 149(1)(b) of the Act, six years from the end of the relevant A.Y is 31.03.2012 beyond which period a notice u/s 148 cannot be issued for the A.Y 2005-06. Since as per section 2 of section 150, the notice u/s 148 cannot be issued if the order under appeal before the Tribunal, was beyond the limitation period prescribed u/s 149(1)(b) of the Act. However, we find that the order of the CIT (A) which is subject matter of appeal before the Tribunal is dated 30.06.2011 is well within the period of six years from the end of the relevant financial year and therefore, the proceedings initiated by the AO by issuance of notice u/s 148 for

www.taxguru.in

the A.Y 2005-06 in the case of the assessee is sustainable. Therefore, we see no reason to interfere with the order of the CIT (A) on this issue. Thus, grounds of appeal Nos. 2 to 6 are rejected.

12. As regards Ground No.7 is concerned, the learned Counsel for the assessee submitted that by virtue of various decisions of the Tribunal and also the jurisdictional High Court in the case of Shri Syed Ali Adil (352 ITR 0418) and also the decision of the Hon'ble Madras High Court in the case of CIT vs.V.R. Karpagam (373 ITR 0127) and the Hon'ble Karnataka High Court in the case of CIT vs.Smt. K.G. Rukminiamma (331 ITR 0211), the assessee was entitled to deduction u/s 54F of the Act in respect of more than one residential flats received by virtue of a development agreement. We find that this issue is now fairly covered by the decision of various High Courts in favour of the assessee. The relevant paragraphs are reproduced hereunder for ready reference:

i) **CIT vs. Smt. K.G. Rukminiamma:**

> "*12. In the instant case, the facts are not in dispute. On a site measuring 30' x 110', the assessee had a residential premises. Under a joint development agreement, she gave that property to a builder for putting up flats. Under the agreement eight flats are to be put up in that property and four flats representing 48% is the share of die assessee and the remaining 52% representing another four flats is the share of the builder. So, the consideration for selling 52% of the site is four flats representing 48%. AH the four fiats are situate in a residential building. These four residential flats constitute 'a residential house' for the 'purpose of Section 54. Profit on sale of property is used for residence. The four residential flats cannot be construed as four residential houses for the purpose of Section 545 It. has to be construed only as "a residential house" and the assesses is entitled to the benefit accordingly.*

www.taxguru.in

ii) **CIT vs. V.R. Karpagam**

*"**9.** It is relevant to note herein that an amendment was made to the above-said provision with regard to the word 'a' by the Finance (No.2) Act, 2014, which will come into effect from 01.04.2015. The said amendment reads as follows:*

'32a. Words "constructed, one residential house in India" shall be substituted for "constructed, a residential house" by the Finance (No.2) Act, 2014, with effect from 01.04.2015.'

***10.** The above-said amendment to Section 54F of the Income Tax Act, which will come into effect only from 01.04.2015, makes it very clear that the benefit of Section 54F of the Income Tax Act will be applicable to constructed, one residential house in India and that clarifies the situation in the present case, i.e., post amendment, viz., from 01.04.2015, the benefit of Section 54F will be applicable to one residential house in India. Prior to the said amendment, it is clear that a residential house would include multiple flats/residential units as in the present case where the assessee has got five residential flats. We may also mention here that all the Authorities below have clearly understood that the agreement signed by the assessee with M/s. Mount Housing Infrastructure Ltd., is that the assessee will receive 43.75% of the built- up area after development, which is construed as one block, which may be one or more flats. In that view of the matter what was before the Assessing Officer is only equivalent of 56.25% of land transferred, equivalent to 43.75% of built up area received by the assessee. This built up area got translated into five flats. Hence, we are of the opinion that the transaction in this case was not with regard to the number of flats but with regard to the percentage of the built up area, vis-a-vis, the Undivided Share of Land.*

iii) **CIT vs. Syed Ali Adil**

*"**10.** We see no force in the said contention. As held in D. Ananda Basappa's case (supra) by the Karnataka High Court, the expression "a residential house" in section 54 (1) of the Act has to be understood in a sense that the building should be of residential nature and "a" should not be understood to indicate a singular number and where an assessee had purchased two residential flats, he is entitled to exemption under section 54 in respect of capital gains on sale of its property on purchase of both the flats, more so, when the flats are situated side by side and the builder has effected modification of the flats to make it as one unit, despite the fact that the flats were purchased by separate sale deeds. This decision was followed by the Karnataka High Court in CIT v. Smt. K.G. Rukminiamma [2011] 196 Taxman 87/[2010] 8 taxmann.com 121 (Kar.) where a residential house was transferred and four flats in a single residential complex*

www.taxguru.in

*were purchased by the assessee, it was held that all four residential flats constituted "a residential house" for the purpose of section 54 and that the four residential flats cannot be construed as four residential houses for the purpose of section 54. Admittedly the two flats purchased by the assessee are adjacent to one another and have a common meeting point. In the impugned order, the Tribunal has also relied upon the decisions in K.G. Vyas's case (supra), P.C. Ramakrishna, HUF's case (supra) and PremPrakash Bhutani's case (supra) wherein it was held that exemption under section 54 only requires that the property should be of residential nature and the fact that the residential house consists of several independent units cannot be an impediment to grant relief under section 54 even if such independent units were on different floors. The decision in Ms.Suseela M.Jhaveri's case (supra) holding that only one residential house should be given the relief under section 54 does not appear to be correct and we disapprove of it. We agree with the interpretation placed on section 54 by the High Court of Karnataka in D. Ananda Basappa's case (supra) and Smt. K.G. Rukminiamma's case (supra) and the decisions of the Mumbai, Chennai and Delhi Benches of the Tribunal in K.G. Vyas (supra), P.C. Ramakrishna, HUF (supra) and Prakash Bhutani (supra). We therefore hold that the CIT (Appeals) was correct in setting aside the order of the Assessing Officer and the Tribunal rightly confirmed the decision of the CIT (Appeals).*

***11**. We hold that no substantial question of law arises for consideration in this appeal and the same is accordingly dismissed. No costs".*

Therefore, the ground of appeal No.7 is allowed.

13. As regards grounds of appeal Nos. 8 to 14 are concerned on the applicability of the provisions of section 50C of the I.T. Act, we find that the AO has adopted the SRO value of flats received by the assessee as consideration for the transfer of the land under the development agreement u/s 50C of the Act. In our opinion, this is not correct. The cost of the constructed area received by the assessee should be taken as the consideration received by the assessee in lieu of the development agreement and not the SRO value. The SRO value u/s 50C of the Act would come into play when the assessees sell their share of the flats and if the sale consideration received by them is less than the SRO value. Therefore, the AO is directed to take the cost of construction of

www.taxguru.in

the flats by the builder as the sale consideration received by the assessee for transfer of land to the development for computing the long term capital gain.

14. In the result, assessee's appeals are partly allowed.

Order pronounced in the Open Court on 29th September, 2017.

| | |
|---|---|
| **Sd/-** | **Sd/-** |
| **(S.Rifaur Rahman)** | **(P. Madhavi Devi)** |
| **Accountant Member** | **Judicial Member** |

Hyderabad, dated 29th September, 2017.
***Vinodan/sps***

Copy to:

1 M/s. M.A. Mohiaaddin & Co. CAs, 307, Lenaine Estate, Abid Road, Hyderabad 500001
2 Income Tax Officer Ward 5(3) Hyderabad
3 CIT (A)-10 Hyderabad
4 Pr. CIT – IV Hyderabad
5 The DR, ITAT Hyderabad
6 Guard File

*By Order*