

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI B. R. BASKARAN, ACCOUNTANT MEMBER**

ITA No.41/Bang/2020
Assessment Year : 2009-10

Sri Ganga Poorna Prasad, #718, II Main, 1 st Cross, 1 st Block, Ramakrishnagar, Mysuru – 570 026. PAN : AIQPP 5131 K	Vs.	The Assistant Commissioner of Income Tax, Circle-2(1), Mysuru.
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Assessee by	:	Shri. V. Srinivasan, Advocate
Revenue by	:	Shri. Sankar Ganesh, JCIT(DR)(ITAT), Bengaluru

Date of hearing	:	04.10.2021
Date of Pronouncement	:	07.10.2021

ORDER

Per N. V. Vasudevan, Vice President

This is an appeal by the assessee against the order dated 25.10.2019 of CIT(A), Mysuru, relating to Assessment Year 2009-10.

2. The assessee is an individual. For Assessment Year 2009-10, the assessee filed return of income on 31.03.2010 declaring total income of Rs.1,84,980/-. The total income declared by the assessee comprised of income from 2 house properties totalling to Rs.29,400/-. Out of the 2 house properties one house property was property at Vishnuvardhan Road, Mysuru. The details of the income from house property declared by the assessee were as follows:

<u>Income from House Property Let</u>	
<u>out properties</u>	
<u>Property]</u>	
1089, Vishnuvardha raod,	
<i>Gross annual value</i>	<u>24,000</u>
Less - Municipal taxes	24,000
Net annual value	<u>NIL</u>
<u>Deductions</u>	24,000
Standard deduction u/s 24(a)	
<i>Net Income from Property]</i>	<u>7,200</u>
<u>Property2</u>	<u>16,800</u>
Gross annual value	18,000
Less - Municipal taxes	
Net annual value	<u>NIL</u>
<u>Deductions</u>	18,000
Standard deduction u/s 24(a)	
<i>Net Income from Property2</i>	<u>5,400</u>
• Income chargeable under the head "HouseProperty"	<u>12,600</u>
	29,400

3. Besides the above income, the assessee also declared income from business of Rs.2,54,250/-, income from other sources of Rs.1,100. After claiming deduction under Chapter VIA, the total income of Rs.1,89,980/- was declared by the assessee.

4. It is not clear from the orders of assessment as to whether this return of income was processed under section 143(1) of the Income Tax Act, 1961 (hereinafter called the 'Act') or not. The AO issued a noticed under section 148 of the Act for the reason that as per information available with the department it came to light that the assessee had entered into a development agreement with M/s. Oceanus Dwelling Pvt. Ltd. on 10-04-2008 on a sharing ration of 67:33. Subsequently the assessee revised the agreement and the ratio of built up area to be received also revised to 71:29, the assessee was to receive 17226 sqft built up area in return however finally he received only 16819 sqft of built up area and there was

deficiency of 407 sqft. The assessee had already received refundable amount of Rs. 25 lakhs at the time of original agreement which has not been returned by the assessee to the builder even after the completion of the construction and handing over of flats and till date the assessee not returned the amount. Thus the advance amount of Rs. 25 lakhs also requires to be treated as assessee's income from the project. The assessee has received 17226 sq. feet of built up area in return of the portion of land surrounded. The assessee has not declared any capital gain on the transaction. For this reason, the notice u/s 148 dated 09.10.2013 was issued.

5. The assessee filed return to notice u/s 148 on 26.08.2014 declaring a total income of Rs.1,23,99,990/-.

6. On 19.02.2015, the assessee filed a letter before the AO in which he submitted that in response to notice under section 148 of the Act, return of income was filed declaring Total Income of Rs. 1,17,59,366.00. The Total income comprised of Income from House Property, Business income and Income for Other Sources offered for taxation in the return of income originally filed earlier and Long Term Capital Gain amounting to Rs. 1,15,74,390.00.

7. After the return of income was filed in response to notice U/s 148, the assessee consulted Chartered Accountant in Bangalore in respect of the issue of Capital Gain arising for the relevant Assessment Year. After eliciting my case history and going through all my records thoroughly, the Learned Senior Chartered Accountant appraised me of certain major errors that had crept in, in the return of income originally filed and the return of income filed in response to the Notice U/s 148. The assessee submitted that the rental income from house bearing No. 1089 situated at Vishnuvardhan Road, Chamaraja Mohalla Mysore, was offered to tax in the hands of the assessee in his individual capacity. The fact remains that the said house belongs to the Hindu Undivided Family of H. Gangadharan & Sons consisting

of assessee's father H. Gangadharan — Kartha, assessee and assessee's brother Ganga Rajendra Guruprakash. As such, the rental income from the said house constitutes the income of H. Gangadharan & Sons — HUF. However, the rental income from the said house was wrongly included in total income in return of income filed originally and in the return of income filed in response to Notice U/s 148. The assessee further pointed out that he has entered in to a Joint Development agreement with M/s. OCEANUS DWELLINGS (PVT) LTD., BANGALORE, on 10/04/2008 in terms of which the assessee was entitled to 13 flats with a total plinth area of 16,819 Sq Ft in lieu of transfer of 71% undivided share in the land situated at site No 26/B Industrial Suburb 3rd Stage Mysore, belonging to the assessee. Though the assessee is eligible for exemption U/s 54 F of the income Tax Act 1961 in respect of Long Term Capital Gain arising from the transfer of the 71% of undivided share in the said land, by inadvertence and lack of advice, Exemption U/s 54F was not claimed in the return of income filed in response to the notice U/s 148. The assessee pointed out that the law is clear to the effect that exemption U/s 54F is available in respect of investment in acquisition of more than one house by the assessee. The assessee relied on decisions of Karnataka High Court in Anand Basappa case and Smt K.G. Rukminiamma case and submitted that the entire Long Term Capital Gain of Rs. 1,15,74,390.00 is entitled to exemption U/s 54F of the Act of 1961.

8. In short, the assessee made two claims by way of the aforesaid letters viz., (i) deletion of income from House Property belonging to H. Gangadharan & Sons-HUF but wrongly offered for taxation in the hands of the assessee and (ii) allowance of exemption U/s 54F of the entire Long Term capital Gain amounting to Rs. 1,15,74,390.00.

9. The AO however held that assessee did not file any evidence in support of the assessee's claim that the property at Vishnuvardhan Road, Mysuru, belonged to

the HUF of H. Gangadhara and Sons. In this regard, it is seen that the assessee had filed the following documents in support of his claim that the property at Vishnuvardhan Road, Mysuru, was a joint family property of H. Gangadhara and Sons.

		Page No. of Paper Book	
		From	To
9.	Copy of the partition deed dated 24/03/2005 in vernacular	72	81
9a.	Copy of the free English translation of the above partition deed dated	82	89
10.	Copy of the Encumbrance certificate of property #1089, Vishnuvardhan Road, Chamaraja Mahalla, for the period 01/01/2004 to 14/02/2019 in vernacular	90	91
10a.	Copy of the Free English translation of the above Encumbrance certificate for the period 01/01/2004 to 14/02/2019 in vernacular	92	93
11.	Copy of the Encumbrance certificate of property #1089, Vishnuvardhan Road, Chamaraja Mohalla, for the period 10/04/1971 to 31/12/2003 and 01/01/2004 to 29/12/2014	94	95
11a.	Copy of the Encumbrance certificate of property #1089, Vishnuvardhan Road, Chamaraja Mohalla, for the period 10/04/1971 to 31/12/2003	96	96
11b.	Copy of the Encumbrance certificate of property #1089, Vishnuvardhan Road, Chamaraja Mohalla, for the period 01/01/2004 to 29/12/2014	97	97
13.	Copy of the Corporation Tax paid receipt of property #1089, Vishnuvardhan Road, Chamaraja Mohalla, in vernacular dated 30/12/2010	98	100
13a.	Copy of the Free English translation of the above Corporation Tax paid receipt In vernacular dated 30/12/2010	101	104

14.	Copy of the Corporation Tax paid receipt of property #1089, Vishnuvardhan Road, Chamaraja Mohalla, in vernacular dated 30/12/2010	105	107
14a.	Copy of the Free English translation of the above Corporation Tax paid receiptIn vernacular dated 30/12/2010	108	110
15.	Copy of the endorsement dated 17/12/1996 issued by the Mysore City Corporation transferring the Khata in the name of Sri	111	113
16.	Copy of the Free English translation of the above endorsement dated 17/12/1996 issued by the Mysore City Corporation transferring the Khata in the name of Sri H.Gangadharan	114	116

10. Thereafter, the AO gave a finding that the assessee owned 2 residential properties other than the new asset which the assessee acquired under the Joint Development Agreement (JDA) and therefore the assessee cannot be given the benefit of deduction under section 54F of the Act. In this regard, it is worthwhile noticing that under proviso to section 54F(1) of the Act, the assessee should not own more than 1 residential house other than the new asset on the date of transfer of the original asset. We have already seen that in the return of income filed by the assessee for Assessment Year 2009-10 on 31.03.2010, he had declared income from house property in respect of 2 properties out of which one is the property at Vishnuvardhan Road, Mysuru. If the property at Vishnuvardhan Road, Mysuru, is regarded as the property belonging to HUF, then the assessee would not be hit by the condition laid down in the proviso to section 54F(1) of the Act. The AO thereafter proceeded to compute the long term capital gain by holding that the assessee will not be entitled to the benefit of deduction under section 54F of the Act and also after holding that the property at Vishnuvardhan Road, Mysuru belonged to the assessee and that the property was held as stock-in-trade. The computation of long term capital gain made by the AO was as follows:

“The assessee received 13 flats in return for 71% of the property. The assessee has adopted the guidelines value of the flats for arriving on the sale consideration. It is not an acceptable method of arriving at the capital gain in this situation. It is also ascertained that refundable advance of Rs. 25,00,000/- received by the assessee from the builder has not been so far claimed by the builder therefore the same is treated as assessee's income includable with the sale consideration. Therefore, the capital gain computed as above after obtaining the cost per sqft of the flats from the builder M/s. Oceans Dwellings Pvt. Ltd. According to the builder the cost of construction is Rs.2,064/- per sqft including the land cost.”

The plinth area of the construction of flats	16,819 sqft.
Cost per sqft of the flats	Rs. 2,064/-
Cost of 13 flats	Rs. 3,47,14,416/-
Indexed cost of the land sold (as furnished by the assessee)	Rs. 11,89,990/-
Indexed cost of improvement (as furnished by the assessee)	Rs 1,90,820/-
Total indexed cost	Rs. 13,80,810/-
Profit	Rs. 3,33,33,606/-
Taxable profit of the venture	Rs. 3,33,33,606/-
Add: advance received by the assessee at the time of agreement	Rs. 25,00,000/-
Total sale consideration	Rs. 3,58,33,606/-

11. Aggrieved by the order of the CIT(A), assessee preferred appeal before the CIT(A) contending as follows:

- i. That the property at Vishnuvardhan Road, Mysuru, belonged to the HUF and not to the assessee and therefore the assessee was not hit by the prohibition contained in the proviso to section 54F(1) of the Act.

- ii. Challenging the manner in which the AO computed the capital gain on sale of the property by the assessee by adopting the value of construction of the flats as against the claim of the assessee that guideline value of the land should be on the basis of the computation of long term capital gain.

12. The CIT(A) however did not render any finding on both the grounds raised by the assessee but however dismissed the appeal of the assessee. The following were the relevant observations of the CIT(A):

“5.4 I have considered the above written submissions filed by the appellant and assessment order of the Assessing Officer. On going through the same it is found that the appellant has entered into a joint development agreement with Mis Oceanus Dwelling Pvt. Ltd. on 10.04.2008 on a sharing ratio of 67:33. Subsequently the assessee revised the agreement and the ratio of built up area to be received also revised to 71:29, the assessee was to received 17226 sqft built up area in return however finally he received only 16819 sqft of built up area there is deficiency of 407 sqft. The same has been perused. However, the Assessing Officer found that the appellant did not declare any capital gains for the assessment year 2006-07. Therefore, the assessment was reopened by issuing notice u/s.148 on 23/07/2013 after recording the reasons and obtaining necessary approval from the competent authority. In response to the notice issued u/s.148 no return has been filed. I have carefully. considered the evidence on record, the reasons given by the Assessing Officer in the impugned order and found that the reasons recorded and notice issued u/s.148 are in order. Hence, the ground raised by the appellant challenging the validity of issue of notice u/s.148 is hereby rejected. This ground of appeal is dismissed.

5.5 With regard to objection for denying the claim u/s.54F is concerned, the facts involved are considered. It is found that the Assessing Officer has invoked the provision of section 2(47)(v) of the Income Tax Act 1961 r.w.s 53A of the transfer of Property Act 1882 (herein after TPA) and as the appellant is contesting the application of this provision in the present case, I have examined closely the ingredients of the above provisions.

5.6 Further, the amendment to section 54 F (1) by substituting the words

'constructed', one residential house in India" for constructed, a residential house by the Finance Act (No.2) 2014 w.e.f 01/04/2015, therefore does not adversely affect the appellant's claim in this case. The amendment w.e.f A.Y 2015-16 (refer circular no. 01/2015 in F. No. 142/13/2014-TPL dated 21/01/15) cannot be applied to the assessment year under consideration.

6. *The ground relating to charging of interest u/s.234A, 234B & 234C of the Income Tax Act 1961 is also dismissed, as such interests are consequential and mandatory.*

7. *In the result the appeal is dismissed."*

13. Aggrieved by the CIT(A), assessee is in appeal before the Tribunal.

14. We have heard the rival submissions. It is clear from the perusal of the order of the CIT(A) that he has not rendered any findings on various issues raised by the assessee in its appeal. In these circumstances, we have no other option but to remand the issue to the AO for consideration of the issues afresh. We also notice from the perusal of the order of the AO that he has come to the conclusion that the assessee held the property that was subject matter of JDA as stock in trade and therefore the assessee was not eligible to claim deduction under section 54F of the Act. This finding of the AO is without any basis and is liable to be vacated. The issues to be considered afresh are whether the property at Vishnuvardhan Road, Mysuru, belongs to the HUF or the assessee. The second issue that the AO has to consider is as to whether the assessee would be entitled to deduction under section 54F of the Act. In this regard, learned Counsel for the assessee placed reliance on the decision of the ITAT, Bengaluru Bench in the case of Smt. Nethravathi, Bengaluru vs ITO in ITA No.2630/Bang/2017 order dated 25.04.2018 wherein this Tribunal took the view that multiple flats obtained under JDA would be entitled to deduction under section 54F of the Act. The third issue that might require consideration by the AO is the methodology to be adopted while computing long term capital gain in JDA. Learned Counsel in this regard has brought to our notice the decision of the

ITAT, Bengaluru Bench in the case of ACIT Vs. Shankar Vittal Motor Co.Ltd. ITA No.35/Bang/2015 order dated 18.03.2016 wherein this Tribunal took the view that while computing long term capital gain in a JDA, guideline value of the land transferred has to be taken as the full value of consideration. The third issue may become academic if the second issue is decided in favour of the assessee. With these observations, we allow the appeal of the assessee for statistical purposes. We may also clarify that we are remanding the issue to the AO for the reason that none of the documents filed by the assessee in support of his claim that the property at Vishnuvardhan Road, Mysuru, is a joint family property, has been considered by the AO.

15. In the result, the appeal of the assessee is treated as allowed for statistical purposes.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-

(B. R. BASKARAN)
Accountant Member

Sd/-

(N. V. VASUDEVAN)
Vice President

Bangalore.

Dated: 07.10.2021.

/NS/*

Copy to:

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| 1. Appellants | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.