IN THE HIGH COURT OF KARNATAKA AT BANGALORE

Dated the 27th day of August 2010

: P R E S E N T :

HON'BLE MR.JUSTICE : N. KUMAR

A N D

HON'BLE MR.JUSTICE : V.JAGANNATHAN

INCOME TAX APPEAL No. 783 / 2008

BETWEEN :

1. The Commissioner of Income-Tax,
C.R.Building, Queens Road, Bangalore.

2. The Income-Tax Officer,
Ward-3(4), C.R.Building,
Queens Road, Bangalore.

...Appellants

(By Sri K.V.Aravind for Sri M.V.Seshachala, Advocate.)

A N D :

Smt.K.G.Rukminiamma,
Partner, M/s Meena Trading Co.,
Balepete, Bangalore.

...Respondent

Income Tax Appeal filed under Section 260-A of the I.T.Act, 1961 arising out of order dated 22.2.2008 passed in ITA.No.99/BNG/2007, for the Assessment Year 2004-05, praying that this Hon'ble Court may be

pleased to: i) formulate the substantial questions of law stated therein, ii) allow the appeal and set aside the order passed by the ITAT Bangalore in ITA.No.99/BNG/2007, dated 22.2.2008 confirming the order of the appellate commissioner and confirm the order passed by the Income Tax Officer, Ward-3(4), Bangalore, in the interest of justice and equity.

This ITA coming on for admission this day, Kumar, J, delivered the following :

JUDGMENT

This appeal is by the revenue challenging the order passed by the Appellate Tribunal as well as the Appellate Authority holding that, in the facts and circumstances of this case, the assessee is entitled to deduction under Section 54 and the capital gains would be nil.

2. Assessee Smt. Rukminiyamma had a property at Basavanagudi. She entered into a joint development agreement with builder M.A.Mohan Kumar on 8.7.2002

to develop the said property. According to the agreement, the assessee is the owner of the property bearing No. 69 (old 17 and later 46) situated at Govindappa Road, Basavanagudi, Bangalore-2, measuring 30' x 110'. The builder agreed to construct residential apartment and agreed to deliver 48% of the super built area to the assessee in the form of residential apartments. The entire cost of construction and other expenses are to be borne by the builder. Accordingly, as agreed, the builder constructed eight flats and handed over four flats to the assessee. Out of the four flats, she gifted three flats to her sons and retained one flat for her use. The builder, out of four flats retained by him, has sold three flats for a consideration of Rs.17,21,250/-.

3. The assessee filed her return of income for the assessment year 2004-05 on 1.3.2005 and had declared the income from capital gains as nil. The sale value of 52% of the site was valued at Rs.22,93,650/- and arrived at capital gains at Rs.13,94,736/-. Since the

amount was invested in residential flat, the net taxable capital gains was declared as nil. The assessee had worked out the capital gains at Rs.2,08,912/-. In the note furnished, she had mentioned that, out of the four flats allotted to her, three flats were gifted to her sons and retained one flat for her use. The return was processed under Section 143(1) on 6.2.2006. The case was selected for scrutiny as per Board's instruction since the assessee had claimed exemption under Section 54F being the capital gain invested in residential property. Notices under Sections 143(2) and 142(1) were issued. The assessee entered appearance with her counsel. At the time of hearing, the assessee was requested to furnish a valuation report from the registered valuer to arrive at the cost of construction of four flats. The assessee produced a valuation report showing the cost of construction of four flats at Rs.40,54,200/-. The builder had given a sum of Rs.1,20,000/- on 8.7.2002 as refundable deposit. Out of the said amount, she had repaid Rs.50,000/- to the builder and still she was due to refund Rs.70,000/-.

4. The assessing authority, on the aforesaid facts, held that the consideration received by the assessee is Rs.40,54,200/- as against Rs.22,93,650/- declared by her being the value of 1,699 feet of land being 52% of site transferred to the builder. Accordingly, a sum of Rs.21,73,880/- was held to be the capital gain. Therefore, it was concluded that the assessee had furnished inaccurate particulars of income by declaring the value of portion of site transferred to the builder at Rs.22.9 lakhs as against the correct figure of Rs.40.5 lakhs for which initiation of action under Section 271(1)(c) of the Income Tax Act was directed.

5. Aggrieved by the said order of the assessing authority, the assessee preferred an appeal before the Commissioner (Appeals). The appellate authority held that it is clear from the facts that the asset transferred was a residential house and the consideration received in the form of four flats are also residential flats. Thus, the appellant is entitled for deduction under Section 54 and certainly not under Section 54F. Regarding the

quantum of deduction, he held that the appellant is entitled to deduction under Section 54 in respect of the entire value of four flats received by her being consideration for transfer of undivided interest in 1,699 sq. ft. of property owned by her to the developer. He further held that the judgment of this court in the case of *Anand Basappa Vs. ITO*, reported in (2005)1 (11) ITCL 283, squarely applies to the facts of the case and accordingly, the appeal was allowed and the assessee was granted the relief of Rs.2,73,880/-.

6. Aggrieved by the said order of the appellate authority, the revenue preferred an appeal before the appellate tribunal. The tribunal, on reappreciation of the facts and the law on the point, has held that, in a case of this nature, what is to be examined is whether the conditions of Section 54 are satisfied at the time of investment in the property and when the assessee sold the original property and earned capital gain out of sale, what is to be seen is whether the sale proceeds of original assets has been utilized in acquiring another

house property. The apartments were acquired simultaneously and hence the conditions for acquiring a residential house within the time specified are complied with and, therefore, the assessee is eligible for deduction under Section 54 in respect of all the apartments simultaneously acquired. Accordingly the Appellate Tribunal dismissed the appeal. Aggrieved by the same, the revenue is before this court.

7. The learned counsel for the revenue assailing the impugned orders passed by the appellate authority, contended that, under Section 54, the word used is "a residential house". The letter 'a' in the said word is to be given a meaning. The only meaning that can be given to the said letter is that the assessee would be entitled to the benefit of exemption from payment of capital gains only when he or she acquired a residential house. If more than one residential house is acquired, as in the present case, when four residential flats are acquired, the benefit can be extended only in respect of one residential flat and in respect of the remaining three

residential flats, the assessee is not entitled to the benefit and, therefore, he submits that the impugned judgments are erroneous and requires to be set aside.

8. For a proper appreciation of the aforesaid contention, it is necessary to have a careful look at Section 54 of the Income Tax Act, which reads as under:

> "54. *Profit on sale of property used for residence*:- (1) Subject to the provisions of sub-section (2), where, in the case of an assessee being an individual or a Hindu undivided family, 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" (hereafter in this section referred to as the original asset), 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, a residential house, then, instead of the capital gain being charged to income-tax as

income of the previous year in which the transfer took place, it shall be dealt with in accordance with the following provisions of this section, that is to say,-

(i) ....."

9. A reading of the aforesaid provision makes it very clear that the property sold is referred to as original asset in the section. That original asset is described as buildings or lands appurtenant thereto and being a residential house. Therefore, it is not mere "a residential house". The residential house may include buildings or lands appurtenant thereto. The stress is on the use to which the property is put to. Only when that asset was used as a residential house, which may consist of buildings or lands appurtenant thereto, the income derived from the sale of such a residential house is chargeable under the head "income from house property." If 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 a residential

house, then, instead of the capital gain being charged to income-tax as income of the previous year in which the transfer took place, it shall be dealt with in accordance with the aforesaid provisions. In this part of the section also, the words "a residential house" is again used. The said residential house necessarily has to include buildings or lands appurtenant thereto. It cannot be construed as one residential house. In this context, it is useful to refer to Section 13 of the General Clauses Act, 1897, which reads as under:

> "13. *Gender and number.* – In all Central Acts and Regulations, unless there is anything repugnant in the subject or context–
>
> (1) words importing the masculine gender shall be taken to include females; and
>
> (2) words in the singular shall include the plural, and *vide versa*."

10. The context in which the expression 'a residential house' is used in Section 54 makes it clear that, it was not the intention of the legislation to convey the meaning that it refers to a single residential house. If

that was the intention, they would have used the word "one." As in the earlier part, the words used are buildings or lands which are plural in number and that is referred to as "a residential house", the original asset. An asset newly acquired after the sale of the original asset also can be buildings or lands appurtenant thereto, which also should be "a residential house." Therefore the letter 'a' in the context it is used should not be construed as meaning "singular." But, being an indefinite article, the said expression should be read in consonance with the other words 'buildings' and 'lands' and, therefore, the singular 'a residential house' also permits use of plural by virtue of Section 13(2) of the General Clauses Act. This is the view which is taken by this court in the aforesaid Anand Basappa's case in I.T.A.No. 113/2004, disposed of on 20.9.2008.

11. We, therefore, do not see any merit in the submission of the learned counsel for the revenue.

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 the 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%. All the four flats 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 54. It has to be construed only as "a residential house" and the assessee is entitled to the benefit accordingly.

13. In that view of the matter, the Tribunal as well as the appellate authority were justified in holding that there is no liability to pay capital gain tax as the case squarely falls under Section 54 of the Income Tax Act. Hence, we do not see any substantial question of law

arising for consideration in this appeal. Accordingly, the appeal is dismissed.

Sd/-
Judge

Sd/-
Judge

ckc/-