IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH: BANGALORE

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

IT(IT)A No.699/Bang/2021
Assessment Year : 2013-14

Sri Mathew Pradeep Francis C/o Jacob Cherian, SilpiChikenhully Estate B Banagala Post Siddapur Coorg 571 253 Karnataka **PAN NO : ABGPF7516D**	**Vs.**	ACIT (Int. Taxn.) Mangalore
APPELLANT		**RESPONDENT**

Appellant by	**:**	Smt. Sunaina Bhatia, A.R.
Respondent by	**:**	Shri Sankar Ganesh K., D.R.

Date of Hearing	**:**	15.03.2022
Date of Pronouncement	**:**	04.04.2022

O R D E R

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

The assessee has filed this appeal challenging the order dated 29.11.2021 passed by Ld. CIT(A)-12, Bengaluru and it relates to the assessment year 2013-14. The assessee is aggrieved by the decision of Ld. CIT(A) in granting only partial relief in respect of long term capital gains arising on sale of house property.

2. The facts relating to the issue are stated in brief. The assessee is an NRI, residing in USA. During the year under

consideration, he sold a house property located at Survey No.917, ChembuKavu village, Thrissur, Kerala, which was inherited from his father. The area of the house property consisted of 23 cents of ground and 2433 sq.ft.,of constructed building. The assessee sold the above said house property for a consideration of Rs.2,45,20,000/-. The assessee declared nil capital gain after claiming exemption u/s 54 and u/s 54 EC of the Income-tax Act,1961 ['the Act' for short]. The A.O. however computed the longterm capital gain at Rs.60,32,849/-. The Ld. CIT(A) granted partial relief and hence the assessee has filed this appeal before us.

3. The capital gain workings made by the assessee and by the A.O. are extracted below for the sake of understanding the dispute before us:-

(A) Capital gains workings computed by the Assessee:-

Sale consideration			2,45,20,000/-
Less: Sale Expenses:			5,20,400/-
Net Sale consideration:			2,39,99,600/-
Acquisition details	F.Y.		
Cost of purchase	81-82	6,75,000/-	
Indexed Cost 6,75,000 x 852/100		-	57,51,000/-
(@Rs.25,000 per cent			
Cost of improvement	-	5,00,000/-	
Indexed cost of improvement		14,47,980/-	71,98,980/-
Capital gains			1,68,00,620/-
Less:			
Exemption : Sec 54 – Investment in capital gains			1,18,00,620/-
Sec 54 EC		50,00,000/-	1,68,00,620/-
Taxable capital gain			Nil

(B) The capital gains worked out by the A.O. is as under:-

Sale consideration	2,45,20,000	
Less: Advocate's fee:	30,000	
		2,44,90,000
Acquisition detailsF.Y.		
Cost of purchase		
As discussed –		
i) land Rs.1,000 per cent (FY 81-82)		
Indexed cost 23000x852/100	1,95,960	
ii) Building – Rs.1,00,000		
Indexed Cost 1,00,000 x 852/100	8,52,000	
Cost of improvement-1,00,000/- 86-87		
Indexed cost of improvement		
1,00,000 x 852/100	6,08,571	
Total Indexed cost of purchase and Improvement		16,56,571
Capital gains		2,28,33,469
Less:		
Exemption Sec 54 – Investment in capital gains		1,18,00,620
Sec 54EC		50,00,000
Taxable capital gain		60,32,849

4. The differences made by the AO in computation of capital gains are as under:-

(a) Sale expenses allowed was Rs.30,000/- only as against the claim of Rs.5,20,400/-.

(b) The assessee had adopted the market value of land as on 1.4.1981 at Rs.25,000/- per cent. The AO, however, has adopted the market value on that date at Rs.1000/- per cent. The market value of building as on 1.4.1981 adopted by the assessee at Rs.1,00,000/- was accepted by the AO.

(c) The assessee had claimed cost of improvement at Rs.5,00,000/-. The AO has reduced the same to Rs.1,00,000/-.

(d) The assessee claimed before the AO that he has purchased new residential house from M/s Sattva Developers by paying a sum of Rs.1,48,26,257/-. The assessee had originally claimed a sum of Rs.1,18,00,620/- only as deduction u/s 54 of the Act. In view of the disallowances proposed by the AO, the assessee sought deduction of Rs.1,48,26,257/- u/s 54 of the Act before the AO. However, the AO rejected the same observing that the amount spent after filing of return of income should have been deposited in the Capital gains account scheme, which has not been done. The AO also held that the assessee can make fresh claim only by filing revised return of income.

5. The first issue relates to restriction of property sale expenses to Rs.30,000/-. The assessee claimed expenses on sale of house property to the tune of Rs.5,20,400/-, which consisted of brokerage amount of Rs.4,92,400/- claimed to have been paid to a broker named Shri K.T. Verghese and advocate fee of Rs.30,000/-. The AO rejected the claim of payment of brokerage in the absence of any proof. Before the AO, the assessee furnished an acknowledgement of receipt of brokerage signed by Shri K T Verghese. However, the same was on the letter head of the assessee herein and hence the AO did not accept the same. Accordingly, the AO rejected the claim of payment of brokerage in the absence of any proof. Accordingly, he restricted the claim of sale expenses to Rs.30,000/-. The Ld. CIT(A) also confirmed the same.

5.1 We heard the parties on this issue and perused the record. We notice that the Ld. A.R. could not furnish the address of the above said broker. Since the assessee had obtained acknowledgement for receipt of money from Shri K.T. Verghese on

his letter head, the A.O. held that he could not verify the genuineness of the payment. Before us, the assessee could furnish copy of bank statement, wherein it is noticed that the payment of Rs.4,90,000/- made to person named Shri K.T. Verghese by way of cheque No.395577 was found debited on 16.3.2013. According to Ld A.R, the above said payment represents commission calculated @ 2% on the sale consideration.

5.2 It is an admitted fact that the assessee is a non-resident and is residing in USA. We notice that, from the beginning, the assessee has been stating that he has paid brokerage of Rs.4,90,000/- calculated @2% of the sale consideration to a person named Shri K.T. Verghese. The mistake, according to AO, is that the assessee has obtained acknowledgement from Shri K.T. Verghese for the payment of brokerage on his letter pad, instead of obtaining a separate receipt from Shri K T Verghese. Further the assessee was not aware of address or whereabouts of Shri K.T. Verghese, making it impossible to cross verify the claim of payment of brokerage. The only other evidence furnished the assessee, apart from acknowledgement referred above, is the bank statement, wherein the payment of Rs.4,90,000/- made to Shri K.T. Verghese was found debited.

5.3 Thus, the assessee could not prove the payment of brokerage with concrete evidences. It is a common practice to pay brokerage while purchase or selling the properties. Since the assessee is in USA, it is quite possible that he would have paid brokerage to the broker who introduced the buyer. Hence, the payment of brokerage by the assessee cannot be discounted altogether and in our view, in the facts of the present case, in the absence of concrete evidences, the genuineness of the payment may be determined on the basis of circumstantial evidences, which are acknowledgement given on the

letter pad of the assessee and the bank entries. Since these are incomplete documents, it is not clear as to whether the entire amount of Rs.4,90,000/- represented only brokerage amount or not. Accordingly, in the absence of proper evidences, we are of the view that the entire claim of brokerage of Rs.4,90,000/- may not be allowed. Accordingly, we restrict the brokerage payment to the extent of 1% of the sale consideration may be allowed and direct the AO to allow brokerage expenses to the extent of Rs.2,45,000/- as against the claim of Rs.4,90,000/-. Accordingly, we set aside the order of Ld. CIT(A) passed on this issue and direct the A.O. to allow brokerage expenses to the tune of Rs.2,45,000/-.

6. The next issue relates to determination of fair market value as on 1.4.1981. The assessee had estimated the fair market value of the land as on 1.4.1981 at Rs.25,000/- per cent and the fair market value of building as on that date at Rs.1,00,000/-. The A.O. accepted the fair market of building. However, he adopted the fair market value of land at Rs.1,000/- per cent, on the basis of details obtained from sub-registrar office. Before A.O. as well as Ld. CIT(A), the assessee furnished copy of a certificate obtained by his father in the year 1981. The Tahsildar, Thrissur had issued a certificate dated 17-12-1981, wherein he had valued the property consisting of 62 cents and building at Rs.4,52,000/-. The AO did not consider this certificate and proceeded to adopt the value shown in comparable cases during that period obtained from the sub-registrar office. Accordingly, the AO adopted the fair market value of land as on 1.4.1981 at Rs.1,000/- per cent.

6.1 The Ld CIT(A), however, took cognizance of the certificate issued by the Tahsildar. He noticed that the value of Rs.4,52,000/- pertained to land having extent of 62 cents and building. The Ld CIT(A) estimated the value of building component at Rs.2.00 lakhs.

Accordingly, he arrived at the value of land consisting of 62 cents at Rs.2,52,000/-, which worked out to around Rs.4,000/- per cent. Accordingly, the Ld. CIT(A) directed the A.O. to adopt fair market value of land as on 1.4.1981 at Rs.4,000/- per cent, instead of Rs.1,000/- per cent. The assessee is aggrieved.

6.2 We heard the parties on this issue and perused the record. We notice that the AO had adopted fair market value as on 1.4.1981 @ Rs.1,000/- per cent on the basis of comparable sale consideration furnished by the sub-registrar office. We also notice that the assessee could not furnish any material to support the claim of FMV of Rs.25,000/- per cent. Hence, the only other credible material available in this case is copy of certificate obtained in 1981 itself from Tahsildar of Thrissur taluk. We noticed that the Ld CIT(A) has computed the FMV land as on 1.4.1981 at Rs.4,000/- per cent on the basis of this certificate. While making computation, we notice that the Ld CIT(A) has adopted the value of building at Rs.2,00,000/-. However, we noticed earlier that the FMV of building was adopted at Rs.1,00,000/- both by the assessee and AO. Accordingly, we are of the view that the FMV of building should have been taken at Rs.1,00,000/- by Ld CIT(A) instead of Rs.2,00,000/-.

6.3 We noticed that the value of 62 cents and building was estimated by the Tahsildar at Rs.4,52,000/-. By adopting the value of building at Rs.1,00,000/-, the value of 62 cents of land would work out to Rs.3,52,000/-, which results in FMV of land per cent at Rs.5,677/-. Accordingly, we are of the view that the FMV of land as on 1.4.1981 may be adopted at Rs.5,700/- per cent. Accordingly, we modify the order passed by Ld. CIT(A) and direct the A.O. to adopt fair market value of land at Rs.5,700/- per cent.

7.0 The next issue relates to rejection of claim of cost of improvement to Rs.1 lakh as against the claim of Rs.5 lakhs. The assessee had claimed cost of improvement at Rs.5 lakhs, which consisted of civil work carried out in bathrooms at Rs.1 lakh and cost of air conditioners fitted in the rooms at Rs.4 lakhs. The A.O. rejected the claim of cost of air conditioners of Rs.4 lakhs and accordingly restricted the cost of improvement to Rs.1 lakh. The Ld. CIT(A) also confirmed the same.

7.1 We heard the parties on this issue and perused the record. We notice that the Ld. CIT(A) has observed that the assessee has not been able to provide any banking transaction in support of purchase of air conditioners. Further, he has observed that the air conditioners are at best categorized as furnishing in order to improve the living condition inside the building and it do not enhance the value of building or longevity of the building per se. Accordingly, on cumulative reasons, he has rejected the claim of Rs.4.00 lakhs. Before us, the Ld. A.R. could not counter the reasoning given by Ld. CIT(A) that the air conditioners, at best, can be categorized as furnishing for improving living conditions. We also agree with the said view expressed by Ld CIT(A). Accordingly, we are of the view that the tax authorities are justified in rejecting the claim of cost of improvement of Rs.4 lakhs relating to purchase of air conditioners. Accordingly, we confirm the order passed by Ld. CIT(A) on this issue.

8 The last issue relates to rejection of enhanced claim of deduction u/s 54 of the Act to Rs.1,48,26,257/-. We noticed earlier that the assessee had claimed deduction u/s 154 at Rs.1,18,00,620/- in the return of income and claimed deduction for enhanced amount of Rs.1,48,26,257/- before the A.O. However, the AO has rejected the claim on the reasoning that the assessee

could revise the claim only by filing revised return of income and further the assessee has not kept the amount not used before the due date for filing return of income in capital gain account scheme. The Ld. CIT(A) also confirmed the same. In this regard, the Ld CIT(A) confirmed the view of the AO by following the decision rendered by Hon'ble Supreme Court in the case of Goetze India Limited (284 ITR 323).

8.1 The Hon'ble Supreme Court has held in the case of Goetze India Limited that the power of the Tribunal to admit additional claims is not impinged by its decision. Accordingly, if the assessee has spent Rs.1,48,26,257/- in acquiring new residential house, then in order to meet the ends of justice, the same should be allowed as deduction u/s 54 of the Act. In the written submissions filed before the tax authorities, the assessee has furnished details of investment made in purchasing new residential house as under:-

03/11/2013	Rs. 2,00,000
30/11/2013	Rs.1,19,00,000
10/07/2014	Rs. 25,12,905
10/07/2014	Rs. 2,13,352
TDS	Rs. 1,33,774

	Rs.1,48,26,257
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The next objection raised by the AO is that the assessee has not deposited the amount remaining unutilized before the due date for filing return of income u/s 139(1) of the Act in the capital gains account scheme. However, this objection of the AO is contrary to the binding decision rendered by Hon'ble jurisdictional Karnataka High Court in the case of Fatima Bai Vs. ITO (2009) 32 DTR (Kar) 243. We notice that the above said decision of Hon'ble jurisdictional High Court was followed by the coordinate bench in the case of Smt. Selvi Venkata Subramani Vs. ITO in ITA No.1052/Bang/2013. For the sake of convenience, we extract

below the operative portion of the order of this Tribunal in the above said case:-

> *"8. We have considered the rival submissions as well as the relevant material on record. As regards the denial of claim u/s 54F on the ground that the assessee did not deposit the sale proceeds in the capital gain account as per the provisions of sub- sec.(4) of sec.54F, we note that this issue is now settled by the decisions of the Hon'ble jurisdictional High Court in the case of Fatima Bai vs. ITO reported in (2009) 32 DTR (Kar) 243 and in the case of Smt.Vrinda P.Issac (supra). The Hon'ble High Court in the case of Fatima Bai (supra) has held in paragraphs 7 to 12 as under:*
>
> > *"7. The s. 54(1) declares that when the assessee sells any long-term capital asset, the assessee should purchase the building within one year before the transfer or within two years after the transfer by investing capital gains. In which event the assessee will not be liable for capital gain tax.*
> >
> > *8. The s. 54(2) declares that within one year from the date of transfer if the capital gain is not invested in purchase of building, he should deposit the amount in the 'Capital Gain Account Scheme' or else the assessee should invest the capital gains before filing of return within the permitted period under s. 139. In which event, the assessee will not be liable to pay capital gain tax.*
> >
> > *9. The s. 139(4) declares that the assessee should file returns within the time prescribed, if he fails to file returns, he may file returns for any previous year at any time before expiry of one year from the end of relevant assessment year.*
> >
> > *10. In the instant case, the due date for filing of return is 30th July, 1988. Under s. 139(4) the assessee was entitled to file return in the extended time, which is within 31st March, 1990.*
> >
> > *11. The extended due date under s. 139(4) would be 31st March, 1990. The assessee did not file the return within the extended due date, but filed the return on 27th Feb., 2000. However, the assessee had utilised the entire capital gains by purchase of a house property within the stipulated period of s. 54(2) i.e., before the extended due date for return under s. 139. The assessee technically may have defaulted in not filing the return under s. 139(4). But, however, utilised the capital gains for purchase of property before the extended due date under s. 139(4). The contention of the Revenue that the deposit in the scheme should have been made before the initial due date and not the extended due date is an untenable contention.*

12. The Gauhati High Court in CIT vs. Rajesh Kumar Jalan (2006) 206 CTR (Gau) 361 : (2006) 286 ITR 274 (Gau) has taken a similar view that the time-limit for deposit under the scheme or utilisation can be made before the due date for filing of returns under s. 139(4). "

Thus it is clear that if the assessee has utilised the entire capital gain by purchase of a house or construction of the new house within the stipulated period, the benefit of sec.54F cannot be denied. This view has been reaffirmed by the Hon'ble jurisdictional High Court in the case of Smt.Vrinda P.Issac (supra). Accordingly, if the assessee has constructed the new house and utilised the sale proceeds and capital gain within the period of limitation as provided u/s 54F, then the claim of the assessee u/s 54F cannot be denied."

In the instant case, we noticed that the assessee has made investment in acquiring new residential house property within the time given in sec.54 of the Act and also within the time limit prescribed u/s 139(4) for filing revised return of income. Accordingly, following the binding decision of the Hon'ble jurisdictional High Court, we direct the AO to allow the deduction u/s 54 to the extent of Rs.1,48,26,257/-.

9. Accordingly, we restore the issue of computation of long term capital gains to the file of AO for making fresh computation as per the directions given above.

10. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 4th Apr, 2022.

Sd/-	**Sd/-**
(N.V. Vasudevan)	**(B.R. Baskaran)**
Vice President	**Accountant Member**

Bangalore,
Dated 4th Apr, 2022.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.