IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date : 28.02.2019

CORAM

THE HONOURABLE DR.JUSTICE VINEET KOTHARI
AND
THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

W.A.No.1127 of 2017
and
C.M.P.No.15677 of 2017

Principal Commissioner of Income Tax-5
Aayakar Bhavan
Wanaparthy Block, 5th Floor,
121, Mahatma Gandhi Road
Chennai - 600 034, ... Appellant/Respondent

Vs

Shri.Abhijit Bhandari ... Respondent/Petitioner

PRAYER:
The Writ Appeal filed under Clause 15 of the Letters Patent, against the Final order passed in W.P.No.11596 of 2016, dated 02.06.2017.

W.P.No.11596 of 2016:-
Writ Petition filed under Article 226 of the Constitution of India, praying for the issuance of Writ of Certiorari, or any other appropriate writ, direction or other in the nature of Writ, Calling for the records in C.No.2(24)/263/PCIT-5/CR-5/2015-16 dated 26.02.2016 on the file of the Respondent relating to Assessment Year 2008-09 quashing the same.

For Appellant : M/S.Hema Muralikrishnan
For Respondent : Mr.M.P.Senthilkumar

JUDGMENT
(Judgment of the Court was delivered by C.V.Karthikeyan,J.)

The respondent in W.P.No.11596 of 2016, the Principal Commissioner of Income Tax-5, Chennai, is the appellant herein, calling into question the order of the learned Single Judge, dated 02.06.2017.

2.W.P.No.11596 of 2016 had been filed by the petitioner Abhijit Bhandari under Article 226 of the Constitution of India praying to issue a Writ of Certiorari or any other appropriate writ, calling for the records in C.No.2(24)/263/PCIT-5/CR-5/2015-16 dated 26.02.2016, on the file of the appellant herein relating to Assessment Year 2008-09 and to quash the same.

W.P.No.11596 of 2016:

3.As stated above the Writ Petition had been filed by Abhijit Bhandari, seeking issuance of Writ of a Certiorari to call for the records and quash the order in C.No.2(24)/263/PCIT-5/CR-5/2015-16 dated 26.02.2016, passed under Section 263 of the Income Tax Act, 1961 [in short "the Act"] by the Principal Commissioner of Income Tax-5, Chennai.

4.The writ petitioner was the principal shareholder of a company called Royal Images Direct Marketing Private Company [in short referred to as "RIDM"]. The petitioner, along with other shareholders had entered into a Share Purchase Agreement, dated 17.07.2006 [in short "SPA"] with another entity by name Accor Services.

5.According to the SPA, 70% of the shareholding in RIDM was to be sold by way of tranche, followed by a second and third tranches comprising 20% and 10% of the equity stake in RIDM. The said three tranches were required to be sold in three consecutive years, namely, AY-2007-2008, AY-2008-2009 and AY-2009-2010. The petitioner had received an advance to a sum of Rs.15,82,86,273/- in the previous year 2006-2007, relatable to AY 2007-2008 towards the sale of 70% of the shares in the first tranche. The petitioner claimed that 70% of the shareholding was sold by him on 05.05.2007 for a total consideration of Rs.22,42,72,478/- in the first tranche including the aforementioned sum received in the form of advance.

6.The petitioner, to avail the benefit of Section 54F of the Act, decided to invest the amount received in two residential flats located in the Olumpus Building in Altamount Road, Cumbulla Hill, Mumbai [hereafter collectively called as "flats"]. These flats bore Nos. 607 and 612. They were, according to the petitioner adjacent to each other.

7.The Housing Society issued a No Objection Certificate [in short "NOC"] with respect to flat No.612 on 11.04.2006. The petitioner purchased the two flats by two separate sale deeds. Flat No.607 was purchased by sale deed dated 23.05.2006. Flat No.612 was purchased by sale deed dated 16.01.2007.

8.The petitioner claimed in the writ petition that he had commenced the modification and renovation works to convert the

two adjoining flats into a single residential unit by or about June 2006.

9.The petitioner also claimed that the Housing Society also provided him only with one single vote in matters relating to adjudicating issues which arise in the Society since for all practical purposes, he was the owner of one flat though, it was actually two separate flats conjoined into one.

10.The petitioner filed his returns for AY 2008-2009 on 31.07.2008, wherein, he claimed deduction under Section 54F of the Act. An assessment order dated 22.12.2010, was passed.

11.In the writ petition, the petitioner further claimed that he was intimated about an objection raised by Internal Revenue Audit and he further claimed that he had provided all the necessary details and thereupon the Assessing Officer dropped the proceedings initiated. The petitioner further stated in the writ petition that he received a notice dated 20.03.2013, under Section 148 of the Act, with respect to the very same AY 2008-2009 on the ground that income chargeable to tax had escaped assessment.

12.The petitioner sought reasons for the notice and was informed that the aspect pertaining to claim made by him under Section 54F of the Act, was the reason for the issuance of the said notice.

13.The petitioner then filed his objections. The Assessing Officer, passed an assessment order on 30.03.2014 and sustained the claim of the petitioner. In the meanwhile, the petitioner filed his return for AY 2009-2010, in which he declared the sale of the second tranche of 20% of the shareholding in RIDM and declared a total consideration of Rs.11,24,14,809/-. He also claimed that he paid Rs.40 lakhs out of the said amount as advance for purchase of immovable property in Alibaug in Rajgad District, Maharashtra, to construct a residential property. He also invested in Capital Gains Account Scheme, maintained in the Bank of India.

14.The return for AY 2009-2010 was also subjected to scrutiny and an assessment order was passed under Section 143(3) of the Act, on 12.12.2011. The Assessing Officer disallowed the claim of the petitioner for a sum of Rs.6.50 Crores, under Section 54 of the Act, on the ground that the flats purchased by the petitioner were two separate residential units and consequently, he was not entitled to claim the benefit under Section 54F of the Act.

15.The petitioner challenged the assessment order by

preferring an appeal before the Commissioner of Income Tax (Appeals) [in short "CIT(A)"]. The CIT(A), by order dated 29.07.2013, allowed the appeal and sustained the deduction claimed by the petitioner under Section 54F of the Act. It must be pointed out that in the very same order the CIT(A) also dealt with the appeal preferred by the petitioner in respect of AY 2008-2009 as some of the issues were common to the two appeals preferred by him. The issue pertaining to the deduction claimed by the petitioner under Section 54F of the Act, arose only in the appeal preferred with respect to AY 2009-2010.

16.Challenging the order of CIT(A), the Revenue filed an appeal before the Income Tax Appellate Tribunal, Chennai, [in short the "Tribunal"]. The Tribunal by common order dated 08.04.2015, dealt with the two appeals filed by the Revenue and dismissed the appeal pertaining to AY 2008-2009 and partly allowed the appeal pertaining to AY 2009-2010.

17.The Tribunal, had dealt with three aspects, namely,

(i)The claim of the petitioner under Section 54F in relation to the investment in the flats.

(ii)The investment made by the petitioner to a sum of Rs.6.20 Crores in the Capital Gains Account scheme with Bank of India.

(iii)The sum of Rs.40 Lakhs paid by the petitioner for purchase of immovable property in Alibaug, Rajgad District, Maharashtra.

18.The Tribunal, observed that the Assessee had constructed a residential house in the Alibaug property in or about July 2011 from the investment made in Capital Gains Account Scheme. The petitioner claimed exemption under Section 54 of the Act to the extent of funds utilized for purchase of land and construction of residential building which he claimed was within three years from the date of investment in the Capital Gains Account Scheme.

19.The Tribunal, observed that the petitioner had offered a sum of Rs.49,24,780/- for taxation. Thereafter, the Tribunal, remanded the matter back to the Assessing Officer, stating that there was no discussion by the Assessing Officer about the issue of investment in Capital Gains Account Scheme amounting of Rs.6,10,000/- and Rs.40,00,000/- as advance paid for purchase of the Alibaug property. It was further observed by the Tribunal, that the Assessing Officer had only considered the investment in the flats at Olumpus Building in Altamount Road, Cumballa Hills, Mumbai, for which he had already claimed deduction under Section 54F of the Act, for the AY 2008-2009 and which had been allowed by the Assessing Officer.

20.The petitioner further stated in the Writ Petition that not withstanding the order of the Tribunal, the Principal Commissioner of Income Tax-5, issued a Show Cause Notice dated 15.12.2015 to the petitioner under Section 263 of the Act. In the show cause notice, the petitioner's claim for deduction under Section 54F of the Act to a sum of Rs.4,88,78,900/- being the amount invested in the flats was questioned.

21.The petitioner claimed that he filed a reply to the notice. The respondent in the writ petition namely, the Principal Commissioner of Income Tax-5, passed the impugned revisional order dated 26.02.2016, challenged in the writ petition. By the said order, the respondent in the writ petition set aside the assessment order dated 31.03.2014, pertaining to AY 2008-2009 passed under Section 143(3) read with Section 147 of the Act. This led the petitioner to file writ petition seeking to call for the records of the said order and to quash the same.

The Order dated 02.06.2017:

22.By order dated 02.06.2017, the learned Singe Judge of this Court observed that the CIT(A) by common order dated 29.07.2017, had held that the petitioner should be allowed deduction under Section 54F of the Act, as the aspects pertaining to the claim had been considered in AY 2008-2009. It was observed that in the order, the CIT(A) had discussed the entire history of the transaction and also the material placed which included the Surveyor's report, whereby a categorical finding was returned that the two flats were conjoined into one flat and it was confirmed that it was a single residential unit. The Assessing Officer by order dated 31.03.2014, in the proceedings under Section 143(3) read with Section 147 of the Act, with relation to AY 2008-2009 had also come to the very same conclusion and had allowed deduction under Section 54F of the Act.

23.It was further observed by the learned Single Judge that while the Revenue, had preferred appeals to the Tribunal against the common order dated 29.07.2013 of the CIT(A), with relation to AY 2008-2009 and 2009-2010, it also simultaneously initiated proceedings under Section 263 of the Act, against the Order of the Assessing Officer, dated 31.03.2014. It was further observed that the Tribunal, was obliged to adjudicate the appeals preferred by the Revenue, with respect to both AY 2008-2009 and 2009-2010. The Tribunal, had considered not only the issue whether the said flats formed one residential unit, but also examined the investment made by the petitioner in the Alibaug property, wherein he had constructed a residential house. The Tribunal also examined the petitioner's claim that he had

invested Rs.6.10 Crores in a Capital Gains Account Scheme with Bank of India.

24.It was observed by the learned Single Judge, that the Tribunal dealt with all the three aspects in its order dated 08.04.2015. After discussing the three aspects, the Tribunal had remanded the matter back only with respect to the last two issues, namely, claim with respect to investment of Rs.6.10 Crores in the Capital Gains Account Scheme and the investment of Rs.40 Lakhs made by way of advance for purchase of Alibaug property. The learned Single Judge observed that the Tribunal had thought it fit not to entertain the appeal of the Revenue, with respect to the challenge laid to deduction claimed by the petitioner with respect to the flats under Section 54F of the Act.

25.The learned Singe Judge further observed as follows:

> "12.3.Therefore, in my opinion, since, the Revenue did not assail the order of the Tribunal dated 08.04.2015, the respondent could not have exercised powers under Section 263 of the Act to revisit the issue once again, by setting aside the order dated 31.03.2014, passed by the Assessing Officer under Section 143(3) read with Section 147 of the Act."

26.The learned Singe Judge further observed as follows:

> "13. Furthermore, according to me, as correctly argued by Mr.Senthil, on behalf of the appellant, the view taken by the Assessing Officer in its order dated 31.03.2014, was a possible view, and therefore, would not, necessarily, as it sought to be projected on behalf of the Revenue, be categorised as an erroneous view.
>
> 13.1. A perusal of the impugned order would show that the respondent has set aside the order and directed the Assessing Officer to revisit the issue, as he, according to him, had faulted to take into account the fact that the subject flats had been purchased via two separate sale deeds, and had separate electricity meter connections. According to me, it appears that the respondent was unnecessarily burdened by the fact that the subject flats were purchased by two separate sale deeds and had separate electricity meter connections. The issue at hand, before the Assessing Officer, in my opinion, was whether or not the subject flats form a single residential unit.

13.2. The size of the flat, or, that they had separate electricity meter connections would not, necessarily, lead to a conclusion that they were two separate residential units. The Assessing Officer was required to look at other attendant circumstances, which included the survey report, in reaching a conclusion in the matter. Notably, what was available on record, was not only the survey report, but also the material provided by the concerned HousingSociety. The survey report, as it appears, did advert to the fact that the subject flats formed a single residential unit.

13.3. The learned counsel for the Revenue has not assailed the survey report before me. Therefore, quite clearly, there was material available to the Assessing Officer to come to a possible view, if not, definite view that the subject flats formed a single residential unit.

13.4. If, that be the conclusion, then, clearly, the respondent had no jurisdiction to initiate proceedings under Section 263 of the Act and thereupon, proceed to pass the impugned order."

27.In the result, the learned Single Judge, quashed the impugned order and allowed the writ petition.

W.A.No.1127 of 2017:

28.Challenging the said order, the respondent in the Writ Petition namely, the Principal Commissioner of Income Tax-5, Chennai, had filed the present Writ Appeal.

29.Heard arguments advanced by Ms.Hema Muralikrishnan, learned counsel for the appellant/respondent in the writ petition and Mr.M.P.SenthilKumar, learned counsel for the respondent/petitioner in the writ petition.

Arugments Advanced:

30.Ms.Hema Muralikrishnan, learned counsel for the appellant pointed out that the Tribunal had only remanded the issues to the Assessing Officer for investigation of the facts and to take a decision of merits. It was thereafter, pointed out that the learned Single Judge ought to have dismissed the writ petition

and allowed the fact finding authority to investigate and finally determine the facts. It was further pointed out that the learned Single Judge had wrongly concluded, that the Tribunal had dealt with three separate aspects in its order dated 08.04.2015. It was urged that the Tribunal had not considered whether the flats purchased by the respondent formed a single residential unit. It was also pointed out by the learned counsel that the issue whether the respondent was entitled to deduction under Section 54F of the Income Tax Act, with respect to the second flat purchased by him was never discussed by the Assessing Officer for AY 2008-2009 or even by the CIT(A) or by the Tribunal. The discussion arose in the course of deciding whether the respondent was entitled for deduction under Section 54F for investment made in AY 2009-2010 in Alibaug property. Since the Assessing Officer had not decided this question, Ms.Hema Muralikrishnan, learned counsel insisted that the order of the appellant in initiating proceedings under Section 263 of the Act, was in accordance with law and cannot be termed as prejudicial to the interest of the respondent. It was repeatedly urged by the learned counsel that the issue as to whether the purchase of two residential flats by the respondent can be considered as purchase of one residential unit eligible for exemption under Section 54F in AY 2008-2009 had not been decided at all by only of the authorities.

31.The learned counsel also assailed the observation of the learned Single Judge while setting aside the impugned order that the flats formed a single residential unit as a "possible view" and that consequently, the appellant cannot revise the same under Section 263 of the Act. It was strenuously argued and claimed that whether the purchase of two flats can be considered as purchase of one residential unit or purchase of two separate residential units had not been considered by the Assessing Officer and consequently, the appellant was well within his powers to initiate proceedings under Section 263 of the Act.

32.Mr.M.P.Senthilkumar, learned counsel for the respondent/writ petitioner, seriously disputed the contentions raised by Ms.Hema Muralikrishnan. The learned counsel also submitted a synopsis of dates and events and also an additional typed set of papers, wherein he had given the sequence of events prior to the purchase of two residential flats. The learned counsel stated that a No Objection Certificate had been issued by the Olumpus Co-operative Society Limited, with respect to flat No.612 on 11.04.2006 and immediately thereafter, on 20.04.2006, the respondent herein had intimated to the Secretary of the Housing Society, the scope of the renovation work in flat Nos.612 and 607. Among other works it included "breaking the wall between second bedroom of 612 and the passage wall of 607 to combine the two flats". Permission for such renovation was

granted on 28.04.2006. The agreement for purchase of flat No.607 was entered into on 05.05.2006 and the sale deed was executed on 23.05.2006. The sale deed with respect to flat No.612 was executed on 16.01.2007. It must be kept in mind that the first tranche of sale of 70% of share in RIDM was on 05.05.2007.

33.The learned counsel placing strong reliance on the above sequence of events stated that within one year prior to or subsequent to the sale, the two flats had been purchased and conjoined into one single residential unit. The learned counsel, therefore, justified the claim under Section 54F for the cost of both the flats as one single residential unit. It was further pointed out that the assessment under Section 143(3) for AY 2009-2010 was completed on 12.12.2011, disallowing the exemption claimed under Section 54F to the extent of Rs.6.50 Crores on two grounds namely, the property purchased in Alibaug was agricultural land and on the date of sale of shares of the second tranche, the respondent had owned two flats and consequently, he owned more than one residential unit.

34.This order was challenged by the respondent herein before the CIT(A) on 29.07.2013. The CIT(A) passed a common order also recording the report of the Surveyor wherein it was stated that the respondent herein had converted the two residential flats into one single unit. The CIT(A) allowed the claim of the respondent for exemption under Section 54 (AY 2009-2010), stating that all aspects have been duly considered for permitting relief claimed under AY 2008-2009. It was observed that the assessment was completed under Section 143(3) by order dated 22.12.2010. The claim of the respondent that the acquisition was a single dwelling unit in the previous year and could not be a ground to deny relief under Section 54F in the subsequent year AY 2009-2010 was accepted.

35.The learned counsel pointed out that the Tribunal had remitted the issue for fresh consideration with respect to the investment in Capital Gains Accounts Scheme and advance paid for purchase of property in Alibaug. In the meanwhile, on 15.12.2015, the appellant herein had issued the notice under Section 263 of the Act, with respect to AY 2008-2009 claiming that the assessee owned more than one residential unit on the date of sale of shares on 05.05.2007. The learned counsel supported the order of learned Single Judge and urged the Court to uphold the same.

Discussion and Findings:

36.The respondent, Abhijit Bhandari, had in the writ petition assailed the order of the appellant herein dated 26.02.2016, in C.No.2(24)/263/PCIT-5/CR-5/2015-16, with respect to the AY 2008-2009. The appellant was a principal shareholder

of a company by name RIDM. He entered into a SPA dated 17.07.2006, along with other shareholders, with other entity by name Accor Services. It was agreed under that SPA that initially 70% of the shareholding of the RIDM would be sold by way of tranche. The second and third tranches would comprise sale of 20% and 10% respectively of the equity stake in RIDM. They were to be sold in three consecutive years namely, AY-2007-2008, AY-2008-2009 and AY-2009-2010.

37.The respondent had received an advance of Rs.15,82,86,273/- relating to AY 2007-2008 towards sale of 70% of shareholding of RIDM. The total consideration was Rs.22,42,72,478/- and the date of sale was 05.05.2007. The respondent sought to avail the benefit under Section 54F of the Act. Section 54 is in chapter-IV of the Act relating to computation of income from Capital Gains Accounts Scheme and also relates to profit on sale of property used for residence.

38.Section 54(1) of the Act is as follows:

> "Profit on sale of property used for residence:
> 54.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 after that date construction, one residential house in India, 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) if the amount of the capital gain is greater that the cost of the residential house so purchased or constructed (hereafter in this section referred to as the new asset), the difference between the amount of the capital gain and the cost of the new asset shall be charged under section 45 as the income of the previous year; and for the

purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be nil; or

(ii) if the amount of the capital gain is equal to or less than the cost of the new asset, the capital gain shall not be charged under section 45; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be reduced by the amount of the capital gain."

39. Section 54F provides as follows:

"Capital gain on transfer of certain capital assets not to be charged in case of investment in residential house:

54F.(1)Subject to the provisions of sub-section(4), where, in the caseof an assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of any long-term capital asset, not being a residential house (hereafter in this section referred to as the original asset), and the assessee has, within a period of one year before or [66][two years] after the date on which the transfer took place [65]purchased, or has within a period of three years after that date [67][constructed, one residential house in India](hereafter in this section referred to as the new asset), the capital gain shall be dealt with in accordance with the following provisions of this section, that is to say,-

(a) if the cost of the new asset is not less than the net consideration in respect of the original asset, the whole of such capital gain shall not be charged under section 45;

(b) if the cost of the new asset is less than the net consideration in respect of the original asset, so much of the capital gain as bears to the whole of the capital gain the same proportion as the cost of the new asset bears to the net consideration, shall not be charged under section 45:

Provided that nothing contained in this sub-section shall apply where:

(a) the assessee,--

(i) owns more than one residential house, other than the new asset, on the date of transfer of the original asset; or
(ii)------
(iii)-----
(b)------"

40.The respondent, quite aware of the legal position that he could avail benefits of Section 54F of the Act, if he purchases one residential unit had also taken advantage of an extended interpretation of the said provision and had purchased two adjoining flats and converted the same into one single residential unit. In this connection, the respondent ventured to purchase flats Nos.612-607 in Olumpus Building in Altamount Road, Cumbulla Hill, Mumbai.

41.The Olumpus Co-operative Society Limited, had issued a no objection certificate on 11.04.2006 for sale of flat No.612. The respondent had entered into correspondence with the Society as early as 20.04.2006. In the said letter, the respondent had very clearly stated that he intended to conjoin flat Nos.612 and 607 and sought permission for commencing work to that need. Among other works, the respondent also sought permission for "breaking the wall between the second bedroom of 612 and the passage wall of 607 to conjoin the two flats". It is thus seen that right from the inception, the respondent always wanted to convert the two flats into one single residential unit. The respondent purchased flat No.607 by sale deed dated 23.07.2006 and flat No.612 by sale deed dated 16.01.2007.

42.As had been pointed out earlier, the Society had also recognized the respondent as the owner of one single residential unit alone and had also provided the facility of only one vote in matters relating to the Society. These facts have not been seriously disputed by the appellant herein.

43.The respondent had also filed his return for AY 2008-2009 on 31.07.2008 and he claimed deduction under Section 54F of the Act. It was taken up for scrutiny and the order dated 22.12.2010, was passed. It was then intimated to the respondent that the Internal Revenue Audit had raised an objection with respect to the claim under Section 54F of the Act.

44.The Assessing Officer, on receipt of the information provided by the respondent dropped the proceedings which had been initiated pursuant to the objection of the Internal Revenue Audit. The respondent received a notice dated 20.03.2013, under Section 148 of the Act, in respect of the very same AY 2008-2009, on the ground that income chargeable to tax has escaped assessment. When the respondent sought reasons for issuance of

notice under Section 148 of the Act, it was informed that claim made by him under Section 54F of the Act, was the reason of issuance of the notice.

45.The respondent then filed his objections. The Assessing officer, passed the assessment order under Section 143(3) read with Section 147 of the Act, on 31.03.2014. The Assessing Officer had made the following observations and had sustained the claim made by the respondent.

> "3.4..... With regard to the merits of the case the assessee vide letter dated 09.07.2013 submitted that the assessee had sold the shares of the Royal Images Direct Marketing Private Limited shares on 05.05.2007. Annual Return filed by the said company to the ROC reflecting the above fact has already been submitted at the time of assessment. A copy of the same has been attached with this letter for your reference. This being the case for purchase of the flats by the assessee on 23.05.2006 and 16.01.2007 is well within the limits of one year, as prescribed by the sub section Section (sic) 54F of the Income Tax Act, 1961. For the above reasons, the deduction allowed under Section 54F cannot be withdrawn. The details provided by the assessee were verified and the assessee's claim is found to be in order. ....."

46.The respondent then, in the interregnum period had filed his return for AY 2009-2010. He declared the sale of second tranche of shareholding in RIDM for total consideration of Rs.11,24,14,809/-. This return was also subject to scrutiny and an assessment order was passed under Section 143(3) of the Act on 12.12.2011. The respondent had laid a claim for a sum of Rs.6.50 Crores, under Section 54 of the Act. This was rejected and the Assessing Officer held that the flats purchased by the respondent were two separate residential units and that the respondent was not entitled to claim the benefit. It is to be seen that the Assessing Officer had differed from the view taken with respect to the same issue in the year 2008-2009, while passing the assessment order under Section 143(3) for AY 2009-2010 on 12.12.2011. This order was challenged by the respondent before the CIT(A). By order dated 29.07.2013, the appeal was allowed.

47.By this order, the CIT(A) also dealt with the appeal preferred by the respondent in respect of AY 2008-2009, since the issues were common. The issue specifically related to the

deduction claimed by the respondent under Section 54F of the Act. The CIT(A) had given a specific finding that the apartment is a single residential unit comprising of a single kitchen and connected by a common passage inside the house. Further, there was only one entry for the house. There was no independent entry to the flat No.607. It was further observed as follows:

> "9.11 All these aspects have been duly considered for permitting relief u/s 54F claimed during the A 2008-09. The assessment for the said year was completed u/s 143(3) vide order dated 22.12.2010 by accepting the assessee's submission and considering the acquisition as a single dwelling unit in the previous year it is (not) appropriate to deny relief u/s 54F, in the subsequent year i.e.AY 2009-2010 by taking a stand that the assessee has more than one house.
>
> 9.12.I have verified the assessment order, remand report of the AO, assessee's reply to the remand report and note on sequence of events. Mr.Abhijit Bhandari, the appellant was the principal share holder of M/s Royal Images Direct Marketing Pvt Ltd., a company that was engaged in management of Customer Loyalty Programs. The property purchased consist of two adjacent flats Flat No.612 and Flat.No.607 in Olympus Apartments, 5 C, Altamount Road, Mumbai 26, combine together to make a single residential unit, the assessee claimed deduction u/s 54F during the AY 2008-09 for the said investment and the same was accepted by the Assessing Officer during the scrutiny assessment proceedings and allowed the investment as deducted u/s 54F. The assessee has sold his balance share holding in Royal Images Direct Marketing Pvt.Ltd, on 14.07.2008 (AY 2009-10). The appellant has deposited Rs.6,10,00,000/- on the balance long term capital received during the AY under consideration in Capital gains Accounts scheme (CGAS) as specified u/s 54F of IT Act for the purpose of claiming deducting u/s 54F. The AO had disallowed in the claim on the ground that the assessee was in possession of more than one residential unit at the time of investment in a new residential property and hence the deduction claimed u/s 54F was denied. The property purchased by the appellant relating to two

different apartments which are adjacent to each other pertains to the AY 2008-09 wherein the Assessing Officer has examined the issues involved treating the investment made in purchase of the two adjacent apartment treating the same a single dwelling unit which is having a common kitchen a common passage inside the house, and only one entry for the entire house without having independent entires to either flat No.607 or 612. Both the apartments are contiguous and considered as single unit and even by the Olympus Housing Society the owner is eligible to only one vote and allowed the exemption claimed u/s 54F. ....."

48.The Revenue took up the matter before the Tribunal. The Tribunal, by common order dated 08.04.2015, broadly adverted to three aspects, namely, (i) Investment made by the respondent in the flats, (ii) Investment made by the respondent to a sum of Rs.1.60 Crores with Capital Gains Account maintained with Bank of India and (iii) The sum of Rs.40 Lakhs paid by the respondent for purchasing the Alibaug property. The Tribunal, remanded the matter to the Assessing Officer with the following observation in paragraph 10:

"..... 10. After considering the remand reports and the order of the first appellate authority, we find that there is no discussion by the Assessing Officer about the issue of investment in capital gains accounts scheme amounting to Rs.6,10,000/- and Rs.40,00,000/- and advance paid for the purchase of property. It means that the Assessing Officer has not given any comments regarding this issue. Being so, in our opinion, it is appropriate to remit this issue. being so, in our opinion, it is appropriate to remit this issue back to the Assessing Officer, as there is violation of Rule 46A. Accordingly, we remit the issues for fresh consideration with regard to investment in capital gains accounts scheme and the advance paid for the purchase of property totalling at Rs.6,50,00,000/- back to the Assessing Officer, as he has only considered the investment in flat Nos.607 and 612, Altamount Road, Cumballa Hills, for which the assessee has already claimed deduction u/w.54F for assessment year 2008-09 and allowed by the Assessing Officer in

the assessment year 2008-09. Therefore, the same cannot be considered once again in the assessment year 2008-09 (sic 2009-2010). This issue to be decided afresh by the Assessing Officer. ...."

49.The Revenue, did not raise any issue regarding the above order, but issued a show cause notice under Section 263 of the Act, on 15.12.2015, questioning the deduction made under Section 54F to a sum of Rs.4,88,78,900/- which was the amount invested in the two flats. The respondent herein filed a reply. The impugned order was then passed on 26.02.2016 by the appellant, whereby the assessment order dated 31.03.2014, was set aside. This related to AY 2008-2009 and passed under Section 143(3) read with under Section 147 of the Act. The show cause notice was passed under Section 263 of the Act.

50.The respondent had filed the writ petition challenging the impugned order. The learned Single Judge has observed as follows in his order dated 02.06.2017:

"10. The Tribunal, therefore, while adjudicating upon the appeals preferred by the Revenue for both AYs, i.e., AY 2008-2009 and 2009-2010, was required to deal with the issue, which is, as to whether the subject flats formed one single residential unit.

11. The fact that this issue came before the Tribunal is quite evident, if, one were to peruse the paragraph 9 of the impugned order dated 08.04.2015. For the sake of convenience, the same is extracted hereafter :

"..... 9. In the remand report, it was stated by the Assessing Officer that the transfer of assets involving financial transactions took place on 7.7.2008. The assessee claimed ownership of Flat No.607 and 612 of Olympus Apartments. The Assessing Officer emphasized on the two conditions for claiming deduction u/s.54F. According to the Assessing Officer, the first condition is that the assessee should not own more than one residential property. The Assessing Officer is of the opinion that while claiming deduction u/s.54F of the Act, the assessee as on date of transfer of long term capital gain, the assessee should possess only one residential house property. It is brought out by the Assessing Officer that the assessee has bought the properties on

different dates, viz., flat Nos.607 and 612 on 23.5.2006 and on 16.1.2007 respectively and that the assessee produced copies of permission for renovation by Olympus Co-operative Housing Property Ltd., for sale of flat No.612 layout of combined Flat Nos.607/612 of Olympus Apartments and certificate from V.S.Modi Associates. The Assessing Officer's question is that on the date of capital gain transaction, i.e., on 7.7.2008, how many residential properties the assessee was holding. The Assessing Officer states that the submissions by the assessee did not support the assessee's contention of holding single residential unit on the date of transfer of capital gain and also no supporting documents were received from the assessee regarding completion of renovation and occupation of the assessee in the combined residential unit of flat Nos.607 & 612. Further, according to the Assessing Officer, the second condition for disallowance is that the assessee should have invested in a residential house. The Assessing Officer states that as per deduction of claim u/s.54F, the assessee could invest either in purchase of residential property one year prior to the date of transfer or 2 years after the date of transfer or construct house within 3 years after the date of transfer. In the assessee's case the Assessing Officer states that the assessee has utilized the amount in agricultural land located at Dhokawade Village, Alibag, Taluka of Rajgad District, which is evident from the document describing the property as 'pieces and parcels' of agricultural land. The Assessing Officer also pointed out that the assessee had not produced any proof like approval obtained from the Municipal Corporation of competent Authority for construction of residential property for treating the assessee's agricultural land as residential area."

"11.1. A perusal of the aforesaid extract would show that the Tribunal was considering, not only the issue as to whether or not the subject flats formed one

residential unit, but also, was looking at the investment made by the petitioner in the Alibaug property, on which, a residential structure had been built by him.

11.2. Furthermore, a perusal of paragraph 8 of the Tribunal's order would also establish that it was also examining the petitioner's claim that he had invested Rs.6.10 crores in a Capital Gains Account scheme via the Bank of India. This aspect is evident from the perusal of the following extract of the Tribunal's order dated 08.04.2015 :

> ".... 8. We have heard both the parties and perused the orders of the authorities below. In our opinion, the Assessing Officer mixed up with the investment on two flats at Mumbai. the Commissioner of Income-tax (Appeals) observed that the assessee has earned capital gains on sale of shares during the year under consideration and deposited the same in capital gain account scheme in July 2007 with Bank of India vide A/c No.006610110001298 amounting to Rs.6,10,00,000/-. The amount paid as advance for the purchase of land at Alibagh Taluka, Dhokawde Village, Maharashtra for Rs.40,00,000/- totalling to Rs.6,50,00,000/-. The assessee has claimed exemption u/s.54F for the coast (sic cost) of land at Rs.4,46,26,000/- including registration charges for the land of 16940 sq.meters. The assessee has completed the construction on this land by July 2011, i.e., within 3 years from the date of investment made in capital gains accounts scheme. The total amount of cost of construction incurred by the assessee is at Rs.1,54,49,220/-. the amount utilized as on 7.7.2011 out of the investment made in capital gains accounts has been disclosed in the income tax return for the financial year 2011-12 relevant to the assessment year 2012-13 and offered for taxation at Rs.49,24,780/-. Since the assessee has constructed residential house within 3 years from the date of investment in capital against accounts scheme, he claimed exemption u/s.54F of the Act to the extent of capital gains utilized in purchasing of land and construction completed thereon. Regarding these facts, the Commissioner of Income Tax

(Appeals) called for remand report and the same was submitted by the Assessing Officer vide remand report dated 31.07.2012. Later, a second remand report dated 13.8.2012 was also submitted by the Assessing Officer, which was considered by the Commissioner of Income-tax (Appeals)." (emphasis is mine)

12. The Tribunal, thus, as indicated in my narration above, was dealing with three aspects via its order dated 08.04.2015. First, as to whether the subject flats formed a single residential unit. Second, the petitioner's claim that he had invested Rs.6.10 Crores in the Capital Gains Accounts Scheme was borne out. Third, the petitioner's claim that he had invested money in the Alibaug property, on which, he had, purportedly, constructed a residential structure.

12.1. The Tribunal, after discussing these three aspects of the matter, confined the remand only to the last two aspects, that is, the claim of the petitioner with regard to investment of Rs.6.10 Crores in the Capital Gains Scheme; and the purported investment of Rs.40 lakhs made by him by way of advance towards purchase of Alibaug property.

12.2. The issue with regard to the claim of deduction under Section 54F of the Act, (which arose, as correctly argued on behalf of the Revenue, in its appeal filed qua A.Y. 2009-2010), was not remanded for reconsideration, as the same had already been considered in AY 2008-2009. This is quite evident upon perusing paragraph 10 of the Tribunal's order. The relevant observations made, in this regard, have already been extracted hereinabove by me.

12.3. Having regard to the aforesaid, in my view, the Tribunal in its wisdom, thought it fit not to entertain the appeal of the Revenue, with regard to its challenge laid to the deduction claimed by the petitioner vis-a-vis the subject flats under Section 54F of the Act.

12.3. Therefore, in my opinion, since, the Revenue did not assail the order of the Tribunal dated 08.04.2015, the respondent could not have exercised powers under Section 263 of the Act to revisit the issue once

again, by setting aside the order dated 31.03.2014, passed by the Assessing Officer under Section 143(3) read with Section 147 of the Act."

51.As had been correctly observed by the learned Single judge, the Tribunal had, after discussing three aspects namely, whether the subject flats formed one single residential unit and with respect to the claim of the respondent that he had invested Rs.1.60 Crores in the Capital Gains Account Scheme, and the further claim of the respondent that he had invested money in the Alibaug property had confined the remand only to the last two aspects. The claim under Section 54F of the Act, was not remanded for re-consideration as it had already been considered for AY 2008-2009. This is evident from perusing paragraph 12 of the Tribunal's order. Consequently, the Tribunal did not entertain the appeal of the Revenue, with respect to the challenge relating to the flats and the claim for deduction under Section 54F of the Act. The learned Single Judge also correctly held that the view taken by the Assessing Officer in the order dated 31.03.2014, was a "possible view" and therefore cannot be categorized as a erroneous view.

52.Section 263 of the Income Tax Act as follows:

"Revision of orders prejudicial to revenue:

263. (1)The Principal Commissioner or Commissioner may call for and examine the record of any proceedings under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment."

It is seen that unless there is a definite finding that the order passed by Assessing Officer was erroneous and prejudicial to the interest of the Revenue, and, further only after

providing opportunity and after making necessary enquiry, an order under Section 263 of the Act can be passed.

53. In the case of MALABAR INDUSTRIAL CO.LTD. VS. COMMISSIONER OF INCOME TAX, KERALA STATE, [reported in (2000) 2 SCC 718], the Honourable Supreme Court, held as follows:

"

5.To consider the first contention, it will be apt to quote Section 263(1) which is relevant for our purpose:-

263. Revision of orders prejudicial to revenue - (1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous insofar as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment. Explanation - x x x

6.A bare reading of this provision makes it clear that the prerequisite to exercise of jurisdiction by the Commissioner suo moto under it, is that the order of the Income-tax Officer is erroneous insofar as it is prejudicial to the interests of the revenue. The Commissioner has to be satisfied of twin conditions, namely, (i). the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the revenue. If one of them is absent -- if the order of the Income-tax Officer is erroneous but is not prejudicial to the revenue or if it is not erroneous but is prejudicial to the revenue -- recourse cannot be had to Section 263(1) of the Act.

7.There can be no doubt that the provision

cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind.

8.The phrase prejudicial to the interests of the revenue is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not confined to loss of tax. The High Court of Calcutta in Dawjee Dadabhoy & Co. Vs. S.P. Jain and Another [31 ITR 872], the High Court of Karnataka in Commissioner of Income- tax, Mysore Vs. T. Narayana Pai [98 ITR 422], the High Court of Bombay in Commissioner of Income-tax Vs. Gabriel India Ltd. [203 ITR 108] and the High Court of Gujarat in Commissioner of Income-tax Vs. Smt. Minalben S. Parikh [215 ITR 81] treated loss of tax as prejudicial to the interests of the revenue. Mr. Abaraham relied on the judgment of the Division Bench of the High Court of Madras in Venkatakrishna Rice Company Vs. Commissioner of Income-tax [163 ITR 129] interpreting prejudicial to the interests of the Revenue.

9. ....

10.The phrase "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be

> treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the Income-tax Officer is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the Revenue. Rampyari Devi Saraogi Vs. Commissioner of Income-tax [67 ITR 84] and in Smt. Tara Devi Aggarwal Vs. Commissioner of Income-tax, West Bengal [88 ITR 323]."

54.In the present case, the Assessing Officer in the order dated 31.03.2014, had only, as rightly pointed out by the learned Single Judge taken a "possible view" and this cannot be projected or categorized as an erroneous view.

55.We hold that there is no infirmity in the order under challenge. The learned Single Judge had observed as follows:

> "13.1.....According to me, it appears that the respondent was unnecessarily burdened by the fact that the subject flats were purchased by two separate sale deeds and had separate electricity meter connections. The issue at hand, before the Assessing Officer, in my opinion, was whether or not the subject flats form a single residential unit."

56. It must be emphasised that in reaching such conclusion the Assessing Officer not only had the benefit of examining the survey report, but also all other connected documents, particularly, the materials provided by the Housing Society. The documents convincingly point to the fact that flats Nos.607 and 612 were conjoined into one single residential unit.

57.In view of the reasons stated above, we find no reason to interfere with the order of the learned Single Judge. The issues raised on facts have been finally decided. A "possible view" had been arrived at stating that there was only one single residential unit. The appellant herein had not provided any additional material for us to hold a contrary view to the view

held by the learned Single Judge.

58.For all the reasons stated above, the Writ Appeal is dismissed. No costs. Consequently, the connected Civil Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

smv

Principal Commissioner of Income Tax-5
Aayakar Bhavan
Wanaparthy Block, 5th Floor,
121, Mahatma Gandhi Road
Chennai - 600 034,

+1cc to M/S.Hema Muralikrishnan, Advocate, S.R.No.19093
+1cc to Mr.G.Baskar, Advocate, S.R.No.19000

W.A.No.1127 of 2017
and
C.M.P.No.15677 of 2017

BR(CO)
CS/03/04/2019