

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

**Before Shri P.M. Jagtap, Accountant Member
and Smt.Asha Vijayaraghavan, Judicial Member**

ITA No.886/Hyd/2010
(Assessment year: 2006-07)

Smt. S. Uma Devi 5-9-67/20 L.B. Stadium Hyderabad PAN: AIRPS 7720 G (Appellant)	Vs.	Commissioner of Income Tax-IV Hyderabad (Respondent)
--	-----	--

ITA No.885/Hyd/2010
(A.Y. 2006-07)

Smt. V. Shailaja 5-9-67/20 L.B. Stadium Hyderabad (Appellant)	Vs.	Commissioner of Income Tax-IV Hyderabad (Respondent)
---	-----	--

Assessee by:	Shri A.V. Raghuram, Advocate
Department by:	Smt. G. Aparna Rao, (DR)
Date of Hearing:	02/12/2014
Date of Pronouncement:	30/01/2015

ORDER

Per Smt. Asha Vijayaraghavan, J.M.

The assessee Smt. S. Uma Devi and Smt. V. Shailaja being sisters, filed return of income for A.Y 2006-07 on 31.10.2006. The assessment was completed u/s 143(3) and the AO accepted the income returned by the assessee. The CIT finding that the relevant assessment order to be both erroneous and prejudicial to the interests of the Revenue, assumed jurisdiction u/s 263 of the I.T. Act and issued show cause notice to the assessee, as to why the assessment should not be revised or set aside. The assessee replied to the show cause notice. However, the CIT proceeded to set aside the assessment order with a direction to

redo the same in the light of the observations and directions given by him in his order u/s 263 of the I.T. Act.

ITA No.886/Hyd/2010 – Smt. S. Uma Devi:

2. We shall first take up the case of Smt. Uma Devi. The assessee Smt. Uma Devi has raised 11 grounds of appeal against the order passed u/s 263 by the CIT. Ground No.1 is general in nature, hence no specific adjudication is required.

3. Ground No.2 raised by the assessee is as under:

“The ld CIT failed to appreciate the fact that the AO passed the order after detailed scrutiny and after examining all the issues and applying his mind to the issues and thereby erred in holding that the assessment so passed is erroneous and prejudicial to the interest of revenue and revising the assessment”.

3.1 Ground No.2 is against the order of the CIT in assuming jurisdiction u/s 263. We find that the AO has passed cryptic, non speaking order and hence we are of the opinion that the jurisdiction assumed u/s 263 by the CIT is justified. Our opinion is based on the decision of Apex Court in CIT vs. Toyota Motor Corpn.(306 ITR 52).

4. Ground No.3 raised by the assessee is given below:

“The ld CIT erred in directing to disallow deduction u/s 54F on the ground that the assessee owns more than one residential house on the date of transfer without appreciating the fact that the other property owned by the assessee is a commercial property and not a residential house and other properties were owned by assessee’s minor children whose income

was clubbed in assessee's hands by virtue of fiction created u/s 64(A) but not by the assessee”.

4.1 The Id CIT raised query at para 2.1 of 263 order that the assessee had disclosed long term capital gain on sale of undivided share in land situated at Rajat Manzil, Somajiguda, Hyderabad at Rs.2,18,46,264 and long term gain of Rs.26,54,263 on sale of land at Ramantapur. He stated that she had admittedly invested an amount of Rs.91,34,388 in a house property at Visakhapatnam and claimed deduction of Rs.61,91,673 u/s 54F from the long term capital gain and as per proviso to section 54F(1) deduction is not allowable in case the assessee owns more than one residential house on the date of transfer of original asset. It was further observed by the CIT that as per the assessment record, it can be seen that the assessee owns residential property at Jubilee Hills and also at Pancom Chambers.

4.2 Assessee submitted that during the previous year relevant to the A.Y under consideration, assessee sold long term assets for Rs.3,22,29,760 and declared long term capital gain of Rs.2,18,46,264, out of which she invested Rs.91,34,264 in a new residential property and claimed deduction of Rs.61,91,673 u/s 54F of the Income Tax Act, 1961 which the CIT did not allow on the ground that assessee owned two residential houses, one at Jubilee Hills and another at Pancom Chambers and that exemption u/s 54F is available for an assessee who owns only one residential property.

4.3 It was submitted that the assessee actually owns only one residential property and not two as presumed by the CIT. The property situated at Suite No.11, Pancom Chambers, Rajbhavan Road is a commercial property which was purchased by the assessee way back in February, 1995. The same was let out for commercial purposes for the year under consideration to M/s Sumit Inotech Ltd New Delhi and in the current year to M/s M.U Associates, Hyderabad for their business purposes, copies of purchase deed and lease agreements were enclosed. The assessee further submitted that though residential house has not been defined in the statute, the issue as to whether the particular property is a residential house or not arises in the context of concession for self occupation for residential purpose u/s 23(1) and exemption given under Wealth Tax Act for one residential house. The word "residence" signified a man's abode or continuance in a place and where there is nothing to show that it is used in a more extensive sense. In P.N. Shukla vs. CIT (2005) 276 ITR 642, the Allahabad High Court held that "*The nature of the user of the building let out determines the grant or denial of relief envisaged by clause (b) of the second proviso to section 23(1) of the Act. Had the object of the Legislature been to allow this concession irrespective of the user of the building, it was not necessary to qualify the word 'unit' by the expression 'residential'. An owner may construct a building with self-contained floors with the object of letting out the same to tenants, but such letting out has to be for the purpose of residence of the tenants and not otherwise. Admittedly, in this case, the units, which were let out to the bank, were not constructed as residential units. A residential unit is that which is used as a residence*".

4.4 It was submitted further that the intention of the assessee was to construct the building for non residential purpose as the property had been let to the Fertilizer Corporation of India for non residential purpose. Hence the assessee was not entitled for deduction under clause (c) of the second proviso to section 23(1). Keeping in view the above legal preposition, it was submitted that in the instant case, the unit owned by the assessee in Pancom Chambers is an office space, situated in a commercial complex, which is being used by the tenants for their business purposes; hence the same cannot be treated as a residential house. As the assessee owned only one residential property on the date of transfer, she prayed that she is entitled for deduction u/s 54F as claimed by her in the return of income.

4.5 The CIT observed that the amount exemption claimed is Rs.61,91,673, the ground on which the said exemption claimed was that the assessee had invested Rs.91,34,588 in residential house at Visakhapatnam. The CIT noticed from the assessee's return that she had disclosed rent from the let-out properties under the head "income from house property". Further, u/s 64(1A) of the I.T. Act, 1961, assessee had clubbed in her own hands the rents received from Chennai flat which property stands in the names of her two minor children. Hence the CIT disallowed her claim of exemption u/s 54F as ownership of more than one residential house on the date of transfer of the original asset is laid down u/s 54F (i.e. proviso to sub section (1) as disqualifying factor for the exemption. During the appellate

proceedings, the AR submitted that the property situated at Suite No.11 Pancom Chambers, Raj Bhavan Road is a commercial property which was let out for commercial purposes. The user of the property being commercial, it should not be considered as residential house for disqualifying the assessee's claim for exemption. According to the CIT, the undeniable point is that it was the assessee who treated the rent from Pancom Chamber as income from house property and claimed all incidental deductions and this she had done consistently over the years. Further, the assessee had invested in purchase of residential flat in Chennai in the names of her two minor children – the rents of which are offered to tax in her own hands u/s 64(1A). All these properties existed on the date of transfer of the original asset. Hence the assessee would not be eligible for exemption u/s 54.

4.6 The assessee reiterated the submissions as made before the CIT and submitted that under the provisions of Income Tax Act, 1961 income from property whether commercial or residential is to be offered for taxation under the head "Income from House Property" unless the same assessable under any other head of income like business or income from other sources. If the income from a property is offered under the head house property, it cannot be presumed that it is a residential property. As the assessee has offered income from Pancom chambers office under the head "income from house property", it cannot be presumed that it is a residential property. Further, by virtue of fiction created by section 64(IA) of the I.T. Act, 1961, the incomes of properties owned by the two minor daughters, were clubbed in

the hands of the assessee since the date of purchase of the said properties. The investment for purchase of said properties has come from the independent sources of these daughters, which has been accepted by the Department year after year. Simply, by virtue of inclusion of rental income of minor daughters u/s 64(IA) of the I.T. Act, 1961, it cannot be presumed that the assessee was owner of these properties. Thus, the findings of the Id CIT are factually incorrect and are unsustainable legally.

4.7 We have heard both the parties. The Id Counsel for the assessee has pointed to the page No.72 of the Paper Book wherein the lease agreement has been produced. Since the assessee has treated one property as commercial property and the other property is the only residential house in the possession of the assessee, the assessee is entitled to exemption u/s 54F. Further the incomes of the properties owned by the minor daughters were clubbed in the hands of the assessee, but the investment for purchase of the said properties has come from the independent sources of the daughters and hence it cannot be presumed that assessee is the owner of the properties. Hence in our opinion the assessee having only one residential house is eligible for claiming exemption u/s 54F.

5. Ground No.4 raised by the assessee is given below:

“The Id CIT while directing to disallow the claim of deduction u/s 54F erred in giving a finding that the deduction is claimed against short term capital gains without appreciating the fact that the sale of flats included sale of undivided share of land which is a long term capital asset”.

5.1 The AO noted that the assessee had treated the capital gains on sale of flats received as long term capital gains. The capital gains on sale of flats received are short term capital gains as the flats were sold by the assessee within financial year 2005-06 and also the flats received were not appearing in balance sheet as on 31.3.2005.

5.2 In this connection, the assessee submitted that those 10 flats were received by the assessee in exchange of surrender of her right in land. Those flats were sold immediately after they were handed over to the assessee. While working out the long term capital gain on surrender of land, the assessee has taken market value, that is sale consideration of superstructure of those ten flats as “full consideration” received in lieu of surrender of her right in the land as held by the Apex Court in the case of CIT vs. George Henderson Ltd and has accordingly worked out long term capital gain. Since the sale consideration of superstructure of flats has been taken as full value of consideration received for working out long term capital gain on surrender of right in land, the same value has become cost of acquisition in the hands of the assessee for the superstructure of those flats. There was no difference between the cost of acquisition and sale consideration of superstructure of these flats. However, gain on transfer of undivided share in land along with those flats had been offered as long term gain by the assessee.

5.3 The full value of consideration in respect of surrender of the assessee share of land to the developer has been taken as the market value of the superstructure of flats and not cost of construction of flats to the developer as proposed by the CIT for the following reasons:

- a) As required u/s 48 of I.T. Act, 1961 for working out capital gain, first full value of consideration received or accruing as a result of transfer of the capital asset is to be found out. Where the consideration for the transfer is in kind, as for instance, in a transfer by way of exchange of capital assets or is partly in cash and partly in kind, the fair market value of the property granted in exchange as on the date of the exchange shall have to be ascertained in order to arrive at the figure of consideration received as held by the Hon'ble Supreme Court in the case of George Henderson and Co. Ltd (1967) 66 ITR 622.
- b) On scrutiny of the statement of computation of long term capital gain as filed by the assessee, it can be noticed that out of 2232 sq.yards of land (after deducting the area taken by MCH for road widening) the assessee surrendered 1116 sq.yards of land in favour of the developer, in lieu of getting 10 flats in exchange for the same. For determining the gain on this surrender of right in land, the market value of the superstructure of those flats has to be determined. Since the flats have been sold in the year of possession itself, the assessee out of the total consideration of flats sold reduced the market value

of undivided share of land and arrived at the market value of the superstructure and adopted the same as full value of consideration received in lieu of surrender or right in land, as per the principle enumerated by the Hon'ble Supreme Court.

- c) As an amount of Rs.2,43,18,500/- was received by the assessee in exchange of surrender of land admeasuring 1116.0 sq. yards which is a long term asset, the resultant profit has been rightly shown as long term capital gain by the assessee.

5.4 The CIT on this issue has observed, whether the assessee's method of treating the entire sale proceeds of 10 flats as long term capital gains is correct and legally tenable. The material facts are that on 30.12.2002 the assessee had entered into a development agreement with M/s Lumbini Constructions Ltd in respect of her land (jointly held with her sister V. Shailaja) bearing No.6-3-661 at Kapadia Lane, Somajiguda, Hyderabad. The Id CIT extracted Para Nos.3, 6, 7 and 11 from the said agreement as under:

“3. That the OWNERS shall grant and allow the DEVELOPER to undertake development and construction of a residential complex in the schedule property and the DEVELOPER shall undertake the development of the schedule site and take up construction....”

6. That the OWNERS hereby grant license to the DEVELOPER and authorize and empower it to develop the schedule property at the Developer's cost into a residential complex and to undertake all necessary and incidental works in respect thereof i.e. to survey the land, engage architects,

contractors, workers, agents and any other required for the purpose of construction activities....”

7. It is agreed by and between the parties that the parties hereto are entitled to the constructed/built up areas etc. including common spaces, parking spaces in the following ratios:

- i) OWNERS : 50%*
- ii) DEVELOPER: 50%*

11. That after completion of the construction, the OWNERS on one hand and the DEVELOPER on the other hand, shall become the absolute OWNERS of 50%:50% of the built up areas together with all common areas, facilities amenities and services provided in the building along with proportionate undivided share of land and rights in the terrace and the parking areas etc....”

5.5. The CIT further observed that the total number of flats proposed to be constructed was 40. 50% of it would be 20 flats i.e. 10 flats each to the share of the assessee and her sister. In other words, the assessee was to get 10 flats in lieu of her transfer of the extent of her share in the land in question. Total area of the plot was 5000 sq. yards. The share of the assessee in the said plot was half i.e. 2500 sq.yards. The assessee happened to take possession of the 10 flats from the builder M/s. Lumbini Constructions Ltd in June/July 2005 and in a matter of 6 months thereafter, the assessee happened to dispose of all the 10 flats. The question is at what point the long term capital gain can be said to arise legally i.e. whether at the point of time when the 10 flats were received by the assessee from the builder or at the point of time when all the flats were sold out by the assessee. In other words, whether the sale proceeds of 10 flats would be long term capital gains or the cost of construction of the 10 flats i.e.

cost to the builder plus non-refundable deposit received from the builder, if any, would be long term capital gains?. It is the case of the assessee that the sale proceeds of 10 flats would be long term capital gains. In canvassing this contention, the AR has placed reliance on the decision of the Apex Court in the case of CIT vs. George Henderson Ltd (66 ITR 622), The Id CIT extracted the relevant portion from the above decision as under:

“The expression "full value of the consideration for which the sale, exchange or transfer of the capital asset is made" appearing in section 12B(2) meant the market value of the asset transferred and on this ground the Appellate Tribunal was justified in taking the market value of the shares to be the full value of the consideration. We are unable to accept this contention as correct. It is manifest that the consideration for the transfer of capital asset is what the transferor receives in lieu of the asset he parts with, namely, money or money's worth and, therefore, the very asset transferred or parted with cannot be the consideration for the transfer. It follows that the expression "full consideration" in the main part of section 12B(2) cannot be construed as having a reference to the market value of the asset transferred but the expression only means the full value of the thing received by the transferor in exchange for the capital asset transferred by him. The main part of section 12B(2) provides that the amount of a capital gain shall be computed after making certain deductions from the "full value of the consideration for which the sale, exchange or transfer of the capital asset is made". In case of a sale, the full value of the consideration is the full sale price actually paid. The legislature had to use the words "full value of the consideration" because it was dealing not merely with sale but with other types of transfer, such as exchange, where the consideration would be other than money”

5.6 The 1d CIT observed that the above decision of the Apex Court, is diametrically opposite to the assessee's stance. The gist of the said decision is that the expression "full consideration" occurring in the statutory provision relating to capital gains under the 1922 Act does not connote market value of the transferred asset but only the full value of the thing received by the transfer in exchange for the capital asset transferred. If the ratio is applied to the present case, what would constitute full consideration for the transfer of the assessee's share in Somajiguda land. Needless to say that the full consideration in this case would be the 10 flats i.e. the value embodied in the 10 flats as per the builder's account books, not the sale proceeds of the flats as contended by the assessee. For example, in the present case, the assessee happened to dispose of the flats in the year of possession itself. Now there could be different situations, for example where an assessee retains all the flats for personal family use or for commercial exploitation as let out properties. In the later type of situation, what would be the long term capital gain and what would be the cost of construction of the 10 flats as per the builder's account. If the contention of the assessee is accepted, then there would be no long term capital gain in a case where an assessee decides to retain the flats but such a stance would be untenable legally since full consideration can be money or money's worth. In the present case, the full consideration, for the transfer of the assessee's share in the Somajiguda land would be the cost of construction of the 10 flats. Strangely and untenably, the assessee has taken the sale proceeds of the flats as full value of consideration, pleading that the fair market value of the property granted in exchange as on date of exchange shall

have to be ascertained in order to arrive at the figure of consideration. This is entirely untenable. The language used is “full value of consideration received or accruing” not fair market value. For example, in a case where a property is transferred for money, the full value of consideration becomes the sum of money stated in the sale deed, not the fair market value. In fact in order to curb the practice of glaring understatement of consideration in matters of transfer of capital asset, section 50C had been introduced w.e.f 1.4.2003 and that too in a situation where the consideration stated in the documents is less than the value adopted by the registering authority for the purpose of stamp duty. It has no reference to fair market value.

5.7 We are of the opinion that the CIT erred in determining the short term capital gain on the entire property while computing deduction under the head “capital gain”. The long term capital gain has to be calculated on the undivided interest in land i.e. on the land component. Hence we set aside this issue to the file of the AO to rework the capital gain computation. The assessee may be given an opportunity to represent her case, since the assessee has elaborately submitted before us as stated supra at Para 5.2 and 5.3.

6. Ground No.5 raised by the assessee is reproduced below:

“The ld CIT while directing to deny deduction u/s 54F erred in giving a finding that the possession of new asset is beyond three years”.

6.1 The Id Counsel for the assessee submitted before us that the Id CIT further erred in giving the finding that the deduction is claimed against the short term capital gain, without appreciating the fact that the sale of flats included sale of undivided share in land which had been sold during the year under consideration. Hence the period of 3 years is to be calculated from the date of this sale. What is to be seen is the date of investment and not the date when the house property was handed over to the assessee. Even otherwise also, without prejudice to the stand that the construction of the new asset is within three years, the Id CIT erred in appreciating the legal provision that for such failure to construct the new residential unit within three years, the long term capital gains is to be brought to tax only in such year when the period of three years from the date of transfer expires and not in the year in which it is claimed.

6.2 We heard both the parties. The ITAT Hyderabad “B” Bench in ITA No.234/Hyd/2012 (35 Taxmann.com 90) has held as follows:

“Provision contained under section 54F being a beneficial provision has to be construed liberally. In various judicial precedents it has been held that the condition precedent for claiming benefit under section 54F is only that the capital gain realized from the sale of capital asset should be parted by the assessee and invested either in purchasing a residential house or in constructing a residential house. If the assessee has invested the money in construction of residential house, merely because the construction was not complete in all respects and it was not in a fit condition to be occupied within the period stipulated, that would not disentitle the assessee from claiming the benefit under section 54F.”

Once the assessee demonstrates that the consideration received on transfer has been invested either in purchasing a residential house or in constructing a residential house, even though the transactions are not complete in all respects and as required under the law, that would not disentitle the assessee from availing benefit under section 54F. Even investment made in purchasing a plot of land for the purpose of construction of a residential house has been held to be an investment satisfying the conditions of section 54F. Though there cannot be any dispute with regard to the above said proposition of law, the assessee is required to prove the actual date of investment and the amount invested towards purchase/construction of the residential house with supporting evidence.

Since the primary facts relating to which date should reckoned as the actual date of investment and which is the actual amount of investment have not been properly brought on record in the instant case, the matter is to be remitted back to the file of the Assessing Officer who shall determine the issue with regard to assessee's claim under section 54F afresh after considering all the facts and materials available before him”.

6.3 Respectfully following the above decision of the Coordinate Bench of the ITAT, Hyderabad Bench, we set aside the issue to the file of the AO, with a direction to follow the decision of the ITAT in the case of Shri Narasimha Raju (Supra) in the instant case before us.

7. Ground No.6 is the alternate ground raised by the assessee. Since Ground No.5 has been set aside by us to the file of the AO, Ground No.6 has become redundant.

8. Ground No.7 in assessee's appeal is as under:

“The ld CIT erred in giving direction to adopt cost of construction of ten flats at Rs.1,43,73,845 which is as per builder's account without providing information as to how the cost of construction to the builder for 40 flats is arrived at Rs.5,74,95,383.51”

8.1 This ground has not been pressed by the assessee at the time of hearing and hence dismissed as not pressed.

9. Ground No.8 in assessee's appeal is given below:

“The ld CIT erred in issuing directions to treat Rs.10.00 lakhs as additional sale consideration without appreciating the fact that total deposit received by the assessee was refunded back to the Developer”.

9.1 According to the AO, as per the development agreement, the advance deposit received by the assessee from the developer is refundable on delivery of assessee's share of flats. The advance deposit received from the developer is assessable to tax in the hands of the assessee as there was no evidence available on record of refund of such deposit to developer after receipt of assessee's share of flats.

9.2 In this regard, the assessee submitted that it received a deposit of Rs.20.00 lakhs which was returned to the developer by the assessee on 6.7.2005 vide ack. No.100822 of HDFC Bank

Ltd, photocopy of which was enclosed. Hence the question of taxing advance received from the developer does not arise.

9.3 According to the 1d CIT (A) this issue pertaining to the advance deposit received by the assessee from the builder i.e. Lumbini Constructions Ltd. It is the case of the assessee that such deposits were refundable to the builder and that she had refunded such amounts. The 1d CIT (A) reproduced the relevant portions from the development agreement as under:

“8. The developer shall pay to the owners an interest free deposit of Rs.1.00 crores. The DEVELOPER already paid an advance of Rs.15.00 lakhs as below:

Name of the owner: Smt. T. Hemalatha Devi

Ch. No.425382 dt. 20.10.2001 Rs.10,00,000/-

Smt. V.Shailaja – Ch.No.426381 dt. 20.10.01 – Rs.2,50,000/-

Smt. S. Uma Devi Ch. No.426380 dt. 20.10.01 Rs.2,50,000/-

All the cheques drawn on Andhra Bank, Somajiguda Branch, Hyderabad as interest free deposit out of Rs.1.00 crores and the balance of Rs.85.00 lakhs shall be paid to the owners within two weeks from the date of receipts of the Municipal sanction and the Developer shall be entitled to take possession and commence the work after payment of the balance deposit amount within the specified two weeks time, then the owners are at liberty to cancel this agreement. This deposit amount shall be over of the possession of the completed built up areas by the Developer to the owners of their share as per this agreement”.

9.4 The CIT held that *“from the above, it can be seen that the builder had given interest free deposit of Rs.1.00 crores. As*

against this the AR produced evidence of refund of Rs.80.00 lakhs by the assessee, her sister Smt. V. Shailaja and her mother Smt. T. Hemalatha Devi. The mention of the name of the mother is just a token one since her share in the land had further been sub-divided between the two daughters i.e. the present assessee Smt. S. Uma Devi and Smt. V. Shailaja. Hence, moneys as well as moneys' worth falling to the share of Smt. T. Hemalatha Devi have been apportioned between the two daughters in equal shares. It becomes clearly evident that while the builder had given advance deposit of Rs.1.00 crores, the aggregate of refunds by the assessee, her sister and their mother Smt. T. Hemalatha Devi put together works out to only Rs.80.00 lakhs. There is absolutely no evidence of further refund of Rs.20.00 lakhs. In fact the builder itself i.e. M/s. Lumbini Constructions Ltd had certified the aggregate refund received by it to be Rs.80.00 lakhs. In view of this fact, the non refunded amount of Rs.20.00 lakhs becomes assessable as part of sale consideration for the transfer of the respective shares in the Somajiguda land and hence assessable as long term capital gain. Since the two sisters i.e. the assessee Smt. S. Umadevi and Smt. V.Shailaja have had equal shares in everything connected with this transaction, the amount of Rs.20.00 lakhs has to be divided equally between both of them in the ratio of Rs.10.00 lakhs each. In completing the assessment the AO had not at all applied his mind to his aspect. Such omission on his part has rendered the assessment not only erroneous but also prejudicial to the interests of the revenue. Therefore, the ld CIT (A) directed the AO to bring to tax Rs.10.00 lakhs as long term capital gains in addition to the cost of construction of 10 flats as per the builders account in the hands of the present case”.

9.5 Assessee reiterated its submission that the amount of Rs.20.00 lakhs received as deposit from the developer and the same had been refunded back, copy of the confirmation letter in this regard from Lumbini Constructions Ltd was enclosed. Hence no amount can be added on this count. We have perused the evidence for return of the amount of deposit and are satisfied with the assessee's claim that no amount can be added on this count. This ground of appeal is allowed.

10. Ground No.9 raised in assessee's appeal is given below:

"The ld CIT erred in directing to bring to tax an amount of Rs.18,50,000 as additional sale consideration in short term capital gains without appreciating the fact that this amount was not sale consideration but was towards society corpus fund, water and electricity connection charges, cost of solar water heating system, which was in turn to be defrayed to respective agencies. Hence the same cannot be considered as sale consideration".

10.1 The next issue is that the assessee had not offered the amounts received towards additional amenities, parking charges, lift, common area etc. on sale of flats.

10.2 On this the assessee submitted that with regard to the amounts received towards additional amenities, the sale consideration mentioned in the sale deeds and work order agreement is inclusive of the cost of various amenities like parking etc, provided to the prospective buyers besides cost of

flat which can be verified from the sale deed and work order was made use of in respect of all the 10 flats sold by the assessee. All the amounts received by the assessee towards sale of flats, including work order charges and receipts on account of other amenities have been clubbed together while working out the total consideration received. Assessee also enclosed a statement indicating the amounts received under various heads and how the same have been treated for arriving at the total sale consideration. A perusal of this statement will reveal that the consideration taken for sale of flats is all inclusive of sale price as well as amenities. Hence it is incorrect to assume that the assessee has not offered for taxation, the amounts received towards additional amenities, parking charges, lift common areas etc. on sale of flats.

10.3. The Id CIT (A) on this issue stated that the submission of the assessee gets demolished by the documentary evidence available on record i.e. the respective work order. For example, the work order relating to the purchase of flat by Sri M. Ramasubba Reddy evidences that an amount of Rs.12,21,600/- was to be paid towards work order agreement. The Id CIT (A) reproduced the relevant Para as under:

“CONSIDERATION

An amount Rs.12,21,600/- (Rupees Twelve Lakhs Twenty One Thousand Six Hundred only) payable by the FIRST PART to the Land Owner Smt. S. Umadevi only. The first party has already paid an amount of Rs.12,21,600/- and acknowledge the receipt of the same.

Corpus Fund Rs.50,000/-, water and electricity Rs.1,10,000/- and solar water heating systems

Rs.25,000/- will be paid before taking the delivery of the possession”.

10.4. The CIT held that *“from the above extract, it can be seen that in addition to Rs.12,21,600/-, there was further obligation to pay Rs.1,85,000/- i.e. corpus fund Rs.50,000/- water and electricity Rs.1,10,000/- and solar water heating system Rs.25,000/-. It is clear that the assessee had taken into account the amount of rs.12,21,600/- she had not taken into account the further amount of rs.1,85,000/-. There can be no doubt that the further amount of Rs.1,85,000/- is a part of sale consideration of the flats in question. This feature is noticed in respect of all the 10 flats sold by the assessee. The AO had completed the assessment without examining this aspect and without applying his mind to this issue. This omission on his part had rendered the assessment not only erroneous but also prejudicial to the interests of the revenue. Hence, the CIT (A) directed the AO to bring to tax, as a part of short term capital gains i.e. part of sale proceeds of the flats i.e. Rs.18,50,000/-(Rs.1,85,000 x 10)”.*

10.5. We have heard both parties. In our opinion, the ld CIT erred in directing to bring to tax an amount of Rs.18,50,000/- as additional sale consideration without appreciating the fact that this amount was not sale consideration, but was towards society corpus fund, water and electricity connection charges, cost of solar water heating system, which was in turn to be defrayed to respective agencies. Hence, the same cannot be considered as sale consideration. The ld CIT (A) seems to have ignored the statement of sale consideration received, which was filed before

him. The assessee did include amount received towards electricity and water charges (Rs.1,10,000 per flat) from 8 flat owners, amount of Rs.1,62,500 received towards solar system from 8 flat owners and Rs.1,50,000 towards corpus fund from three flat owners which in turn, were defrayed to respective agencies. Those flat owners who have not paid their contribution to the assessee have directly paid their respective shares to the concerned agencies. Hence these amounts should not form part of sale consideration of the flats sold. Hence this ground of appeal preferred by the assessee is allowed.

11. Ground No.10 is as follows:

“The ld CIT erred in directing to bring to tax the amount of Rs.5,00,000 claimed as cost of acquisition of shares, being amount paid to the consultant for advising on the matter of purchase and sale of shares, inspite of providing all the details and evidences for such expenditure”.

11.1 With regard to deduction of Rs.5.00 lakhs from short term capital gains of Rs.51,41,303 on sale of shares towards “fee paid to investment advisor” as seen from the statement of computation of income, AO was of the opinion that this expenditure does not form part of “cost of acquisition” nor is it connected to sale of shares. Hence the deduction claimed by the assessee was not admissible.

11.2 In response to this, the assessee submitted that:

- a) this sum was paid for the periodical and timely advice given by Royal Corporate Advisors (P) Ltd for purchase and sale of shares, without which the assessee could not have earned short term capital gain of Rs.51,41,313.
- b) This expenditure had to be incurred whether the advice given by them resulted in gain or loss to the assessee.
- c) Assessee being a women, she had to necessarily depend on professionals to give timely advice, particularly in purchase and sale of shares in which prices of shares are subject to unforeseen and unexpected frequent fluctuations.
- d) Incurring of the expenditure was a continuous process but quantified at the close of the year.
- e) Similarly the expenditure incurred for advice on sale of shares forms part of cost of sales of the shares before they are transferred. Unless both transfers viz., transfer in the name of the assessee while purchasing and transfer in the name of the purchaser while selling, the transaction is not complete and the resultant gain or loss would not arise. Thus the aforesaid expenditure is wholly and exclusively incurred in connection with transfer as contemplated u/s 48(1) of the Act and hence allowable. Reliance was placed on the Hon'ble Apex Court in the case of Dham Dadabhay Kadadia vs. CIT (1967) 63 ITR 651.

11.3. The ld CIT (A) in this regard observed that section 48 of the I.T. Act, 1961 lays down the mode of computation of capital gains. The permissible deductions are:

- i) Expenditure incurred wholly and exclusively in connection with such transfer
- ii) The cost of acquisition of the asset and the cost of any improvement thereto.

11.4 The CIT (A) held that *“from the above, it can be seen that the amount of Rs.5.00 lakhs in question, cannot be a part of cost of acquisition of the shares in question. Similarly, the said amount cannot be said to have been incurred wholly and exclusively in connection with the transfer of the shares in question. Moreover, the assessee has not produced any solitary evidence as to the nature of advice rendered. Hence, the CIT (A) held that the claim of deduction of Rs.5.00 lakhs is not admissible”*.

11.5 The assessee reiterated the submissions made before the AO and the ld CIT. It was submitted that the said expenditure was incurred by the assessee for advice rendered both at the time of purchase of shares and at the time of sale of shares. Thus, the expenditure incurred for advice rendered at the time of purchase forms part of the cost of the shares. Similarly the expenditure incurred for advice on sale of shares forms part of cost of sales of the shares before they are transferred. Unless both transfers viz., transfer in the name of the assessee while purchasing and transfer in the name of the purchaser while selling, the transaction is not complete and the resultant gain or loss would not arise. Thus the aforesaid expenditure is wholly

and exclusively incurred in connection with transfer as contemplated u/s 48(1) of the Act and hence allowable.

11.6 We have heard both the parties and perused the record. We find no infirmity with the order of the CIT (A). We are of the opinion that the deduction is permissible only when (i) Expenditure is incurred wholly and exclusively in connection with such transfer and (ii) Expenditure is towards the cost of acquisition of the asset and the cost of any improvement thereto. The assessee has not proved that it comes under any one of the permissible deduction as stated above and hence is eligible. Also no evidence has been produced with regard to the advice rendered. Hence the deduction is unavailable to the assessee.

ITA No 885/Hyd/2010 – Smt. V. Shailaja

12. In the case of Smt. V. Shailaja, the grounds of appeal are identical as that of Smt. S. Uma Devi, except for Ground No.4 which is as follows:

“4. The ld CIT erred in directing to disallow deduction u/s 54F on the ground that assessee’s deposit in Bank a/c made in October 2006 is beyond the due date for filing of return of income of 31.07.06 without appreciating the fact that the due date for this A.Y was extended till 31.10.2006 by the CBDT”.

13. The ld Counsel submitted as follows:

- The CIT, while directing to disallow the claim for deduction u/s 54F erred in giving a finding that the deduction is claimed against short term capital gains without appreciating the fact that the sale of flats included sale of undivided share of land, which is a long term capital asset.

- The CIT erred in directing to disallow deduction u/s 54F on the ground that the assessee's deposit in Bank account made in October, 2006 is beyond the due date for filing of return of income of 31.07.06 without appreciating the fact that the due date for filing return of income for this A.Y was extended till 31.10.2006 by the CBDT (vide order No.142/41/2005 TPI CPE dated 24.07.2006: 284 ITR (ST) 62).
- During the course of assessment proceedings, the assessee has filed date-wise details of investment in new residential house situated at Visakhapatnam. A copy of the same was enclosed which indicate that the assessee has made substantial investment within three years from the date of sale of original assets. In order to get benefit u/s 54F, assessee need not complete the construction of house and occupy the same within the stipulated period (Mrs. Seetha Subramaniam vs. ACIT (Mad.) (1996) 55 ITD 094.
- Further it is not the requirement of law that the assessee should utilize only the sale proceeds for investment in new residential house property. Since money has no colour, what is required by law is that assessee should use his/her own funds for investment in order to claim exemption u/s 54F which the assessee has done.
- Assessee's turnover from sale of securities was Rs.35,87,875.05 and share of profit, which is business income only from partnership firm M/s Pioneer Oxygen was Rs.29,48,881.08. But put together amounted to Rs.65,36,866 which exceeded Rs.40.00 lakhs. Hence the

assessee was required to get its books of accounts audited u/s 44AB of I.T. Act, 1961.

14. The ld DR relied on the order of the CIT.

15. We have heard both parties. Since the AO has allowed the exemption u/s 54F of the Act as claimed by the assessee after examining the pass book produced by the assessee and verifying the details also, the assessee had made substantial investment within 3 years from the sale of original asset. We also find that the date of filing the return was extended and the amount was deposited. The assessee has produced the notification for extension by the CBDT at page 34 of the paper book. Hence, we are of the opinion that the assessee is eligible for deduction u/s 54F.

16. In the result, both the appeals are partly allowed for statistical purposes.

Order pronounced in the Open Court on 30th January, 2015.

Sd/-
(P.M. Jagtap)
Accountant Member

Sd/-
(Asha Vijayaraghavan)
Judicial Member

Hyderabad, dated 30th January, 2015.

Vnodan/sps

Copy to:

1. *Shri A.V. Raghu Ram & B. Peddi Rajulu, Advocates, 403, Manisha Towers, D.No.10-1-18/31, Shyam Nagar, Hyderabad 500004*
2. *The CIT-IV, Aayakarbhavan, Basheerbagh, Hyderabad*
3. *The CIT Hyderabad*
4. *The DR, ITAT, Hyderabad*
5. *Guard File*

By Order