

आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम
IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM

श्री वी. दुर्गाराव, न्यायिक सदस्य एवं
श्री जी. मंजुनाथा, लेखा सदस्य के समक्ष
BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A.No.716/Vizag/2013
(निर्धारण वर्ष / Assessment Year: 2006-07)

ITO, Ward-2(1),
Vijayawada
(अपीलार्थी / Appellant)

Vs.

Smt. Ivaturi Mahalakshamma,
Vijayawada
[PAN: AATPI 0474P]
(प्रत्यार्थी / Respondent)

अपीलार्थी की ओर से / Appellant by : Shri M.N. Murthy Naik, DR
प्रत्यार्थी की ओर से / Respondent by : Shri C. Subrahmanyam, AR

सुनवाई की तारीख / Date of hearing : 20.06.2016
घोषणा की तारीख / Date of Pronouncement : 09.09.2016

आदेश / ORDER

PER V. DURGA RAO, Judicial Member:

This appeal filed by the revenue is directed against the order of CIT(A), Vijayawada dated 4.9.2013 for the assessment year 2006-07.

2. The assessee is an individual filed return of income for the assessment year 2006-07 on 6.2.2008 by declaring total income of ₹

11,93,700/- and the same was processed u/s 143(1) of the Income Tax Act, 1961 (hereinafter called as 'the Act') and subsequently assessment was re-opened u/s 147 of the Act after following the due procedure.

3. In the assessment order, the A.O. has observed that the assessee Smt. Ivaturi Mahalakshamma received a residential house at Dr.No.38-8-7, M.G. Road, Vijayawada from her husband Late Sri Ivaturi Sivaprasad as per regd. Will dated 17.11.1977. She had given such property for development to M/s. Dutta Constructions, Vijayawada vide agreement dated 29.1.2001. As per the said agreement, she had to receive 50% of the constructed area of the commercial complex to be constructed by the developer. In the return of income filed on 6.2.2008, the assessee had adopted the rate per sq.yd. at ₹ 240/- for the constructed area and also had not taken into account value of common area while arriving at the sale consideration. When the A.O. has asked the assessee to explain chargeability of capital gains, it was submitted that the assessee had handed over the possession to M/s. Dutta Constructions on 29.1.2001. As per the agreement, the capital gains has to be taxed in the assessment year 2001-02 and not the year under consideration. However, the A.O. has not accepted the explanation of the assessee for the following reasons:

1. Though as per the agreement dt 29.01.2001 for development of the property, the possession of the property to be handed over to the developer immediately as per clause 16, the assessee could not give the actual date of handing over possession of the property to the developer.

2. As could be seen from the agreement, as per clause no.8, the shares of the owners and developer in the property would be decided only after the approval from the municipality and other Government Departments and as per clause 9 all the approvals from the departments concerned would be obtained by the developer only. It means that so long as the approval is not obtained the shares of both the parties are not determined and there is no question of part performance of handing over the property to the developer as claimed by the assessee. The plan approval of the property was obtained from the municipal authorities vide approval no.140.I2QQ. Subsequent to the approval only the construction was started and partly completed during the financial years 2004-05 and 2005-06 only. As such the assessee's claim that the capital gains are assessable in the year 2001-02 is not correct.

3. As verified from the Regd. Sale deeds executed by the assessee and the second party jointly vide document No.536/05 dt.05.02,2005 and 3755/04 dated 15-10-2004, it was recorded therein at page.2 thereof, among other things as follows (para 5 thereof)

"The schedule property is devolved upon the 1" party (viz Smt. Ivaturi Mahalakshamma) by virtue of the will no.244/1977 executed by her husband and since then the scheduled property is under the enjoyment of the 1st party with absolute title together with possessory rights".

It is therefore evident from the recitals of the above registered title deeds executed in favour of the purchasers, the possession over the impugned property was only vested with the assessee and not in the developer as claimed by the assessee.

4. Again, as is evident from the records the assessee had accounted for the long term capital gains with reference to the "Sale of flats" which were effected by means of "Registered sale deeds"

In view of the above facts and taking support from the decisions of various High Courts and other judgments quoted in the order u/s.263 of the Income Tax Act, 1961 dt.31.03.2010, the contention of the assessee that the capital gains are assessable for the assessment year 2001-02 is not accepted.

In view of the detailed discussion made by the Commissioner of Income Tax, Vijayawada in the order u/s.263 of the Income Tax, Act, 1961 dated. 31.03.2010, and following the directions of the Commissioner of Income Tax, Vijayawada therein as also for the reasons pointed out in the earlier paras above, the capital gains are assessed to tax in the year of receipts basing on the flats sold, along with the cost of undivided share of land and common area, for the assessment years 2005-06 and 2006-07.

Coming to the sale consideration of the property, the assessee could not give the details of actual handing over her share of property by the builder. As per the assessee's own explanation the assessee received 7294 Sq.ft out of the total area of construction. While computing the capital gains, the assessee had not taken into account the cost of common area and the undivided land received along with the constructed carpet area. Hence, the same was proposed for taking into account for the computation of capital gains and a show-cause notice was issued to the assessee on 04.11.2010 calling for her objections for assessing the capital gains by taking into account the value of common area and the value of undivided land received along with the constructed area of 7294 s.ft. The case was posted for hearing on 16.11.2010. The assessee had filed her written submissions on 19.11.2010. Further, the assessee's Authorized Representative, Sri. K. Sai Suresh, CA appeared on 03.12.2010 and the case was discussed. The assessee's Authorized Representative contended that there is part of performance and half share of the site was already handed over to the builder and the right in the rest of the property i.e half share was with the assessee only and hence the question of inclusion of the cost of land in the capital gains in the hands of the assessee does not arise.

This contention is not acceptable. While taking the value of the share of the assessee in the constructed portion, the cost of the undivided land and common area are includible, as the assessee had got right in these areas besides the carpet area of 7294 Sq.ft received.

While arriving at the cost of construction the Regd. valuer adopted the composite rate of 918 per sft. As against this, the composite rate adopting the market rate as per S.R.O, patamata for the site and the cost of construction, u/s.500 of the Income Tax Act, 1961. comes to Rs.933 per sft. Doing so, the long term capital gains are worked out as under:

Total Constructed area received
By the assessee in fifth floor : 7294 sft.

Share of assessee in common
Area – 3900 sft/5 (floors) : 780 sft.

Total area received Rs. : 8074 sft.

Value of land
(as per sub registrar record) : ₹ 17,700 per sq.yd.

Total value of land
(Total land including share of three sons)
 $17700 \times 1369 \text{ Sq.yd} = 2,42,31,300$

Total constructed area : 35,340 sft.

Value of land per sft : $2,42,31,300/35,340 = ₹ 686$

<i>Cost of construction per sft</i>		
<i>(As per Regn. Department's proceedings dt.28.9.2005)</i>		
	=	₹ 440
<i>Composite rate per sft</i>	:	₹ 1,126 (686+440)
<i>Fair market value of transferred property (410 sq.yds)</i>		
<i>Rs.1126 x 8074</i>		:₹ 90,91,324
<i>321/410 share in the sale consideration</i>		
<i>90,91,324 x 321/410</i>		:171,17,841
<i>Less: Indexed value of the property 321x500x497/100</i>		:17,97,685

	<i>Capital gain</i>	₹63,20,156
<i>Add: Interest income under other sources</i>		:₹ 72,773

		₹63,92,929
<i>Income from other sources</i>	:	₹ 72,773
<i>Long Term capital gains</i>	:	₹63,20,156

<i>Tax thereon</i>	:	₹ 12,51,586
<i>Add: Surcharge</i>	:	₹ 1,25,159

		₹ 13,76,745
<i>Add: Education cess</i>	:	₹ 27,535

		₹ 14,04,280
<i>Add: Interest u/s 234A</i>	:	₹ 2,24,685
<i>Interest u/s 234B</i>	:	₹8,00,466
<i>Interest u/s 234C</i>	:	₹ 9,082
	-----	: ₹ 10,34,233

		₹24,38,513
<i>Less: Self assessment tax paid</i>	:	₹ 3,29,793

		₹ 21,08,720
<i>Less: Demand raised u/s 143(1)</i>	:	₹ 820

<i>Balance payable</i>	:	₹21,07,900

4. Accordingly, A.O. has calculated the capital gains including undivided land and common area also.

5. Assessee carried matter in appeal before the Ld. CIT(A). The Ld. CIT(A) deleted the addition made by the A.O. by observing as under:

"4. I have carefully gone through the assessment order and submissions of the appellant. The appellant has given her property for development and received 5th floor of the building with carpet area of 7294 sq.ft. as per development agreement dated 29.01.2001, which was not disputed by the Assessing Officer in his assessment order. Instead the appellant disclosed the capital gains during the Asst. Years 2005-06 and 2006-07 and filed return of income based on the registration of flats (constructed area) and disclosed her share. For this Asst. Year, the Assessing Officer completed the assessment and taxed capital gains on the appellant's share in common area i.e. on 780 sq.ft. On careful observation of the submissions of the appellant and the assessment order, I am of the opinion that once the development agreement is over, 50% share of constructed value comes to the landlord i.e. the appellant, which is taxable during Asst. Year 2001-02, which is not before me. For this Asst. Year, the appellant already disclosed capital gains as per the registration documents according to her share of property received. Once the development agreement is decided and shared by the landlord and the builder i.e. developer, the issue of common area does not come to the landlord again. The appellant has already given her land to the developer as per development agreement and disclosed her share value for this assessment year. Hence, there is no question of common area received back to the owner of land. Therefore, the consideration of proportionate land to the common area will not arise. In view of the above findings, the addition made by the Assessing Officer in the order under appeal stands deleted and the appeal is hereby allowed."

6. On being aggrieved, revenue carried matter in appeal before the Tribunal.

7. The Ld. D.R. has pointed out that though the agreement entered by the assessee on 29.1.2001, the approval is obtained by the developer after two years, thereafter construction was started and therefore, the actual possession of property was not given in the assessment year 2001-02 and therefore taxing the capital gains in the assessment year

2006-07 is according to law. He also pointed out that the Ld. CIT(A) without considering the agreement dated 19.1.2001 simply held that capital gain taxable only in assessment year 2001-02 may be remitted back to the file of CIT(A).

8. On the other hand, the Ld. Counsel for the assessee has submitted that the assessee had given the possession to the developer on 29.1.2001 and capital gains has to be taxed only in the assessment year 2001-02 and submitted that the appeal filed by the revenue may be dismissed. In this regard, he relied on various case laws.

9. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. The assessee has received a residential house as a gift from her husband dated on 17.11.1977. She had given the said property to M/s. Dutta Constructions, Vijayawada vide agreement dated 29.1.2001. As per the said agreement, she has to received 50% of the constructed area of the commercial complex to be constructed by the developer. As per the A.O., the developer of the property has obtained the approval no.1440/2003. Subsequent to the approval only, the construction was started and partly completed during the financial years 2004-05 and 2005-06. As per clause 8 of the agreement, it says that after getting the plan approval, we will fix our shares in the construction. We find

that the assessee has also offered capital gains for the assessment year 2005-06 as well as 2006-07. It appears from the record that though the assessment for the A.Y. 2005-06 is not before us, the A.O. has completed assessment u/s 143(3) of the Act, thereafter the Commissioner has issued a notice u/s 263 of the Act. Assessee carried matter in appeal before the ITAT, Visakhapatnam. The ITAT, Visakhapatnam Bench has set aside the order of the Commissioner u/s 263 of the Act and directed the A.O. to complete the assessment u/s 143(3) r.w.s. 254 of the Act. The order already passed on 24.2.2015 and the order is under appeal before Ld. CIT(A). In so far as, assessment year 2006-07 is concerned, the Ld. CIT(A) without considering the agreement various clauses incorporated, without considering the facts and circumstances of the case, without considering the capital gains offered by the assessee herself simply held that the assessment year 2001-02 is not before me and it has to be taxed only in assessment year 2001-02. We find that the order passed by the Ld. CIT(A) is not correct and the Ld. CIT(A) ought to have considered all the details. We also find that in the assessment years 2005-06 and 2006-07 facts are similar. In view of the above facts and circumstances of the case, we find that the request made by the Ld. D.R. is justified and accordingly we set aside the order passed by the Ld. CIT(A) and

direct the Ld. CIT(A) to examine all the details and decide de-novo, in accordance with law.

10. So far as case laws relied by the Ld. Counsel for the assessee is concerned, it is a mere academic in view of the issue being remitted back to the file of the Ld. CIT(A).

11. In the result, the appeal filed by the revenue is allowed for statistical purposes.

The above order was pronounced in the open court on 9th Sept'16.

Sd/-
(जी. मंजुनाथा)
(G. MANJUNATHA)

Sd/-
(वी. दुर्गाराव)
(V. DURGA RAO)

लेखा सदस्य/ACCOUNTANT MEMBER न्यायिक सदस्य/JUDICIAL MEMBER

विशाखापटणम /Visakhapatnam:

दिनांक /Dated : 09.09.2016

VG/SPS

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. अपीलार्थी / The Appellant – The ITO, Ward-2(1), Vijayawada
2. प्रत्यार्थी / The Respondent – Smt. Ivaturi Mahalakshamma, D.No.38-5-1, Ist lane, Punnamathota, Opp. AIR Cross Roads, Vijayawada
3. आयकर आयुक्त / The CIT, Vijayawada
4. आयकर आयुक्त (अपील) / The CIT(A), Vijayawada
5. विभागीय प्रतिनिधि, आय कर अपीलीय अधिकरण, विशाखापटणम / DR, ITAT, Visakhapatnam
6. गार्ड फ़ाईल / Guard file

आदेशानुसार / BY ORDER

// True Copy //

वरिष्ठ निजी सचिव (Sr.Private Secretary)
आय कर अपीलीय अधिकरण, विशाखापटणम /
ITAT, VISAKHAPATNAM