

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.498/Vizag/2013

(निर्धारण वर्ष / Assessment Year: 2009-10)

ITO, Ward-1(2),
Vijayawada

Sri Ravuri Sai Chaitanya,
L/R of Late Smt. Ravuri Bhanusri
Vijayawada
[PAN No.APWPR3568K]

(अपीलार्थी / Appellant)

(प्रत्यार्थी / Respondent)

C.O. No.128/Vizag/2013

(Arising out of I.T.A.No.498/Vizag/2013)

(निर्धारण वर्ष / Assessment Year: 2009-10)

Sri Ravuri Sai Chaitanya,
L/R of Late Smt. Ravuri Bhanusri
Vijayawada

ITO, Ward-1(2),
Vijayawada

(अपीलार्थी / Appellant)

(प्रत्यार्थी / Respondent)

आयकर अपील सं./I.T.A.No.499/Vizag/2013

(निर्धारण वर्ष / Assessment Year: 2009-10)

ITO, Ward-1(2),
Vijayawada

Sri Ravuri Kishore,
L/R of Late Smt. Ravuri Ramayamma
Vijayawada

[PAN No.APWPR3567G]

(अपीलार्थी / Appellant)

(प्रत्यार्थी / Respondent)

C.O. No.129/Vizag/2013

(Arising out of I.T.A.No.499/Vizag/2013)

(निर्धारण वर्ष / Assessment Year: 2009-10)

Sri Ravuri Kishore,
L/R of Late Smt. Ravuri Ramayamma
Vijayawada

(अपीलार्थी / Appellant)

ITO, Ward-1(2),
Vijayawada

(प्रत्यार्थी / Respondent)

आयकर अपील सं./I.T.A.No.500/Vizag/2013

(निर्धारण वर्ष / Assessment Year: 2009-10)

ITO, Ward-1(2),
Vijayawada

(अपीलार्थी / Appellant)

Sri Ravuri Kishore
Vijayawada
[PAN No.AMWPR0183P]

(प्रत्यार्थी / Respondent)

C.O. No.130/Vizag/2013

(Arising out of I.T.A.No.500/Vizag/2013)

(निर्धारण वर्ष / Assessment Year: 2009-10)

Sri Ravuri Kishore
Vijayawada

(अपीलार्थी / Appellant)

ITO, Ward-1(2),
Vijayawada

(प्रत्यार्थी / Respondent)

अपीलार्थी की ओर से / Appellant by

: Shri S.R.S. Narayan, DR

प्रत्यार्थी की ओर से / Respondent by

: Shri G.V.N. Hari, AR

सुनवाई की तारीख / Date of hearing

: 21.03.2017

घोषणा की तारीख / Date of Pronouncement

: 28.03.2017

आदेश / ORDER

PER Shri Manjunatha, Accountant Member:

These are three appeals filed by the revenue and separate cross objections filed by different assesseees are directed against separate, but identical orders of the Commissioner of Income Tax (A), Vijayawada dated 16.4.2016 for the assessment year 2009-10. Since, the facts are identical and issues are common, they are clubbed, heard together and disposed-off by way of this common order for the sake of convenience.

2. The brief facts of the case extracted from ITA No.498/Vizag/2013 are that the assessee is an individual deriving income from property, filed her return of income for the assessment year 2009-10 on 22.10.2010 declaring total income of ₹ 4,28,780/-. The return of income was processed u/s 143(1) of the Income Tax Act, 1961 (hereinafter called as 'the Act') on 8.3.2011. Subsequently, the case has been re-opened u/s 147 of the Act, for the reasons recorded that the income chargeable to tax had been escaped assessment within the meaning of section 147 of the Act. The facts which are relevant for re-opening of assessment are that during the previous year relevant to assessment year 2009-10, the assessee Late Smt. R. Bhanusri along with 12 others entered into development agreement with M/s. Sri Sai Venkata Ramana

Constructions for development of a piece of land admeasuring 1.68 acres at S.No.93, Gollapudi and agreed to share constructed flats in the ratio 17:23. The agreement with the builder for development and construction of flats is in the nature of transfer within the meaning of section 2(47) r.w.s. 53A of the Transfer of Property Act, 1882 and also fact that the assessee has not admitted resultant capital gain on transfer of land in pursuance of joint development agreement in the return of income filed on 22.2.2010, a notice u/s 148 of the Act, was issued to the assessee on 20.4.2011 requiring the assessee to file return of income for the assessment year 2009-10. Meanwhile, the assessee has filed a revised return on 18.5.2011 admitting total income of ₹ 4,35,260/- as against income admitted in the original return of ₹ 4,28,790/- besides declared agricultural income of ₹ 1 lakh. The assessee also filed a letter on 18.5.2011 stating that the return filed on 18.5.2011 may be treated as return filed in response to notice issued u/s 148 of the Act.

3. Subsequently, the case has been selected for scrutiny and accordingly, notice u/s 143(2) of the Act was issued. In response to notice, the authorized representative of the assessee appeared from time to time and furnished the information as called for. During the course of assessment proceedings, the A.O. observed that the development agreement entered into by the assessee with the

developer amounts to transfer of property within the meaning of section 2(47)(v) r.w.s. 53A of the Transfer of Property Act, 1882 and hence issued a show cause notice and asked to explain as to why capital gain shall not be charged in respect of transfer of property in pursuance of the development agreement. In response to show cause notice, the assessee has filed its reply on 5.11.2012 and contended that there is no transfer of property within the meaning of section 2(47)(v) of the Act as the development agreement entered into with the developer is a temporary permission extended to the builder to enter and construct, but not allowing the possession of the property to be taken or retained in part performance of the contract of the nature referred to in section 53A of the Transfer of Property Act, 1882. The assessee further contended that merely entering into a joint development agreement does not give rise to any capital gain as the assessee neither received any consideration nor received possession of the constructed flats as on the date of joint development agreement and hence computation of capital gain as on the date of agreement does not arise. The assessee filed one more letter on 31.12.2012 and opposed proposed levy of capital gain on transfer of property in pursuance of joint development agreement.

4. The assessee further contended that in case there is a liability on account of capital gains, in pursuance of joint development agreement, the value of the property transferred has to be taken based on the cost of construction incurred by the developer for construction of flats, but not the guidance value of the property as per the SRO. The assessee has filed one more letter on 28.2.2013 and claimed exemption u/s 54F of the Act, on total flats received in pursuance of joint development agreement by claiming that the said flats are constructed for residential purpose. In support of his arguments relied upon the following case laws:

- 1) CIT Vs. Gita Duggal (ITA No.1237/2011) (Delhi High Court)
- 2) CIT Vs. Smt. K.G. Rukminiamma (2011) 239 CTR (Kar) 435
- 3) CIT Vs. Dr. P.K. Vasanthi Rangarajan (2012) 252 CTR (Mad) 336
- 4) CIT Vs. Syed Ali Adil (ITA No.2012) (A.P. High Court)

The assessee referring to the above decisions submitted that in case of joint development agreements, if property is given for development, the assessee is eligible for deduction u/s 54F of the Act on all the flats received in pursuance to joint development agreement, even if the flats are located in different floors.

5. The A.O. after considering the explanations of the assessee and also referring to certain judicial precedents, held that as per the provisions of section 2(47)(v) of the Act, 'transfer' includes any transfer involving the allowing of the possession of any immovable property to

be taken or retained in part performance of the contract of the nature referred to in section 53A of the Transfer of Property Act, 1882. Since, the development agreement entered into with the developer is in the nature of transaction allowing possession of any immovable property, which comes under the definition of transfer as defined u/s 2(47) r.w.s. 53A of the Transfer of Property Act, 1882 and hence, capital gain is chargeable on the transaction. The A.O. further observed that in so far as computation of capital gain on flats received in pursuance of joint development agreement, the A.O. has adopted cost of construction @ ₹ 400/- per sq.ft. incurred by the builder to determine the consideration received for transfer of land in pursuance of joint development agreement and rejected the claim of the assessee with regard to the value of parking place and adopted rate of ₹ 250/- per sq.ft. for parking place. In so far as claim of exemption u/s 54F of the Act, the A.O. rejected the claim of exemption on the ground that the assessee has constructed building and leased out to M/s. Chaitanya Educational Society for running educational institution for the purpose of commercial exploitation of the property and hence, the assessee is not eligible for exemption u/s 54F of the Act. With these observations, computed long term capital gain of ₹ 80,53,279/-.

6. Aggrieved by the assessment order, the assessee preferred an appeal before the CIT(A). Before the CIT(A), the assessee reiterated the submissions made before the A.O. The assessee further contended that the A.O. was erred in treating the value of undivided share of land allotted by the builder as consideration received by the assessee, ignoring the fact that the land belongs to the assessee himself and therefore cannot be considered as consideration received from the builder. The assessee further submitted that the A.O. was erred in determining the status of the assessee as individual as against HUF status, claimed at the time of assessment, even though the A.O. has observed in the assessment order that the assessee's source of income derived from ancestral property. It was further submitted that the A.O. was erred in concluding that the flats allotted to the assessee were commercial property, overlooking the fact that the flats were constructed for purely residential purpose and also the tenant has used the premises for accommodating the students for their residence. The assessee further submitted that the A.O. was erred in rejecting the claim of exemption u/s 54F of the Act, ignoring the decision of the Karnataka High Court, in the case of CIT Vs. K.G. Rukminiamma (supra), wherein it was held that several flats received by the site owner from the

developer should be considered as a single residential unit and therefore, all of them were eligible for exemption u/s 54F of the Act.

7. The CIT(A) after considering the relevant submissions of the assessee, accepted the claim of the assessee with regard to the status and observed that the assessee's family was consisting of assessee and her two children and accordingly, the claim of HUF status is in order. The CIT(A) further observed that the A.O. was erred in determining the assessee's status as individual, ignoring the fact that the property in question was inherited from the assessee's ancestors and hence the assessee has rightly claimed the HUF status. In so far as computation of long term capital gain towards share of constructed flats, the CIT(A) observed that as the land belongs to the assessee, it would not form part of the consideration received from the builder, hence, its value needs to be deleted from the capital gains as worked out by the A.O.

8. In so far as claim of exemption u/s 54F of the Act, the CIT(A) observed that it has to be stated here that it is not relevant to refer to the agreement between builder and the future tenant to decide whether the property is residential or commercial. The flats were allotted to site owner by the builder on the basis of agreement and let out by the owner to the tenant. The A.O. has not brought on record any agreement between the assessee and tenant to prove that the assessee

has let out its premises to the educational institution for commercial purposes. The CIT(A) further referring to the decision of ITAT, Hyderabad in the case of Smt. M. Sreedevi Reddy, Hyderabad Vs. CIT in appeal no.1009/Hyd/2012, observed that 'residential house' used u/s 54F of the Act has not been defined in the Income Tax Act. The popular meaning of the 'house' is a place used for habitation of persons, that residential house is a dwelling house as distinguished from a house of business, warehouse, office, shop, etc. Applying these parameters and also fact that the flats were constructed for residential purpose and these flats were used to accommodate the students by the tenant, held that the flats have to be considered as a 'residential house' only and not as a 'commercial property' and thus the assessee is eligible for exemption u/s 54F of the Act. The CIT(A) further held that the A.O. denied the benefit of exemption on the sole ground that the flats received by the assessee are commercial property, but not residential house without going into the issue of eligibility of exemption u/s 54F of the Act. Therefore, by relying upon the decision of Hon'ble A.P. High Court in the case of CIT Vs. Syed Ali Adil (supra) and the decision of High Court of Karnataka in the case of CIT Vs. K.G. Rukminiamma (supra), held that the property in question is a residential property and hence the assessee is eligible for exemption u/s 54F of the Act, in

respect of all the flats allotted and that the exemption cannot be restricted to a single flat. Aggrieved by the CIT(A) order, the revenue is in appeal before us.

9. The Ld. D.R. submitted that the Ld. CIT(A) erred in holding that the value of undivided share of land allotted to the assessee would not form part of consideration, since the entire land was handed over to the developer and the sale consideration was received in the form of flats along with undivided share of land. The Ld. CIT(A) ought not to have accepted the assessee's explanation for inclusion of minor share of land in the hands of the assessee, since the same is taxable in the hands of the assessee as per provisions of section 64(1) of the Act. The Ld. CIT(A) ought to have considered that the assessee is not eligible for deduction u/s 54F of the Act, as the consideration received was re-invested in the commercial property and not in the residential property. The D.R. further submitted that the Ld. CIT(A) erred in allowing exemption u/s 54F of the Act, as the assessee got his share of flats in different blocks and each block consist separate residential units having separate entrances and by no stretch of imagination, constitute a single residential unit.

10. On the other hand, the Ld. A.R. for the assessee strongly supported the order passed by the CIT(A). The A.R. further submitted

that the CIT(A) has rightly allowed exemption u/s 54F of the Act, in respect of flats received by the assessee in pursuance of joint development agreement, as the legal position prior to the amendment of section 54F of the Act by the Finance Act, 2014 w.e.f. 1.4.2015 is very clear on the eligibility of exemption towards all flats received in pursuance of joint development agreement. The A.R. referring to the decision of Hon'ble High Court of Madras, in the case of CIT Vs. Gumanmal Jain in TCA No.33 of 2017 (2017) 98 CCH 0093 (Chennai HC) submitted that when the assessee received his share of flats in pursuance of joint development agreement, the assessee is eligible for all the flats, even if flats/apartments are in different blocks and different towers as long as they are in same address/location and it does not disentitle the assessee from getting the benefit of section 54F of the Act.

11. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. The factual matrix which leads to the dispute is that the assessee along with other 12 co-owners entered into a development agreement with Shri Sai Venkata Ramana Constructions for development of a piece of land admeasuring 1.68 acres at S.No.93. As per the said joint development agreement, the assessee and 12 other family members have agreed to share the constructed flats in the ratio of 17:23. The assessee has

claimed exemption u/s 54F of the Act on total flats received in pursuance of joint development agreement. According to the assessee, exemption u/s 54F of the Act is allowable even if the flats/apartments are situated in different blocks or towers. The A.O. has disallowed exemption claimed u/s 54F of the Act, on the ground that the assessee has let out the apartment to educational institution for the purpose of commercial use. The A.O. further observed that exemption u/s 54F of the Act is available to one residential house, but not for all residential flats received in pursuance of joint development agreement.

12. The only issue to be decided is whether on the facts and in the circumstances of the case, the assessee is eligible for exemption u/s 54F of the Act for all the flats received in pursuance of a development agreement? The issue is no longer a res integra. The Hon'ble High Court of A.P., in the case of CIT Vs. Syed Ali Adil (supra), has considered the issue and after analyzing the provisions of section 54F of the Act, observed that the expression 'a residential house' in section 54F of the Act has to be understood in a sense that building should be of residential nature and 'a' should not be understood to indicate a single number and where an assessee had purchased two residential flats, is entitled to exemption u/s 54F of the Act, in respect of capital gains on sale of its property on purchase of both flats. The High Court further

observed that deduction u/s 54F of the Act, is allowable with respect to the residential house consisting of several independent units. A similar view has been expressed by the Hon'ble High Court of Madras, in the case of CIT Vs. Gumanmal Jain (supra), wherein the Hon'ble High Court observed that all the flats are a product of one development agreement of the same piece of land being said land, hence even if flats are in different blocks and different towers, as long as they are in same address/location, it does not disentitle the assessee from getting the benefit of section 54F of the Act. In yet another case, the Hon'ble High Court of Madras in the case of CIT Vs. V.R. Karpagam (2015) 373 ITR 127, held that prior to amendment u/s 54F by Finance Act, 2004 w.e.f. 1.4.2015, with regard to word 'a', a residential house include multiple flats/residential units, where under the development agreement assessee was entitled to receive certain built-up area, which got translated into five flats, exemption u/s 54F in respect of five flats in a multi-storey construction would be available.

13. Thus, the legal proposition before the amendment of section 54F of the Act, by the Finance Act, 2014 w.e.f. 1.4.2015, in the case of development agreement, is very clear that if the land owner receives number of flats, even though they are located in different blocks and different towers, once they are in same address/location and all the flats

are a product of one development agreement, then the assessee is eligible for exemption u/s 54F of the Act, in respect of all the flats. Therefore, we are of the view that the assessee is eligible for exemption u/s 54F of the Act in respect of all the flats received in pursuance of joint development agreement. The revenue has failed to bring on record any contrary decision against the law laid down by the Hon'ble A.P. High Court, in the case of CIT Vs. Syed Ali Adil (supra). Considering the facts and circumstances of the case and also respectfully following the decision of Hon'ble A.P. High Court, in the case of CIT Vs. Syed Ali Adil (supra), we are of the view that the assessee is eligible for exemption u/s 54F of the Act, towards all the flats received in pursuance to development agreement.

14. In so far as the allegation of the A.O., that the flats constructed by the assessee are commercial property but not residential house, we find that the assessee has filed necessary evidences to prove that the property in question is a residential flat. The assessee has furnished a copy of plan sanctioned by the municipal authorities, which clearly shows that the apartments constructed by the builder are residential houses. Though the assessee has leased out the premises to an educational society, the tenant has used the premises for the purpose of accommodation of students. Therefore, we are of the view that merely

because the house is leased out to an educational society, it cannot be said that the property in question is a commercial property, which is not entitled for exemption u/s 54F of the Act. The CIT(A), after considering the relevant facts, and also by following certain judicial precedents has rightly directed the A.O. to allow exemption claimed u/s 54F of the Act. We do not find any reasons to interfere with the order of the CIT(A). Hence, we uphold the CIT(A) order and reject the ground raised by the revenue.

15. The next ground raised by the revenue is with regard to computation of long term capital gain in pursuance of joint development agreement and adoption of consideration for transfer of property. Once the issue has been decided that the assessee is eligible for exemption u/s 54F of the Act, in respect of all the flats, the other issues, i.e. computation of capital gains and adoption of guidance value for the purpose of determination of capital gain becomes academic, as the assessee is eligible for exemption towards all the flats received in pursuance of a joint development agreement and hence computation of capital gain and adoption of guidance value for the purpose of determination consideration has no impact on the total income.

16. In so far as clubbing of income of the minor children in the hands of the assessee, we are of the view that even though section 64(1)(a) of

the Act, applies for clubbing of income of minors in the hands of the assessee, before clubbing of income, the normal procedure for computation of capital gain has to be adopted. Therefore, before arriving at net income for the purpose of clubbing in the hands of the assessee, the deduction available u/s 54F of the Act has to be considered separately in the hands of the minor children. The CIT(A) has rightly considered the issue and we do not find any reasons to interfere with the order of the CIT(A). Accordingly, we uphold the CIT(A) order and reject the ground raised by the revenue.

17. In the result, the appeals filed by the revenue in ITA Nos.498, 499 & 500/Vizag/2013 are dismissed.

18. The assessee has filed cross objections in support of the order of the CIT(A). Therefore, for the reasons recorded in the preceding paragraphs, we dismiss cross objections filed by the assessee as not maintainable.

19. In the result, the cross objections filed by the assessee are dismissed.

The above order was pronounced in the open court on 28th Mar'17.

Sd/-

(वी. दुर्गराव)

(V. DURGA RAO)

न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-

(जी. मंजुनाथा)

(G. MANJUNATHA)

लेखा सदस्य/ACCOUNTANT MEMBER

विशाखापटणम /Visakhapatnam:

दिनांक /Dated : 28.03.2017

VG/SPS

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

1. अपीलार्थी / The Appellant – The ITO Ward-1(2), Vijayawada
2. प्रत्यार्थी / The Respondent (1) – Sri Ravuri Sai Chaitanya, L/R of Late Smt. Ravuri Bhanusri, No.6-4, One Centre, Beside SBI Gollapudi, Vijayawada
3. प्रत्यार्थी / The Respondent (2) – Sri Ravuri Kishore, L/R of Late Smt. Ravuri Ramayamma, D/o Sri P. Nageswara Rao, No.6-40, One Centre, Beside SBI Gollapudi, Vijayawada
4. प्रत्यार्थी / The Respondent (3)– Sri Ravuri Kishore, S/o R. Satyanarayana, No.6-4, B/S SBI, Gollapudi Main Road, Vijayawada
5. आयकर आयुक्त / The CIT, Vijayawada
6. आयकर आयुक्त (अपील) / The CIT (A), Vijayawada
7. विभागीय प्रतिनिधि, आय कर अपीलीय अधिकरण, विशाखापटणम /
DR, ITAT, Visakhapatnam
8. गार्ड फ़ाईल / Guard file

आदेशानुसार / BY ORDER

// True Copy //

Sr. Private Secretary
ITAT, VISAKHAPATNAM