

**IN THE INCOME TAX APPELLATE TRIBUNAL
VISAKHAPATNAM BENCH, VISAKHAPATNAM**

**BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, HON'BLE ACCOUNTANT MEMBER**

**ITA No. 122/VIZ/2017
(Asst. Year : 2012-13)**

ITO, Ward-2(2),
Vijayawada.

vs.

Smt. Gogineni Sarada
Vani, 40-7-13, J.C. Plaza,
Jammichettu Street,
Moghalrajpuram,
Vijayawada.

(Appellant)

PAN No. ACFPG 5834 R
(Respondent)

**ITA No. 152/VIZ/2017
(Asst. Year : 2012-13)**

Smt. Gogineni Sarada Vani,
40-7-13, J.C. Plaza,
Jammichettu Street,
Moghalrajpuram,
Vijayawada.

vs. ITO, Ward-2(2),
Vijayawada.

PAN No. ACFPG 5834 R
(Appellant)

(Respondent)

Assessee by : Shri G.V.N. Hari, Advocate.
Department By : Shri M.N. Murthy Naik, Sr.DR

Date of hearing : 06/07/2018.
Date of pronouncement : 31/07/2018.

ORDER**PER V. DURGA RAO, JUDICIAL MEMBER**

These cross appeals filed by the Revenue and the assessee are directed against the order of Commissioner of Income Tax (Appeals), Vijayawada, dated 28/11/2016 for the Assessment Years 2012-13.

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2. Facts of the case, in brief, are that assessee is an individual derives income from house property and other sources, filed her return of income by admitting total income of Rs. 1,05,893/-. The case of the assessee was selected for scrutiny and assessment was completed after following due procedure under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'Act'). During the course of assessment proceedings, the Assessing Officer has noticed that the assessee had admitted long term capital gain of Rs. 77,45,050/- and the same is claimed as exempt under section 54F of the Act in respect of property purchased on 10/12/2010. It is further noted by the Assessing Officer that the assessee has sold three plots to different individuals for a total consideration of Rs. 84,06,850/- and, after deducting the cost of acquisition and related expenses admitted long term capital gain

at Rs. 77,45,050/-. The Assessing Officer asked the assessee that the treatment given by him under the head capital gains in the light of section 54F of the Act, the assessee vide letter dated 16/02/2015 submitted that the land was purchased on 11/03/1997 as a capital asset and subsequently after approval of layout, land was divided into plots. The property was subsequently sold after six years and the said transaction was done only to fetch more income and not with any business proposition. The Assessing Officer has considered the explanation given by the assessee and observed that assessee has purchased the land of 0.78 acres and sold it in plots after approval of layout by the competent authority dated 22/05/2006. Therefore, the intention of the assessee is clear to earn the profit, the land was converted into plots, as such, there is a treatment to the land in question as envisaged in the provisions of section 45(2), in applying for layout, getting it approved and selling the same in plots by engaging services of marketing agent, to whom an amount of Rs. 1,50,000/- was paid. It established that the activity is in the nature of business (adventure in trade). In view of the above, the Assessing Officer has treated the above transaction from the purchase of the land i.e. from purchase of land i.e. 11/03/1997 to till approval of layout i.e. on 22/05/2006

as a capital gains; from approval of layout i.e. on 22/05/2006 to till sale of plots as a business income and accordingly assessment is completed.

3. On being aggrieved, assessee carried the matter in appeal before the Id. CIT(A).

4. The assessee has submitted before the Id.CIT(A) that the land was purchased way back in 1997 and never converted into a stock-in-trade.

5. It was further submitted that the assessee has divided the entire lands into plots and after approval, sold the same without developing, such as roads, drainage etc. Therefore, the land has to be treated as 'capital gain' and not as 'business income'.

6. The assessee has converted the land into plots for easy saleability, therefore, profits earned out of sale of plots was to be treated as a capital gain and not the business income. The Assessing Officer has observed that the assessee has paid Rs.1,50,000/- to the commission agent, therefore, he treated it as business income. It was further submitted that for any immovable transaction, the assessee has to engage some third party/broker whether it is business transaction or sale of land, commission has to be paid, therefore, simply because of commission is paid, it cannot be treated as business income.

7. The one of the reasons given by the Assessing Officer to treat the income of the assessee as business income that the husband of the assessee has offered his income as business income. In this context, it is submitted that the husband of the assessee is in the real estate business, therefore, same analogy cannot be applied to the assessee.

8. The assessee never purchased and sold any other land, except the land purchased in 1997, therefore, the activity of the assessee cannot be treated as adventure in trade.

9. The Id. CIT(A) after considering the detailed submissions made by the assessee, observed that the assessee is not a trader of lands. Sale of plots took place after 15 years of purchase of land and after 05 years of conversion into plots, admeasuring 0.78 acres at Gollapudi Village in Financial Year 1996-97 (suburb of Vijayawada) later came under the jurisdiction of the Vijayawada Municipal Corporation. The land was converted into plots to have better price and easy saleability. Even then, the assessee had kept the plots for more than 5 years and no prudent business person will keep asset idle without optimising the turnover. Merely because the plots were sold for profit, it cannot be held that income arising from the sale of plots was taxable as profit arising from the adventure in the nature of trade. With the above

observations, the Id. CIT(A) deleted the addition made by the Assessing Officer.

10. On being aggrieved, Revenue carried the matter in appeal before this Tribunal.

11. Id. Departmental Representative strongly supported the order passed by the Assessing Officer and submitted that the assessee has converted the land into plots and the same is sold. Therefore, the activity of the assessee has to be treated as an adventure in the nature of trade, therefore, from the date of conversion to the date of sale of plots has to be treated as business activity and the same has to be taxed under the head 'business income'.

12. On the other hand, Id. counsel for the assessee reiterated the submissions which he made before the Id. CIT(A) and supported the order passed by the Id. CIT(A).

13. We have heard both the sides, perused the material available on record and orders of the authorities below.

14. The assessee has purchased the vacant land admeasuring 0.78 acres at Gollapudi village on 11/03/1997 (a suburb of Vijayawada) later came under the jurisdiction of the Vijayawada Municipal Corporation. The assessee after 09 years of purchase of the above land, on 22/05/2006, she obtained permission from the

Municipal Corporation for layout of the above land. Accordingly, the entire land was converted into plots and sold near about 6 years to three parties namely; Sri Ramesh Kumar & others sale consideration of Rs. 57,57,000/- on 30/01/2012; Sri N.D. Sri Lakshmi sale consideration of Rs. 12,54,074/- on 21/11/2011; and Sri N.R.P. Kumar for sale consideration of Rs. 13,95,776/- on 21/11/2011, total sale consideration of Rs. 84,06,840/- and after deducting cost of acquisition and related expenses, assessee admitted long term capital gain at Rs. 77,45,050/-. The case of the Assessing Officer is that though the assessee has purchased the property on 11/03/1997, the same is converted into plots after approval of layout i.e. on 22/05/2006 and the approval has been taken by the assessee only for the purpose to sale the property for more profit. Therefore, from the date of approval of layout, till the date of sale of plots, the Assessing Officer has treated it as a business income. In the assessment order, the Assessing Officer has observed that the main intention of the assessee to make more profit and also paid an amount of Rs.1,50,000/- to the commission agent and adjacent land of her husband is treated as business income. Therefore, the Assessing Officer treated the income of the assessee as business income from the date of approval of layout to sale of sites. On appeal,

Id.CIT(A) gave a finding that the assessee never converted the land into stock-in-trade. The assessee is never in the real estate business. The property was purchased in the year 1997 and the approval was taken after 09 years i.e. 22/05/2006 of the sold property after 05 years. The activity of the assessee cannot be treated as adventure in nature of the trade and, therefore, it cannot be treated as business income. The entire income of the assessee has to be treated as income from capital gains. We find that the assessee initially purchased the property which is situated at Gollapudi village and, subsequently it came under the jurisdiction of Vijayawada Municipal Corporation. The assessee converted the entire land into plots after 09 years and after dividing into plots, the same has been sold after waiting of near about 6 years. From the above, the assessee's intention is to keep the land as it is, and no intention of converting into the business asset. Simply because, the assessee taken approval for layout and divided into plots and some commission is paid for sale of the same, it cannot be said that the land in question is in adventure in the nature of trade. It has also not been taken into consideration for the purpose to ascertain the intention of the assessee that her husband has treated adjacent land as business

asset. In our opinion, sub-section (2) of section 45 has no application to the facts of the case.

15. Recently, the Hon'ble Supreme Court has dismissed the SLP filed by the department in the case of *Pr.CIT Vs. Bhanuprasad D. Trivedi (HUF)* reported in (2018) 95 taxmann.com 19 (SC), against the order of the Hon'ble Gujarat High Court. The Gujarat High Court has considered the issue in paragraph No. 3 of the order and the same is extracted as under:-

"3. Insofar as the first question is concerned, the Tribunal while confirming the view of the CIT (Appeals) referred to and relied upon the decision of Supreme Court in case of CIT vs. Associated Industrial Development reported in 82 ITR 586 as also the CBDT circular dated 15.06.2007 highlighting that whether a particular holding of shares, by way of investment or forms part of the stock-in-trade, is a matter which is within the knowledge of the assessee who holds the shares and it should, in normal circumstances, be in a position to produce evidence from its records as to whether it has maintained any distinction between those shares which are stock-in-trade and those which are held by way of investment. The Tribunal also referred to the recent circular of CBDT dated 29.02.2016 in which the guidelines have been provided for dealing with such an issue. The principal intention being to reduce the litigation of the similar nature. One of the directives of the said circular is that the assessee itself irrespective of the period of holding the listed shares and securities. One of intentions is that in respect of listed shares and securities held by the assessee for a period of more than 12 months before transfer, if the assessee desires to treat the income from transfer of the shares as capital gain, the Assessing Officer would not dispute the same. Relying on such materials, the Tribunal confirmed the view of the CIT (Appeals) making following observations:

"12. Considering the facts in hand, in the light of the aforementioned circular at the Board, in our considered opinion, the intention of the assessee at the time of the

purchase of shares is paramount. If the assessee has clear intention of being an investor and showing the shares of investment we do not find any reason to disturb the intention of the assessee. The assessee under consideration is investor and therefore, any gain arising out the transfer of shares should be treated as capital gains be it short term or long term."

16. From the above judgment of the Hon'ble Gujarat High Court, it is very clear that the intention of the assessee at the time of purchase is paramount. In this case, the intention of the assessee at the time of purchase and even subsequent to conversion of the land into plots, it is very clear that the subject matter of the land is a capital asset and income derives from the sale of the same has to be treated as a capital gain. Keeping in view of the facts and circumstances of the case and also by following the judgment of the Hon'ble Supreme Court upholding the view of the Hon'ble Gujarat High Court in the case of Bhanuprasad D. Trivedi (HUF) (supra), we find no infirmity in the order passed by the Id. CIT(A). Thus, this ground of appeal filed by the Revenue is dismissed.

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17. In the assessment order, the Assessing Officer has noted that the assessee has received a gift of Rs. 4.00 lakh; Rs. 3.00 lakh and Rs. 2.90 lakh from her mother. When the Assessing Officer asked, assessee filed confirmation letter from her mother.

From the confirmation letters filed, the Assessing Officer has observed that as per the information, the assessee's mother had agricultural land about 14.02 acres and 11.84 acres. It is stated that agricultural income received on sale of crops for years 2009-10 to 2011-12 was given as gift to her daughter. However, there is no corroborative evidence furnished as regards quantum of saving, where the lakhs of cash is kept. As per the bank account bearing No. xxx088 held by the donor with Allahabad Bank, Governorpet, Vijayawada, from which account the gift funds were flown to the assessee, there were cash deposits on the same dates of transfer to the assessee's bank account. The assessee /donor established holding of agricultural land, which is insufficient to prove the genuineness of the transaction. The Assessing Officer further observed that the same donor Smt. K. Rajyalakshmi lent Rs. 4.65 lakhs during the years 2007-2009 to Sri K. Ajay Babu (husband of the assessee) and the source being agricultural income. As such, past savings were given to Sri K. Ajay Babu towards loan; and therefore availability of past savings does not arise. The Assessing Officer has issued notice under section 142(1) dated 27/02/2015 to produce the donor before him. The assessee stated that the donor could not be produced in

view of her old age, however, neither assessee nor donor could produce the corroborative evidence regarding holding of physical cash as on the date of remittance of cash into donor's bank account, which amount was transferred to the assessee on the same day. Since, genuineness of the gift is not established, the Assessing Officer has treated an amount of Rs. 9.90 lakhs received from her mother is unexplained income of the assessee and brought to tax.

18. On appeal, Id. CIT(A) confirmed the order of the Assessing Officer on the ground that in absence of books of account for agricultural income and adequate balance in the bank account of donor, it is difficult to believe the genuineness of gift claim made by the donor.

19. Aggrieved by the order of the Id. CIT(A), assessee carried the matter in appeal before the Tribunal.

20. The assessee has received gift of Rs. 9.90 lakhs from her mother Smt. K. Rajyalakshmi through cheques on different dates which are as under:-

02/05/2011	Rs. 4,00,000/-
27/10/2011	Rs. 3,00,000/-
22/03/2012	<u>Rs.2,90,000</u>
Total	<u>Rs. 9,90,000</u>

When Assessing Officer asked the assessee to explain the source of gifts, the assessee has submitted that she has received the above amounts from her mother through banking channel and also submitted that her mother is having land to the extent of 25.87 acres and also filed the details of the land such as, pattadaar passbook etc. The Assessing Officer has verified the bank accounts and found that the assessee has received these gifts through cheques deposited in Allahabad Bank, Governorpet, Vijayawada. In the very same day, cash deposits were made by the donor, therefore, the Assessing Officer doubted the genuineness of the transactions, however the Assessing Officer has not doubted the genuineness of the agricultural land hold and the annual income derived by the donor. The Assessing Officer again asked the assessee to produce the donor. In response to that, assessee submitted that the donor is the mother of the assessee is aged about 70 years, she cannot be produced and confirmation letter dated 16/03/20185 is filed before the Assessing Officer wherein she stated that today Inspector of Income tax visited my residential premises and enquired about my age and my assets, and in the confirmation letter she stated that all the lands are under cultivation of paddy in two crops. From the

lands, I used to get around Rs. 4,70,000/- to Rs. 5,00,000/- per annum and submitted that the entire transaction is a genuine transaction and also submitted that I have no other activity other than agriculture and I have no income liable for income tax and no return of income was filed. However, the Assessing Officer has doubted the entire transactions for the reason that the assessee is not able to establish the corroborative evidence that the cash hold by the donor is in her hands. Therefore, the entire amount of Rs.9.90 lakhs is confirmed. We find that when the Assessing Officer himself recorded that assessee is having land to the extent of 25.86 acres of the agricultural land and in a letter addressed to the Id. CIT(A) she has clearly mentioned that there are two paddy crops going in a year and yearly income of Rs. 4.70 lakhs to Rs.5.00 lakhs, when the assessee is receiving such amount and the same is gifted to her daughter. Because of assessee is not able to produce any corroborative evidence in respect of cash in hand, addition cannot be made, when the assessee particularly filed confirmation letter about the land to the extent of 25.86 acres hold by the donor (mother of the assessee). When all the surrounding factors suggest that the gift is a genuine simply because the assessee is not able to establish cash in hand,

addition cannot be made without making enquiry. The Assessing Officer also gave a finding that donor has given loan to her son-in-law of Rs. 4.50 lakhs during the financial years 2007-08 & 2008-09. Therefore, the donor could not have sufficient funds in her hands to gift again to her daughter. In this context, it is necessary to examine the gifts received by the assessee. From the assessment order it is very clear that assessee has received gift on 02/05/2011 Rs. 4,50,000/-; on 27/10/2011 Rs.3,00,000/-; and on 22/03/2012 Rs. 2,90,000/-. From the above, it is very clear that the assessee has received the gifts on various dates and the so-called gift given by the donor to the husband of the assessee in financial years 2007-08 & 2008-09. The assessee has received the impugned gift after three years. If the assessee's annual agricultural income of Rs. 4,70,000/- to Rs. 5,00,000/-, the gift amount received by the assessee cannot be said that it is not a genuine. When the assessee filed a letter from the donor (assessee's mother) stating that the extent agricultural holding and income derived from the agricultural lands i.e. paddy to crop grown in the agricultural lands twice a year and receiving income of Rs. Rs. 4,70,000/- to Rs. 5,00,000/- which is in the hands of the donor, gifted to the assessee. The assessee by submitting the

land details and also annual income of the donor (assessee's mother), in our opinion, the assessee has discharged the burden casted upon her. If at all, the Assessing Officer is having any doubt, it is the duty of the Assessing Officer to examine whether the land held by the donor is yielding two paddy crops are not and what is the expected annual income from the lands. From that he has to arrive whether donor is having sufficient funds or not. Without doing any such exercise simply disbelieving the explanation given by the assessee, cannot be justified. In view of the extent of the land owned by the assessee's mother (donor) and also in view of the above facts and circumstances of the case, we are of the opinion that the action of the Assessing Officer in disbelieving the gift received by the assessee from her mother (donor) and is confirmed by the Id. CIT(A) is not correct. Thus, this ground of appeal raised by the assessee is allowed.

21. In the result, appeal filed by the Revenue is dismissed and that of assessee is allowed.

Order Pronounced in open Court on this 31st day of July, 2018.

Sd/-
(D.S. SUNDER SINGH)
Accountant Member

sd/-
(V. DURGA RAO)
Judicial Member

Dated : 31st July, 2018.

vr/-

Copy to:

1. *The Assessee – Smt. Gogineni Sarada Vani, 40-7-13, J.C. Plaza, Jammichettu Street, Moghalrajpuram, Vijayawada.*
2. *The Revenue – ITO, Ward-2(2), Vijayawada.*
3. *The Pr.CIT, Vijayawada.*
4. *The CIT(A), Vijayawada.*
5. *The D.R., Visakhapatnam.*
6. *Guard file.*

By order

(VUKKEM RAMBABU)
Sr. Private Secretary,
ITAT, Visakhapatnam.