

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

BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER

**ITA Nos. 445 to 447/VIZ/2019
(Asst. Year : 2009-10)**

ITO, Ward-1(4),
Visakhapatnam.

vs.

1) Pakki Prabhakar Rao
(HUF), D.No. 47-10-22,
502, Pakkis Apartment,
Dwarakanagar,
Visakhapatnam.

PAN No. AAKHP 6133 P

2) Pakki Nagabhushana Rao
(HUF), D.No. 47-10-22,
503, Pakkis Apartment,
Dwarakanagar,
Visakhapatnam.

PAN No. AAKHP 6134 L

3) Pakki Tirupathi Rao
(HUF), D.No. 47-10-22,
501, Pakkis Apartment,
Dwarakanagar,
Visakhapatnam.

PAN No. AAKHP 6135 M

(Appellant)

(Respondents)

Assessee by : Shri N.S.S.H. Bhaskar, CA.

Department By : Shri B.Rama Krishna, Sr.DR

Date of hearing : 03/02/2020.

Date of pronouncement : 28/02/2020.

ORDER

These appeals by the different assessees are directed against the common order of Commissioner of Income Tax (Appeals)-1, Visakhapatnam, dated 21/02/2019 for the A.Y. 2009-10. Since facts and issues are common, clubbed and heard together and disposed of by way of this consolidated order.

2. In all the appeals, there was a delay of 25 days in filing the appeals. The Revenue has filed separate affidavits for condonation of delay. I have gone through the affidavits and find that there is a sufficient cause to condone the delay. Accordingly, delay is condoned.

ITA No.445/VIZ/2019

3. Facts of the case, in brief, are that assessee (HUF) filed its return of income by declaring total income of Rs. 50,516/- for capital gains. The case of the assessee was selected for scrutiny under CASS and assessment was completed on 28/07/2011 by assessing capital gains at Rs. 7,64,090/-. Subsequently, the Assessing Officer has issued a notice u/sec. 148 on the ground that there was an escarpment of income, and after following due procedure assessment was completed u/sec. 143(3) r.w.s 147 of the Act, dated 20/08/2014. In the assessment order, the

Assessing Officer has noted that assessee along with his two brothers entered into development agreement with M/s. SRC Constructions on 03/05/2007 for development of the property on sharing system for construction of residential and commercial apartments. The share of the builder and the owners in the built up area are as under:-

Particulars	Owner's share	Builder's share
Ground, 1 st & 2 nd floors- for commercial purpose	1/2 of the built-up area on the eastern side from north to south	1/2 of the built-up area on the western side from north to south
3 rd floor comprises of 4 residential flats	NIL	Entire 3 rd floor
4 th floor comprises of 4 residential flats	Entire 4 th floor	NIL

It is further noted that the owners i.e. assessee along with two brothers received total extent of 13700 sq.ft. built-up area towards their 1/2 portion of share in the complex in lieu of exchange of 413 sq.yds. as per the development agreement dated 03/05/2007 entered between the owners and the developer. Hence, the sale consideration for exchange of 413 sq.yds of land is Rs. 1,33,39,900/- as per the value of Sub-Registrar, Dwaraka Nagar, Visakhapatnam and accordingly the Assessing Officer has issued show-cause notice to the assessee with a proposal to reassess the capital gains at Rs. 27,81,371/- as against taxable capital gains computed at Rs. 7,64,090/-. In reply, the assessee

has submitted that cost of construction to the developer forms part of full value of consideration in the case of development agreement and submitted that same may be considered. However, the Assessing Officer not agreed with the explanation of the assessee and he is of the opinion that full value of consideration accrued would be nothing but the market value of the capital asset transferred as on the date of transfer. Accordingly, capital gains was calculated by adopting the rate of 32,300/- per sq.yd. as per SRO value.

4. On appeal, Id. CIT(A) reversed the order of the Assessing Officer by observing that deemed consideration to the landlord would be the cost of construction to the developers and directed the Assessing Officer to adopt the consideration as cost of construction to the developer.

5. On being aggrieved, the Revenue is in appeal before this Tribunal.

6. The Id.DR has submitted that the Assessing Officer rightly calculated the capital gains by considering the market value of the capital asset transferred on the date of transfer as per SRO, Visakhapatnam and submitted that the order of the Assessing Officer may be upheld.

7. On the other hand, Id.AR has submitted that cost of construction in the hands of the developer has to be considered.

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

9. The only issue for consideration in this appeal is to ascertain the capital gains whether SRO value of the land transferred on the date of agreement has to be considered or cost of construction in the hands of the developer has to be considered. In this case, assessment was completed u/sec. 143(3) on 28/07/2011 and subsequently, the case was reopened on the ground that there is an escapement of income. According to the Assessing Officer, to ascertain the capital gains the SRO value of the land transferred as on the date of agreement has to be considered and accordingly calculated the capital gains. The case of the assessee is that assessment was reopened on 05/06/2013, in the meantime, the developer has already constructed a building and the assessee has received his share in the complex in lieu of the exchange of 413 sq.yds. as per development agreement, therefore the cost incurred by the developer has to be considered to ascertain the capital gains. The Id. CIT(A) by considering the entire facts and circumstances of the case, came to a conclusion that cost of construction has to be considered in the hands of the developer to

ascertain the capital gains. For the sake of convenience, the relevant portion of the order of the Id. CIT(A) is extracted as under:-

"4.3 I have gone through the submissions made by the appellant and the order of the A.O. and carefully perused the relevant material placed on record. I found merit in the submission of the appellant. In development agreement the developer would give certain pre-agreed constructed area to the land owner in consideration for the land owner allowing the construction on its land. The land owner was required to pay tax on the capital gains arising on the so-called transfer of land at the time of entering the DA and giving possession of the land to the developer for construction thereon, while it would receive the consideration in form of constructed area. Hence the consideration to the landlord would be cost of construction to the developers. Section 45(5A) was introduced vide Finance Act, 2017, effective A.Y. 2018-19, prescribing the taxability of area-sharing arrangement under a DA in the hands of land owner, according to which the cost of acquisition of the share in the project being land or building or both, in the hands of the land owner shall be the 'stamp duty value' which is deemed as full value of consideration. Hence, it can be presumed that prior to the above amendment, deemed consideration to the landlord would be cost of construction to the developers. In view of the above the A.O. is directed to adopt the value of consideration as cost of construction to the developers."

10. The Id. CIT(A) has suggested the Assessing Officer to adopt the cost of construction in the hands of the developer, in my opinion, Id. CIT(A) correctly decided the issue, therefore, I find no reason to interfere with the order passed by the Id. CIT(A). Thus, this appeal filed by the Revenue is dismissed.

ITA Nos. 446 & 447/VIZ/2019

11. The facts involved in these appeals are similar to the facts involved in ITA No. 445/VIZ/2019. Therefore, my decision in ITA

No. 445/VIZ/2019 shall apply *mutatis mutandis* to these appeals also.

12. In the result, appeals filed by the Revenue are dismissed.

Order Pronounced in open Court on this 28th day of Feb., 2020.

Sd/-
(V. DURGA RAO)
Judicial Member

Dated: 28th February, 2020.

vr/-

Copy to:

1. *The Assessee*

a) Pakki Prabhakar Rao (HUF)

b) Pakki Nagabhushana Rao (HUF)

c) Pakki Tirupathi Rao (HUF)

All are residents of D.No. 47-10-22, 502, Pakkis Apartment, Dwarakanagar, Visakhapatnam.

2. *The Revenue - ITO, Ward-1(4), Visakhapatnam.*

3. *The CIT-1, Visakhapatnam.*

4. *The CIT(A)-1, Visakhapatnam.*

5. *The D.R., Visakhapatnam.*

6. *Guard file.*

By order

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