

आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'B' BENCH, CHENNAI

श्रीएन.आर.एस. गणेशन, न्यायिकसदस्य एवं

श्री डि.एस. सुन्दर सिंह, लेखा सदस्य केसमक्ष

**BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA No.1442/Mds/2012

& CO No.141/Mds/2012

निर्धारण वर्ष /Assessment Year : 2008-09

The Assistant Commissioner of
Income Tax,
Circle XV, Chennai -600 034.

v. M/s.Vishwakarma Realtors,
Vishwakarms Centre,
563/2, Anna Salai,
Teynampet, Chennai – 600 018.

PAN : AAGFV 3905 R

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent/ Cross Objector)

Assessee by

: Shri V.Jagadisan, C.A.

Department by

: Shri Supriyo Pal, JCIT

सुनवाईकीतारीख/Date of Hearing

: 20.10.2016

घोषणाकीतारीख/Date of Pronouncement

: 25.11.2016

आदेश / O R D E R

PER N.R.S. GANESAN, JUDICIAL MEMBER:

This appeal of the revenue is directed against the order of CIT(A) –XII, Chennai dated 30.03.2012 and pertains to assessment year 2008-09. The assessee has filed the cross objection to support the same order

of the CIT (A). Since both the appeal and the cross objection arise out of the very same order of the CIT (A), we heard the same together and we dispose of the same by this common order.

2. Shri Supriyo Pal, the learned representative for the department submitted that the assessee filed the return of income claiming that it is a partnership firm. The assessing officer found that the partners of the assessee entered into memorandum of undertaking with various other parties. Therefore, the assessee has to be treated as AOP. Accordingly, the assessing officer treated the status of the assessee as AOP instead of partnership firm. The CIT(A) also confirmed the status of the assessee as AOP. According to the learned representative, the entire transaction in real estate was carried on by the AOP on the basis of the investment brought in by the respective members of AOP. In the absence of any provision in the memorandum of undertaking to share the profit, the assessing officer found that the claim of the assessee that it is a partnership firm is not justified. Referring to the order of CIT(A), the learned department representative submitted that the CIT(A) treated the status of the assessee as a firm even though the 10 different persons were carrying on the business as joint venture without any definite determination of sharing the profit. The order of the CIT(A) according to

the representative is not justified. Therefore, the assessee has to be treated as AOP.

3. Referring to the next ground of appeal, the department representative submitted that the assessing officer disallowed the claim of the expenditure to the extent of Rs.6,20,00,000/-. However, the CIT(A) allowed the claim of the assessee and determined the taxable income at Rs.1,73,60,403/- instead of Rs.7,53,60,403/-. The learned department representative further submitted that even though the rate of tax is same for the firm and the AOP, the status of the assessee cannot be treated as firm since ten different persons were carrying on the business as a joint venture project. Therefore, the CIT(A) is not justified in allowing the claim of the assessee. The assessee has also filed cross objection against the order of CIT(A) wherein, he confirmed a part of the expenditure claimed by the assessee.

4. On the contrary, Shri V.Jagadisan, the learned representative for the assessee submitted that the assessing officer on the basis of special memorandum of undertaking, agreement and sale deeds executed between two individual partners of the assessee firm with third parties found that the assessee was carrying on business as joint venture in the status of AOP. According to the learned representative, there is a

partnership firm consisting of two partners. The profit has to be shared equally among the two partners. Therefore, the assessee has to be treated as partnership firm. Merely because the individual parties entered memorandum of understanding and agreement with three parties that cannot be a reason to treat the assessee as an AOP. The assessee firm was constituted by a written partnership deed and it has nothing to do with the transaction of individual partners with the three parties. On a query from the bench, how can the partnership firm can claim the expenditure said to be incurred by AOP, the learned representative submitted that the partnership firm is not claiming any expenditure. The partnership firm was established with an intention to aggregate land for several companies. Since the assessee-firm have no sufficient funds, the individual partners entered into agreement and memorandum with other parties including the some companies so as to bring money for the purpose of acquiring the land. The agreement entered into between the two independent partners of the assessee firm with three parties is a separate transaction. It cannot be confused with business of the assessee. At the best, the AOP constituted by independent partners of the assessee and other three parties can be assessed separately. However, no notice was issued by the revenue to the AOP for assessing

separately. Therefore, the CIT(A) has rightly found the status of the assessee as partnership firm.

5. Referring to the disallowance of expenditure, the revenue in the grounds of appeal claims that the assessee claimed Rs.6,20,00,000/- as expenditure. In fact, the assessee has not claimed Rs.6,20,00,000/-. Referring to the order of CIT(A), more particularly at page 33, the development expenditure was claimed only to the extent of Rs.2,22,09,600/- and not Rs.6,20,00,000/-. Therefore, the grounds of appeal raised by the revenue is not correct. The learned representative for the assessee further submitted that in respect of part of expenditure, disallowed by CIT(A), the assessee has filed the CO.

6. We have considered the rival submissions on either side and perused the relevant material available on record. The partnership deed clearly shows that it was constituted by two partners. The profit sharing ratio is 50% each. Subsequent to formation of the partnership firm, admittedly, the partners, in their individual capacity entered into several agreements and memorandums for raising funds. The partnership firm is not a party to above agreements and memorandum. Even though the partners and partnership firm are one and the same under the common law, the partners and partnership firm are different assessable unit under

the Income Tax Act. Therefore, the activity of the individual partners without any reference to the partnership firm cannot be taken as the transaction of the petitioner firm. Therefore, this Tribunal is of the considered opinion that the assessee was validly established pursuant to a written partnership deed. Hence, the status of the assessee has to be treated as a firm and not as AOP. As rightly submitted by the authorized representative for the assessee, the independent partners entered into several agreements and memorandum with three parties. Therefore, subsequent to the formation of the partnership firm, the independent partners entered into agreement for joint venture project. This act of entering into agreement to do business jointly can be considered as AOP.

7. The revenue is confusing the two situations and treating the assessee as an AOP. This tribunal is of the considered opinion that the subsequent conduct of the individual partners of the assessee firm may be relevant for treating formation of the joint venture as AOP. However, the assessee firm has to be treated only as partnership firm. This Tribunal do not find any reason to interfere with the order of the lower authority in treating the assessee firm as partnership firm.

8. Now coming to the claim of the assessee towards expenditure, the assessee claims that the independent partners entered into joint

venture project through agreement and memorandum of undertaking. The subsequent conduct of the partners in entering into the partnership firm may constitute as an association of persons. Therefore, the expenditure incurred by the AOP cannot be claimed as expenditure of partnership firm. No material is available on record to suggest that the money brought in subsequent to the formation of partnership firm consequent to the agreement and memorandum of understanding was taken as capital receipt in the hands of the assessee firm. Moreover, no material is available on record to suggest that the assessee has incurred any expenditure in development of the land. The material available on record suggest that the profit of the joint venture project was shared among the members of the AOP. However, the assessee claims that it is only an expenditure and not sharing of profit. In view of the above, there is a factual confusion regarding the expenditure said to be incurred by the assessee. It has to be ascertained what was claimed by the assessee is an expenditure for earning the income or it is an expenditure of the AOP constituted between several persons and the partners of the assessee firm. In the absence of any material available on record, this Tribunal is of the considered opinion that the matter needs to be re-examined. Accordingly, the orders of the lower authorities are set aside and issue of claim of expenditure is remitted back to the file of the AO.

The AO shall re-examine the matter afresh and find out the source of income of the assessee and expenditure for earning that income and thereafter decide the matter in accordance with law.

9. In the result, both the appeal of the revenue and cross objection of the assessee stands allowed for statistical purposes.

Order pronounced on 25th November, 2016 at Chennai.

Sd/-

(डि.एस. सुन्दर सिंह)

(D.S. Sunder Singh)

लेखा सदस्य/Accountant Member

Sd/-

(एन.आर.एस. गणेशन)

(N.R.S. Ganesan)

न्यायिक सदस्य/Judicial Member

चेन्नई/Chennai,

दिनांक/Dated, the 25th November, 2016.

sp.

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT,
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.