

आयकर अपीलुय अधलकरण, 'ए' नुयलयपीठ, चेलुनई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH: CHENNAI

BEFORE SHRI DUVVURU RL REDDY, JUDICIAL MEMBER, AND
SHRI D.S.SUNDER SINGH, ACCOUNTANT MEMBER

आयकर अपील सं./ITA Nos.3095 & 3096/Mds/2016
निर्धारण वर्ष /Assessment Years: 2012-13 & 2013-14

Shri S. Elango,
No.281, Precision Plaza II Floor,
Anna Salai, Chennai-600 002.

Vs. The Asst. Commissioner of
Income Tax, Non-Corporate
Circle-3, Chennai.

[PAN: AACPE 6397 G]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by

: Mr.S.Sridhar, Adv.

प्रत्यर्थी की ओर से /Respondent by

: Mr.Shiva Srinivas, JCIT

सुनवाई की तारीख/Date of Hearing

: 31.03.2017

घोषणा की तारीख /Date of Pronouncement

: 30.05.2017

आदेश / ORDER

PER D.S.SUNDER SINGH, ACCOUNTANT MEMBER:

These appeals are filed by the assessee against the Orders dated 31.08.2016 of Commissioner of Income Tax (Appeals)-4, Chennai, in ITA No.68 & 129/2015-16/AYs 2012-13 & 2013-14/CIT(A)-4 for the AYs 2012-13 & 2013-14. Both the appeals are clubbed together and heard together and disposed off in common order as under:

A) ITA Nos.3095/Mds/2016-A.Y 2012-13

2.0 The assessee raised Total 8 grounds in this appeal and ground Nos.1 & 8 are general in nature which do not require specific adjudication.

3.0 Ground Nos.2 to 4 are related to the assessment of business income instead of long term capital gains admitted by the assessee Ground Nos.5 & 6 are related to the deduction u/s.54F of Income Tax Act. No argument advanced in respect of Ground No.7 which relates to the insufficient opportunity. On verification of the Assessment Order and Ld.CIT(A)'s Order, sufficient opportunities were afforded to the assessee. Therefore, we do not find any merit in the assessee's argument that sufficient opportunity was not given. Therefore, ground No 7 is dismissed as not pressed.

4.0 Ground Nos.2 to 4 are related to the assessment of business income against the assessee's claim of long term capital gains. During the previous year relevant to the A.Y 2012-13 the assessee sold the following properties consisting of plots:

		Date of Purchase
1.	Kalayarasi Garden	07.09.2006
2.	Plot No.21/22, Golden Avenue	29.08.2008
3.	Plot No.46 Money Plant	07.02.2008
4.	Plot No.47, Pushpathanatha Nagar	16.06.2006
5.	Mevalurkuppam land	04.01.2005

4.1 The assessee sold the above properties on various dates and received the total sale consideration of Rs.5,93,38,950/-. The assessee admitted the above income under the head long term capital gains and

claimed the deduction u/s.54F of IT Act. The AO assessed the long term capital gains offered by the assessee under the head business income stating that, the assessee is engaged actively in his personal capacity in the business of real estate and the company in which he is the MD is solely engaged in the business of real estate development. The particular sphere engaged by both the assessee and his company in the field of real estate is to develop vacant housing sites in the outskirts of Chennai city and sell them to various customers. The asset sold during the year, the profit from which was claimed as deduction u/s.54F, were also related to vacant housing sites and vacant land exploited by the assessee in the same fashion as it were undertaken in respect of the stock-in-trade held by M/s. Abhi Estates and M/s. Abhi Estates Pvt Ltd. The AO was of the view that the assessee is not eligible for deduction u/s.54F, since the asset sold was in the nature of Stock-in-trade and it was supported by non-declaration of assets under Wealth Tax on the transferred assets during the period of its holding, though the same are qualified as taxable assets within the meaning of S.2(ea) of Wealth Tax Act. The AO during the assessment proceedings, conducted scrutiny u/s.133A on 12-12-05, and during the course of survey proceedings, various materials in respect of the transferred assets were found. The information inferred from the records gathered at the time of survey and post survey operations was communicated to the assessee with all the evidences to disallow the deduction u/s.54F and treat the profit as business income. And in response, the AR appeared before the AO on various occasions and

submitted the corresponding details and explanations to support that the claim of deduction u/s.54F. The assessee explained that he is maintaining two portfolios of accounts for the lands, one as stock-in-trade and the other as the personal assets. The facts of the case are that the assessee was in possession of 2.74 acres of vacant land at Mevalurkuppam Village, Sriperambudur Taluk. Starting from the date 30/04/2011, the assessee started drawing funds from the company in which he has substantial stake and for the year he had drawn a sum of Rs.4,09,50,000. In order to thwart the attempts to income the provisions of S.2(22)(e) he routed the property sale of 2.74 acres through the company and squared off the debt. While the new asset has been purchased on 01/07/2011, the sale to the company was concluded much later. Therefore, the company was only used as a conduit to the sale transaction. The AO further observed that, the fact that the company was only a tool in the assessee's act to obtain a shelter from the provisions of S.2(22)(e) and also treat the transaction as sale of capital asset is substantiated by the documents in the form of approval obtained to lay out the property and subsequent sale deeds. All these documents bear the name of Shri S. Elango in his individual capacity and not in his capacity as Director of the company. The AO noticed that an MOU was entered into on 01/11/2007 to sell the same property @Rs.36,20,000/. The market value of the property had not undergone any change and hence the value of the property on the date of transfer should also remain the same. Instead the assessee has received Rs.4.09 Cr. The transactions are proven to be not at arm's length and a benefit of

Rs.3,72,80,000/- is passed on by the company to the Director and substantial stake holder being the excessive amount paid as consideration over and above the market value of the property. This value of benefit, squarely falls under the provisions of S.2(24)(iv) and needs to be brought to tax u/s.28. Thus for this amount, the assessee is not eligible for deduction u/s.54F. However the assessee has exploited the asset by converting it into a residential layout and thereafter selling it. Hence the entire gain including this benefit of Rs.3,72,82,000/- should be brought to tax as business profit. The AO During the assessment observed that , after large scale purchases of land the assessee has undertaken the activity of obtaining the necessary approval of the local authority/CMDA for his layout and division into plots and had subsequently undertaken the sale of such plots. The assessee operates only in the field of real estate and thus the dominant intention expressed from the documents and the finding in this case, during the current year and that of the past is that the land held by the assessee is towards garnering larger profits by venturing into real estate in the nature of trade. The AO relied on the decision of the Supreme Court in the case of CIT v. Sutlej Cotton Mills Supply Agency Ltd. reported in 100 ITR 706, where in it was held that if the dominant intention of the assessee was to make profit by resale of assets and not to make an investment, as is exhibited in the assessee's case, this exercise needs to be categorized as an adventure in the nature of trade only. Accordingly, the entire gains on this transaction of is treated as business profits and taxed at normal rates. Accordingly, the AO assessed the long

term capital gains claimed by the assessee as business income. The AO also relied on the decision of the Hon'ble Supreme Court in the case of Shri Rameswaran v. CIT reported in 42 ITR 117 (SC) and the decision of the Hon'ble Supreme Court in the case of G. Venkata Swamy Naidu .v. CIT 35 ITR 594. The AO rejected the deduction claimed by the assessee u/s.54F of IT Act amounting to Rs.5,24,35,289/- and computed the business income at Rs.6,37,30,650/- against the returned income of Rs.9,0,57,646/-.

5.0 Aggrieved by the order of the AO, the assessee went on appeal before the CIT(A) and the Ld.CIT(A) confirmed the order of the AO holding that the consideration received on sale of the plots was business income, as per the discussion made in Ld.CIT(A) order in Para No.14.1 to 14.2 & 14.4 are as under:

14.1. Contrary to the above findings of the AO, the appellant contended that during the year under consideration, he had sold five plots of land as mentioned at Para 2.2 of the written submission filed on 31.08.2016 before the CIT(A)-4. And the first three assets were shown under the head of fixed assets in the balance sheet of the proprietary concern M/s.ABI Estates and the other two assets were shown in his personal books. It was further contended that all these properties were shown separately under fixed assets because they have all along been treated as investments and stock in trade has been shown separately under current assets. However, in view of the factual matrix of the case, as discussed in detail in the assessment order, this contention of the assessee was rightly rejected by the AO.

14.2 Before arriving at a particular conclusion, I am of the opinion that the following relevant issues need to be answered to ascertain whether a particular transaction falls under the category of 'investment' or 'stock in trade':

- i. Whether the assessee has been transacting at short intervals?*
- ii. Whether the way in which the transaction was organized was typical of a land dealer?*
- iii. Whether the land was suitable for or right for the immediate development?*
- iv. Whether the intention of the assessee at the moment of the acquisition of asset was to develop and sell?*
- v. Whether the infrastructure developed by the assessee enhanced the value of the asset?*
- vi. Whether assessee had undertaken certain preparatory activities to make the asset feasible for sale as stock in trade?*

14.4 Considering the facts available in the above discussed case laws and the judgments relied on by the AO, it is apparent that the impugned transactions held by the present assessee are in the nature of trade and the assets were held in the nature of stock in trade. In view of this; I am of the considered opinion that the findings given by the AO are justified and, hence, the action of the AO is confirmed.

6.0 Aggrieved by the order of the Ld.CIT(A), the assessee is on appeal before us.

Appearing for the assessee, the Ld.AR argued that the assessee is engaged in the business of real estate and maintained two portfolios for investments as well as stock in trade. The assessee is permitted to maintain two portfolios and certain assets were kept for the purpose of investments and balance assets were used for the purpose of business. The assessee is also maintaining two sets of accounts personal as well as business. In the personal accounts, the above assets were shown as investment from the date of purchase and sold the assets after holding for more than three years intact, and no improvements or the business activity was carried on in the above assets. Except in the case of property No.5 the assessee has not even applied for the approval to DTCP in the remaining cases. In the case of property No.5, the assessee has had applied for the approval of DTCP and no further action was taken to make any improvements. Further, the Ld.AR also submitted that in the balance sheet, properties were reported in the investment but not in the stock in trade. The expenditure relating to purchase of plots was never debited to the profit and loss account. The Ld.AR also submitted that the intention of the assessee was to make the investment of properties but not to deal the assets for the purpose of business. It was also submitted by the Ld.AR

that the assessee also filed Wealth Tax returns declaring the above assets. Accordingly, the Ld.AR argued that the assessee has rightly admitted the sale proceeds under the head capital gains and both the lower authorities have committed the error in assessing the sale consideration under the head business income. The sole action of the assessee of obtaining the approval from the DTCP cannot be held to be a business activity or adventure in the nature of trade.

6.1 On the other hand, the Ld.AR argued that the assessee is one of the leading realtor in Chennai frequently purchasing and selling the lands and have plenty of land bank in his possession. The assessee is in the habit of purchasing the lands, developing and selling it. Though the assessee has claimed that the Wealth Tax returns were filed, it was filed by the assessee only after the sale of the plots in May, 2012 i.e. after the completion of FY which is under consideration with an intention to evade the taxes. Mere treatment of the properties as the investments should not be sole criterion to determine the capital gains or business income. The entire facts should be considered in holistic manner. Though the assessee declared the above properties as investments in the balance sheet the same was not verified by the AO which fact was not born out from the assessment records. Therefore, the Ld.DR contended that the AO has rightly assessed the income under the head business income and no interference is called for.

7.0 We heard the rival submissions and perused the material placed before us.

The assessee has purchased the above five properties and sold the same for a consideration of Rs.5,93,38,950/-. The net consideration after reducing the cost of acquisition was claimed as deduction u/s.54F of IT Act. The assessee has not debited the purchase consideration to the profit and loss account and holding the properties as investments for more than three years and there was no dispute . As per the balance sheet filed before us, the assessee has shown the properties under the investment in the personal balance sheet of the assessee. By showing the properties as investments, the assessee has declared his intention as investment but not as a business asset. The assessee is maintaining two verticals, one for business purpose and the other for personal accounts and the assessee is permitted to maintain two sets of books of accounts for the purpose of business and the other for the purpose of investments. Though, the assessee is dealing in real estate, the properties kept for investment should be assessed under the head capital gains but not under the head business income. The Ld.AR of the assessee relied on the decision of the Hon'ble jurisdictional High Court in the case of Commissioner of Income-tax* v.N.S.S. Investments (P.) Ltd. [2007] 158 Taxman 13 (Madras), which Supports this view of the assessee. In the instant case, the assessee has purchased the assets on different dates and sold after three years and no improvement or business activity was carried on in respect of the

above properties. The purchase of the land and the sale of the land is evidenced by the Sale Deed produced by the assessee in the Paper Book in Page No.39-48. Only in the case of Mevalurkuppam, the assessee has obtained approval from DTCP. No other activity was carried on by the assessee in Mevalurkuppam. The sole activity of taking the approval from DTCP cannot make the investment activity as a business activity. As stated by the AO in the Assessment Order, after purchasing the properties, the assessee has not made any plots segregated into plots and taken up the development of the plots. The AO has not made out any case that the assessee has developed the plots for the purpose of business and debited the business expenditure. From the above facts, it is clear that the assessee has purchased the plots for the purpose of investment and held as investments for more than three years and no business activity was carried on and no business expenditure was debited by the assessee. Though, the assessee has not declared the Wealth Tax returns in the relevant Assessment Years, that cannot be a reason for taxing the capital gains as business income. It appears some of the assets were agricultural land and exempted from Wealth Tax. These facts were not controverted by the Ld. DR with any evidence. For non payment of wealth tax, the Department is free to take the permissible action under the Wealth Tax act for non-filing the returns or for non-declaring the return of Wealth. The facts of the case show that the resultant consideration should be assessed under the head capital gains but not under the head business income. However, the Ld. DR during the appeal argued that there was no

findings by the AO in the assessment order with respect to balance sheets filed before this Tribunal with regard to two portfolios of accounts and declaring under investments in personal accounts as well as business accounts and this aspect needs further verification. The Ld. A.R has not objected for remitting the issue back to the file of AO for verification of the declaration of assets as investments in personal balance sheets and not claiming the expenditure related to the assets in the profit and loss account. Therefore, we remit the matter back to the file of the AO to verify whether the assets sold in question were declared in the balance sheet under the head investments or stock in trade whether the assessee debited to the purchase consideration to the profit and loss account or any other expenditure relating to the capital gain assets was claimed or expenditure or not. If the assets declared in the balance sheet under the head investments as per the foregoing discussion, the gains should be assessed as capital gains otherwise the same should be brought to the tax under the business income. Accordingly, we direct the AO to decide the matter afresh as per the above discussion. The appeal of the assessee on this ground is allowed for statistical purposes.

8.0 Ground No. 5 and 6 are related to rejection of claim made u/s.54F of IT Act.

8.1 The Ld.CIT(A) has not adjudicated the claim of the assessee u/s.54F of IT Act, since the income of the assessee was assessed under

the head business income and the same was confirmed by the CIT(A). We have remitted the issue of assessment of income as business or capital gains to the file of the AO with specific directions in earlier paragraphs. The assessing officer should decide the nature of income in the light of the discussion made in the earlier paragraphs and decide the issue of deduction u/s.54F of IT Act on the facts and law subject to satisfaction of the conditions laid down under section.54F of IT Act. Accordingly, we set-aside the issue to the file of the AO to decide the issue afresh on merits. The appeal of the assessee on this ground is allowed for statistical purposes.

ITA No.3096/Mds/2016 AY 2013-14:

9.0 During the previous year relevant to the AY 2013-14, the assessee sold the following properties:

Sl. No	Address and description of the lands sold	Date of purchase	Date of sale	Capital gain	Sale value	Cost indexation of	Cost of acquisition
1	P.No.31 C.V.Raman Nagar	25.05.06	30.05.12	2417179	2856880	439701	267846
2	P.No.29 Abinath Avenue Phase II	12.09.06	16.04.12	5259556	5448650	189094	99208
3	Lands at Varadarajapuram	10.03.08	25.06.12	22838544	42500000	19662489	12715000
		10.04.08	25.06.12	6954699	12375000	5420301	3702600
		28.01.08	25.06.12	47918954	62625000	14706046	9510600

10.0 The assessee declared the sale proceeds as capital gains. During the assessment proceedings the AO found that the assessee is engaged in the business of real estate and purchased land of 13.67 acres. The purchaser obtained approval from DTCP, developed the land into plots at Varadarajapuram and sold 9.00 acres of the total 13.67 acres. The AO has viewed that such large quantities are obviously not intended for self consumption. According to AO the land purchased was developed, segmented into smaller plots and then sold. They are exactly similar to the operations usually associated with real estate trade or business. The assessee has repeated the purchase and sale transactions of the similar nature, method and quantity in the preceding year as well as in the year under consideration and the transaction is not an isolated one.

11.0 The assessee negated all the observations made by the AO with regard to plotting , intention, developing, the use of the land and obtaining the approval from DTCP. The assessee also objected for observations of the AO with regard to sale of the land that it was developed, and plotted. The Ld A.R submitted that the lands were sold intact and no improvement was made no expenditure was incurred and business activity was carried on in the said lands. The assessee maintained two portfolios of accounts, one for personal and other for business purpose. In the personal books of accounts three properties were recorded and the two properties were shown as fixed assets in Firms books. The facts of the case are identical to that of the AY 2012-13.

Since the facts are identical to the AY 2012-13, we hold that the capital gains on account of sale of the above five properties required to be assessed as capital gains but not under the head business income as per our observation in the appeal for the A.Y.2012-13. At the time of appeal hearing, the Ld.DR brought to our notice that the correctness of the claim made by the assessee in the balance sheet filed before this Tribunal in the Paper Book require verification from the assessment records. We agree with the Ld. DR that further verification of facts is necessary in this case. The Ld.AR did not object for remitting the issue to the file of the AO for further verification of the facts in the light of the discussion made in the appeal order for A.Y 2012-13 with regard to maintaining two sets of books of accounts and declaration of assets as investments or non-business assets in respective of books of accounts. Accordingly, we remit the matter back to the file of the AO for limited purpose of verifying the fact of reporting the assets in the personal books and business accounts for investment or business purpose. Accordingly we direct the AO to make further verification of facts and decide the issue a fresh on merits in the light of discussion made in the A.Y 2012-13.

12.0 The issue with regard to the deduction u/s.54F of IT Act also remitted back to the file of the AO as discussed in this order for the AY 2012-13. The appeal of the assessee is allowed for statistical purpose.

13.0 In the result, the appeal of the assessee for the AYs 2012-13 & 2013-14 allowed for statistical purposes.

Order pronounced in the Open Court on 30th May, 2017, at Chennai.

Sd/-
(DUVVURU RL REDDY)
न्यायिक सदस्य/**JUDICIAL MEMBER**

Sd/-
(D.S.SUNDER SINGH)
लेखा सदस्य/**ACCOUNTANT MEMBER**

चेन्नई/Chennai,

दिनांक/Dated: 30th May, 2017.

TLN

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