

आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'C' BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं श्री एस जयरामन, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI S. JAYARAMAN, ACCOUNTANT MEMBER

आयकर अपील सं./ITA Nos.2179, 2180, 2181, 2182 & 2183/Chny/2017

निर्धारण वर्ष / Assessment Years : 2007-08 to 2011-12

Smt. P. Supriya,
C/o M/s Subbaraya Aiyar
Padmanabhan & Ramamani
Advocates,
New No.75 (Old No.105),
Dr. Radhakrishnan Salai,
Mylapore, Chennai - 600 004.

v. The Income Tax Officer,
Non Corporate Ward 8(3),
Chennai - 600 034.

PAN : ARGPS 1432 D

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

आयकर अपील सं./ITA Nos.1357, 1358 & 1359/Chny/2017

निर्धारण वर्ष / Assessment Years : 2008-09, 2009-10 & 2010-11

The Income Tax Officer,
Non Corporate Ward 8(3),
Chennai - 600 034.

v. Smt. P. Supriya,
No.40, MCK Nagar,
Adjacent S&P Foundation,
Nolambur, Mugappair West,
Chennai - 600 095.

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

निर्धारिती की ओर से /Assessee by : Sh. R. Vijayaraghavan, Advocate

राजस्व की ओर से /Revenue by : Sh. Sailendra Mamidi, Pr. CIT

सुनवाई की तारीख/Date of Hearing : 03.01.2018

घोषणा की तारीख/Date of Pronouncement : 23.03.2018

आदेश / O R D E R

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

Both the assessee and Revenue have filed appeals for the assessment years 2008-09, 2009-10 and 2010-11. The assessee has filed appeals for assessment years 2007-08 and 2011-12 also. All these appeals of the assessee and Revenue are directed against the common order passed the Commissioner of Income Tax (Appeals)-9, Chennai, dated 23.01.2017, for the assessment years 2007-08 to 2011-12. Since common issues arise for consideration in all these appeals, we heard these appeals together and disposing of the same by this common order.

2. The assessee has filed the appeals with a delay of 71 days and the Revenue has filed the appeals with a delay of 16 days. Both the assessee and Revenue have filed petitions for condonation of delay. We have heard the Ld.counsel for the assessee and the Ld. D.R. We find that there was sufficient cause for not filing these appeals by the assessee and the Revenue before the stipulated time. Therefore, we condone the delay and admit the appeals.

3. Let's first take the assessee appeal for assessment year 2007-08.

4. The first issue arises for consideration is addition of ₹33,09,648/- towards unaccounted investment.

5. Sh. R. Vijayaraghavan, the Ld.counsel for the assessee, submitted that the assessee purchased agricultural land and developed the same into housing plot. According to the Ld. counsel, in the accounts of one Shri Muralidharan, it was disclosed that the assessee has invested ₹49,98,948/- towards the cost of the land. As per the registered sale deed, the cost of the land is only ₹14,88,812/-. According to the Ld. counsel, the assessee claimed the development expenses of ₹44,79,240/-. However, no evidence was produced to support the claim of expenditure. According to the Ld. counsel, the assessee has incurred the expenditure in three assessment years. In fact, in the assessment year 2007-08, the assessee incurred only an amount of ₹7,40,500/-. The balance amount of ₹37,38,740/- was incurred in the assessment year 2008-09. However, according to the Ld. counsel, the Assessing Officer has taken the entire expenditure during the year under consideration and added to the total income of the assessee.

Therefore, according to the Ld. counsel, the addition made by the Assessing Officer is not justified.

6. On the contrary, Shri Salendra Mamidi, the Ld. Departmental Representative, submitted that the assessee is a business associate of one Shri Muralidharan. According to the Ld. D.R., a search operation under Section 132 of the Income-tax Act, 1961 (in short 'the Act') was conducted in the case of Shri Muralidharan on 15.03.2011. During the course of search operation, certain materials were found, which were impounded. According to the Ld. D.R., in the cash flow statement filed before the Assessing Officer, the assessee claimed a sum of ₹37,38,740/- which was spent in land development for the assessment year 2008-09. However, no material was filed to support the claim of the assessee. According to the Ld. D.R., the assessee admitted before the Assessing Officer that out of total area of 1,00,831 sq.ft. of land, 71,800 sq.ft. was sold during the financial year 2007-08, therefore, the development might have been completed earlier. According to the Ld. D.R., the assessee cannot sale plot unless it is developed, therefore, the development expenditure ought to have been incurred before the sale of the plot. In fact, according to the Ld. D.R., the assessee

registered sale deed for sale of plots at the rate of ₹66/- per sq.ft. for the period from 11.06.2007 to 16.07.2007. Subsequently, the assessee registered sale deed for ₹100/- per sq.ft. Therefore, according to the Ld. D.R., the Assessing Officer found that the expenditure claimed by the assessee is not relevant for the assessment year under consideration. Out of total investment to the extent of ₹49,98,948/-, according to the Ld. D.R., the Assessing Officer herself admitted the source to the extent of ₹16,89,300/-. The interest income of ₹1,20,540/- and agricultural income of ₹74,500/- were not taken as source because the same was required for maintenance of the assessee's family. Therefore, according to the Ld. D.R., the balance amount of ₹33,09,648/- was treated as unexplained investment in development of land.

7. We have considered the rival submissions on either side and perused the relevant material available on record. It is not in dispute that during the course of search operation, an investment of ₹44,79,240/- towards development expenses was found. The assessee claimed that ₹7,40,500/- was incurred in the assessment year 2007-08 and the balance of ₹37,38,740/- was incurred in the assessment year 2008-09. However, the admitted fact by both the

parties is that the assessee has sold plot before the assessment year 2007-08. Some of the plots were sold at the rate of ₹66/- per sq.ft. Subsequently, it was sold for ₹100/- per sq.ft. Therefore, as observed by the CIT(Appeals), the assessee must have incurred the expenditure for development of land before the year under consideration. The sale consideration received by the assessee to the extent of ₹69,89,300/- as found by the Assessing Officer, the same might have been used in development of the land. The balance of ₹33,09,648/- was not properly explained, therefore, the Assessing Officer has rightly found that the assessee has no reason in making the claim of ₹33,09,648/- towards development of the land. Therefore, this Tribunal is of the considered opinion that the Assessing Officer has rightly made the addition in respect of the investment made by the assessee in development of land to the extent of ₹33,09,648/-. Therefore, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

8. The assessee has raised one more ground with regard to estimated disallowance of ₹19,400/-.

9. Sh. R. Vijayaraghavan, the Ld.counsel for the assessee, submitted that the assessee has sold a house property for a consideration of ₹12,79,000/- and the assessee has also admitted capital gain of ₹1,402/- in the return of income. According to the Ld. counsel, the assessee claimed before the Assessing Officer that the property was gifted to her by her father in the year 1976. Therefore, the assessee has taken the market value as on 01.04.1981 at ₹1,00,000/- and the indexed cost was computed at ₹5,19,000/-. According to the Ld. counsel, the assessee has constructed 1944 sq.ft. of building in the land received from her father as gift. The cost of construction was worked out to ₹1,94,400/-. According to the Ld. counsel, the Assessing Officer disallowed the cost of construction on ad hoc basis at the rate of 10% of disclosed cost. According to the Ld. counsel, when the construction of the building was made in the year 1985, there cannot be any disallowance on estimate basis.

10. On the contrary, Shri Sailendra Mamidi, the Ld. Departmental Representative, submitted that there was no material evidence to support the source for construction of the building to the extent of 1944 sq.ft. Therefore, according to the Ld. D.R., the

Assessing Officer has rightly estimated the cost of the building by making an *ad hoc* disallowance of 10% of the cost.

11. We have considered the rival submissions on either side and perused the relevant material available on record. It is not in dispute that the assessee received the land by way of gift from her father. The assessee has also constructed 1944 sq.ft. of building in the said land in the year 1985. The assessee claimed the cost of the building at ₹1,94,400/-. However, the Assessing Officer disallowed ₹19,400/- on the ground that there was no material to support the source of income. This Tribunal is of the considered opinion that when the Revenue accepted that the assessee constructed the building in the year 1985, there cannot be any disallowance on *ad hoc* basis. The area of the building to the extent of 1944 sq.ft. is not in dispute. Therefore, there is no reason for the Assessing Officer to estimate the disallowance on *ad hoc* basis. This Tribunal is of the considered opinion that the cost of construction disclosed by the assessee is very reasonable and there is no basis for making any *ad hoc* disallowance. After considering the material available on record and the fact that the

assessee has constructed the building, there cannot be any *ad hoc* disallowance, therefore, the addition of ₹19,400/- is deleted.

12. The appeal of the assessee for assessment year 2007-08 is partly allowed.

13. Now coming to assessment year 2009-10, in addition to the common issue, the assessee has raised one more issue with regard to addition of ₹16,50,000/- towards unexplained cash credit.

14. We heard Sh. R. Vijayaraghavan, the Ld.counsel for the assessee and Shri Sailendra Mamidi, the Ld. Departmental Representative. A sum of ₹16,50,000/- was claimed to be paid by Smt. Beena Kalahasthi to Thenmozhi. The assessee appears to have filed a confirmation through e-mail. The CIT(Appeals) directed the Assessing Officer to verify the genuineness of the confirmation and thereafter decide the matter. This Tribunal is of the considered opinion that when the assessee filed confirmation through e-mail, the genuineness of the same has to be verified. Therefore, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

15. Now coming to assessment year 2011-12, the only issue arises for consideration is expenditure of ₹82,000/- incurred by the assessee towards brokerage and fencing of plot.

16. Sh. R. Vijayaraghavan, the Ld.counsel for the assessee, submitted that the assessee sold a plot at Pakkam Village for a sale consideration of ₹9,25,575/-. The assessee claimed brokerage of ₹25,000/- and expenditure of ₹57,000/- incurred on fencing the plot. According to the Ld. counsel, the Assessing Officer disallowed the claim of the assessee on the ground that there was no evidence for incurring these expenses. According to the Ld. counsel, it is a customary practice to pay brokerage to the middleman who is involved in the sale and purchase of land. Moreover, the assessee has also incurred expenditure in fencing the land. Hence, according to the Ld. counsel, such an expenditure has to be allowed while computing the total income.

17. On the contrary, Shri Sailendra Mamidi, the Ld. Departmental Representative, submitted that in the absence of any evidence to show that the assessee has paid brokerage on sale of land, it cannot be allowed while computing the total income. Moreover, according to the Ld. D.R., the assessee has incurred

development expenditure. The development expenditure would definitely include the cost of fencing of the land also. Moreover, according to the Ld. D.R., no evidence is available to show that the assessee has incurred such expenditure. In those circumstances, according to the Ld. D.R., the Assessing Officer has rightly disallowed the claim of the assessee.

18. We have considered the rival submissions on either side and perused the relevant material available on record. It is not in dispute that the assessee has incurred ₹25,000/- towards sale of plot at Pakkam Village. Admittedly, the assessee sold the plot at Pakkam Village, which is not disputed. It is a practice in this part of the country to pay brokerage to the middleman, who is arranging the sale and purchase of landed property, at the rate of 1% to 3%. The percentage of commission would vary from individual to individual. Therefore, we cannot say that the assessee has not paid any brokerage. The brokers, who are arranging the transactions, have no place of residence. They would move from one place to another often due to their economic condition. Therefore, when the assessee paid commission ranging from 1% to 3% of the sale consideration, this Tribunal is of the considered opinion that it

cannot be disallowed on the ground that the assessee could not produce any supporting material. The regular practice which is adopted by the businessman in real estate business cannot be totally ignored by the Revenue authorities. Therefore, this Tribunal do not find any reason for disallowing the so-called brokerage of ₹25,000/-. Accordingly, the orders of both the authorities below are set aside and the addition of ₹25,000/- is deleted.

19. Now coming to the cost of fencing at ₹57,000/-, the assessee has to necessarily purchase the fencing materials, therefore, certain kind of documentary evidence can be produced to support the expenditure. Unfortunately, no such documentary evidence was filed before the lower authorities or before this Tribunal. Moreover, the assessee has claimed a huge expenditure for development of land. So, development of land would naturally include fencing also. Therefore, making a further claim of ₹57,000/- would amount to double deduction. In view of these facts, more particularly in the absence of any material for incurring the expenditure of ₹57,000/-, this Tribunal is of the considered opinion that the CIT(Appeals) has rightly confirmed the addition made by the Assessing Officer.

20. The appeal of the assessee for assessment year 2011-12 is partly allowed.

21. Now coming to assessment year 2008-09, the first ground of appeal is with regard to addition of ₹19,00,000/- towards unexplained cash payment. During the course of hearing, the Ld.counsel for the assessee submitted that he is not pressing this ground.

22. Another ground raised by the assessee with regard to cost of development charges was also not pressed by the Ld.counsel for the assessee during the course of hearing. Hence, the addition made on account of unexplained cash payment of ₹19,00,000/- and the development charges are confirmed.

23. Now coming to commission paid to Shri Muralidharan, Sh. R. Vijayaraghavan, the Ld.counsel for the assessee, submitted that the assessee has paid commission at the rate of 10% of the sale price to one Shri Muralidharan. However, according to the Ld. counsel, the CIT(Appeals) has taken the commission at the rate of ₹5/- per sq.ft. Against the order of the CIT(Appeals), the Revenue has also filed appeal in I.T.A. No.1357/Mds/2017. According to the Ld.

counsel, during the period 11.06.2007 to 16.07.2007, the plots at Arani project were sold at ₹66/- per sq.ft. Thereafter it was sold at ₹100/- per sq.ft. According to the Ld. counsel, the assessee claimed before the Assessing Officer that the plots were in fact sold at the rate of ₹125 – ₹130/- per sq.ft. after deducting ₹5/- per sq.ft. as commission to Shri Muralidharan. The assessee also filed revised computation. According to the Ld. counsel, the assessee explained before the Assessing Officer that the plots sold upto July, 2007 was at the rate of ₹100/- per sq.ft. According to the Ld. counsel, the assessee has also paid 10% as commission to Shri Muralidharan. In fact, the total sale proceeds admitted by the assessee comes to ₹85,13,575/-. The commission paid to Shri Muralidharan is ₹8,51,353/- being 10% of ₹85,13,575/-. Therefore, according to the Ld. counsel, the CIT(Appeals) is not justified in restricting the commission at ₹5/- per sq.ft. instead of 10% of total sale consideration.

24. On the contrary, Shri Sailendra Mamidi, the Ld. Departmental Representative, submitted that a sworn statement was recorded from the business associate of the assessee Shri Muralidharan who clarified that the plots were sold at ₹140/- per

sq.ft. However, the assessee made statement before the Department that the plots were sold at a price of ₹125 – ₹130/- per sq.ft. which included commission of ₹5/- per sq.ft. to Shri Muralidharan. Even though the assessee admitted before the Department that the commission was paid at ₹5/- per sq.ft., he has taken 10% as commission to Shri Muralidharan while computing taxable income. According to the Ld. D.R., Shri Muralidharan, the business associate of the assessee, filed statements for the assessment years 2005-06 to 2010-11 admitting the receipt of money on sale of plots at ₹140/- per sq.ft. Therefore, according to the Ld. D.R., the CIT(Appeals) is not justified in accepting the claim of the assessee that the plots were sold at ₹125/- per sq.ft. According to the Ld. D.R., in the absence of any material, there cannot be any claim of commission.

25. Referring to the Department's appeal for the assessment year 2008-09, the Ld. D.R. submitted that the Department has also raised a ground with regard to cash payment of ₹19,00,000/- for assessment year 2008-09. According to the Ld. D.R., the assessee has filed additional material before the CIT(Appeals). The CIT(Appeals) without examining the same, allowed the claim of the

assessee. Therefore, the CIT(Appeals) has exceeded his jurisdiction.

26. We have considered the rival submissions on either side and perused the relevant material available on record. The assessee claims to have paid commission at the rate of 10% on the sale price of the land to one Shri Muralidharan. The Assessing Officer disallowed the claim of the assessee. However, the CIT(Appeals) allowed the commission at the rate of 5% per sq.ft. instead of 10% claimed by the assessee. The contention of the assessee before this Tribunal is that ₹5/- per sq.ft. was paid to Shri Muralidharan as commission. In addition to that, the assessee also claimed 10% of the total amount. Therefore, the CIT(Appeals) has allowed only 5% of the total consideration received by the assessee to the extent of ₹85,13,575/-. This Tribunal is of the considered opinion that when the land was divided into housing plots, it is natural for anybody to pay commission to those who are dealing in purchase and sale of the property. As observed in the earlier paragraph, this Tribunal is of the considered opinion that it is common to pay 1% to 3% commission to those who are facilitating the sale of property. In view of the above, this Tribunal is of the considered opinion that the

assessee might have paid commission at the rate of 3%. Therefore, the commission has to be restricted to 3% of the total consideration instead of 5% allowed by the CIT(Appeals). Accordingly, orders of both the authorities below are modified.

27. In respect of cash deposit of ₹19,00,000/-, the issue raised by the Revenue was also raised by the assessee in her appeal. However, when the appeal was taken up for hearing, the Ld.counsel for the assessee submitted that he is not pressing this issue since the CIT(Appeals) allowed the same. The only contention of the Revenue is that the CIT(Appeals) admitted the additional evidence without giving any opportunity to the Assessing Officer. Therefore, this Tribunal is of the considered opinion that there is a violation of Rule 46A of the Income-tax Rules, 1962. Whenever the CIT(Appeals) admits additional evidence, an opportunity should be given to the Assessing Officer to controvert the same. Unfortunately, such an opportunity was not given to the Assessing Officer. Therefore, the Assessing Officer needs to reconsider the issue in the light of the material that was filed by the assessee. Accordingly, orders of both the authorities below are set aside and the issue of payment of ₹19,00,000/- is remitted back to the file of

the Assessing Officer. The Assessing Officer shall reconsider the issue afresh in accordance with law, after giving a reasonable opportunity to the assessee.

28. In the result, all the appeals of the assessee stand partly allowed. The Revenue's appeal for assessment year 2008-09 is partly allowed and for assessment years 2009-10 and 2010-11 are dismissed.

Order pronounced on 23rd March, 2018 at Chennai.

sd/-

(एस जयरामन)

(S. Jayaraman)

लेखा सदस्य/Accountant Member
चेन्नई/Chennai,

दिनांक/Dated, the 23rd March, 2018.

Kri.

sd/-

(एन.आर.एस. गणेशन)

(N.R.S. Ganesan)

न्यायिक सदस्य/Judicial Member

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. Assessee
2. Assessing Officer
3. CIT(A)-9, Chennai-34
4. Principal CIT- 4, Chennai
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.